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PIRACY CASES IN THE SUPREME COURT

JAMES J. LENOIR*

In ancient times piracy was almost the only maritime undertaking of international scope; and, on occasion, even nations participated in acts of a piratical nature. With the development of maritime commerce, however, there was almost a complete reversal of the point of view with which the practice was regarded.¹ By the latter part of the fifteenth century it was an accepted rule that piracy in any form was contrary to all rules of seafaring trade and that the pirate was thus the common enemy of all nations.² Practically all of the earlier writers accepted this viewpoint, which thereupon became an alleged rule of law which judges in most cases accepted and applied.³

In spite of the antiquity of the subject, however, there does not seem to be any acceptable or comprehensive work on piracy.⁴ This is all the more to be regretted since piracy as a crime is well worth attention today. It is by no means obsolete, yet its place in legal theory has never been stated and its actual definition in substantive law is still open to argument.

There are some who deny the present importance of piracy and regard it as a matter of historical interest only. They claim that such piracy as is still to be found is chiefly piracy made such by special conventions, or by municipal law,⁵ and that it has little or no sig-

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¹See Whatley, A. T., "Historical Sketch of the Law of Piracy," 3 *Law Magazine and Review* (N. S.) (1874), 536, 618.

²This view appeared to be common in England with the passage of the "Offense at Sea Act," 1536, 28 Henry VIII, C. 15. See 6 Holdsworth, *A History of English Law* (1924), 400-401; 1 Russell, *Crimes and Misdemeanors* (8th ed., 1923), 261 ff.; 3 Wharton, *Criminal Law* (12th ed., 1932), secs. 2239-2248; 3 Story, *Commentaries on the Constitution of the United States* (1833), 52-58; 1 Kent, J., *Commentaries on American Law* (14th ed., 1896), 183-187; Marshall's speech, delivered when he was a member of Congress, 5 Wheaton (U. S. Reports) Appendix, 7-8.

³Cf. Story's opinion in *United States v. Smith*, 5 Wheat. 153 (1820); *Rex v. Dawson*, 8 William III, 1695, 13 *State Trials* 451 (1816); and *Rex v. Green*, 4 Anne, 1705, 14 *State Trials* 1199.

⁴*Draft Convention and Comment on Piracy*, 26 *American Journal International Law* (Supplement, 1932), 743-885.

⁵"The infrequency of the offence in modern times is no doubt the reason why its nature has not been more precisely settled." 6 Holdsworth, *op. cit.*, 401. See, also, Cleminson, H. M., "Laws of Maritime Jurisdiction in Time of Peace with Special Reference to Territorial Waters," 6 *British Yearbook of International Law* (1925), 144-158. In this article it is said that the obsolete-

nificance in international law. But recent investigations and research do not bear out this claim.⁶ It is true that certain forms of piracy have disappeared, for example, that connected with the slave trade. But piratical undertakings are quite common, even under present circumstances, in certain regions of the world, especially in the rivers and bays of some of the more backward nations.⁷ It is a matter of common knowledge that pirates have infested Chinese waters for some time, and have been a menace to maritime trade there. This may cause intervention by those powers interested in the safety of the China trade. Foreign steamers in Chinese waters (except the great ocean liners that do not take third-class Chinese passengers) take every precaution to protect themselves from pirates. Each has a steel barrier erected between the third-class and the rest of the ship, and at concerted signals these steel gates are shut tight. No Chinese is ever allowed forward of them. This is because dire experience shows that any number of third-class Chinese passengers may be disguised pirates. It is not merely river banditry; it is high seas banditry.⁸

It cannot be denied that piracy cases may easily arise again and do in some instances appear directly or indirectly before international and municipal tribunals.⁹ Piracy is, moreover, dealt with in the criminal statutes of most nations,¹⁰ which upon examination from either a national or international viewpoint, show certain well-defined developments. Not only are municipal laws of piracy less

ness of piracy is one reason why the United States has refrained from participating in drawing up conventions upon piracy. See Kenny, C. S., *Outlines of Criminal Law* (1933), 332.

⁶Instead, it appears that piracy is today a matter of concern both to municipal and international law. See Matsuda's Draft Provisions for the Suppression of Piracy, *League of Nations Document C. 196 M. 70, 1927, V., 119*; *26 Am. Jour. Int. Law* (Supp.) 873. Roumanian Draft for the Suppression of Piracy, 1926; *League of Nations Document C. 196 M. 70, 1927, V., 220-221*. Dickinson states that although "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." "Is the Crime of Piracy Obsolete?," *38 Harvard Law Review* (1924-1925), 354.

⁷Scrutton, L. J., called this "internal piracy." *China Navigation Co., Ltd. v. Attorney-General*, *infra* note 9.

⁸For a description of modern piracy in Chinese waters, see Steep, T., "Warriors and Pirates of Modern China," *59 Travel* (1932), 45-46. See, also, Pella, V., "La Répression de la Piraterie," *Hague Academy, Recueil des Cours* (1926), V, 145, 163.

⁹See *China Navigation Co., Ltd. v. Attorney-General*, (1932), 2 K. B. 197; *People v. Lol-Lo and Saraw*, 43 P. I. (Reports) 19 (1922); Judgment No. 9—*Lotus Case*, Permanent Court of International Justice, Series A, No. 10, opinions of Judges Moore and Finlay.

¹⁰See "Piracy Laws of Various Countries," compiled by Stanley Morrison, *26 Am. Jour. Int. Law* (Supp.), 889-1013.

severe at the present time than they were even a hundred years ago, but additional offenses have also been added to the old accepted concept of acts of piratical nature.¹¹ These developments in the field of municipal law, taken with the recent efforts to codify the rules of piracy may serve as ample evidence of widespread international interest in the subject, and undoubtedly show that law is still regarded as a necessary preventive of piratical undertakings. Suggestions have been made that the League of Nations codify the rules of piracy; and actual attempts at such codification have been made by the Harvard Research in International Law, and other organizations.¹²

Not only is piracy a subject of present concern, but its importance will probably increase, both in international law and municipal law. It would appear that by the development of rapid means of transportation upon the high seas and the improvement of air navigation, there may be new opportunities for depredations, perhaps on a smaller scale than those of two centuries ago, but surely harmful enough to warrant the enforcement of laws to prevent them. It could hardly be questioned that a new type of piracy may make its appearance. It was probably the anticipation of this fact that led some writers to advocate the extension of international law piracy to air navigation.¹³ In fact, municipal laws have extended the crime by adding any number of offenses to it until at present it is in marked contrast to the term "piracy" as defined by Lord Stowell, Justice Story, and other early English and American jurists.

Some confusion has arisen because of the use of the two terms: international law piracy and municipal law piracy. The rule was formulated rather late in the history of the subject that *any robbery or depredation committed upon the high seas for private gain constitutes the offense*.¹⁴ Writers on public law, as well as jurists and publicists,¹⁵ have generally accepted this rule as one of customary international law to be enforced by the courts of every civilized nation. Confusion results, however, from the fact that, with the main purpose of protecting their commerce, nearly all of the maritime nations have enacted severe laws against piratical depredations,¹⁶ and

¹¹See *Harvard Draft*, Article 3, paragraph 1; 26 *Am. Jour. Int. Law (Supp.)*, 743. Article 4, paragraph 1, *ibid.*, 822; Article 3, Roumanian Draft, *ibid.*, 874.

¹²See *League of Nations Document*, C. 196, M. 70, 1927, V., 119; also 26 *Am. Jour. Int. Law (Supp.)*, 733-785.

¹³*Supra* note 11.

¹⁴The italics are supplied.

¹⁵See *Rex. v. Dawson*, *supra* note 3; Kent, *op. cit.*, 183-189; 6 Holdsworth, *op. cit.*, 400; 2 Stephen, *History of the Criminal Law*, 27; Story, *op. cit.*, 52-58.

¹⁶*Supra* note 10; and see Whatley, *loc. cit.*, 618. Japan, Russia, and Turkey are probably the only larger countries not having laws in force on piracy.

although the basis of these laws appears to be the principle that piracy is contrary to the law as it has developed among nations, the various laws lack uniformity as well as completeness. Questions arise as to whether there are two distinct kinds of piracy; that is, piracy which is an offense against international law and piracy which is a violation of the municipal law of a state, and also as to the place which piracy occupies in each system of law.¹⁷

To answer the first of these questions: piracy is not and cannot be, under present circumstances, a crime against the law of nations, but is always an offense against municipal law, inasmuch as it concerns the acts of individuals and not of states.¹⁸ International law is a rule of conduct for international persons or entities, who alone may violate its provisions.¹⁹ Even though the state should assume the responsibility for the acts of an individual, it is generally agreed that he would not be responsible to any other law than the one having jurisdiction over his person, that is, the municipal law of the state.²⁰ It follows that one cannot properly be convicted of piracy solely upon proof that his action is contrary to the law of nations. A conviction may be obtained only by reference to municipal law.

What, then, is the place of piracy in international law? First of all, international law permits any nation to assume jurisdiction over offenses that are generally considered of a piratical nature.²¹ Pirate ships lose all nationality and can be brought before the courts of any country. A lack of uniformity as to what is piracy may cause disputes among the nations. Thus, when the United States recognized the slave trade as lawful and Great Britain did not, the British were ready to treat slave ships on the high seas as pirates. This

¹⁷*Cf.* the earlier writers on the law of nations, cited above, *e. g.*, Story, Kent, and others, with Brierly, J. L., *The Law of Nations* (1928), 154. See the *Harvard Draft*, 26 *Am. Jour. Int. Law (Supp.)*, 771-778.

¹⁸There seems to have been an over-emphasis on international law by such early writers as Story and Kent. See Williams, J. F., "International Criminal Law," *Chapters on Current International Law and the League of Nations* (1929), 248. *Cf.* Clark and Marshall, *Law of Crimes* (3rd ed., 1927), 661-662; Kenny, *op. cit.*, 430; 6 Holdsworth, *op. cit.*, 401.

¹⁹Eagleton takes the view that the individual may violate international law "piracy." See his *Responsibility of States in International Law* (1928), 40-41. *Cf.* Williams, *op. cit.*, 247-248: "International law thus operates, in relation to piracy, to extend the province of municipal law beyond the limits otherwise set to it, and in the course of this operation international law necessarily gives or accepts a definition of the crime."

²⁰See Whatley, *loc. cit.*, 553-554.

²¹"One unique exception is, indeed, universally allowed. For persons guilty of any act of 'Piracy *jure gentium*' are treated as the common enemy of all mankind, and any nation that can arrest them may exercise jurisdiction over them, whatsoever their nationality, and wheresoever their crime may have been committed, even within the territorial waters of some other nation." Kenny, *op. cit.*, 430. *Cf.* Stephen, *Digest*, Ch. X, Art. 108.

shows the desirability of some agreement as to what constitutes piracy from the point of view of international law even though piracy is not a crime against that law. In other words no conviction of the individual can be secured by virtue of international law alone, but instead, the international law of piracy is concerned with permitting a state to exercise jurisdiction beyond its territorial boundaries so that the state may punish individuals committing offenses involving robbery or certain depredations upon the high seas.

International law, as it is concerned with piracy, has changed only slightly or not at all since the development of customary rules on the subject. It is true that many often interpret piracy under international law purely in the sense of prevailing rules of national law;²² but this may lead to inaccuracies and confusion. Not only are there wide differences of definition of the term in the varying national laws,²³ but there are some few states which have failed to enact laws against piracy.²⁴ It may be argued with some force, therefore, that since all nations do not recognize the offense, piracy appears in the law of nations only to the extent that custom has made it a part of that law.

In contrast to piracy under international law, piracy under municipal law has been characterized by periodic additions according to the legislative whims of the respective nations, or by treaties between nations.²⁵ Early criminal laws levied severe punishment upon those found guilty of piratical acts.²⁶ Offenders received no mercy before municipal courts, but were given the extreme penalty of capital punishment no matter how trivial the offense. The rigor of the law was somewhat lessened, however, by the fact that it was found difficult to prove guilt. This was no doubt because of the expeditious way in which the pirate treated his victims. For a long while, and until comparatively recent times, a class of pirates unknown to this age profitably plied its profession upon the seas by preying indiscriminately upon the commerce of nations.²⁷ Although this older type

²²See Whatley, *loc. cit.*, 550.

²³*Cf. Mercantile Marine Code for Tripolitania and Cyrenaica of June 22, 1913, 26 Am. Jour. Int. Law (Supp.)*, 982-984, with the *United States Criminal Code of March 4, 1919, 35 Stat.* 1088.

²⁴*Supra* note 16.

²⁵*Cf. Dickinson, loc. cit.*, 347-350.

²⁶See 6 Holdsworth, *op. cit.*, 400.

²⁷See the charge to the grand jury, delivered in the circuit court of the United States, for the judicial district of Maine, 1st session, in Portland, May 8, 1820, *Miscellaneous Writings of Joseph Story* (ed. by W. W. Story, Boston, 1852), 130-136. *Cf.* the following statement by Malcolm, J., in *People v. Lol-Lo and Saraw*, 43 P. I. 19, 21 (1922): "The days when pirates roamed the seas, when picturesque buccaneers like Captain Avery and Captain Kidd

of pirate disappeared with the development of large national navies, it was he who brought into existence the national laws against piracy and aided in the development of a rule of customary law condemning the practice. It is he who is the obsolete factor in piracy, and not the law of states or the rules developed among nations to suppress his activities.

Yet there appears to be some inconsistency among jurists and other authorities as to what exactly constitutes the crime even under municipal law.²⁸ All agree that robbery upon the high seas is one factor in piracy. But courts have sometimes found much difficulty in construing statutes in which the term "high seas" is found.²⁹ It has also been questioned whether seizures made without governmental authority upon rivers were properly termed piracy.³⁰ Doubtless the positivist would consider them acts committed within the territorial jurisdiction of a sovereign state and therefore differing only slightly from robbery committed upon land, yet some jurists and writers consider them piracy. In their opinion ships descending upon a coast town for the purpose of robbing and murdering the inhabitants are pirate ships.³¹ The Supreme Court of the United States has never had occasion to decide this question.

In municipal courts privateering is sometimes confused with piracy in international law.³² Although privateering is probably obsolete, there can be no doubt that it may constitute piracy at municipal law if the statute so defines the term. There are a number of national cases in which privateering was held to be piracy, especially in those cases when the vessel sailed under a commission issued by

and Bartholomew Roberts gripped the imagination, when grotesque brutes like Blackbeard flourished, seem far away in the pages of history and romance. Nevertheless, the record before us tells a tale of twentieth century piracy in the south seas, but stripped of all touches of chivalry or of generosity, so as to present a horrible case of rapine and near murder."

²⁸See 2 Stephen, *History of Criminal Law*, 27-28; Kenny, *op. cit.*, 331; 6 Holdsworth, *op. cit.*, 401.

²⁹See *United States v. Rodgers*, 150 U. S. 249 (1893).

³⁰"Piracy is a maritime offence, and cannot be committed on a river, however large, far within the boundaries of a State." 1 Russell, *op. cit.*, 260. See *Republic of Bolivia v. Oriental Indemnity Ins. Co.*, (1909), 1 K. B. 785; *Rex v. Dawson*, *supra* note 3, approved in *Attorney-General of Hong Kong v. Kwok-a-Sing* (1909) L. R. 5 P. C. "The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state, for those limits, though neutral to war, are not neutral to crimes." *Lol-Lo Case*, 43 P. I. 19, 22-23 (1922).

³¹See 1 Oppenheim, *International Law* (1905), 329; Hall, *International Law* (7th ed.), sec. 81; Lawrence, *International Law* (4th ed.), sec. 122; Westlake, *International Law* (1904 ed.), Pt. I, 277; 1 Hyde, *International Law* (1922), 411.

³²See Dana note 84, Wheaton, *International Law* (8th ed.), 196; and 3 Wharton, *op. cit.*, 2534.

an unrecognized insurgent government; but this phase of the subject will not be treated in detail in this article. Privateering was never considered in the past to be piracy according to the law of nations.⁸³

By way of summary it may be stated that piracy has for a long time been treated as a subject of primary importance. It is a matter which writers on international law as well as municipal law have always stressed. Jurists and publicists seem to have regarded it as having a definite place in the development of common and widely accepted principles of law. The Supreme Court of the United States and other national courts have laid down rules of law on piracy that at least express evidence of what is customary international law and they have established precedents to be followed in future cases arising in their own national courts.

In the light of the preceding discussion it is interesting to examine the decisions of the Supreme Court. Although the last case directly involving piracy was decided by the Supreme Court nearly a century ago,⁸⁴ this is not necessarily an indication that future cases may not arise.⁸⁵ Laws upon piracy in the United States have been changed so often that piracy at present includes a number of crimes.⁸⁶ Recently there was a case before the Supreme Court of the Philippine Islands involving certain felonious acts which were held to be piratical under the existing statutes of the Islands.⁸⁷

The Supreme Court has, in a number of cases, treated piracy as a subject regulated and controlled by certain generally accepted rules of law.⁸⁸ In the Constitution Congress is given the power to define and punish piracies and felonies committed on the high seas in the same sentence in which it is given the power to define offenses against the law of nations.⁸⁹ The Supreme Court, of course, has appellate jurisdiction over all cases arising under the acts of Congress. After an examination of the decisions of the Court upon these cases of piracy it is one of the purposes of this article to find what rules of law have been laid down and to what extent they conform to those generally considered to be rules of international law. Another pur-

⁸³Cf. *Baker v. United States*, 5 Blatchf. 6, 12. See Nelson, J., in the case of the *Officers of the Savannah*, 371—cited in 2 Moore, *Digest*, sec. 330.

⁸⁴*Peter Harmony and Others, Claimants, the Brig Malek Adhel, v. United States*, 2 How. 210, 238 (1844).

⁸⁵Dickinson, *loc. cit.*, 360

⁸⁶*Criminal Code*, March 4, 1909, 35 *Stat.* 1088.

⁸⁷*People v. Lol-Lo and Saraw*, 43 P. I. 19.

⁸⁸See the "Annual Address of the President of the American Society of International Law," 27th meeting, April 27, 1933, *Proceedings*, 15-16.

⁸⁹Art. I, sec. 8, cl. 10, "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

pose is to find to what extent the Court has added to or aided in the development of customarily accepted rules of law among nations.

Probably the leading case involving piracy is that of the *United States v. Smith*.⁴⁰ Smith and others had been part of the crew of the private armed vessel, the *Creollo*, commissioned by the government of Buenos Ayres, a colony which at the time was at war with Spain. When the vessel was lying at the port of Margaritta, Smith and certain others, all members of the vessel's crew, mutinied, confined their officer, and finally abandoned the vessel. The mutinous crew then seized the *Irresistible*, a private armed vessel lying in that port, and commissioned by the government of Artigas, which was also at war with Spain. Smith and his fellow conspirators appointed officers and proceeded to sea without a commission from any government. In April, 1819, while cruising the high seas, the crew of the *Irresistible* committed the offense charged in the indictment; that is, they plundered and robbed a Spanish vessel.

This case was first tried in the circuit court of Virginia and brought up on appeal to the Supreme Court. The chief point to be decided was whether or not the facts warranted a conviction for piracy under the terms of the act of Congress of March 3, 1819.⁴¹ Among other things the statute provided "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as *defined by the law of nations*, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, be punished with death."⁴² It was the principal task of the Court to determine whether the act of Congress sufficiently defined the term piracy so that the courts would have the power to convict the alleged offenders. If a strict interpretation of the statute were rendered, then the statute would not of necessity be regarded as covering the facts presented to the Court.⁴³ A broad construction of the statute would mean going beyond the exact wording and employing the term "law of nations" in a wider sense. In the case of the latter construction the Court would be able to convict Smith upon the charge of piracy.

Counsel for both sides presented able argument.⁴⁴ It was the

⁴⁰5 Wheat. 153, 183 (1820).

⁴¹Questions as to the scope of sec. 8 of the Act of 1790 led to the enactment of a new provision in the Act of March 3, 1819, 3 Stat. 510. See 1 Warren, *The Supreme Court in United States History*, 579.

⁴²See 5 Wheat. 153, 157. The italics supplied.

⁴³If there was a conviction then the Court had to go beyond the wording of the Statute; that is, bring in the law of nations.

⁴⁴Daniel Webster served as counsel for the defendant and William Wirt

contention of the Attorney-General that Congress, by referring to the law of nations for a definition of the crime of piracy, had duly exercised the power given them by the Constitution "to define and punish piracies . . . committed on the high seas . . ." and that, by this reference, they had adopted the definition of the offense given by the writers on public law.⁴⁵

Daniel Webster appeared as counsel in behalf of the defendants. He asserted that Congress was bound to define piracy, in terms, and was not at liberty to leave it to be ascertained by judicial interpretation. He claimed that a reference to the law of nations for a definition of piracy was insufficient "for the very thing to be ascertained by the definition, is the law of nations on the subject."⁴⁶ Webster's view also was that writers on public law do not define piracy with any "precision and certainty." He argued that Congress must define the term just as the Constitution had defined treason, "not by referring to the law of nations, in one case, or to common law, in the other, but by giving a distinct, intelligible, explanation of the nature of the offense in the act itself." That this argument was a clear and logical statement of a proper interpretation of the case may be readily seen from an examination of studies on the history and development of piracy.⁴⁷ Webster's view was that of a positivist. He looked upon piracy as a crime at municipal law and regarded the courts as restricted to the letter of the statute.

The Court regarded Webster's contention as narrow and referred with approval to the statement in *The Federalist* that congressional action was unnecessary to make the constitutional provision effective, for an adequate definition of piracy could be found by looking to the law of nations.⁴⁸ It thought that the law of nations on the subject might be ascertained "by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of

appeared for the government, 5 Wheat. 153, 155-157. See 1 Warren, *op. cit.*, 584.

⁴⁵The Attorney-General cited "Grotius, de. J. B. ac. P., 1.2, c. 15, s. 5, Puffendorf, 1.2, c. 2, s. 10. Vattel, *Droit des Gens*, 1.3, c. 15, s. 226. Bynk. Q. J. Pub. 1, 1 Duponceau's Trans., p. 127. Marten's Hist. of Privateers, p. 2. Horne's Trans. Molloy, b. 1, c. 4, s. 5. 2 Bro. Civ. and Adm. Law, 461. 2 Azuni, 351, Johns. Trans., and the authorities there cited." Note in 5 Wheat. 155. The Attorney-General claimed that "The definition given by them (the authorities) is certain, consistent, and unanimous; and pirates being *hostes humani generis*, are punishable in the tribunals of all nations." 5 Wheat. 156.

⁴⁶See Webster's argument, 5 Wheat. 156-157.

⁴⁷Cf. *Harvard Draft*, "Introduction," 26 *Am. Jour. Int. Law (Supp.)*, 749-766. See Marshall's opinion in *United States v. Palmer*, 3 Wheat. 610 (1818); see, also, 1 Warren, *op. cit.*, 578-580.

⁴⁸*United States v. Smith*, 5 Wheat. 153, 159, referring to *The Federalist*, No. 42 (Madison). See *The Federalist* (ed., John C. Hamilton, 1864), 331.

nations; or by judicial decisions recognizing and enforcing that law."⁴⁹ Justice Story, who delivered the opinion of the Court, found that there was "scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy."⁵⁰ He cited various authorities upon maritime law as having the same opinion and he pointed out that the common law also recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations. The majority of the Court thus came to the conclusion that piracy depended both for its definitions and its punishment "not upon the particular provision of any municipal code, but upon the law of nations" and that a true definition by that law was robbery upon the sea.⁵¹ Thus, the Court considered the term to be "sufficiently and constitutionally defined" by the statute in question.⁵²

In order to justify his conclusions in this case Justice Story drew largely upon what he assumed was actual international law. His was a broad interpretation and really expressed his opinion as to what the customary international law on piracy was, at that time.⁵³ But although it is true that the decision has its weak points, that it is probably based upon an erroneous conception of international law which is at present discredited, it serves, nevertheless, an important purpose in showing the extent to which the Court at an early period in its history looked beyond the municipal law to what it thought was a law equally as binding.⁵⁴

The Court did not make any distinction between piracy at municipal law and piracy under the law of nations and this is the real weak-

⁴⁹5 Wheat. 153, 160-161; Dr. James Brown Scott, and others, *e. g.*, Dickinson and Kent, commend Story's view in this case.

⁵⁰Story cites, in a long note, a number of writers and cases on piracy. *United States v. Smith*, 5 Wheat. 153, 163.

⁵¹See comment of 2 Stephen, *Hist. of Crim. Law*, 28-29; and 4 Blackstone, *Commentaries*, 731, cited by Story in note, 5 Wheat. 163.

⁵²The Court cited numerous authorities and cases to prove the conclusiveness of its holding, referring particularly to a large number of the older and accepted authorities upon international law. Sir William Scott's opinion in *The Maria* (see note, 5 Wheat. 170), was cited with approval, as well as the cases of *Rex v. Dawson* (*supra* note 3), the trial of *William Kidd* (13 William III, 1701; 14 *State Trials*, 1816, 123, 147), *Rex v. Green* (4 Anne, 1705, 14 *State Trials*, 1199), and certain other well known English decisions. See Story, *op. cit.*, 52-58; Kent, *op. cit.*, 183-187; and Dickinson, *loc. cit.*, 350.

⁵³His claim that piracy was an offense contrary to the law of nations, undoubtedly merits criticism. See *Harvard Draft*, 26 *Am. Jour. Int. Law (Supp.)*, 733-785.

⁵⁴See Scott, J. B., *Am. Soc. Int. Law, Proceedings* (1933), 19.

ness in the opinion and the principal reason why it may be discounted at the present time. To the Court, piracy had only one definition, and was a crime contrary only to international law. In holding this view the Court undoubtedly erred.⁵⁵ An individual can not, under any logical system of reasoning, violate international law in the proper sense of the term. International law may grant to any and every nation the right to take jurisdiction over crimes committed upon the high seas, but only to that extent can international law envisage the crime of piracy.

If this case makes any contribution it is to be found in the liberal view which the Court takes toward international law even though its opinion is not a correct exposition of the general rule of law. Perhaps the more correct view appears in the dissenting opinion of Justice Livingston which was in fact an able presentation of a positivistic argument. He thought that there was considerable uncertainty among writers upon public law as to what was understood by the term piracy.⁵⁶ He considered that the Constitution authorized Congress to define the term and unless that body did define it, there could hardly be a basis for prosecution before the courts of this country. In answer to the majority opinion that certainty existed among writers of public law in regard to piracy he pointed out that "If in criminal cases everything is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to" in this case.⁵⁷ He pointed out that by the same clause of the Constitution which gives Congress power to define and punish piracy it is also given the power to punish offenses against the law of nations. If the interpretation of the majority of the Court were accepted as a rule, Congress could declare that offenses against the law of nations should be punished with death, without defining any one of them. Yet, as he justly remarks, this would hardly be a fair or a legitimate exercise of authority.

This dissenting opinion can not be overlooked. The fact is that it would now more than likely be given weight as an authoritative statement of the present law upon the subject. Piracy in *United States v. Smith* was a subject to be dealt with by a municipal court meting out

⁵⁵See Stephen, *supra* note 51; and *cf.* Dickinson, *loc. cit.*, 346, who supports the conclusion of Justice Story in this case.

⁵⁶5 Wheat. 153, 181. See Stephen, *supra* note 51, and *cf.* Kenny, *op. cit.*, 331-332, and others writing on criminal law.

⁵⁷5 Wheat. 181.

justice in conformity with the law enacted by Congress. It was apparently not Justice Livingston's view that piracy according to international law was the basis of a nation's jurisdiction. It was his opinion, and it seems quite correct, that this was a case in which the act of Congress was to determine or to define what the courts were to administer in the matter of piracy. It was an able dissenting opinion and it undoubtedly may be regarded as a more direct exposition of what piracy is, according to municipal law, than the decision of the majority of the Court.

United States v. Smith is still regarded as the leading Supreme Court decision upon the subject of piracy.⁵⁸ As has been pointed out, however, it is extremely doubtful whether the Court will take the same view in future cases, for today most authorities agree with the dissenting opinion of Justice Livingston.⁵⁹

When are seizures made upon the high seas piratical? If captures are made by ships commissioned by a revolutionary government, are such seizures legitimate?⁶⁰ In answering these questions the Court has been guided almost entirely by the attitude expressed by the political departments of the government as to the exact status of the insurrection.⁶¹ In the case of *Ralph Klintock*, a citizen of the United States was placed in command of a vessel commissioned by one Aury, calling himself Brigadier of the Mexican Republic, a republic whose existence was not acknowledged by the United States.⁶² Klintock sailed as a first lieutenant on a ship called the *Young Spartan*, commissioned by the above Aury. He encountered and boarded a Danish ship, the *Norberg*, upon which the officer immediately under Klintock concealed some Spanish papers in a locker on board, which he later affected to have found there. The *Norberg* "was then taken possession of, the whole original ship's company left on an island on the coast of Cuba," and the second officer of the *Young Spartan* being put in command, he took the name of the original captain of the Danish vessel. He sailed for Savannah where, upon arrival, he impersonated the Danish captain. The *Young Spartan* followed the *Norberg* into Savannah. Counsel for Klintock contended that Aury's commission exempted the prisoner from the charge of piracy and

⁵⁸See Dickinson, *loc. cit.*, 346; and Scott's "Presidential Address," *supra*, note 38.

⁵⁹This decision, as pointed out by Dickinson, *loc. cit.*, 350, fails to distinguish between international law piracy and municipal law piracy. Cf. Kenny, *op. cit.*, 430.

⁶⁰See Dana, note 84, Wheaton, *International Law* (8th ed.), 197.

⁶¹See Nelson, J., in *United States v. Baker*, 5 Blatchf. 6, 12 (1861).

⁶²*United States v. Klintock*, 5 Wheat. 144 (1820), Marshall, C. J.

that although fraud was practiced upon the Danish ship, it was not in any sense piracy.⁶⁵ The circuit court found the defendant guilty of the charge, from which holding he appealed.

Chief Justice Marshall delivered the opinion of the Supreme Court. He thought that the entire transaction demonstrated the fact that the *Norberg* was not captured *jure belli*, but was a seizure illegally made, and that the vessel was taken into Savannah *animo furandi*.⁶⁴ He held that it was a plain case of robbery upon the high seas, and although the fraud practiced on the Danish captain and crew might not in itself have constituted piracy, yet it was an ingredient in the transaction, which had no tendency to mitigate the character of the offense. Here, too, it was the task of the Court to construe an act of Congress.⁶⁵ In so doing, the Court looked to international law for evidence as to the intention of the framers of the act of Congress. Thus the Court ruled that the municipal law extended to all persons on board vessels which had thrown off their national character and which were cruising piratically and committing the offenses brought out in the facts of this case.⁶⁶ The justice and legal weight of the opinion in the *Klintock* case can hardly be criticized, for it is a clear construction of the act of Congress.⁶⁷

⁶⁵Wheat. 144, 148-149.

⁶⁴*Ibid.*, 150; see, also, Dana, notes 83-84, Wheaton, *op. cit.*, 196-199; and 1 Hyde, *International Law*, 415.

⁶⁵Wheat. 144, 145-146. The 8th section of the act of 1790 provided, "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 offense, which, if committed within the body of a country, 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 defense 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 be first brought."

⁶⁶Dickinson, *loc. cit.*, 346-347, claims this case is followed by the later case of *United States v. Bowers and Mathews*, see *infra* note 75.

⁶⁷"The Court is of opinion 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 foreign state, or persons within a vessel belonging exclusively to the subjects of a foreign state, is not a piracy within the true intent and meaning of the Act for the punishment of certain crimes against the United States." Opinion of Marshall, C. J., 3 Wheat. 610, 633-634.

"There are several inconsistencies growing out of a construction unfavorable to the prisoners, which merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the

In the case of *United States v. Holmes*⁶⁸ a vessel that was apparently Spanish was captured by two privateers out of Buenos Ayres, and a prize crew was placed on board. The defendants brought before the Court were members of that prize crew; one of them was a citizen of the United States and the others were foreigners. They were charged with the murder of the prize master of the captured vessel. There was no evidence to show who were the owners of the privateers or where they resided, neither was there anything of an informative nature in regard to the ships' papers or documents. The privateers had been at Buenos Ayres, and had openly kept a rendezvous there. The crews which they shipped from that port consisted chiefly of men of English, French, and American nationality. The commander of one of the privateers was a citizen of the United States whose family was domiciled in the city of Baltimore and both of the privateering vessels were built in Baltimore.

Justice Washington, speaking for the majority of the Court, reasoned that murder or robbery committed on the high seas may be an offense cognizable by the courts of the United States under certain circumstances, although it may have been committed on board a vessel not belonging to citizens of the United States and without a national character, possessed and held by pirates, or by persons not lawfully sailing under the flag of any foreign country. The Court ruled here that if an act of murder be committed either by a citizen or a foreigner, on board of a piratical vessel, "the offense is equally cognizable by the courts of the United States" under the statute concerning piracy.⁶⁹

In this case Justice Washington seldom employed the terms international law or law of nations, but decided the case entirely in accordance with what he regarded as the wording of the act of Congress. Yet he did reconcile his opinion with the facts and holding of the Court in *United States v. Klintock*.⁷⁰ His decision was probably also in conformity with international law in so far as it deals with piracy, for privateering was not considered a lawful undertaking unless the privateer was commissioned by a recognized *de facto* or *de jure* government.⁷¹

gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond true whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merit attention." Johnson, J., 3 Wheat. 610, 638-639. See 1 Warren, *Supreme Court in United States History*, 578.

⁶⁸5 Wheat. 412 (1820).

⁶⁹*Cf.* the facts in this case with *United States v. Palmer*, 3 Wheat. 610.

⁷⁰See Wharton, *op. cit.*, 2534; and Nelson, J., *supra* note 61.

⁷¹5 Wheat. 412, 416-418.

In 1820, the same year as the decision in *United States v. Holmes*, a series of cases pertinent to the present discussion came before the Court and all were decided under the title of *United States v. Pirates*.⁷² Although the facts in each case were different, all were alleged to set forth piratical acts on the part of the defendants. The first of these cases dealt with one John Furlong, alias Hobson, and concerned the conduct of an English subject, who at the time was a member of the crew, on board an English vessel.⁷³

Another set of facts concerned an American citizen who had fitted out a vessel in an American port for the purpose of cruising against a power at peace with the United States. The vessel had a commission from a belligerent government and the principal question was whether the act of Congress covered the points at issue.⁷⁴

According to the third set of facts David Bowers and Henry Mathews were indicted under the act of Congress dealing with piracy on the charge of committing a piratical robbery on an American ship. While members of the crew of the privateer *Louisa* they mutinied, removed the officers from the ship and proceeded upon an alleged piratical cruise. The *Louisa* had been commissioned by the Republic of Buenos Ayres, and commanded by Captain Olmeida. The accused were American citizens, and the acts for which they were indicted were perpetrated upon the ship *Asia*, an American ship, which at the time of the robbery was anchored in an open roadstead at the island of Bonavista.⁷⁵

Justice Johnson delivered the opinion of the Court upon all these statements of fact. The questions at issue called for an interpretation of the statutes on piracy. The Court held that the moment a ship was taken from her officers, with the intent of proceeding on a piratical cruise, then the crew lost all claim to the national character of the vessel, the citizens or foreigners on board such vessel became equally punishable, under a reasonable construction of the act of Congress.⁷⁶

In a learned exposition of the subject of piracy Justice Johnson asserted that robbery on the seas may be considered an offense

⁷²Wheat. 184 (1820).

⁷³*Ibid.*, 203-204.

⁷⁴This, of course, is the principal question in all cases coming before the Court. Cf. *United States v. Holmes*, *supra* note 68; *United States v. Benjamin Brailford and James Griffith*, 5 Wheat. 188-189, holding of the Court, 203-205.

⁷⁵*United States v. David Bowers and Henry Mathews*, 5 Wheat. 184, 189-192; see the holding of the Court, *ibid.*, 205-206.

⁷⁶See *infra* note 82.

within the criminal jurisdiction of all nations.⁷⁷ He considered piracy as committed against all, and punishable by all, and in his opinion, there could be no doubt that the plea of *autre fois acquit* would be good, in any civilized state, although resting on a prosecution instituted in some other civilized state.

In these cases there is little or no development of the view expressed in *United States v. Smith* that piracy is an offense defined by the law of nations. The facts were ruled upon entirely in the light of the act of Congress on piracy. Generally speaking, in these several cases the Court made little reference to international law as authority.

In *United States v. Palmer*,⁷⁸ one John Palmer, with others, boarded a Spanish ship at sea and took certain valuable merchandise from her. The case was first brought before the circuit court for the Massachusetts district which proposed a series of some eleven questions which had to be answered before a decision could be made upon the facts in the case. The lower court being divided in opinion the case was certified to the Supreme Court which thereupon proceeded to answer these questions. The first four related to the construction of the 8th section of the act of Congress "for the punishment of certain crimes against the United States." The argument had been made that since robbery committed on land was not punishable with death, by the laws of the United States, it was not a proper interpretation of the act of Congress to consider robbery on the high seas as piracy. In other words, it was contended that Congress did not intend to make that a capital offense on the high seas which was not a capital offense on land. In rendering the opinion of the Court, Chief Justice Marshall stated that he could not assent to the correctness of the above argument although it was entitled "to great respect on every account." "The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offenses shall be piracy."

A second question was whether Congress had intended to apply the words of the statute to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas. The Court answered this question in the negative asserting that "it would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this

⁷⁷The opinion, 5 Wheat. 197, referred with approval to *United States v. Smith*.

⁷⁸3 Wheat. 610.

law to punish."⁷⁹ Therefore, according to the Court, robbery committed by a person on the high seas, on board of any ship or vessel belonging to subjects of a foreign state, and committed on persons within such vessel, was not piracy within the true intent and meaning of the act of Congress and was not punishable in the courts of the United States.⁸⁰ In this holding Chief Justice Marshall conformed to the general rule of statutory interpretation.⁸¹

Justice Johnson, in a separate opinion, found it impossible to agree with Chief Justice Marshall. He thought it was inconsistent to distinguish between robbery on land and robbery at sea for the purpose of considering the latter a more serious offense. He reasoned that it was not the intention of the framers of the statute upon piracy to inflict the death penalty "for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement."⁸² Consequently Marshall, in his analysis of the case, may be considered to have adopted a strict construction of the statute. The proper interpretation of the municipal law on piracy was his sole concern in deciding this case, and he thought it unnecessary to make references to any other law. It is interesting to compare this case with *United States v. Smith* wherein Justice Story drew largely upon international law for a definition of the crime of piracy.⁸³

In the case of the *Brig Malek Adhel v. United States*,⁸⁴ decided by Justice Story, frequent references were made to the law of nations. According to the facts the ship in question sailed from New York bound to Guayman, in California, under the command of one, Joseph Nunez. Armed with a cannon and some ammunition, pistols, and daggers, it stopped several vessels upon the high seas, and at length put into the port of Fayal, where it remained for some days. In August, 1840, it arrived at Bahia, Brazil, where it was seized by the United States vessel of war, the *Enterprise*. A libel was there filed against the vessel and cargo upon several counts, all founded upon the act of Congress passed in order to protect the commerce of the United States, and to punish the crime of piracy.⁸⁵ Other counts

⁷⁹3 Wheat. 631.

⁸⁰See the opinion of Johnson, J., *United States v. Pirates*, 5 Wheat. 184, 197.

⁸¹1 Kent, *op. cit.*, 186, 187, supports this decision as well as does Johnson, J., in *United States v. Pirates*, *supra* note 80.

⁸²3 Wheat. 610, 639.

⁸³*Supra* note 48.

⁸⁴2 How. 210, 238 (1844).

⁸⁵The statute referred to, at 2 How. 229, was the Act of March 3, 1819, Ch. 75.

were afterwards added, charging that the acts complained of had been done in violation of the law of nations. The district court condemned the vessel, but restored the cargo to the claimants and owners and apportioned part of the cost among these claimants. Both parties appealed.⁸⁶

Justice Story, delivering the opinion of the Court, commented upon the use of the term "piratical" in the act of Congress. He said that the word, in a general sense, imported that the aggression was unauthorized by the law of nations, and utterly without any sanction from any public authority or sovereign power.⁸⁷ Law, he reasoned, looks upon a piratical action as one of hostility; if a vessel is not commissioned and is not engaged in lawful warfare, its action is regarded as that of a pirate, that is, as the act of one who is emphatically *hostis humani generis*. It was Story's contention that the act of Congress upon piracy had done nothing more than to affirm and enforce the general principles recognized in the law of nations.⁸⁸

Story's opinion in this case is open to criticism and perhaps evades the real issue. He uses the term "law of nations" very broadly, and seems to take a biased view of the facts that were presented to the Court. To him piracy was piracy without any distinction between the term as it was recognized by the act of Congress and as it is employed in international law.

In 1821, the United States ship of war, the *Alligator*, encountered the Portuguese ship, the *Marianna Flora*.⁸⁹ According to the facts in the case they were "mutually described" by each other off the coast of Africa. The American ship had been sent to cruise against pirates and slave-traders, under instructions of the President; the Portuguese vessel was bound on a voyage from Bahia to Lisbon, with a valuable cargo on board. Soon after the meeting the *Marianna Flora* shortened her sail and hove to, having at this time a vane or flag on her

⁸⁶Dickinson, *loc. cit.*, 355.

⁸⁷2 How. 210, 232.

⁸⁸The Court gave great weight to the view that the action of the master and crew would not justify any adverse action against the cargo unless, of course, the owner thereof cooperated in or authorized the unlawful acts. See argument of Meredith for claimants, 2 How. 224; Nelson, Attorney-General, upon right of owners to cargo, *ibid.*, 226; R. Johnson, for the United States, on "What Is the Law of Nations as to the Cargo," *ibid.*, 228. Story's opinion, *ibid.*, 237-238.

Dickinson, *loc. cit.*, 350, sums up the American position on piracy in the following words: "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 seas."

⁸⁹11 Wheat. 1, 58 (1826).

mast, somewhat below the head, which together with her other manoeuvres, induced Lieutenant Stockton of the *Alligator* to suppose that she was in distress, or wished information. When the *Alligator* approached the Portuguese vessel, the latter fired upon him, whereupon Lieutenant Stockton hoisted the United States flag and pendant. He captured the *Marianna Flora* which raised her national flag just before surrendering. The prize was sent to Boston as a captured pirate ship.⁹⁰

Justice Story delivered the opinion of the Court in this case. Among other things, he declared that pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme penalties of war. According to the Court a piratical aggression by an armed vessel, sailing under the regular flag of any nation, may be subjected to the penalty of confiscation for such a gross breach of the law of nations.⁹¹ "But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates."⁹²

A number of cases in which the charge of piracy was made arose out of the Civil War.⁹³ A large number of authorities contended that captures made by privateers commissioned by the Confederate government were piratical and that the capture of such privateers ought to result in a trial for piracy.⁹⁴ In the earlier cases before the federal district courts involving these privateers the defendants were dealt with as pirates,⁹⁵ but in the case of *Ford v. Surget*⁹⁶ the Supreme Court decided that they should not be treated as such, for the Federal blockade in itself was a tacit recognition of the South as a belligerent power. Justice Clifford, in a concurring opinion, attempted to show in a clear and analytical way that the captures by Confederate privateers and naval vessels could not on any sound interpretation be treated as piracy.⁹⁷

In the case of the *Palmyra: Escurra, Master*, an American vessel captured upon the high seas a Spanish privateer which had searched

⁹⁰*Ibid.*, 4-6.

⁹¹11 Wheat. 1, 38-39.

⁹²*Ibid.*, 41.

⁹³See *supra* note 60; *Baker v. United States*, *supra* note 33; 2 Moore, *Digest*, sec. 330.

⁹⁴See citations in 3 Wharton, *op. cit.*, 2529.

⁹⁵See 2 Moore, *Digest*, 1079-1083, sec. 330.

⁹⁶97 U. S. 596, 619 (1878).

⁹⁷*Ibid.*, 618.

two American merchant vessels. The privateer was taken into an American port upon the charge of piracy. Justice Story, passing upon the facts in the case, upheld the judgment of the lower court restoring the vessel to the Spanish owners, but thought that no damage should be awarded because, under the circumstances, the captors should not be penalized for attributing a piratical character to the Spanish ship.⁹⁸

In justifying the action of the American vessel the Court reasoned that although the privateer might have been protected by a *bona fide* commission, yet in the present case it was otherwise, and the defects in the irregular commission of the Spanish vessel, connected with the insubordination and predatory spirit of the crew, were sufficient to excite a justly founded suspicion.

In 1819, a privateer, the *Columbia*, sailing under a Venezuelan commission, entered the port of Baltimore, clandestinely took on a crew of thirty or forty men, and proceeded to sea.⁹⁹ It thereupon hoisted the Artegan flag, assumed the name *Arragonta*, and prosecuted a voyage along the African coast. The officers and a greater part of the crew were citizens of the United States. While just off the African coast it captured an American vessel from which it took some twenty-five Africans. It later captured several Portuguese vessels, from which it took Africans; and, still later, it captured a Spanish vessel, the *Antelope*, upon which there was a large number of negroes. The *Antelope* and the privateer thereupon sailed to Brazil where the latter was wrecked and her master and a great part of her crew made prisoners; the remainder of the crew, with the armament of the *Arraganta*, was transferred to the *Antelope*, which, thus armed, assumed the name *General Ramirez*, under the command of one, John Smith, a citizen of the United States. The negroes were all placed upon this vessel. The United States revenue cutter, *Dallas*, found the *Antelope* hovering near the coast of the United States and captured her with two hundred eighty negroes on board. The Spanish and Portuguese vice-consuls claimed these negroes as property of their citizens. They were also claimed by the United States on the grounds that they had been transported from foreign parts by American citizens in contravention of the laws of the United States; and were entitled to their freedom by those laws as well as by the law of nations.

Chief Justice Marshall delivered the opinion of the Court in this case. He cited with approval the decision of Sir William Scott

⁹⁸12 Wheat. 1, 18 (1827).

⁹⁹The *Antelope*, 10 Wheat. 66 (1825). See the argument of the Attorney-General, *ibid.*, 105-114.

in the case of *Le Louis* in which it had been held that the slave trade in its proper interpretation was not piracy.¹⁰⁰ In Marshall's opinion slave trading could not be considered as piracy unless it was made so by the treaties or statutes of the nation to whom the parties belonged.¹⁰¹ The Chief Justice reasoned that no matter what might be the answer of the moralist to the question whether slave trading was piracy, yet the jurist must search for a legal solution to such questions and also must look to those principles of action which are sanctioned by the usage, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made.¹⁰² "If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality" of the slave trade, and naturally, by the law of nations that trade could not in any logical sense be called piracy unless every state gave its consent.

This concludes our study of the cases before the Supreme Court which have involved piracy. As has been noted, the majority of them concerned the proper interpretation to be placed upon the Act of Congress on piracy, and thus are of importance to constitutional rather than to international law. In *United States v. Smith*, however, Justice Story declared that piracy depended both for its definition and for its punishment "not upon the particular provision of any municipal code, but upon the law of nations." Referring to English authorities and cases he came to the conclusion that piracy was universally treated as an offense against the law of nations, and that a true definition of that law was robbery, or forcible depredations upon the sea, *animo furandi*.

It is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy. In the first place piracy is not sufficiently defined by international law so that offenders may be prosecuted by reference to that law alone. Justice Livingston's dissent in *United States v. Smith* pointed out the fallacy in the majority opinion. Nor is piracy generally considered to be a crime against international law. Piracy is an offense against the municipal law; international law enters into the matter by condemning the practice and permitting the states to exercise jurisdiction over piratical acts.

¹⁰⁰2 Dods. 244, followed in 10 Wheat. 118-120.

¹⁰¹Marshall agreed that the African slave trade was contrary to the law of nature, but thought that it was not prohibited by public international law. See 1 Warren, *op cit.*, 584-586.

¹⁰²10 Wheat. 121.

As new offenses are added to the municipal law on piracy it is quite probable that piracy cases will again appear before the Court. It seems, moreover, that the Court will render its decisions by reference to this law. Only when there are lacunae or ambiguities in the municipal law is the Court bound to look to international law for rules, or for evidence as to the intention of the framers of the statute.

In some circumstances the Court follows the political departments on points important to its decision. Thus, if a vessel commissioned by an insurgent or revolutionary group is captured as a pirate ship, the Court will accept the view of the political departments as to the status of the insurgents.