In the matter of a Reference under the Judicial Committee Act, 1833, in the matter of Piracy *jure gentium*

REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1934.

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT SANKEY).

LORD ATKIN.

LORD TOMLIN.

LORD MACMILLAN.

LORD WRIGHT.

[*Delivered by* THE LORD CHANCELLOR.]

On the 4th January, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding, the S.S. "Hang Sang" approached and subsequently also the S.S. "Shui Chow." The officers in command of these merchant vessels intervened and through their agency, the pursuers were eventually taken in charge by the Commander of H.M.S. "Somme," which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law:—"Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The Full Court of Hong Kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy and in the result the accused were acquitted.

The decision of the Hong Kong court was final and the present proceedings are in no sense an appeal from that court, whose judgment stands.

Upon the 10th November, 1933, His Majesty in Council made following order:—"The question whether actual robbery is an

essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations upon the matter.

The answer is as follows :—

" Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*."

In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include Treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts and last, but not least, opinions of jurisconsults or text book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere. Grotius (1583–1645) " De Jure Belli et Pacis," vol. 2 cap 20 § 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases and opinions of jurisconsults or text book writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them but it will be convenient to begin the present discussion by referring to the Act of Henry VIII, cap 15, in the

year 1536, which was entitled " An Act for the punishment of pirates and robbers of the sea." Before that Act, the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that Court administered the civil law. The civilians however, had found themselves handicapped by some of their canons of procedure, as for example, that a man could not be found guilty unless he either confessed or was proved guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law and after referring to " all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, etc." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, etc., shall be tried according to the common law under the King's Commission, to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. It has been thought, for example, that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a misdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy because piracy is a felony as distinguished from a misdemeanour. This mistaken idea proceeds upon a misapprehension of the Act. In Coke's (1532–1634) Institutes Part III Ed. 1809, after a discussion on felonies, robberies, murders and confederacies committed in or upon the sea, it is stated (p.112) that the statute did not alter the offence of piracy or make the offence felony, but " leaveth the offence as it was before this Act, viz., felony only by the civil law, but giveth a mean of triall by the common law and inflicteth such pains of death as if they had been attainted of any felony done upon the land. But yet the offence is not altered, for in the indictment upon this statute the offence must be alleged upon the sea ; so as this act inflicteth punishment for that which is a felony by the civil law and no felony whereof the common law taketh knowledge."

The conception of piracy according to the civil law is expounded by Molloy (1646–1690) " De Jure Maritimo et Navali " or " A Treatise of affairs Maritime and of Commerce."

That book was first published in 1676 and the ninth edition in 1769. Chapter IV is headed " Of Piracy." The author defines a pirate as " a sea thief or *hostis humani generis* who to enrich himself either by surprize or open face sets upon merchants or other traders by sea." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus in para. xiii he says : " So likewise if a ship shall be assaulted by Pirates and in the attempt the Pirates shall be overcome if the Captors bring them to the next Port and the Judge openly rejects the Trial, or the Captain cannot

wait for the Judge without certain peril and loss, Justice may be done on them by the Law of Nature, and the same may be there executed by the captors." Again in para. 14 he puts the case where " a pirate at sea assaults a ship but by force is prevented from entering her " and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist, Casaregis who wrote in 1670, and says " Proprie pirata ille dicetur qui sine patentibus alicujus principis expropria tantum et privata auctoritate per mare discurrit depredante causa." But in certain trials for piracy held in England under the Act of Henry VIII, a narrower definition of piracy seems to have been adopted.

Thus in 1696, the trial of *Joseph Dawson* took place. It is reported in State Trials Vol. XIII, col. 451. The prisoners were indicted for " feloniously and piratically taking and carrying away from persons unknown a certain ship called the " Gunsway " . . . upon the high seas ten leagues from the Cape St. John near Surat in the East Indies." The court was comprised of Sir Charles Hedges, then Judge in the High Court of Admiralty, Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward and a number of other Judges. Sir Charles Hedges gave the charge to the Grand Jury. In it he said " now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without legal authority, this is robbery and piracy." Dawson's case was described as the sheet anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read *secundum subjectam materiam* and must be held to refer to the facts under dispute.

In *Dawson's* case, the prisoners had undoubtedly committed robbery in their piratical expeditions. The only function of the Chief Judge, was to charge the Grand Jury and in fact to say to them " Gentlemen, if you find the prisoners have done these things, then you ought to return a true bill against them." The same criticism applies to certain charges given to Grand Juries by Sir Leoline Jenkins (1623–1685) Judge of the Admiralty Court (1685). See the " Life of Leoline Jenkins," vol. I, p. 94. It cannot be suggested that these learned Judges were purporting to give an exhaustive definition of piracy and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he

robbed his fellow passenger, and was therefore liable to the penalty of death. " That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done on the high seas. As every crime can be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority and the offender were secured and confined by the master of the vessel to be taken home for trial, this state of things would not authorise seizure and trial by any nation that chose to interfere or within whose limits the offender might afterwards be found." Dana's Wheaton 193, note 83, quoted in Moore's Digest of International Law (Washington 1906) Article " Piracy," p. 953.

But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallised in the 17th century, but is a living and expanding code.

In his treatise on international law, the English textbook writer Hall (1835–94) says at p. 25 of his preface to the third edition (1889), " looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been gradually enlarged within the memory of living man."

Again another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which Sir Charles Hedges in 1696 could have had no possible idea.

A definition of piracy which appears to limit the term to robbery on the high seas, was put forward by that eminent authority Hale (1609–76), in his " Pleas of the Crown " Ed. 1737, cap 27, p. 305, where he states, " it is out of the question that piracy by the statute is robbery." It is not surprising that subsequent definitions proceed on these lines.

Hawkins (1673–1746) " Pleas of the Crown " (1716), 7th Ed., 1795, vol. 1, defines a pirate rather differently, at p. 267, " a pirate is one who to enrich himself either by surprise or open force sets upon merchants or others trading by the sea to spoil them of their goods or treasure." This does not necessarily import robbing.

Blackstone (1726–80) 20th Ed., Book IV, p. 76, states, " the offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."

East's " Pleas of the Crown " (1803), Vol. II, p. 796, defines the offence of piracy by common law as " the commission of those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there." This definition would exclude an attempt at piracy, because an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish textbook writers, including Hume (1757–1838) Scottish Criminal Law (1797) and Alison (1792–1867), Scottish Criminal Law (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that as was to be expected they followed in some cases almost verbatim the early concept, and the criticism upon them is :

(1) that it is obvious that their definitions were not exhaustive ;

(2) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen ;

(3) that they may have overlooked the explanation of the statute of Henry VIII as given by Coke and quoted above, and have thought of piracy as felony according to common law whereas it was felony by civil law.

In " Archbold's Criminal Pleading " (28th Edition, 1931) will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*. When it is sought to be contended as it was in this case, that armed men sailing the seas on board a vessel without any commission from any state, could attack and kill everybody on board another vessel sailing under a national flag without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognised in the " Digest of Criminal Law," by the distinguished writer, Sir James Fitzjames Stephen (1829–94), 7th Ed., 1926, at p. 102. At the end of the article on piracy it is stated that " it is doubtful whether persons cruising in armed vessels with intent to commit piracy are pirates or not," but in a significant footnote, it is added that " the doubt expressed at the end of the article is founded on the absence of any expressed authority for the affirmative of the proposition and on the absurdity of the negative."

Murray's Oxford Dictionary (1909) defines a pirate as " one who robs and plunders on the sea, navigable rivers, etc., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all Kent (1826). In his Comm. I. 183, he calls piracy " a robbery or a forcible depredation on the high seas without lawful authority and done *animo furandi* in the spirit and intention of universal hostility."

Wheaton writing in 1836, Elements Pt. II, cap. 2, para. 15, defines piracy as being the offence of " depredating on the seas without being authorized by any foreign State or without commissions from different sovereigns at war with each other." This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them. See the American case of the *Ambrose Light* (1885) (*ubi infra*). Another instance is the case of the " *Huascar*." In 1877, a revolutionary outbreak occurred at Callao in Peru and the ironclad " Huascar," which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiral justly considered the " Huascar " was a pirate, and attacked her. See Parl. Papers, Peru, No. 1, 1877.

In Moore's " Digest of International Law," (1906) (*ubi supra*), Vol. II, p. 953, a pirate is defined as " one who, without legal authority from any State, takes a ship with intention to appropriate what belongs to it. A pirate is a sea-brigand, he has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples.

Ortolan (1802–1873), a French jurist, and professor at the University of Paris, says, Dip. de la Mer, Book II, ch. XI, " Les pirates sont ceux, qui courrent les mers de leur propre autorité, pour y commêtre des actes de dépredation pillant à main armée les navires de toutes les nations."

Bluntschli (1808–81), a Swiss jurist and a professor at Munich and Heidelberg, published, in 1868, " Le Droit International Codifié," which, in Art. 343, lays down : " Les navires sont considerés comme pirates qui sans autorisation d'une puissance belligerante cherchent à s'emparer des personnes à faire du butin (navires et marchandises) ou à anéantir dans un but criminel les biens d'autrui."

Calvo (1824–1906), an Argentine jurist and Argentine Minister at Berlin, para. 1134, defines piracy : " Tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger soit en temps de paix soit en temps de guerre."

An American case strongly relied upon by those who contend that robbery is an essential ingredient of piracy, is that of the *United States* v. *Smith*, 1820, reported at 5 Wheaton, 153. Mr. Justice Story delivered the opinion of the Court and there states (p. 161) " whatever may be the diversity of definitions in other respects, all writers agree in holding that robbery or forcible depredation upon the sea *animo furandi* is piracy." He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned Judge was considering a case where the prisoners charged had possessed themselves of the vessel, the " Irresistible," and had plundered and robbed a Spanish vessel. There was no doubt about the robbery and though the definition is unimpeachable as far as it goes, it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from pages 163–180 of the report it tabulates the opinions of most of the writers on international law up to that time. But with all deference to so great an authority, the remark must be applied to Mr. Justice Story in 1820 that has already been applied to Sir Charles Hedges in 1696, which is that international law has not become a crystallised code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States* v. *The Malek Adhel*, 2 How, 211, it was said at p. 232, " if he wilfully sinks or destroys an innocent merchant ship without any other object than to gratify his lawless appetite for mischief it is just as much 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 at 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*."

Having thus referred to the two cases, *Dawson* 1696 and *Smith* 1820, which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in the case of *The Serhassan Pirates*, 2 Robinson's Reports 354, decided in the English High Court of Admiralty by that distinguished Judge, Dr. Lushington (1782–1873), in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. IV, cap. 49, was given to persons who captured pirates and the learned Judge said (it is not necessary

to detail all the facts of the case for the purpose of the present opinion) " the question which we have to determine is whether or not an attack which was made upon the British pinnance and two other boats constituted an act of piracy on the part of the Prahns so as to bring the persons who were upon board within the legal denomination of pirates." He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case ; what happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (1 Spink Eccl. and Adm. Reports 81), where Dr. Lushington said : " it has never, so far as I am able to find, been necessary to enquire whether parties so convicted of these crimes (*i.e.*, robbery and murder), had *intended* to rob on the high seas or to murder on the high seas indiscriminately."

Finally, there is the American case of the "*Ambrose Light,*" reported in Scott's Cases, 1885, 25 Federal Reports, page 408, where it was decided by a Federal Court that an armed ship must have the authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it.

It is true that the vessel in question was subsequently released on the ground that the Secretary of State had by implication recognised a state of war, but the value of the case lies in the decision of the Court.

Their Lordships have dealt with two decisions by Dr. Lushington. It may here be not inappropriate to refer to another great English Admiralty Judge and jurisconsult, Sir Robert Phillimore (1810–85). In his International Law 3rd Ed., Vol. I, 1879, he states : " piracy is an assault upon vessels navigated on the high seas committed *animo furandi* whether robbery or forcible depredation be effected or not and whether or not it be accompanied by murder or personal injury."

Lastly, Hall, to whose work on international law reference has already been made, states, on p. 314, of the 8th Ed. 1924, " the various acts which are recognised or alleged to be piratical may be classed as follows : robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without or by way of revolt of the crew and conversion of the vessel and cargo to their own use." Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847–1930), " Outlines of Criminal Law," at p. 316, where he says : " piracy is armed violence at sea which is not a lawful act of war." Although even this would include a shooting affray between two passengers on a liner which could not be held to be piracy.

It would, however, correctly include those acts which, as far as their Lordships know, have always been held to be piracy, that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall (*ubi supra*) put such a case in the passage just cited ; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in " The Research into International Law by the Harvard Law School," published at Cambridge, Mass. in 1932. In it, nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pages 749 to 1013.

In 1926 the subject of piracy engaged the attention of the League of Nations, who scheduled it as one of a number of subjects, the regulation of which by international agreement seemed to be desirable and realisable at the present moment. Consequently, they appointed a Sub-Committee of their Committee of Experts for the progressive codification of international law and requested the Sub-Committee to prepare a report upon the question.

An account of the proceedings is contained in the League of Nations document, C 196, M 70, 1927 V. The Sub-Committee was presided over by the Japanese jurist Mr. Matsuda, the Japanese Ambassador in Rome, and in their report at page 116, they state : " according to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons."

The report was submitted to a number of nations and an analysis of their replies will be found at page 273 of the League of Nations document. A number of States recognised the possibility and desirability of an international convention on the question. The replies of Spain, page 154 ; of Greece, page 168 ; and especially of Roumania, page 208 ; deal at some length with the definition of piracy. Roumania adds, page 208 : " Mr. Matsuda maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification ' for private ends.' In our view, the act of taking for private ends does not necessarily mean that the attack is inspired by the desire for gain. It is quite possible to attack without authorisation from any State and for private ends not with a desire for gain but for vengeance or for anarchistic or other ends."

The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy.

They remember the words of M. Portalis, one of Napoleon's commissioners, who said: "We have guarded against the dangerous ambition of wishing to regulate and foresee everything . . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the detail of all questions which may arise upon each particular topic." (Quoted by Halsbury L.C., in Halsbury's Laws of England, Introduction, page ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and having examined all the various cases, all the various statutes and all the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning, namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.

In the Privy Council.

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DELIVERED BY THE LORD CHANCELLOR.

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