JURISDICTION APPURTENANT TO SHIPS OF WAR OVER THE HIGH SEAS

The present writer is in receipt of a communication from an honored and esteemed correspondent, a distinguished member of the faculty of a well-known French university, in which the utmost surprise is expressed at the "action — or rather the inaction of the American men-of-war when, off Nantucket, they suffered merchant ships to be sunk by the U-63 within the range of their guns." "It seems to me" (the French writer continues) "that there was there a violation of the rights and sovereignty of the United States. I state my opinion on this point of international law in a short note which you will find included herein."

The note, which was written in French, covered some five pages and began by a quotation from Baron Ferdinand de Cussy's work on *Phases et Causes célèbres du droit maritime des Nations*, t. 1, p. 250, as follows:

> Par extension au principe de la souveraineté sur la mer territoriale, on peut dire que le droit de police et de protection appartenant au souverain du territoire baigné par la mer, lui appartient également dans l'atmosphère de ses bâtiments de guerre en pleine mer.
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> Un vaisseau qui navigue en pleine mer, le patrimoine commun de toutes les nations, ce vaisseau qui voyage à pleines voiles, emporte avec lui sur l'océan une souveraineté ambulatoire, momentanée, fugitive comme son passage, incontestable toutefois. Un vaisseau dans cette situation a même une sorte de territoire autour de lui, une atmosphère propre qui a pour mesure la portée de ses canons. Cela est si vrai que si un navire poursuivi par un autre se réfugie dans ce rayon, il sera à l'abri des poursuites de l'agresseur comme s'il était dans une rade et un port neutre. . . .

He says further that not merely when pursued by pirates, but by ships of a nation with which his sovereign is at war, if the fugitive encounters the warship of a neutral Power, all pursuit ought to cease from the moment the flying ship finds herself within the range of the neutral cannon, as if she had reached a neutral port. My honored correspondent expresses his approval of the above views quoted from De Cussy and says he can not understand how the commandant of a naval force can suffer, under his eyes and within range of his guns, acts of aggression upon an inoffensive merchant ship. He thinks such conduct on the part of the attacking ship but little friendly to the neutral Power because the attack is made as if the neutral Power were not represented. He says if he were walking in a solitary place,

and there saw a robust man armed with a club beating his wife or child, perhaps for serious cause, nevertheless the act would outrage him because it would wound his feelings of compassion, and that the aggressor, acting as if the observer were not present, wounds his dignity in appearing to consider him incapable of intervening to protect the victim of his brutality.

With deference, it is submitted that the above views, as to the part of the sea at any time covered by the guns of a neutral ship of war becoming for the time being neutral territory, like a neutral port, must be met by a like proposition, namely, that the high sea within range of the guns of a belligerent battleship becomes belligerent territory within which undoubtedly acts of war on the part of the belligerents are fully justified and cannot be restrained by the invasion of such belligerent territory by a neutral warship.

In the case mentioned, the German submarine was a vessel of war. The neutral and belligerent merchant ships were within range of her gun and torpedo fire when the American ships approached. It would be strange if the doctrine *prior in tempore potior in jure* were in this case reversed and the last comer had the complete right to displace and paralyze the powers of the belligerent ship of war in territory already subject to her control.

Laying this view aside, however, though it illustrates the difficulties of maintaining the views advanced, it is, again with deference, submitted that the doctrine of De Cussy, though supported by possibly a few French writers, has never found acceptance at the hands of the principal writers on maritime law or by the courts; that it is so little known as generally not even to be mentioned; that, if one may say so, it is highly fantastic and of impossible application, the jurisdiction varying with the greatly differing range of marine guns and with every movement of the ship. It seems to have its origin in certain confusions: a confusion as to the situation of a merchant ship sailing *under convoy*, when the battleship takes her under its protection, with the case of a ship, on the high seas, of another Power, which comes merely within the range of the guns of a neutral ship of war, the latter having in no way accepted the merchant ship as its charge or received it under its protection. A ship of war is no more a floating island of her own country on the high seas than is a merchant ship, save for certain allowed interference with the latter. Each is subject to the law of her own country and of no country but her own. Each is subject,

however, to international law. The difference is that a government ship retains this characteristic even in the territorial waters of another country. If all the attributes of territory belong to such floating islands, then a circle with a radius of three miles around even a merchant ship on the high seas is territorial water of her country with all the consequences that ensue. The fact that she has no guns makes no difference, since it has been fully held that the three-mile rule applies to an unfortified coast as much as to one bristling with batteries. Lord Stowell applied it to the mud-flat desert islands near the mouth of the Mississippi. The doctrine of three-mile or gun-range jurisdiction as to ships on the high seas must be classed as (I think) Gibbon classed the doctrine of transubstantiation, which he called "rhetoric turned into logic."

A case much in point, though not exactly similar, is the *Marianna Flora* (2 Wheaton 1), argued by Daniel Webster for the successful party and decided by the Supreme Court of the United States in 1826. The opinion is by Mr. Justice Story, perhaps the most learned in international and maritime law of all our justices. The *Marianna Flora*, a Portuguese ship from Bahia to Lisbon, on the high seas, mistook the United States armed schooner *Alligator*, commanded by Lieutenant Stockton, for a South American privateer or piratical cruiser. On the schooner approaching to observe and to determine her character, the Portuguese vessel fired on the United States ship. The latter replied by firing in return, overcame and compelled the *Flora* to surrender and brought her in for condemnation as a prize for a piratical attack on the United States ship. The *Flora* was ultimately released and a claim made against Lieutenant Stockton for damages for an unjustifiable approach and seizure and sending her in without any reasonable cause. The court says in considering the points raised:

> It is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, in time of peace. . . .
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> It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. *It goes to establish upon the ocean a territorial jurisdiction*, like that which is claimed by all nations, within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and PER-

MANENT appropriation, and has never been successfully asserted beyond it. Every vessel, undoubtedly, has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized and we see no reason for admitting its existence.

Lieutenant Stockton was held guilty of no fault and not subject to pay damages.

Rear Admiral Stockton in his Outlines of International Law, falls into error in saying (p. 156) "The *Marianna Flora* was a small Portuguese vessel of war." It appears that she was, on the other hand, an armed merchant ship with a valuable cargo. Justice Story (p. 50) in the opinion states that "she was a merchant ship bound on a lawful voyage, and not a piratical cruiser." The language of the decision is broad enough to cover ships of all sorts, however, and expressly covers armed ships. The case is cited here as strongly repudiating the theory of any right or jurisdiction over the high seas for a cannon shot from a vessel similar to that pertaining to land over the littoral seas, or for any distance beyond that required for her own movements. Mr. John Bassett Moore in his invaluable digest (Vol. 1, p. 700) cites the case in support of this statement: "The rule of territorial waters is inapplicable to ships on the high seas."

The Chargé d'Affaires of Portugal requested the immediate discharge of the ship, and Mr. Adams, Secretary of State, instructed the District Attorney that the President desired her restoration "upon terms as easy and indulgent as might be compatible with law."

The extended index of Calvo's *Droit International* as to ships and jurisdiction with respect to them has been examined but no recognition of the doctrine claimed has been found, yet Calvo is a writer most comprehensive and most hospitable to the ideas of many nations. Neither has it been found recognized in our own or English treatises examined. The added fact that in 1907 at The Hague the representatives of the nations of the world extensively codified maritime international law, and the representatives of the maritime Powers at London in 1909 in the Declaration of London more minutely and extensively carried on such codification, and that neither assembly recognized in any degree the doctrine of De Cussy, is the highest proof that it has not found acceptance and become a part of the law of the sea.

The suggestion that a neutral warship seeing a belligerent warship sink a merchantman of another nationality on the high seas without

seeking to protect the merchant ship, is conducting itself like a strong man who in a lonely place sees a violent assault on women and children without intervening, cannot be agreed to. Such assault appears on its face felonious; that of the warship appears on its face to be the lawful exercise of a belligerent right. However painful to witness it may be, the neutral bystander has no right to intervene any more than to interfere with the lawful, though distressing, exercise of force by a police or sheriff-officer.

In a fierce, destructive war, involving every first-class Power except the United States, when the most well-established neutral rights are invaded, minimized and denied, it is submitted that our country is not called on to apologize for failure to assert such shadowy, unestablished, contentious, and it is believed, repudiated claims to jurisdiction over the high seas as these advanced by De Cussy.

The views here expressed have met with the approval of a considerable number of naval officers of high rank and special knowledge, who were consulted, and of various students of international law. Not one of these gentlemen doubted or denied them.

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SUBMARINES AND INNOCENT PASSAGE

The activity of the German U-boat 53 by its entrance into the harbor of Newport, its short stay there, and its departure for the open sea, followed within a few hours by its destruction of several enemy and neutral merchant vessels outside the three-mile limit, raises important questions concerning the rights and duties of a neutral Power over its territorial waters. The first concerns the doctrine of "innocent passage"; the second, the question of "due diligence"; the third, the extension of territorial jurisdiction in time of war beyond the traditional limit of a marine league.

The doctrine of "innocent passage" is in a way a working compromise between the right of a littoral state to jurisdiction over the marginal sea and the right of maritime powers to make use of the high seas as a universal highway of commerce and navigation. The purpose of such territorial jurisdiction is both strategic and economic. Its extent, despite the extravagant claims of the sixteenth and seventeenth centuries, came to be limited theoretically by the power of the