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Criminal Jurisdiction Over Visiting Armed Forces

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## CHAPTER III

# JURISDICTION OVER MERCHANT VESSELS AND SEAMEN

Theoretical discussion of the bases of criminal jurisdiction and immunities therefrom can be misleading. The type case that readily comes to mind is likely to be one in which virtually all the relevant considerations support the claim of a state to jurisdiction, or support the claim the accused is immune, e.g., an American student at the Sorbonne disturbs the peace of Montmartre, or an ambassador exceeds Maryland's speed limit.

Situations in which each of two or more states has a reasonable basis for claiming jurisdiction and for contesting that of any other state better illuminate the way in which conflicting interests have been balanced, and self-restraint exercised, in reaching acceptable solutions. One such situation which has arisen many times is that of a merchant seaman who commits a crime in a foreign port. Because a parallel may exist between a case of this sort and that of a member of the crew of a warship who commits an offense in a foreign port, it is appropriate to review briefly the way in which jurisdictional conflicts involving merchant seamen have been resolved.

Merchant vessels by their nature and by the activities in which they engage invite jurisdictional controversy.<sup>1</sup> A ship may fly the flag of one state, be manned by officers and seamen drawn from one or several other states, carry passengers of varying nationalities, and be owned by a national of yet another state. Also, a ship on a single voyage may transit the high seas, the territorial waters of other states, and dock in foreign ports. The flag it flies is recognized as determining the status of the ship for jurisdic-

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<sup>1</sup> "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If \* \* \* the courts of each were to exploit every such contact to the limit of its power, \* \* \* a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." Mr. Justice Jackson, in *Lauritsen v. Larsen*, 345 U.S. 571, 581 (1953).

tional purposes.<sup>2</sup> The flag state is recognized as having jurisdiction, and normally exercises jurisdiction, with respect to crimes committed on a vessel on the high seas.<sup>3</sup> It was at one time common to rationalize this result by speaking of the vessel as a part of the territory of the flag state. This fiction is rejected in some quarters<sup>4</sup> but it is acknowledged that the flag state's jurisdiction is as extensive as though the ship were a part of its territory.<sup>5</sup> The Supreme Court has described the jurisdiction as partaking "more of the characteristics of personal than of territorial

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<sup>2</sup> See Articles 5, 6, 10, 11 of the Convention on the High Seas, 13 UST 2312, TIAS 5200. Flags of convenience (or necessity) may undermine this approach but *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) and *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 372 U.S. 24 (1963) reaffirm the traditional doctrine. The right to assert jurisdiction based on ownership or control is questioned by Hyde: "[T]he legislative action of the United States has amounted in substance to a claim that American ownership or control of vessels under foreign registry may be creative of a right of jurisdiction over ships that must, in point of 'nationality,' be regarded as foreign to itself. The soundness of the American claim, which is not understood as yet to have been challenged in an international forum, may be fairly questioned, especially if applied to the conduct of alien occupants on account of acts committed when such vessels are on the high seas." 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 802 (2d ed. rev. 1947).

<sup>3</sup> 1 Hyde, *op. cit. supra*, note 2, at 805. Colombos, *International Law of the Sea*, 257 (4th ed. 1959).

<sup>4</sup> "Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag state, but apply the law of the flag on the pragmatic basis that there must be some law on ship-board, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." *Lauritsen v. Larsen*, 345 U.S. 571, 585 (1953). The rejection of the fiction in *Chung Chi Cheung v. King*, *infra*, page 169, as to warships necessarily involves its rejection as to merchant vessels. See *Rex v. Gordon-Finlayson*, [1941] 1 K.B. 171.

<sup>5</sup> "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so." *S.S. Lotus*, Publications P.C.I.J., ser. A, No. 10, at 25 (1927). Colombos, *op. cit. supra*, note 3, at 247 criticizes the statement as affected by the theory of territoriality of a merchant vessel. See also *Case of Ernest and Prosper Everaert*, Tribunal Correctionnel de Dunkerque, France, Jan. 4, 1936, [1935-1937] Ann. Dig. 262 (No. 110).

The flag state does not have exclusive jurisdiction over the offense of piracy, but historically and otherwise piracy seems clearly *sui generis*.

sovereignty”<sup>6</sup> and a leading text writer has described it as “a jurisdiction over the persons and property of its citizens.”<sup>7</sup> Both phrases suggest that the ship is viewed as an entity to which a status may appropriately be assigned for purposes of jurisdiction. A ship, employed as a unit in a business enterprise, is in a very real sense such an entity. Both safety at sea and the success of the enterprise, which depend on the prompt carriage of passengers and cargo and a minimum time spent in port, require an efficient organization and strict discipline, which ultimately must be sanctioned by the law of some state.<sup>8</sup> The complexity of a ship, moreover, requires officers and seamen with varied, complementary skills. The loss of any one of the officers or seamen may hamper or cripple the operation of the ship. A replacement may be hard to find, particularly in a foreign port. These factors support, though historically they may not have prompted, recognition of the competence of the flag state.<sup>9</sup>

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<sup>6</sup> *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923). The comment was made with reference to the holding that the 18th Amendment did not extend to American merchant vessels outside the waters of the United States although in terms its scope was “The United States and all territory subject to the jurisdiction thereof.” See also *Aderhold v. Menefee*, 67 F. 2d 345 (5th Cir. 1933). Cf. *Casale and Donati Case*, Court of Cassation (Chambre Criminelle), France, Jan. 9, 1937, [1935–1937] Ann. Dig. 247 (No. 102).

<sup>7</sup> “The jurisdiction which a State may lawfully exercise over vessels flying its flag on the high seas is a jurisdiction over the persons and property of its citizens, it is not a territorial jurisdiction.” Colombos, *op. cit. supra*, note 3, at 247.

<sup>8</sup> “States make certain rules for providing ships with their nationality and authorizing them to fly their flags. There is therefore an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-State. It is under these laws that the captain exercises his authority and enforces it.” Colombos, *op. cit. supra*, note 3, at 249.

<sup>9</sup> Charteris, “The Legal Position of Merchantmen in Foreign Ports and National Waters,” [1920–1921] *Brit. Yb. Int'l. L.* 45, 73, quoting in part from Hall, *International Law* 212 (7th ed., 1917), refers to the considerations “that the crew form ‘part of an organized body of men, governed internally in conformity with the laws of the state, enrolled under its control and subordinated to an officer who is recognized by the public authority,’ and that the exercise of local jurisdiction over them may involve detention of the ship, and even the loss of skilled assistance not always easy to replace.”

“The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and

Jurisdiction being conceded normally to be in the flag state when a vessel is on the high seas,<sup>10</sup> the theoretical basis for the

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by common consent is applied to the case of chattels of such a very special nature as ships." Judge Finlay, dissenting in the *S.S. Lotus, Supra*, note 5, at 53. See also Judge Loder's comment, note 10, *infra*.

"\* \* \* [T]here is a mutual disposition on both sides not to exert it [jurisdiction] in a way which will interfere with the proper discipline of the ships of either nation. If every complaint of any individual of the crew of a vessel against the officers for ill-treatment is to be taken up by the civil authorities on shore, and these officers prosecuted as criminals, commercial intercourse will be subjected to very great annoyance and serious detriment." Secretary March to Mr. Crampton, British Minister, April 19, 1856, M.S. Notes to Great Britain, VII, 524, 2 Moore, *International Law Digest* 290 (1906).

<sup>10</sup> Article 6, Convention on the High Seas, *supra*, note 2; Colombos, *op. cit. supra*, note 3, at 257. Recognition of the jurisdiction of the flag state when a vessel is on the high seas is, of course, further supported by the consideration that no other state has a readily discernible basis for asserting jurisdiction. "A merchant ship being a complete entity, organized and subject to discipline in conformity with the laws and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty upon the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State." Judge Loder, dissenting, in the *Lotus Case, supra*, note 5, at 39.

The state of which a seaman or passenger is a national may assert at least a subsidiary competence as to his conduct. "It is submitted that a State whose subjects are on board a foreign ship can appreciate as it thinks fit and attach what consequences it likes to such acts, provided that in so doing it does not exclude or supplant the primary jurisdiction of the State whose flag the vessel flies \* \* \*."

"In all cases, however, where such persons have fallen into the hands of the territorial authorities of their own State, there appears to exist no doubt that the local Courts are entitled to exercise jurisdiction." Colombos, *op. cit. supra*, note 3, at 259, 264. See also Hall, *International Law* 308 (8th ed., 1924). Both writers discuss the incident of Anderson, an English sailor on board an American vessel who stabbed the mate on the high seas, and was tried and convicted by a British court when the vessel docked in Calcutta, giving rise to a controversy between Great Britain and the United States. Hall observed of the British position that "Probably \* \* \* the claim to strictly concurrent jurisdiction is excessive." See 1 Moore, *International Law Digest* 932, 935 (1906).

Colombos, *op. cit. supra*, note 3, at 267, summarizes the situation with the statement: "On the whole question, there is weighty and preponderant opinion in favour of the rule that jurisdiction in respect of crimes committed on board merchant vessels on the high seas is primarily vested in the Courts of the flag-State of the vessel, but that such jurisdiction is not exclusive and that the State whose national is accused of a crime on board

jurisdiction may be considered unimportant.<sup>11</sup> This ceases to be true, however, when a ship enters the territorial waters or docks at a port of another state. It was never helpful, in this context, to refer to a conflict of two "territorial" jurisdictions. In fact there has been an effort, not yet entirely successful, to allocate jurisdiction on the basis of a more precise definition of national interests. Acts committed on board a vessel passing through the territorial waters of another state, in exercise of the right of innocent passage, take place within the territory of the littoral state. Where such acts and their effects are confined to the vessel, the interest of the littoral state is not, however, readily discernible, and "\* \* \* it is so unusual for a local court to take cognizance of such affairs that an attempt to do so might well be considered as officious meddling and probably contrary to the customary rules of international law."<sup>12</sup> In brief, in such instances the interests of navigation and commerce clearly predominate. Where, however, the act takes effect outside the vessel, e.g., in collision cases, the littoral state may properly assert jurisdiction.<sup>13</sup>

When a criminal act takes place on a ship in a foreign port a more complex problem is raised. The lines which have been drawn in allocating jurisdiction with respect to such acts are instructive as to the interests which states are moved to defend.<sup>14</sup>

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a foreign ship is competent to try him when he is within its jurisdiction, although such jurisdiction is not generally exercised."

Some states assert jurisdiction where an offense is committed on board a foreign merchant vessel against one of their nationals—a much more doubtful proposition.

<sup>11</sup> Except in collision cases, e.g., the *S.S. Lotus*.

<sup>12</sup> Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 122 (1927). But see Article 19, Convention on the Territorial Sea and the Contiguous Zone, adopted April 27, 1958, U.N. Doc. A/CONF. 12/L.52, 38 *Dept. of State Bulletin* 1111, 1113, and Article 49(2), Restatement, *Foreign Relations Law*, at 164.

<sup>13</sup> Thus, Jessup points out that the British Territorial Waters Jurisdiction Act of 1878, passed after the British courts had held they had no jurisdiction over the captain of a German vessel whose ship was in collision with a British vessel in British territorial waters, was a proper assertion of jurisdiction. Jessup, *op. cit. supra*, note 12, at 122. See also Colombos, *op. cit. supra*, note 3, at 276.

<sup>14</sup> "These modifications are justified by the fact that the interests of the littoral State are more directly affected by the presence of a foreign vessel in its ports than by her passage through its territorial waters." Colombos, *op. cit. supra*, note 3, at 279.

Where others than the crew are involved, the assistance of the local authorities is asked,<sup>15</sup> or the peace of the port is disturbed,<sup>16</sup> the littoral state has a right, superior to that of the flag state, to assert jurisdiction. Where, however, only internal discipline<sup>17</sup> or acts participated in only by the crew and not disturbing the peace of the port are involved, the littoral state does not normally assert jurisdiction. Rather such cases are commonly left to the flag state. The flag state may, moreover, exercise jurisdiction in any case if the territorial state does not choose to, and the United States, among others, does so as to certain offenses.<sup>18</sup>

The only significant difference of opinion in this area relates to

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<sup>15</sup> *Public Prosecutor v. Kristian Kalsen*, Tribunal Correctionnel of Nantes, France, April 2, 1937 [1935-1937] Ann. Dig. 210 (No. 79).

<sup>16</sup> Article 53 of the Restatement, *Foreign Relations Law*, at p. 178, states that the coastal state: “\* \* \* (a) waives the right to exercise its enforcement jurisdiction \* \* \* with regard to matters involving the internal management and discipline of the vessel and with regard to criminal conduct aboard the vessel, unless

- (i) the consequences of the crime extend to the coastal state or
- (ii) the crime is of a kind to disturb the peace of the port \* \* \*.”

The United States has conceded priority of jurisdiction to the territorial state in other than the excepted cases. See the instances cited in 2 Hackworth, *Digest of International Law*, 212-213 (1941). For the British position, see Charteris, *op. cit. supra*, note 9, at 72-73.

<sup>17</sup> Gidel suggests that infractions of discipline which do not at the same time constitute crimes “*de droit commun*” concern only the flag state, and that the littoral state has no jurisdiction with respect to them. 2 Gidel, *Droit International Public de la Mer* 200, 201 (1934). See *In re Schultz*, Supreme Court, Costa Rica, Dec. 26, 1939, [1938-1940] Ann. Dig. 169 (No. 65).

<sup>18</sup> See *United States v. Flores*, 289 U.S. 137 (1933), overruling a demurrer to an indictment for murder committed by an American on an American vessel while it was at anchor in the Port of Matadi, in the Belgian Congo.

“\* \* \* The right of a nation to punish offenses committed on its vessels, national or private, which for most purposes are considered as part of the national territory, is also admitted. Such offenses, it has been held, may be punished by the vessel’s sovereign, even when they were committed on a merchant vessel in the ports of another sovereign, provided the latter did not take jurisdiction.” Moore’s Report, 1887 *U.S. Foreign Relations* 757, 771. See also *Regina v. Anderson* [1868] 11 Cox Crim. Cas. 198 (Cr. App.), affirming the conviction of an American seaman for manslaughter committed on a British vessel in the Garonne River, 45 miles from the sea; *The Queen v. Carr* [1882] 10 Q.B. 76; *In re Nocita*, Court of Cassation, Italy, July 6, 1938, [1938-1940] Ann. Dig. 297 (No. 98); 2 Gidel, *op. cit. supra*, note 17, at 249.

the basis for this allocation of competence between the littoral and the flag state. There are two approaches, the Anglo-American and the French, each of which has other adherents. Neither relies on the fiction of extraterritoriality, which would exclude the jurisdiction of the littoral state altogether. The Anglo-American theory rather asserts the primacy of the jurisdiction of the littoral state in all cases, and explains the priority in fact accorded the flag state in certain cases as a concession which the territorial state may grant or withhold in its discretion, case by case.<sup>19</sup> The French position, which stems from the *Avis du Conseil d'Etat* of November 6, 1806,<sup>20</sup> is said, on the other hand, to be predicated on the position that international law requires the littoral state to accord immunity where only internal discipline or acts participated in only by the crew and not disturbing the peace of the port are involved.<sup>21</sup> Gidel asserts this is a misinterpretation of the

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<sup>19</sup> In *Wildenhus's Case*, 120 U.S. 1 (1887), a treaty was involved, but the court referred (p. 12) to the "comity" by which "it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged \* \* \*."

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of consideration of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion." *Cunard Steamship Company, Ltd. v. Mellon*, 262 U.S. 100, 124 (1923).

<sup>20</sup> Quoted in full in translation by Charteris, *op. cit. supra*, note 9, at 51.

<sup>21</sup> Jessup concludes (as does Charteris, *op. cit. supra*, note 9, at 56-61) that "\* \* \* even though one accepts the theory that the French rule posits certain definite limitations upon the jurisdiction of the local state, it can scarcely be said that this view has received such general acceptance as to make it a rule of international law." He argues that the acceptance in France of the moral disturbance theory, which implies that the local court may determine for itself whether an incident has affected the peace of the port, precludes saying that a foreign vessel may claim immunity as of right. Jessup, *op. cit. supra*, note 12, at 193-94.

Gidel agrees that, although the approach of the *Avis* has been widely adopted, it cannot be said there is a rule of international law making that approach obligatory. 2 Gidel, *op. cit. supra*, note 17, at 247. See also the



Avis. He insists that the Avis recognizes the primacy of the littoral state's jurisdiction in all cases other than those involving pure matters of discipline; that the French approach differs from the Anglo-American only in that it calls for the littoral state to indicate in advance the class of cases in which it will forego exercising its jurisdiction.<sup>22</sup> It seems agreed, however, that whatever the difference in the theoretical approach, the line drawn by both groups of states is in practice much the same.<sup>23</sup>

The nationality of the seamen is not a factor in the allocation of jurisdiction between the flag state and the territorial state. The flag state may exercise jurisdiction over seamen of any nationality,<sup>24</sup> and there is substantial support for the view that the nationality of the seamen<sup>25</sup> should in no case affect the allocation of jurisdiction. The United States, when it exercised extraterritorial jurisdiction in the Orient, asserted the right both to protect and to try seamen on American vessels, even for offenses on land, regardless of their nationality,<sup>26</sup> even nationals of the territorial state.<sup>27</sup> This at least suggests that the true basis for the assertion

Reporters' Notes to Article 53 of the Restatement, *Foreign Relations Law*, at 180.

<sup>22</sup> 2 Gidel, *op. cit. supra*, note 17, at 204-05; 208-09; 220-21; 246-47.

<sup>23</sup> Colombos, *op. cit. supra*, note 3, at 248.

<sup>24</sup> See *Regina v. Anderson*, [1868] 11 Cox Crim. Cas. 198 (Cr. App.). *The British Merchant Shipping Act*, 1894, 57 and 58 Vict., c. 60, sec. 687, applies to offenses "either ashore or afloat" by any seaman who at the time "or within three months previously has been, employed in any British ship \* \* \*."

<sup>25</sup> 2 Gidel *op. cit. supra*, note 17, at 210; see also Mr. Fish, Secretary of State, to Mr. Schneck, March 12, 1875, [1875] *U.S. Foreign Relations* 592 and 2 Moore, *op. cit. supra*, note 9, at 295-97, relating to jurisdiction with respect to internal discipline, citing an instance in which United States Commissioners at New Orleans were instructed not to exercise jurisdiction in a dispute involving American sailors on a British vessel in that port.

<sup>26</sup> See 2 Moore, *op. cit. supra*, note 9, at 605-12; Hinckley, *American Consular Jurisdiction in the Orient* 87 (1906); *In re Ross*, 140 U.S. 453 (1891). Hall, *Foreign Powers and Jurisdiction of the British Crown*, 141-42 (1894), took the position that the flag state had protective but not punitive jurisdiction over seamen of other nationalities in treaty states.

<sup>27</sup> "Chinamen employed as seamen on American ships have the status of American seamen, even in Chinese waters, 1892 *U.S. Foreign Relations* 243. A Japanese seaman on an American naval vessel was held subject to American consular jurisdiction in 1882 for a crime committed in Japan: *In re Ikeda Tome Kicki*, Seedmore, U.S. Courts in Japan, 229." Hinckley, *op. cit. supra*, note 26, at 88. But Japan challenged American jurisdiction (Mr. Gresham, Secretary of State, to Mr. Dun, Minister to Japan, Nov. 29, 1894,

of jurisdiction by the flag state is the protective principle rather than the nationality principle. The fiction of nationality becomes particularly thin, of course, when a ship sails under a flag of convenience, and no member of the crew is a Panamanian, Liberian or the like.

Any exemption from the local jurisdiction is, however, limited to incidents involving only the crew, and does not apply where passengers<sup>28</sup> or strangers to the vessel are the offenders or, seemingly, the victims.<sup>29</sup> This approach confirms the conclusion

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and Dec. 8, 1894, M.S. Inst. Japan IV 226, 228, 2 Moore, *op. cit. supra*, note 9, at 609, and the issue was left undecided; it should be noted that the incident cited by Hinckley involved a sailor on a naval vessel.

<sup>28</sup> In the recent case of *Complaint of Mikkelson*, France, Court of Cassation (Criminal), June 12, 1952, 48 A.J.I.L. 164 (1954), one alien was accused of criminal defamation of another on a Norwegian vessel in a French port. The Court of Cassation held "that the famous opinion of the *Conseil d'Etat* of Nov. 20, 1806, did not exclude the jurisdiction of the littoral state when the crime was committed either by or against a person who was not a part of the ship's company, even if the public order of the littoral state was not disturbed by the offense. French nationality of the victim was in no way prerequisite for jurisdiction." Charteris, *op. cit. supra*, note 9, at 73 states: "On principle they (passengers) become subject to the law prevailing on the ship on which they embark, but as they perform no function in the navigation, they do not appear to be properly subject to the considerations which, on the French view, make for the immunity of the ship's company from the territorial jurisdiction, \* \* \*." See also 2 Gidel, *op. cit. supra*, note 17, at 211-213, citing the *Cordoba*, in which one German passenger killed another on board a foreign vessel anchored in Dunkirk. The French authorities were appealed to, but the court, in condemning the accused, also indicated that the affair was outside the rule leaving jurisdiction to the flag state when the crew was involved. And see Jessup, *op. cit. supra*, note 12, at 151.

<sup>29</sup> "There should be included in the same juridical category (as passengers) the persons, not passengers on the foreign vessel, who find themselves on board for one reason or another; the criminal acts committed by such persons, if they do not constitute pure and simple infractions of discipline, or against such persons, are subject to the competence of the territorial authorities." 2 Gidel, *op. cit. supra*, note 17, at 213, citing *The Nymphaea*, Trib. Bordeaux, in which the court said that "in all other cases, and notably when the offence has been committed by or against a person not a member of the crew, the French penal law is always applicable."

The fact that a stranger to the vessel is not a national of the littoral state does not preclude that state from taking jurisdiction. Jessup, *op. cit. supra*, note 12, at 150, citing the *Cassa*, in which a French court took jurisdiction where two Syrian seamen assaulted two other Syrians, residents of Marseilles, on board an Austrian vessel at anchor in Marseilles.

that the interests of commerce and navigation—rather than any notions of extraterritoriality—are at the root of the exemption of seamen. Those interests prevail only when there are no substantial conflicting interests of the littoral state. They never prevail, of course, when the offense occurs on shore, regardless of who is involved. The interests of the littoral state are then clearly dominant.

It is perhaps implicit in what has been said that a merchant vessel in a foreign port is in no sense inviolable. The littoral state unquestionably has enforcement jurisdiction on the vessel,<sup>30</sup> although it seems to be agreed also that the flag state may exercise some measure of enforcement jurisdiction on the vessel.<sup>31</sup>

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There is seemingly no precedent with regard to members of the family of a member of the crew.

<sup>30</sup> See Comment f to Article 49 of the Restatement, *Foreign Relations Law*, at 166; 2 Moore, *op. cit. supra*, note 9, at 855; see also Charteris, *op. cit. supra*, note 9, at 85, for a discussion of the *Marie Luz*, in which the Emperor of Russia, as arbitrator, sustained the right of the Japanese authorities to release coolies being carried from Macao to Peru on a Peruvian vessel which put into Yokohama under stress of weather, and, at 75, of the Anglo-German controversy over the right of the British to arrest passengers on German ships putting into British ports who were fugitives from British justice. Disputes have arisen primarily over the right to give asylum to political offenders.

<sup>31</sup> Article 32 of the Restatement, *Foreign Relations Law*, states at p. 92 that "A state has jurisdiction, as to rules within its jurisdiction to prescribe, to enforce them (a) aboard a vessel or aircraft having its nationality while under the control of its commanding officer \* \* \*." Comment b to Article 33 notes that the flag state may exercise such jurisdiction in a foreign state as of right only in the case of a vessel in innocent passage; in other circumstances such jurisdiction may be exercised only with the consent, express or implied, of the territorial state. Comment c states that "The enforcement action that a state may take in the territory of another state includes only arrest and detention in the case of merchant vessels." Article 49(3), at p. 165, relating to Vessels in Passage, states that the flag state's enforcement jurisdiction is limited "to detention or such other interim enforcement measures as the internal management or discipline of the vessel requires." Comment g to that Article states, at p. 167, that the flag state's enforcement jurisdiction may be exercised "\* \* \* only to a limited extent dictated by the necessities of discipline and internal management of the vessel. For this purpose, detention of the person charged with the crime and minor disciplinary measures are sufficient. Should the crime be such as to require a trial and the imposition of more than minor disciplinary sanctions, the coastal state need permit no more than detention of the offender so that such trial and punishment can take place after the vessel is outside its territory."

The implications of the allocation of jurisdiction with respect to merchant vessels are worth noting. They are:

(1) The allocation is made not by rigid adherence to an absolute principle, e.g., territorial sovereignty, but by a more subtle balancing of the opposing interests of the littoral and flag state.

(2) Primacy is clearly given the interest of the littoral state, since it is recognized as having a superior basis for asserting jurisdiction: (a) Where the peace of the port is disturbed, even though the disturbance is only moral;<sup>32</sup> (b) Where passengers or

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Usually, this means that the offender will be brought back for trial and punishment to the territory of the state of the flag of the vessel." Article 53 (b) states at p. 179 that the territorial state "consents to the exercise by the foreign state of its jurisdiction \* \* \* to the extent necessary to detain on board the vessel a person with respect to whom the coastal state does not exercise its jurisdiction," and Comment c states at p. 180 that Comment f to Article 49 is equally applicable to Article 53 (b).

See also Colombos, *op. cit. supra*, note 3, at 258.

Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), describes the jurisdiction of British Consuls, and of the "naval court" which could be summoned in situations beyond the competence of a consul or in which he desired assistance, and notes that "the jurisdiction exercised by consuls and naval courts shows that accused persons may be held in custody, may be tried and sentenced to imprisonment or lesser penalties, and may be sent in custody out of the territorial jurisdiction, either for the purpose of being tried or of undergoing punishment." (pp. 78-79). He notes also that "Persons are no doubt frequently sent on shore from ships to a consulate in custody, but in such cases there is obviously at least tacit consent on the part of the territorial authorities. Adversely to such authorities it cannot be done." (p. 79, footnote).

*The Allied Powers (Maritime Courts) Act*, 1941, 4 & 5 Geo. 6, c. 21 (May 22, 1941) authorized certain allies of Great Britain to establish Maritime Courts in the United Kingdom to try persons, not being British subjects, for certain offences, including "any act or omission committed by any person on board a merchant ship of that Power." Sec. 2 (1). But Sec. 3 (1) provided that "Nothing in this Act shall deprive any British court of jurisdiction in respect of any act or omission constituting an offence against the law of any part of His Majesty's dominion," and the exercise of jurisdiction was subject to certain other restrictions and limitations. These make the major premise abundantly clear that without such express statutory authorization there would have been no right to establish the courts. See Colombos, *op. cit. supra*, note 3, at 268.

<sup>32</sup> The Supreme Court, in *Wildenhus's Case*, *op. cit.*, note 19, stated at 18:

"It is not alone the publicity of the act, or the noise and clamour which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it be-

strangers to the vessel are involved, that is, where the offense is not *inter se*; and (c) With respect to all acts which occur on shore.

(3) No interest of the flag state other than that its commerce should not be unduly burdened is recognized and what will unduly burden such commerce is narrowly construed.

(4) The nationality of the members of the crew is not a factor.

(5) The interests of the members of the crew as individuals, in where they are to be tried, by whom, and under what legal system, are not at least expressly recognized as having any bearing on the allocation of jurisdiction.

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comes known, it is a 'disorder' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a 'disorder' which will 'disturb tranquility and public order on shore or in the port.' "

See also *People v. Wong Cheng*, 46 P.I. 729 (1922) holding that smoking opium on an English ship anchored 2½ miles from shore was punishable under Philippine law; *United States v. Look Chaw*, 18 P.I. 573 (1910) holding that possession of opium in similar circumstances was not; and *Ministère Public v. Kuti Gomes*, Mixed Court of Appeal, Cairo, Egypt, June 13, 1938, [1938-1940] Ann. Dig. 167 (No. 63), holding that having possession of and attempting to sell hashish on a British ship in Port Said was punishable under Egyptian law.

That moral disturbance of the peace of the port is sufficient to give the littoral state a superior claim to jurisdiction is apparently accepted by the French and Italians. In the *Tempest* case (Jessup, *op. cit. supra*, note 12, at 147-48) the Court of Cassation in 1859 stated that the local authorities were properly concerned "when the act is of a nature to compromise the tranquility of the port, or when the intervention of the local authority is requested, or when the act constitutes a common law crime of such gravity as not to permit any nation to leave it unpunished." Jessup notes that on the facts this was dictum, but that it has seemingly been fully accepted in France. See also Gidel's comment on the *Tempest*, 2 Gidel, *op. cit. supra*, note 17, at 216-17. With respect to the Italian view, see also Jessup, at 156-57, citing the *Redstar*.

Comment b to Article 53 of the Restatement, *Foreign Relations Law*, states, at p. 179, that: "The ["peace of the port"] doctrine does not refer to breach of the peace as such. Rather, it is usually interpreted to allocate the exercise of enforcement jurisdiction to the coastal state in those cases, relatively infrequent, in which the seriousness of a crime compels the coastal state to deal with it."