

Michigan Law Review

Volume 47 | Issue 4

1949

INTERNATIONAL LAW-SEIZURE OF FOREIGN VESSELS ON THE HIGH SEAS

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Recommended Citation

David D. Ring S.Ed., *INTERNATIONAL LAW-SEIZURE OF FOREIGN VESSELS ON THE HIGH SEAS*, 47 MICH. L. REV. 555 ().

Available at: <https://repository.law.umich.edu/mlr/vol47/iss4/6>

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INTERNATIONAL LAW—SEIZURE OF FOREIGN VESSELS ON THE HIGH SEAS—After World War I, the Allied Powers under Article XXII of the Covenant of the League of Nations designated Great Britain mandatory of Palestine, providing *inter alia* that, as far as possible without prejudice to the rights of the then residents of Palestine, steps were to

be taken to facilitate Jewish immigration. A High Commissioner for Palestine was appointed, who, by the authority vested in him under the mandate, promulgated a general ordinance regulating immigration. It was provided therein that any British government ship might board any vessel to detain and examine persons reasonably believed to be seeking to enter the country in violation of this regulation. It was further provided that the master of a vessel attempting to bring such persons into the country would be guilty of the criminal offense of abetting illegal immigration and that the ship used for such purpose would be forfeited. If no criminal proceedings were instituted against the master, forfeiture might be confirmed by petition of the Attorney General to a district court of Palestine.

In the recent case of *Molvan v. Attorney General for Palestine*, the Judicial Committee of the Privy Council of Great Britain indicated that forfeiture of a foreign vessel after seizure on the high seas was justified under this statute without violation of international law.¹ A British destroyer sighted the tanker *Asya* sailing without a flag about 100 miles off the coast of Palestine. As the destroyer approached, the *Asya* hoisted a Turkish flag and then replaced it with a Zionist flag. The Zionist flag was at the time not that of any recognized state. When boarded, the *Asya* was found to be carrying 733 persons, none of whom possessed travel documents of any kind. The ship itself was without ship's papers or passenger list. Its charts indicated a course for Tel-Aviv, Palestine. The captain of the destroyer inferred that the *Asya* was engaged in illegal immigration activities and escorted it to Haifa, Palestine, there turning the passengers over to immigration authorities. Subsequently, the Attorney General applied to the district court of Haifa for an order confirming forfeiture of the vessel. Assuming that it had jurisdiction, since the ship was within territorial waters at the time of the petition, the court decreed forfeiture. Both the decree and this basis for jurisdiction were affirmed on appeal by the master of the ship to the Supreme Court of Palestine. On further appeal to the Judicial Committee of the Privy Council of Great Britain, this action was upheld; the Council concluded in addition that the original seizure was not in violation of international law because in conformity with the accepted practice of nations. Even if the statute did not conform to customary international law, it was held proper, since Great Britain was acting according to a policy expressed by many nations in making it the mandatory. And even if this were insufficient to justify the statute, the master could not complain of the seizure since his ship was entitled to fly no flag and could claim the protection of no nation.

¹ 81 Ll.L.L.R. 277 (1948).

I

If it is assumed that the seizure of the vessel would have been in violation of customary international law, but that the master was nonetheless guilty of a crime punishable under the municipal law of Palestine, was the seizure in the *Molvan* case legal because Great Britain occupied a position as mandatory rather than as sovereign of Palestine? Both Great Britain and Turkey were members of the League of Nations at the time of the seizure,² and thus parties to the League Covenant, a multilateral treaty.³ Nations may by treaty expressly consent to the seizure by other nations of their own vessels outside territorial waters for designated acts.⁴ However, the provisions of the League Covenant relating to mandates confer no authority upon the mandatory to act outside the territory of the mandated nation.⁵ That such authority was to be inferred is particularly unlikely in the case of the Palestine mandate, since, as an "A" mandate, it was subject only to the administrative advice and assistance of the mandatory and was to be provisionally recognized as an independent government.⁶ Even if the mandatory had been given full authority, there would be no reason to assume that Great Britain had thus been authorized to act in a manner which would otherwise be a violation of international law. The same difficulty is encountered in attempting to use the Covenant as a pronouncement of policy which, by virtue of the large number of subscribing nations, might itself be deemed to announce a rule of international law. Great Britain's position was in no way improved, then, by the grant of authority to her as mandatory.

II

If it is assumed that the seizure of the vessel as a Turkish vessel would have been in violation of international law, but that the master was nonetheless guilty of a crime punishable under the municipal law of Palestine, was the seizure in the *Molvan* case legal because the ship was not a vessel of Turkey or any other nation? Since a ship is deemed, at least while on the high seas, to be subject to the jurisdiction of the state of its nationality, when suffering injustice at the hands of a foreign

² Series of League of Nations Publications, General, 1946. I, 19, 21.

³ See I OPPENHEIM, INTERNATIONAL LAW, 6th ed., 192-197, 199-200 (1947).

⁴ For example, League of Nations Treaty Series No. 1033, XLII, 73 (1925), and No. 3290, CXLII, 181 (1933).

⁵ Covenant of League of Nations, art. 22 [text in I HACKWORTH, DIGEST OF INTERNATIONAL LAW, 103 (1940)]; see I OPPENHEIM, INTERNATIONAL LAW, 6th ed., 199-200 (1947).

⁶ Covenant of League of Nations, art. 22, para. 4.

state it can claim the protection of its own nation.⁷ The nationality of a ship is shown *prima facie* by its flag, but can be proved against adverse contention only by a showing of proper documentation under the laws of the flag state.⁸ Since the *Asya* carried no papers supporting its right to fly the Turkish flag, it was not the ship of any state, and the rights of no state under international law were violated by its seizure on the high seas.

But the ship is still the property of its owner, the master, and is protected by whatever rights he can assert in behalf of his property.⁹ The question, then, is solely one of the extent of his rights as an alien under international law. Though publicists contend that the notion of the lack of international legal personality of the individual is an anachronism in modern legal theory,¹⁰ in practice international law has been a law of states, and rights and duties under it have accrued only to states.¹¹ There would seem to be no good reason why vessels not under the jurisdiction of some state should yet elude the jurisdiction of a state whose laws they have offended, merely because they are on the high seas.¹²

III

If it is assumed that the seizure of the vessel was in violation of international law, but that the master was nonetheless guilty of a crime punishable under the municipal law of Palestine, should the illegality

⁷ 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 2-5 (1940); 2 *Id.*, 720-721, 724-725 (1941); 4 *Id.*, 72-73 (1942); HALL, INTERNATIONAL LAW, 8th ed., 300-307 (1924); 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 548-549 (1947); RIENOW, NATIONALITY OF A MERCHANT VESSEL, 13-15 (1937).

⁸ 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 22-24 (1940); 2 *Id.*, 724-728 (1941); HALL, INTERNATIONAL LAW, 8th ed., 215 (1924); 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 545-548 (1947); RIENOW, NATIONALITY OF A MERCHANT VESSEL, 140-145, 149-188, 217-219 (1937); 2 MOORE, DIGEST OF INTERNATIONAL LAW, § 321 (1906).

⁹ HACKWORTH, DIGEST OF INTERNATIONAL LAW, 728-734 (1941); 2 MOORE, DIGEST OF INTERNATIONAL LAW, 1009 (1906).

¹⁰ JESSUP, A MODERN LAW OF NATIONS, c. 2-4 (1948). Lauterpacht, "Subjects of the Law of Nations," 63 L.Q. REV. 438 (1947); Aufrecht, "Personality in International Law," 37 AM. POL. SCI. REV. 217 (1943); Brown, "The Individual and International Law," 18 A.J.I.L. 532 (1924). In fact, public bodies other than states have been recognized as international entities, and in some instances of treaties and arbitration proceedings individuals have been so recognized. See Lauterpacht, "Subjects of the Law of Nations," 63 L.Q. REV. 438, 444-453 (1947); 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 114-116, 579-580 (1947).

¹¹ 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 486-487 (1943); HALL, INTERNATIONAL LAW, 8th ed., Pt. I, C. I (1924); 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 580-585 (1947).

¹² For example, vessels engaging in piracy are deemed stateless, and consequently liable to seizure on the high seas by any nation. See 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 203 (1941).

of the seizure in the *Molvan* case have vitiated the jurisdiction which the courts of Palestine asserted by virtue of the presence in territorial waters of the ship and its master at the time of the petition? Where a criminal is properly taken under an international extradition treaty, he may be prosecuted only for one of the offenses enumerated in the treaty,¹³ and, if there is no enumeration of offenses justifying extradition, only for that particular offense for which he was extradited.¹⁴ Mere presence in the state, obtained by extradition, does not support general jurisdiction, and the lack of jurisdiction may be asserted by the arrested individual. Absent some international agreement of this kind, however, the practice of the courts has been to assume jurisdiction of persons within the territory without regard to how they came there, looking only to the validity of local arrest. If there has been a violation of international law, the state whose sovereignty is offended has a right to satisfaction from the responsible state;¹⁵ however, where the executive power of the responsible state (as in the United States) is not supreme to the judicial power, this right may not extend to obtaining stay of adjudication.¹⁶ But the individual himself is without capacity to assert this violation of international law; the matter is a political issue between the two countries and not a justiciable issue between the individual and the country seizing him.¹⁷ This is true even where an extradition treaty is in existence, if seizure is made without reference to it.¹⁸

To sustain the operation of municipal law in a manner which violates international law is inconsistent with the theory of primacy of international law, by which all inconsistent municipal law is *ultra vires*. Further, this distinction between violation of an extradition treaty and of international law is a tenuous one. Consequently, legal writers have contended that an individual should be able to assert this violation of the sovereignty of his nation to defeat the jurisdiction claimed by the nation that seized him.¹⁹ However, international law, as defined by the

¹³ OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 641-642 (1947); 1 MOORE, *EXTRADITION*, 237, 245-246 (1891).

¹⁴ 4 MOORE, *DIGEST OF INTERNATIONAL LAW*, 306-328 (1906).

¹⁵ 1 MOORE, *EXTRADITION*, 281-290 (1891).

¹⁶ *Id.*, 290-293; 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 321 (1941).

¹⁷ 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 309-313, 320 (1941); 4 HACKWORTH, 224-228 (1942); 4 MOORE, *DIGEST OF INTERNATIONAL LAW*, 328-332 (1906); 1 OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 262 note 2 (1947); see JESSUP, *LAW OF TERRITORIAL WATERS*, 275 (1927).

¹⁸ *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225 (1886); see 1 OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 642 (1947).

¹⁹ Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 A.J.I.L. 231 (1934); Harvard Research on the Codification of International Law, 29 A.J.I.L. Supp. 624 (1935); Hoffmannsthal, "Ultra Vires Law," 21 AUST. L.J. 218 (1947). In a few states this is the law. Harvard Research on the Codification of International Law, 29 A.J.I.L. Supp. 624, 630 (1935).

practice of the larger share of the nations, still permits the exercise of jurisdiction obtained by illegal seizure. There was, then, no violation of international law in the *Molván* case in assumption of jurisdiction on the basis of the defendant's presence in the territorial waters of Palestine.

IV

If it is assumed that the ship was a Turkish vessel, was there a violation of international law in seizing it on the high seas for an act which had not yet had any effect within Palestine or its territorial waters? If seizure is found to be proper as to criminal acts generally, it still remains to be shown that the state may impose criminal punishment for an act that never had an effect in the state.

International law embodies the practices to which a major portion of the nations commonly consent.²⁰ Authorization by municipal legislation of a particular practice in international affairs amounts to a declaration by that nation of its consent to that practice. Widespread enactment of similar statutes and acquiescence in their application indicates that the practice has become a custom of nations.²¹ In so far as international law is a source looked to for rules to be applied to individual persons by the municipal courts,²² extensive municipal adjudication of international questions reaching the same result also indicates common consent to that result.²³ The existence of numerous treaties embodying similar provisions as to an international practice may also serve to indicate common consent to that practice.²⁴ The results of international arbitration stand as evidence that such consent has been given.²⁵ Whether seizure on the high seas for a criminal act is permitted by international law depends, then, on whether such seizure is commonly consented to by the nations. Since the question is one of maritime significance, the practices of maritime nations are of primary importance, and most significant are those of the two largest: Great Britain and the United States.

From the time of the Roman Empire, when the sea was said to be

²⁰ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 2-5, 15-17 (1940); HALL, *INTERNATIONAL LAW*, 8th ed., 1-5 (1924); I OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 16-19; Scott, "The Legal Nature of International Law," 1 A.J.I.L. 831 (1907).

²¹ I MOORE, *DIGEST OF INTERNATIONAL LAW*, 2-4 (1906).

²² I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 24-35 (1940); I MOORE, *DIGEST OF INTERNATIONAL LAW*, 9-11 (1906); Dickinson, "Changing Concepts and the Doctrine of Incorporation," 26 A.J.I.L. 239, 256-260 (1932). 355 (1936).

²³ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 22-24 (1940); I OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 29-31 (1947).

²⁴ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 17-21 (1940); HALL, *INTERNATIONAL LAW*, 8th ed., 7-12 (1924); I OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 26-27 (1947).

²⁵ II OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 31-32 (1947).

absolutely free, until the present, when a somewhat similar characteristic can be said to exist, there have been various attempts to reduce the sea to sovereign claims. The nineteenth and twentieth centuries have, however, seen a general recognition that the high seas cannot be made a part of the territory of any state.²⁶ But even the decline of assertions of sovereignty did not remove the antithesis between a completely free sea and an adequately defended land. This conflict was resolved in the seventeenth century by Grotius, who proposed that the state should exercise some sovereignty over as much of the sea as could be controlled from the land. This theory was rendered more tangible by Bynkershoek, who described this area of control as that within the range of coast defense batteries. Largely through the efforts of Thomas Jefferson in the United States at the end of the eighteenth century, this area became the three mile limit, the approximate cannon range at that time.²⁷ The divorce of the limit from the theory of its origin prevented the area of control from expanding with the extension of gun range, and it has remained the limit of territorial waters recognized by the United States, Great Britain, and many other countries ever since.²⁸ All the area outside this marginal belt is that known as the high seas.²⁹ Since the United States and Great Britain have been the most ardent advocates of the three mile limit as a maximum of territorial control, extensions of the limit onto the high seas for any purpose by those countries is of particular significance in defining an international law recognizing some jurisdiction on the high seas.

Since before 1700, British legislation has authorized the seizure of vessels hovering off British coasts if the vessels were found to be engaged

²⁶ For history of the concept of freedom of the seas, see 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, § 198 (1941); 2 MOORE, *DIGEST OF INTERNATIONAL LAW*, 886-914 (1906); FULTON, *SOVEREIGNTY OF THE SEA*, 1-22 (1911); HALL, *INTERNATIONAL LAW*, 8th ed., 78-190 (1924); HIGGINS & COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, 37-54 (1945); I OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 533-538 (1947); Fenn, "Justinian and the Freedom of the Sea," 19 *A.J.I.L.* 716 (1925).

²⁷ For history of territorial waters, see 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, § 198 (1941); I MOORE, *DIGEST OF INTERNATIONAL LAW*, 698-700, 702-706 (1906); FULTON, *SOVEREIGNTY OF THE SEA*, Pt. II, C. I (1911); HIGGINS & COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, 62-67, (1945); JESSUP, *LAW OF TERRITORIAL WATERS*, 7-9 (1927).

²⁸ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 630-631 (1940); I MOORE, *DIGEST OF INTERNATIONAL LAW*, 706-724 (1906); FULTON, *SOVEREIGNTY OF THE SEA*, 650-668 (1911); HIGGINS & COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, C. 3 (1945); JESSUP, *LAW OF TERRITORIAL WATERS*, 9-71 (1927); Dickinson, "Jurisdiction at the Maritime Frontier," 40 *HARV. L. REV.* 1 (1926).

²⁹ 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 651 (1941); HIGGINS & COLOMBOS, *INTERNATIONAL LAW OF THE SEA*, 37 (1945); JESSUP, *LAW OF TERRITORIAL WATERS*, 61, 388 (1927); I OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., 538-539 (1947).

in smuggling activities. The smuggling problem was exactly that of the *Molvan* case, though here the attempt was to smuggle people in violation of immigration laws rather than liquor in violation of revenue laws. These hovering statutes gave authority for seizure as far as 100 leagues from shore, the limit of the statute varying from time to time with the changing need for extended control. This fluctuation of extent with need indicates that the policy behind the statutes was to authorize that control reasonably necessary to meet the particular problem.⁸⁰ Apparently all nations acquiesced in this exercise of authority on the high seas.⁸¹ It is true that in 1876 British law was made applicable only to ships partly owned by British subjects or part of the passengers of which were British,⁸² but, in accord with the policy of the statutes, this corresponded to a decreased need for authority to seize wholly foreign vessels. As to the ships whose seizure it did authorize, this statute set no definite limit. In addition, aside from the fact that the statute still includes ships which are foreign within the meaning of international law, subsequent legislation⁸³ has made it clear that Great Britain has not abandoned the special jurisdiction she formerly exercised on the high seas.⁸⁴ This is substantiated by the result in the *Molvan* case.

Similar legislation has been in existence in the United States since 1790. Hovering vessels found to be carrying persons to be sold as slaves may be seized at any distance from the coast.⁸⁵ Search and seizure of hovering smuggling vessels, once permitted anywhere on the high seas, is now generally limited to twelve miles, though under some circumstances it may extend as far as sixty-two miles from the coast.⁸⁶ Again the policy determining the extent of authority seems to have been the distance reasonably necessary to effectuate the statute.⁸⁷ Other countries have acquiesced in the exercise of this authority. Diplomatic complaints

⁸⁰ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 104-106 (1935).

⁸¹ *Id.*, 94.

⁸² 39 and 40 Vict., c. 36.

⁸³ The preamble to 41 and 42 Vict., c. 73 (1878), states that "the rightful jurisdiction of Her Majesty . . . extends . . . over the open seas adjacent to the coasts of the United Kingdom . . . to such a distance as is necessary for the defence and security . . ."

⁸⁴ For history of British legislation, see Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 86-89, 100 (1935); I MOORE, DIGEST OF INTERNATIONAL LAW, 714-715, 725-732 (1906); JESSUP, LAW OF TERRITORIAL WATERS, 77-79 (1927); MASTERSON, JURISDICTION IN MARGINAL SEAS, Pt. I (1929).

⁸⁵ 35 Stat. L. 1139, 1140, §§ 251, 258 (1909); 18 U.S.C. (1946) § 426, 46 U.S.C. (1946) § 1355.

⁸⁶ 49 Stat. L. 517 § 1 (1935), 19 U.S.C. (1946) § 1701; see 31 A.J.I.L. 101 (1937).

⁸⁷ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 103-104, 106-109 (1935); see JESSUP, LAW OF TERRITORIAL WATERS, 80-86 (1927).

appear to have been registered only by Great Britain and France.³⁸ No complaint was pressed, and the treaties eventually resulting with these nations recognized a contiguous zone within which rights contended for by the United States were properly exercisable.³⁹

That other nations have been even more prone to recognize some jurisdiction outside the three mile zone is evidenced by municipal legislation authorizing seizure there to prevent violation of revenue and sanitary laws.⁴⁰ Further, attempts of the League of Nations to define and codify international law revealed widespread rejection of the three mile limit as an absolute maximum, because of its inadequacy and inconsistency with existing practice. Especially significant was the demand for a contiguous zone outside territorial waters in which jurisdiction might be exercised for special purposes.⁴¹

Because of a decreased need for this authority, there has been an absence of adjudication under the British statutes in recent years. However, earlier judicial decisions under those statutes sustained their operation to the extent reasonably necessary.⁴² The courts of the United States have reached the same result in applying statutes of the United States.⁴³ No international arbitration has expressly decided the question, but it appears that none has denied the existence of such jurisdiction.⁴⁴

Treaties embodying the right to seize hovering smuggling vessels as far as one hour's sailing distance from shore have been entered by the United States with sixteen other nations including France and Great Britain.⁴⁵ Since European nations among themselves have also entered such treaties, twenty-four nations have become parties to treaties recognizing a right to seize hovering vessels outside territorial waters.⁴⁶

³⁸ Masterson seems to have discovered no others; see MASTERSON, *JURISDICTION IN MARGINAL SEAS*, 304-325 (1929).

³⁹ For a history of United States legislation, see Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 89-94, 95-98 (1935); MASTERSON, *JURISDICTION IN MARGINAL SEAS*, Pt. III (1929); I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 664-690 (1940); I MOORE, *DIGEST OF INTERNATIONAL LAW*, 725-732 (1906).

⁴⁰ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 663-664 (1940); JESSUP, *LAW OF TERRITORIAL WATERS*, 86-92 (1927); Masterson, "National Jurisdiction in the Marginal Seas over Foreign Smuggling Vessels," 13 *TRANSACTIONS OF THE GROTIUS SOCIETY*, 53, 65-74 (1928).

⁴¹ I HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 624, 628-630 (1940); MASTERSON, *JURISDICTION IN MARGINAL SEAS*, 385-400 (1929).

⁴² Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 100 (1935).

⁴³ *Id.*, 100-104; JESSUP, *LAW OF TERRITORIAL WATERS*, 241-276 (1927).

⁴⁴ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 109 (1935).

⁴⁵ *Id.*, 98-99; JESSUP, *LAW OF TERRITORIAL WATERS*, 279-317 (1927).

⁴⁶ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 99 (1935).

From the foregoing, text writers agree that there is a strip of coastal water over which the littoral state has full control.⁴⁷ In addition, all concede that in practice nations do act on the high seas to the extent necessary to cope with threatened violations of municipal laws.⁴⁸ The writers disagree, however, as to the basis for this extension of control. Most British writers conclude that there is no basis in international law for permitting municipal law to operate extraterritorially on the high seas, and that where it is done it is acquiesced in as a matter of comity.⁴⁹ On the other hand, substantial authority among British writers and almost all American writers concludes that it is now a positive rule of international law that a nation can go outside its territorial waters to the extent reasonably necessary to prevent violation at least of its revenue and sanitation laws.⁵⁰ Since the common consent of nations is that which determines international law, the American writers are on sound ground when they point out that that which has been done as a matter of comity since the end of the eighteenth century must by this time have become a rule of law.⁵¹

Accepting the existence of a rule of international law permitting a nation to go as far out of its territorial waters as is reasonable under the circumstances to prevent violations of revenue or sanitation laws, can the statute in the *Molvan* case be brought within this rule? It would seem that the regulation of immigration is sufficiently like the protection of revenue to make applicable in both cases the policy that permits statutes protecting revenue to be enforced on the high seas.⁵² The only problem then is whether seizure 100 miles at sea is reasonable. The statute in the *Molvan* case, if interpreted to authorize seizure outside territorial waters at all, imposes no limit on the distance within which seizure can be made; the question is one for the court to determine upon the facts of each case. Since the *Asya* was clearly on its way to Palestine with the objective of violating the law of that mandate, it cannot be said that the court erred in finding the seizure reasonable.

There remains the problem whether the master's act on the high seas can properly be called a crime under the law of Palestine. Ordinarily, crime is said to be territorial, and only acts committed within

⁴⁷ 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 442-449 (1947).

⁴⁸ 2 PIGGOTT, NATIONALITY, 47-51 (1907).

⁴⁹ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 111-115 (1935).

⁵⁰ Id., 115-119; 1 OPPENHEIM, INTERNATIONAL LAW, 6th ed., § 190(i) (1947), but see § 190(ii).

⁵¹ Dr. H. E. Yntema's Brief for the Treasury Department, H. HEARINGS BEFORE COMMITTEE ON WAYS AND MEANS ON H.R. 5496, 74th Cong., 1st sess., 119-122 (1935).

⁵² Masterson, "National Jurisdiction in the Marginal Seas over Foreign Smuggling Vessels," 13 TRANSACTIONS OF THE GROTIUS SOCIETY, 53, 63-68 (1928); see 2 PIGGOTT, NATIONALITY, 51-52 (1907).

the territory are crimes.⁵³ However, a crime is deemed committed in the territory, though the act occurs outside, if it takes effect within the territory.⁵⁴ Whether the practice is sufficiently widespread to be justified as international law, nations have frequently declared an act a crime at a point before it has had any local effect if it ultimately would have had such an effect.⁵⁵ Exemplary are the hovering statutes referred to previously. If this is so at all, it would seem at least to be proper to declare such an act a crime when it occurs within that portion of the high seas in which a state can seize for crimes in general without violating international law. Since it has already been suggested that the seizure in the *Molvan* case was proper, it can then be said that the act of abetting illegal immigration was also properly called a crime against the law of Palestine.

David D. Ring, S.Ed.

⁵³ 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW, §135 (1941); 2 MOORE, DIGEST OF INTERNATIONAL LAW, 243-255 (1906); 26 MICH. L. REV. 429 (1928).

⁵⁴ 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 136 (1941); 2 MOORE, DIGEST OF INTERNATIONAL LAW, 243, 258-269 (1906); Harvard Research on the Codification of International Law, 29 A.J.I.L. Supp. 480-506 (1935).

⁵⁵ 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 137, (1941); Harvard Research on the Codification of International Law, 29 A.J.I.L. Supp. 506-508, 543-561 (1935); see Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 1925 Br. Y.B.I.L. 44.