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Contents: International Law — (8.)

"Hostile Expeditions from Neutral Territory — Loans of Money to Belligerents — Aid to Insurgents — Contraband of War."

International Law

Lecture No. 8.

Hostile expeditions from neutral territory.

These can be of course of various natures. One form was that exemplified in the capture of the Dutch ship Twee Gebroeders and which became the subject of a noted decision by the celebrated English Admiralty Judge Lord Stowell. An English vessel of war in 1800 lying in Prussian waters, then neutral, sent out a boat expedition from the ship and captured this Dutch merchantman outside of the neutral jurisdiction. Lord Stowell decided this act to be improper and that a hostile expedition could not properly proceed from and originate in neutral territory.

Another form of hostile expedition was that known as the Terceira affair which was as follows. In 1828 a civil war broke out in Portugal between the partisans of Donna Maria and her uncle Don Miguel. A body of troops serving Donna Maria driven out of Portugal took refuge in England and with other Portuguese endeavored to fit out an expedition in favor of their mistress. Although warned by the British government about 700 men under Count Saldanha sailed from Plymouth nominally for Brazil but really for Terceira one of the Azores still faithful to Donna Maria. Off Porto Praya they were intercepted by an English vessel of war - the Ranger - and informed that they could not land in the Azores but were free to go anywhere else. On the refusal of the Portuguese commander to give up his purpose or to yield to anything but force, his vessels were escorted back to a point 500 miles from the English Channel and the Ranger returned to Terceira and the expedition put into Brest and gave up its mission. In regard to this jurists generally hold that the British government was right in regard to its view of the illegality of the expedition as though unarmed it was regularly organ-

ized, composed of soldiers and under military command. It is, however, held by them that the method pursued to stop the expedition was wrong as it should have been stopped before leaving British waters and jurisdiction and not on the high seas or on Portuguese waters.

It was decided in 1870, when a large number of French and Germans returned to their respective countries to enetr military service, that so long as they travelled as individuals or not organized that they did not answer to the description of a hostile expedition even if there were large assignments of arms and ammunition in the French shipgovernment on board of the same ship which carried the French flag.

An expedition then should- to be hostile and warlike, should start with a present purpose of entering into hostilities, it should be under military or naval command and it should be organized with a view to acts of war within a short period of time.

President Cleveland in his proclamation in regard to the Cuban insurrection, dated July 27,1896, declares that in accordance with the judicial decision of the U.S.Superior Supreme Court a military expedition under our neutrality laws consists of"any combination of persons organized in the United States for the purpose of proceeding to its making war upon a foreign country with which the United States is at peace, and provided with arms to be used for such purpose" and furthermore that the providing or preparing of the means for such military expedition or enterprise includes the furnishing or aiding in its transportation.

The violation by a belligerent vessel of neutral territory can be punished or stopped before its completion by the

exercise of force by the neutral . If the aggressor is crippled or even sunk, the fault lies with her commander.

As to a pursuit from the jurisdiction of the neutral and capture on the high seas that as before stated cannot be claimed as an established right. If,however, the 8th. rule regarding territorial waters recently adopted by the Institute of International Law should receive the general sanction of the maritime Powers--this pursuit and capture for an offence committed in territorial waters on the the high seas would be legal, the right to capture ceasing if a home port or one of a third State be reached.

Before closing this subject it may be well to make a reference to the most recent and notorious warlike expedition that has occurred and been brought before English courts. I refer to what is generally known as Jameson's raid into the Transvaal Republic.

The trial of Jameson and his principal subordinates took place in London under the foreign establishment enlistment act and before Lord Chief Justice Russell. In the charge the Chief Justice said that the expedition was a filibustering raid even if it was not aimed at overthrowing the Republic, or was prompted by philanthropic and or humane motives , or aimed at securing some reform of the law "And whether"it proceeded"by a showof or actual force. If these things were done by the authority of the Queen" the Chief Justice went on to say " x x x it would be an act of war." From this decision it is then established so far as Great Britain is concerned that it is a vilotatviolation of of law to fit out or aid in fitting out on British soil a military expedition against any friendly State,no matter whether it started

or not,nor whether its promoters were on British soil or not while organizing it, nor whether its members took employment in it without responsibility for its organization.

When then, the jury had three questions put to which they had to answer in , the verdict of guilty was foreshadowed. These questions were:--

1. Had any of the defendants been engaged in the preparation of a military expedition against a friendly State?

2. Had any of them abetted it?

3. Had any of them been employed by it?

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CONSTRUCTION AND EQUIPMENT OF BELLIGERENT VESSELS OF WAR IN A NEUTRAL STATE----

The accepted rules of international law provide among other duties of neutral States towards belligerents, that they are not to give armed assistance to either belligerent or to allow one side privileges denied to the other. This has been extended in the course of time to a duty not to supply belligerents with instruments of warfare, or money--the sinews of war. Then comes the duty which we have already discussed in part, not to permit belligerent agents or their own subjects to fit out war like expeditions in their dominions or to augment therein the hostile forces of a belligerent ship or expedition. Within the limits of this obligation is included naturally and reasonably, the construction and equipment of vessels of war for either belligerent; augmentation of military force are as clearly forbidden by the rules of international law as much as original construction and equipment.

In addition to the prescribed rules of international

law, questions as to the construction,equipment and subsequent departure of belligerent vessels from neutral ports are more or less covered by municipal law and regulations arising from arbitral and judicial decisions and from opinions of advisers of the neutral government concerned.

These matters have been constantly occurring questions withthe United States on account of our extensive ship-building facilities, and many sea- ports, as well as our generally neutral position in European wars and our proximity to the numberless insurrections and revolutions in the Latin-American countries.

In our Neutrality Act of 1818, codified and revised as Sections 5283 and 5285, are contained the prohibitions and punishments for furnishing,fitting out and arming vessels against people at peace with the United States or of augmenting the force of any armed vessel in the service of any foreign prince,state,colony, district or people at war with any other prince,state,colony, district or people with whom the United States is at peace.

In the foreign enlistment Act of 1870, of Great Britain, the words are that if any person within her Majesty's dominions builds or equips-agrees to build or issues,or delivers any commission for any ship,or equips,dispatches or causes or allows to be dispatched any ship with intent or knowledge or having reasonable cause to believe the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state, such person shall be deemed to have committed an offense against this Act. This law of 1870, drawn up with the experience that has accumulated since 1818,especially that afforded by our Civil War is naturally more effective and definite than our present law. The acts of other countries are more general in tone

and leave greater latitude to the government which hence, are charged with greater responsibility.

In summing up the position of the United States to this question to the time of the Civil War Mr.Dana says the results of the legislature,executive and judicial proceedings of the United States may bestated as follows:--

"In case of vessels already armed and commissioned by a foreign belligerent, belligerent, whether public vessels or privateers, they shall not in our ports increase their capacity for hostile purposes, whether of offense or defense. This rule may be violated by enlisting men or by adding to the physical effeciency of the vessel in a respect which is not purely nautical and such as a merchant vessel would not require. We havenot found it necessary to restrict the stay of belligerent cruisers or their prizes,in our waters, to loss than the terms of asylum usually allowed to public vessels in time of peace. As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the operations; but the intent with which the particular acts are done . If any person does any act or attempt to do any act towards such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty without reference to the completion of the preparations, or the extent to which they may have gone. And although his attempt may have resulted in no definite progress towards the completion of the preparation. The procuring of materials to be used,knowingly and with the intent,etc., is an offense. Accordingly it is not necessary to show that the vessel was armed, or was or was in any way, or at any time, before or after the act charged, in a condition

to commit acts of hostility."

The difficulty of the rulings just quoted of Dana, which may be said to still represent our position, is the question of intention, i.e.-whether it is possible to prove the intention sufficiently to make the rule a workable one.

Hall suggests, as an alternative precept, which possibly may be used additionally, that the test be made in the character of the vessel. He would lay stress upon the duty of the neutral to prevent the departure from its ports of vessels built primarily for war like use if destined for the use of either belligerent while he would not molest vessels primarily fitted for commercial purposes. This would meet probably the case of the greater powers, but the weaker ones and especially the budding belligerents of Latin America would find sufficient for their use in the merchant vessels of the present day--Brazilians.

Besides the modern man-of-war of any size is so costly and complicated in its character and so long in process of construction that it is not an article likely to be built for a market or begun at the outbreak of hostilities. Torpedo vessels and and vessels under construction before the outbreak of war would, however, come within Mr. Hall's category, which could be used to supplement, not to supplant, the position given by Dana.

As to the rules provided by the Treaty of Washington, although they are not in substance or phraseology adopted by any other nations than the United States and Great Britain, still the spirit they are so far recognized that I have little doubt they will have a shaping policy, besides serving as a precedent in similar times and circumstances.

The "Due diligence" referred to and required in the first

and third rules of the Treaty of Washington, though not well defined, can be said to be a diligence very much advanced in efficiency beyond that shown in the cases of the Alabama in Great Britain and the Stonewall in France during our Civil War. Whatever may be the words of the theory, the practice will be different.

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LOANS OF MONEY TO BELLIGERENTS----------

First as to the State Acts:-- A loan of money on the part of a neutral state to one of the belligerent states is manifestly a violation of the rules of neutrality and impartiality. Nothing represents so much in war as money; it is contraband of war in every sense, and contributes directly and most effectively to the carrying on of the war.

A guarantee of a war made either by individuals, corporations or by other states on the part of a neutral state in war time, is also a violation of neutrality.

But loans of money regularly made by individuals of neutral statesto a belligerent government is a matter of investment or speculation, is a business transaction which the neutral government has no right or obligation to prevent and for which the belligerent cannot ~~furnish the~~ punish the neutral individual.

During the China)Japanese war both governments of China and Japan were tendered loans of money from individuals and syndicates of European investors.

There is a difference between voluntary subscription and commercial loans to a belligerent government. The law officers of the British government in 1823, gave as an opinion that voluntary subscriptions were inconsistent with neutrality, but loans

according to the opinions of writers on international law, and the prevailing practice, would not be a violation of neutrality. Even though voluntary gifts and subscriptions are held to be in violation of neutrality, the neutral government whose citizens commit such acts , is not considered as having committed a hostile act towards the other belligerent.

Subscriptions and donations of money and material by citizens of a neutral state to relieve suffering and famine in a belligerent state, is not inconsistent with neutrality. During the Franco)German war, large sums of money were sent from both Germans and French in the United States for the relief of the sick and wounded in the hospitals of their respective countries.

In the same way subscriptions for the destitute in Cuba does not have any political character nor does it diredtly aid either side.

An opportunity presented by a neutral state to buy discarded or surplus arms,munitions of war or ships is an improper one The existence or probable-existenee-outbreak of war, makes such a sale of arms improper and the good faith of the government concerned is under a cloud.--Action of Bolivia and Chile.

During the Franco-German war both belligerents went to England for the"sinews of war", and both the French loans and one of the Germans were issued im England

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AID TO INSURGENTS

This is largely a municipal question, as insurgents not possessing belligerent rights do not appear as a recognized factor in international law. The neutrality Acts of the United States now codified as sections of the Revised Statutes do not draw any distinction in language,between belligerents and insurgents.

That this is so as matter of fact was settled by the decision the U.S.Supreme Court in the "Three Friends Case" delivered by Chief Justice Fuller in 1897.

The learned Chief Justice says that as Atty.General Hoar pointed out, though the principal object of the act was to secure the performance of the duty of the United States, under the laws of nations, as a neutral nation in respect of foreign powers still the act is nevertheless an act to punish certain offences against the United States by fines,imprisonment, and forfeitures, and the acts itself defends defines the precise nature of those offences.

"Neutrality" the Chief Justice states,strictly speaking, consists in abstinence from any participation in a public,private or civil war, and in impartiality of conduct towards both parties, but the maintenance unbroken of peaceful relations bwteen two powers, when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And as a mere matter of municipal administration, no nation can permit unauthorized, acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

"The distinction between recognition of belligerney and recognition of a condition of political revolt, between recog-

nition of the existence of war in a material sense and of war in a legal sense is sharply drawaillustrated by the case before us. For here the political department has not recognized the existence of a defacto- de facto belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time, and since this forfeiture is alleged to have been incurred.

On July 12,1895, a formal proclamation was issued by the President and countersigned by the Secretary of State,informing the people of the United States that the island of Cuba was the seat of serious civil disturbances,accompanied by armed resistance to the authority of the established government of Spain, a power with which the United states are and desire to remain on terms of peace and amity,declaring that the laws of the United States prohibited their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment, or procuring to be fitted out and armed ships of war for such service; by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States and by setting on foot or providing or preparing the means for military enterprizess to be carried on from the United States against the territory of such government, and admonishing all such citizens and other persons to abstain from any violation of these laws.

This decision overrules any view or statement of subordinate judges, like that given in the Itata case, which required a recognition of belligerency or independence to cause the word

"People" in the neutrality act to apply.

It has happened more than once, in our country, when an insurrection in neighboring countries broke out to an extent that would make it probable individuals within the jurisdiction of the United States would become involved, to issue a proclamation of warning, calling attention to our neutrality laws. President Madison issued such a proclamation, September 1st., 1815, on account of a revolt in the Spanish American provinces (No mention of revolt in proclamation).

When Texas revolted from Mexico, its belligerency was never recognized, its independence being recognized without this intervening step.

In 1838, President Madison issued two proclamations on account of the insurrection in Canada and the formation of an expedition headed by a citizen of the United States.

President Johnson issued a proclamation with respect to the Fenian invasion of Canada, but there does not seem to have been any proclamations issued by President Grant with respect to th the insurrection in Cuba during his administration, notwithstanding that Congress, in 1876, requested that the Executive issue a proclamation couched in the same terms as that issued by Spain during our civil war.

On July 12, 1895, as before mentioned, President Cleveland issued his first proclamation with respect to the present insurrection in Cuba, which was followed on July 27, 1896, by a second proclamation upon the same subject.

In regard to the previous Cuban insurrection, President Grant in 1875, eight years after hostilities had begun, in his

annual message, after defining belligerency, and stating when it should be recognized, said:--

"I fail to find in the insurrection the existence of such a substantial political organization,real,palpable, and manifest to the world, having the forms and capable the ordinary functions of government toward its own people and ~~to~~ other states, with courts for the administration of justice, with a local habitation possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the tenible footing of war, to which a recognition of belligerency would aim to elevate it. The contest,moreover, is solely on land; the insurrection has not possessed itself of a single sea port whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the ~~consular~~consular officers of other powers, calls for the definition of their relations to the parties to the contest. Considered as a question of expediency, I regard the accordance of belligerent rights still to be unwise and premature,as I regard it to be at present indefensible as a matter of right.

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THE GENERAL LAW OF CONTRABAND

"The right of the belligerent" says Mr.Richard Henry Dana "to prevent certain things getting into the military use of his enemy, is the foundation of the law of contraband; and its limits are, as in most other cases, the practical results of the

conflict between this belligerent right, on the one hand, and the and the right of the neutral to trade with enemy , on the other.

Belligerent interests might well contend that any merchandise sent into his enemy's country gives that enemy aid or relief,moral,financial or physical. But to prevent such trade, would be to end all neutral commerce. Neutral interests therefore insist on the strictest limits of the war right of seizure/and have, at times, striven to confine the rule to instruments which are completely and are of exclusively military use. The result of this conflict has left rather an undefined and irregular line. Articles of doubtful use, the belligerent seeks to condemn,on evidence or presumptions that they were in fact intended to be or would in fact become, whatever the intent, a direct contribution to the military force of his enemy. The chief maritime belligerents have enforced this right, while the chief neutrals have argued against it, in their books and diplomatic letters, and sought to restrict it in their treaties. So where articles are not of a military character, but suitable for household food,as breadstuffs, the belligerent claims the right to capture them, if bound to a port under the stress of actual siege, where the fate of the place may depend on the more question of food. The ground is that the circumstances necessarily bring the food into the category of a direct supply of the military necessities of the enemy."

Contraband <u>trade</u> may be defined as a trade with a belligerent with the intent to supply him with military or naval supplies,equipments,instruments,arms or armaments.

Contraband <u>goods</u> are munitions of war or articles which are designed or capable of use as a support or assistance to the enemy in carrying on an offensive or defensive land or maritime war.

Grotius,in his celebrated work divides articles of trade or commerce into three classes:

1st. Those articles that are useful solely for war purposes, such as arms,warlike ammunition,etc.

2nd. Those articles that cannot be used for war purposes such as pictures,statuary,etc.

3rd. Those articles which can be used for warlike par or peaceful purposes, such as money,provisions.

The first class is prohibited to neut rals,the second class is permitted, while the third is permitted or prohibited according to circumstances.

In using the expression permitted or prohibited it must be borne in mind that contraband trade is not illegal so far as the neutrals state is concern ed, unless it be in the shape of a sale,equipment or augmentation of force of a man-of-war--large or small--without the neutrals limits.

The prevention and repression of such trade falls to the lot of the belligerent most interested, and is done mainly confiscation after capture in regular form and trial if possible. The capture must be made of course upon the high seas or within territorial limits under the control of the offended belligerent. The neutral may or may not warn his subjects of the penalty and result of the contraband trade, but after that all such trade is carried on at the risk of the neutral and without the protection of his state.

Contraband trade carried overland cannot be stopped, so the question of dealing with such trade and transport is one of the high seas and one with which officers of the Navy are concerned as belligerents.

As capture can be made only under the laws of international law and condemnation follows and is determined by the action of the prize courts of the belligerent captor, whose interpretation and application depends greatly upon the facts evolved, it must be borne in mind that the question of sufficient evidence is a vital one. The officers of the belligerent cruiser must then be sure of their ground as they deal with neutrals whose property is involved to a large degree.

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-----CLASSIFICATION OF CONTRABAND-------

What is and what is not contraband? The manual based on Snow's lectures show the variance as to te contraband of war existing in our treaties and in the declarations of our statesmen. T.J.Lawrence says "As It is evident that no authoritative list of contraband ~~of war~~ articles can be compiled from treaties. An examination of the works of publicists reveals a similar divergence and leads to a corresponding conclusion . But amid conflicting views it is possible to discuss two main tendencies. The first which favors a long list of contraband goods and leans to severity in dealing with them, may be called English, since its chief defenders are to be found among the jurists and statemen of Great Britain. The second deems comparatively few articles to be contraband and is inclined to treat all doubtful cases with leniency. As its chief supporters are French,German and Italian writers it ma may be called European. In this matter as in so many others connected with maritime law,America occupies an intermediate position In her treaties and her state papers she has generally followed European and especially French models; while her courts and her legal ~~m~~luminaries have as a rule supported English views."

belligerents use, but in its larger sense not contraband.

Cotton in our civil war, became in one sense, contraband because as Chief Justice White said:--"It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton, they would not have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war and kept the forces in the field." It stood in the same position to the South as money does elsewhere--it was the sinews of war. As to money, Mosely gives the rule that "Money, and what stands for money" can be treated as contraband of war, though he goes on to say that:--

"As a thing of doubtful use it will require other evidence than that, as afforded in itself, of being destined for war. And proof of that money being raised by the agents of a belligerent state, or that it is consigned to the ministers or agents of a belligerent state, would perhaps, be the strongest evidence of its being destined to in maintaining the war. So, if shown by any other means to be a part of a sum to be raised by the government to carry on the war, it would, no doubt, be liable as contraband."

The authorities only speak of money as comprised in gold or silver, coined or in bars. But no doubt, money "In any form, in bonds, bills, notes or otherwise, if proved to be on the road to an enemy's country, to serve in support of the war, it would be the same thing."

PENALTY OF CARRYING CONTRABAND; The extent of the liability to the penalty.

The penalty usually applied for carrying contraband is the confiscation of the contraband goods alone. As the injury to the belligerent arises almost entirely from the nature of the contraband goods and not to its transport, the vessel carrying the goods is subject generally to detention only while the matter is in adjudication, and to the loss of freight.

The cruisers of the Confederates during the Civil War, allowed a free continuance of voyage to the neutral carrier if he gave up his contraband goods to the captor, but this was the result of the circumstances, with no prize courts accessible and with a great desire to avoid entanglements with neutral powers, the rule arose from the necessity.

Hall says of this rule, that "It can scarcely be believed, however, that its vitality could stand the rude test of a serious maritime war. After the capture, the cargo must still go to port for adjudication and it is very rare that the cruiser capturing the goods would have space to stow them, and besides the captor is entitled to the evidence that goes with the vessel, its papers and its master. Notwithstanding that some of our treaties provide for this method it is extremely doubtful whether they can be carried into effect in warttime.

If the ship and contraband cargo belong to the same owner the vessel is subject to the same fate as the contrabend goods. Fraud as to papers, cargo or destination will also cause the condemnation of the vessel.

Lord Stowell, in the case of the "Staat " and Chief Justice Chase in the Peterhoff case ruled also that when

the owner of the contraband goods had also non-contraband goods on board that the taint extended and both were subject to confiscation. This rule is based upon the principle that when a man undertakes an illegal transaction the whole of his property embarked in the transaction is liable to seizure or confiscation.

A usage arose in past times which softened the blow of capture to the owner of contraband goods. It is known as pre-emption and consists in the purchase of the contraband goods of the captor instead of confiscation , the purchase being at a price fixed by the captor, generally the original price of the goods, plus the expenses and ten per cent profit. The rule still held by the English is given as follows in the Admiralty Manual of 1888: "-The carriage of goods conditionally contraband and of such absolutely contraband goods as are in an un-manufactured state and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British government which then pays freight to the vessel carrying the goods."

No one can complain at this; it is less than confiscation. The rule of pre-emption can take place as a matter of agreement between two governments, one who regards the goods in question non-contraband, the other regarding them as contraband. This was the plan adopted in the treaty of 1794 by Great Britain and the United States.

But to apply the rule of pre-emption to any goods not contraband is improper and was ruled so by the joint commission appointed to settle claims of Americans whose goods were treated by Great Britain. Goods are either contraband or non-contraband and must be treated accordingly.

To make goods contraband, a vessel must have a belligerent destination, and the offense begins and confiscation is liable from the

ent destination, and the offense begins and confiscation as liable from the moment of departure from port until the arrival of the ship at a belligerent destination. Even if the belligerent port is only a contingent destination, that is sufficient to make the vessel or her goods liable. If a ship seems carries or intends to carry her cargo to a belligerent cruiser or fleet the destination is belligerent without regard to her given port of destination. If the neutral shipmaster interposes a neutral port between the original port and the hostile port this is an evasion and the doctrine of continuous voyages will prevail. Unless the voyage is fraudalent on the return voyage the vessel is exempted.