Vanderbilt Journal of Transnational Law

Volume 13
Issue 1 *Winter 1980*

Article 7

1980

Free Navigation: Examination of Recent Actions of the United States Coast Guard

Edward H. Lueckenhoff

FREE NAVIGATION: EXAMINATION OF RECENT ACTIONS OF THE UNITED STATES COAST GUARD

TABLE OF CONTENTS

I. INTRODUCTION

The use of aircraft and large, seagoing vessels for smuggling marijuana and other illicit drugs has created a burgeoning problem for United States efforts to control its borders. The use of foreign flag ships as "mother ships" is particularly troublesome. This practice involves foreign flag vessels, often containing several tons of marijuana, that hover in international waters just outside the United States territorial sea. The marijuana is transferred from these mother ships to smaller vessels which then cross into United States waters and distribute the contraband at prearranged points along the coast. The immunities provided by international law for foreign mother ships that remain in international waters present barriers to stopping this practice. As will be discussed below, United States law enforcement officials may only board and search these vessels under a limited number of circumstances. Nevertheless, the Coast Guard and Drug Enforcement Agency (DEA) do board these vessels, seize marijuana, and suc-

cessfully prosecute crew members. The Coast Guard's usual procedures to control drug traffic begin when vessels likely to be carrying contraband are located by spotter planes, Coast Guard cutters, or through information supplied by informants. Then the vessel is put under surveillance by a Coast Guard cutter to prevent it from unloading its cargo. Next, the Coast Guard attempts to find a way to overcome the international law immunities protecting the vessel. If the Coast Guard succeeds, the vessel is boarded and searched.[1] If marijuana is found during the search,[2] the ship is seized and the crew arrested.

This note examines whether the Coast Guard has been successful in overcoming the immunity of the foreign flag vessels. In recent cases the government used several arguments to justify the Coast Guard's actions. In each of the cases, the defendant contended that the Coast Guard's interference with the foreign vessel was a clear violation of international law. Generally, however, the courts upheld the government's arguments. The discussion below will examine and evaluate these decisions.

II. BACKGROUND

A. *General Principle of Free Navigation*

Freedom of navigation on the high seas has not been a constant principle in international law. Complete dominion over vast expanses of the world's seas was once viewed as a natural extension of a nation's sovereignty, provided the state possessed adequate naval power to maintain its control.[3] Debate over whether the

---

1. The search often is not expressly made for contraband. The Coast Guard may board a ship of unknown registry to determine her nationality. If adequate proof of registry cannot be produced by the vessel's captain, the Coast Guard may decide to make a further search for identifying marks. It is clear to all involved, however, that the Coast Guard personnel are actually looking for contraband; otherwise the ship would never have been under surveillance.

2. Such searches must be caried out in accordance with the fourth amendment prohibitions against unreasonable search and seizure. This requirement produced a body of law and much scholarly debate. For an excellent discussion of this question *see* Carmichael, *At Sea with the Fourth Amendment,* 32 U. MIAMI L. REV. 51 (1977). This note, however, will not directly address the search and seizure issue.

3. This view has existed during various periods in history ranging from ancient Greek and Roman times through the Middle Ages. H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 1-12 (1978) [hereinafter cited as KNIGHT]; H. SMITH, THE LAW AND CUSTOM OF THE SEA 57-58 (3d ed. 1959) [here-

seas should be subject to such control, however, has been continuous.[4] The central point in this controversy invariably concerned interference by one state with the flag vessels of another.[5]

The surge in maritime trading that accompanied the global conquest by European colonial powers thrust into the spotlight the issue of free navigation. During this period, legal scholars debated whether there should be national jurisdiction over the seas or complete freedom on the high seas. To argue the rights of the Dutch to sail unimpeded to the East Indies and trade freely there, Hugo Grotius in 1604 wrote his treatise the *Mare Liberum* in which he asserted under a natural law theory that "[i]f in a thing so vast as the sea a man were to reserve to himself from general use nothing more than mere sovereignty, still he would be considered a seeker after unreasonable power."[6] This thesis became the cornerstone of international maritime law. The current activities of the United States Coast Guard raises the question of whether this free navigation principle presently is being violated.

B. *Exceptions in International Law to the General Principle of Free Navigation*

Since early in its history, the United States has professed agreement with Grotius' view of the seas. Commenting upon the nature of the sea in an early seizure case, the Supreme Court paralleled Grotius' reasoning. The Court stated as follows:

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive perogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business, without interruption; . . .[7]

---

inafter cited as SMITH]; Shelton & Rose, *Freedom of Navigation: The Emerging International Regime,* 17 SANTA CLARA L. REV. 523 (1977).

4. KNIGHT, *supra* note 3, at 6.

5. For instance, the precipitating cause for the monumental treatise of Hugo Grotius, the *De Iure Praeda* (1605), was the seizure of a Portugese vessel by the Dutch East India Company. Through the treatise, Grotius sought to defend the seizure as well as the Netherlands' right to trade in the East Indies. R. MAGOFFIN, GROTIUS ON THE FREEDOM OF THE SEAS v-x (1916); KNIGHT, *supra* note 3, at 13.

6. Magoffin, *supra* note 5 at 38.

7. The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826). The case involved the validity of the seizure of a Portuguese merchant vessel by a United States warship.

Even before this declaration, however, the Court had based decisions in seizure cases upon exceptions to the general rule of free sailing.[8] These early exceptions, as well as others added later, sprang "from a higher law to which the national law of every particular State must conform."[9] This "higher law" refers to public international law. Since the acceptance of Grotius' views, international law has presumably governed the seas. If the seas are to be free to all nations, the law of nations must assure that freedom. A corollary to this proposition is that if there are to be restrictions on or exceptions to this freedom, the community of nations must support them. International law is formed by either custom or convention.[10] Exceptions to the free navigation principle were created by both of these means.

International custom created four major exceptions to the principle of free navigation. The first and foremost of these is the rule that every state shall have exclusive jurisdiction over ships which fly its flag, whether those ships are sailing territorial or international waters. This jurisdiction is accompanied by certain responsibilities such as insuring that the vessels are seaworthy.[11] These duties require periodic inspections of vessels by representatives of the flag nation. Thus, the vesting of authority in the flag state to stop, board, search, and seize a vessel while it is on the high seas is a necessary adjunct to this first exception.[12] This rule, however, does not authorize nations to interfere with foreign flag vessels that are sailing in international waters.[13]

The second basic rule established by customary international law is that "all honest men are entitled to treat the pirate as an outlaw, an Ishmaelite, and a general enemy of mankind. He may be fought and destroyed by the ships of any nation and no rules

---

8. *See, e.g.*, The Charming Betsy, 6 U.S. (2 Cranch) 34 (1804); The Flying Fish, 6 U.S. (2 Cranch) 170 (1804); Maley v. Shattuck, 7 U.S. (3 Cranch) 458 (1806).

9. SMITH, *supra* note 3 at 60.

10. *Id.*

11. For a listing of these responsibilities see Convention on the High Seas, arts. 10, 13, 24-25, *opened for signature* April 29, 1958 (entered into force Sept. 30, 1962), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as CHS].

12. Statutory authorization enabling the United States Coast Guard to make "inquiries, examination, inspections, searches, seizures, and arrests upon the high seas" is provided in 14 U.S.C. § 89(a) (1976).

13. *See* CHS, *supra* note 11, at art. 3.

of war limit the methods which may be used against him."[14] The underlying reasoning for this rule is that although the high seas are not subject to national law, they "must not be allowed to become an area of anarchy or crime."[15] The third exception is the rule of self-defense.[16] A nation is entitled to stop and seize a foreign flag vessel on the high seas if the defending state reasonably assumes that the vessel is acting in a manner that jeopardizes the state's security interest.

The final major customary exception to the free navigation principle is the doctrine of hot pursuit. A state may stop and seize a foreign flag ship on the high seas when the vessel has been involved in unlawful activity within the state's territorial waters and chased to a point outside the territorial waters before it could be stopped. Without this right, the power of a coastal state to protect its interests would be seriously weakened. There are, however, limitations upon this right of hot pursuit. Pursuit by the coastal state must be continuous and must cease when the offending vessel reaches the territorial waters of another foreign state.

C. *Convention on the High Seas*

Rules of international law may be formed by convention as well as international custom. The four rules cited above comprise the customary exceptions to the general international law principle of freedom of navigation upon the high seas. In recent years the community of nations used conventions to formalize these exceptions. The principal convention regarding freedom of navigation is the Convention on the High Seas (CHS),[17] a 1958 United Nations sponsored treaty to which the United States is a signatory. The CHS begins with the following reaffirmation of the world community's adherence to Grotius' principle of freedom of the seas:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, . . . (1) Freedom of navigation.[18]

---

14. SMITH, *supra* note 3 at 65.
15. *Id.*
16. *Id.* at 70-71.
17. CHS, *supra* note 11.
18. *Id.* art. 2.

The CHS also reaffirms the customary exceptions discussed above.[19] In addition to enunciating the customary rules, the CHS effectively articulates the sought after balance between freedom on the high seas and the necessary regulation of man's seagoing activities. Freedom of the seas is stressed throughout the CHS although the majority of the CHS' articles deal with exceptions to that freedom. These exceptions represent the totality of the restrictions the world community is willing to place upon maritime activity. Freedom on the high seas remains the norm. Only those restrictions that are essential to the coordinated, orderly use of the world's seas are allowed by international law. Thus, the applicable question when determining the legality of an interference with a foreign flag vessel is whether the situation fits a recognized exception to the general principle of free navigation. If not, such interference constitutes a violation of international law. Article 22 of the CHS outlines those instances, excluding hot pursuit[20] and self-defense,[21] when seizure of a foreign flag vessel on the high seas is justified under international law. Article 22 provides:

> *Except where acts of interference derive from powers conferred by treaty,* a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is *reasonable* ground for suspecting:
> (a) That the ship is engaged in piracy; or
> (b) That the ship is engaged in the slave trade; or
> (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.[22]

"Acts of interference" by a foreign nation are permitted if authorized through a treaty with the flag state.[23] Additionally, the requirement that the interfering ship must have a "reasonable ground" for suspecting that the vessel is engaged in either piracy or the slave trade, or that the vessel is of the same nationality

---

19. The first exception, jurisdiction of states over their flag vessels, is provided for in article 6 of the CHS, the piracy exception is outlined in articles 14 through 21, and the right of hot pursuit is noted is article 23. Although not specifically mentioned in the CHS, the right of self-defense is implicit in article 2 and throughout the CHS.

20. The hot pursuit doctrine is provided for in article 23 of the CHS.

21. *See* notes 16 & 19 *supra.*

22. CHS, *supra* note 11, at art. 22.

23. "The right of visit and search is a war right; it can only be exercised in time of peace by virtue of an express stipulation in an international treaty . . . ." C. COLOMBUS, THE INTERNATIONAL LAW OF THE SEA 311 (6th ed. 1967).

illustrates the CHS' strict adherence to the general principle of free navigation.

Thus, the CHS recognizes six exceptions to the general rule of free navigation.[24] In short, these exceptions are: (1) jurisdiction of the flag state; (2) self-defense; (3) hot pursuit; (4) piracy; (5) slave trade; and (6) when authorized by treaty with the flag state. Freedom of navigation remains the rule, however, and it must be respected under international law. Interference with foreign flag vessels in international waters can be tolerated under international law only if a recognized exception to this general rule applies.

D. *Proposals of the Third Conference on the Law of the Sea*

The provisions of the CHS are echoed in the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea.[25] Article 87 of the Negotiating Text states the following:

> The high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is exercised under the conditions laid down by the present Convention and by other rules of international law. It comprises, *inter alia,* both for coastal and landlocked States: (a) Freedom of Navigation; . . .[26]

It is clear that the states involved in drawing up the new Law of the Sea Convention plan to leave the present international law on freedom of navigation as embodied in the CHS intact. This is particularly significant when one considers the motivation underlying current Law of the Sea negotiations. The United Nations recognized the need for a comprehensive updating of the Law of the Sea. Customary international law and the CHS are not adequate today because of the world community's increasing exploitation of the sea. New agreements among nations in areas such as marine environment, marine technology, and dispute settlement are needed. As indicated in the text quoted above, the

---

24. The right of approach can be considered an adjunct to the six major exceptions. Under general international law, a warship may cruise near merchant vessels on the high seas to better determine if the application of one of the exceptions is warranted. This right is implicit in article 22 of the CHS.

25. Third United Nations Conference on the Law of the Sea—Informal Composite Negotiating Text, A/CONF. 62/WP.10 (July 15, 1977).

26. *Id.* at art. 87.

free navigation principle will provide a foundation for the new agreements.

The Negotiating Text does recognize the problem which drug trafficking presents. Article 108 calls for cooperation among nations in the attempt to suppress the illicit drug trade, especially as carried on by ships on the high seas.[27] Although recognizing the drug trade problem, the article does not add to the exceptions to free navigation discussed above. Even after this document becomes law, in order for a foreign flag vessel to be boarded lawfully on the high seas, it will have to be pursuant to one of the exceptions outlined in the CHS.[28]

E. *American Application of the "Exceptions" to Free Navigation Upon the High Seas*

Although the laws of any one nation do not govern the seas, the courts of each nation are essential to the Law of the Sea. "Since international authority does not exist in any visible form all authority which is actually exercised must in fact be national, but on the high seas it is not, . . . the expression of uncontrolled or sovereign power."[29] Instead, the national courts' authority to rule on such questions comes by delegation from the international community. The national courts are thereby bound to decide cases they are confronted with strictly under the precepts of international law.[30]

---

27. *Id.* at art. 108. The article states as follows:

1. All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a vessel flying its flag is engaged in illicit traffice in narcotic drugs or physchotropic substances may request the co-operation of other States to suppress such traffic.

28. The draft Law of the Sea Convention is not directly relevant to the discussion below since it is not yet current law. Neither the courts nor the parties involved in the cases examined below cited the Negotiating Text. The Text, however, is significant since it represents the latest sentiment of the world community on the principle of free navigation.

29. SMITH, *supra* note 3, at 46.

30. The theory of delegation is not absolute. There are varying doctrines pertaining to how international law is incorporated into local common law. The doctrine of *incorporation* states that rules of international law are incorporated into domestic law automatically unless they are in conflict with the fundamentals of local law. The other school of thought advocates the doctrine of *transfor-*

The case law dealing with the piracy, slave trade, and self-defense exceptions only has historical value today. Although piracy and the slave trade have not completely vanished, they are hardly the center of great legal controversy. Piracy, whether by domestic or foreign vessels, always has been dealt with unequivocally by United States courts[31] and the legislature.[32] Vessels engaged in the slave trade have been treated as pirate ships since the nineteenth century.[33] Similarly, the self-defense doctrine has been accepted in United States law for many years.[34] Each of the other exceptions, however, has produced some element of legal controversy in recent years.

Mr. Justice Story in *The Marianna Flora,*[35] incorporated the doctrine of hot pursuit into United States case law. Story stated as follows: "It is true that it has been held . . . that American ships, offending against our laws, and foreign ships in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized on the ocean, and rightfully brought into our ports for adjudication."[36] Courts have consistently applied this doctrine since *The Marianna Flora.*[37] Questions arose, however,

---

mation, which provides that rules of international law are not to be considered part of local law unless they have already been adopted by the domestic courts.

This distinction is not critical to this discussion, however, since the United States Supreme Court has bound United States courts to the international law principles outlined above. Moreover, by entering into the CHS, the United States committed itself to accept the Convention's provisions as the supreme law of the land. Therefore, the courts are obligated to decide cases regarding freedom of navigation questions according to the CHS and the customary rules of international law.

31. *See, e.g.,* United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844); The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826).

32. *See generally* 33 U.S.C. §§ 381-82 (1976). These statutes, and others dealing with piracy, are still in force.

33. *See generally* McDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 879-85 (1962); 70 C.J.S. *Piracy* § 1 (1951). Federal statutes dealing with the slave trade are still in effect. *See, e.g.,* 46 U.S.C. § 1354 (1976); 18 U.S.C. § 1582 (1976).

34. 1 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER, 348-55 (1932); SMITH, *supra* note 3, at 70-71.

35. 24 U.S. (11 Wheat.) 1 (1826).

36. *Id.* at 42.

37. *See, e.g.,* The Newton Bay, 36 F.2d 729, 731-32 (2d Cir. 1929); Gillam v. United States, 27 F.2d 296, 299-300 (4th Cir.), *cert. denied,* 278 U.S. 635 (1928); United States v. F/V Taiyo Maru, Number 28, SOI 600, 395 F. Supp. 413 (D. Maine 1975).

concerning whether the offending vessel must be strictly within the territorial waters of the coastal state when sighted[38] and whether the pursuing ship also must be within the territorial limit when the sighting is made.[39]

The principle that states have jurisdiction over their flag vessels is firmly entrenched in United States law.[40] Courts treat flag vessels as "part of the territory"[41] of the flag state. Not only are United States vessels subject to being stopped and seized under this doctrine, but United States criminal and civil laws apply to individuals on board United States ships sailing the high seas as they would if these individuals were on United States soil.[42]

> For, aside from the question of the extent of control which the United States may exert in the interest of self-protection over waters near its borders, although beyond its territorial limits, the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.[43]

In recent years, however, many United States shipowners sought to avoid entanglement with the relatively stringent United States maritime laws by registering their ships under "flags of convenience."[44] Before this practice arose, the flag state had little

---

38. *See, e.g.*, Gillam v. United States, 27 F.2d 296 (4th Cir.), *cert. denied*, 278 U.S. 635 (1928); The S.S. I'm Alone Arbitration, (United States v. Canada) Joint Final Report of the Commissioners, II HACKWORTH, DIGEST OF INTERNATIONAL LAW 703-08 (1941). Article 23 of the CHS resolved this question by permitting pursuit if the offending vessel is sighted within "the internal waters or the territorial sea or the contiguous zone of the pursuing State."

39. KNIGHT, *supra* note 3, at 416.

40. *See, e.g.*, United States v. Rodgers, 150 U.S. 249, 264 (1893); Wilson v. McNamee, 102 U.S. 572 (1880); Delany v. Moraitis, 136 F.2d 129, 133 (4th Cir. 1943).

41. United States v. Rodgers, 150 U.S. 249, 264 (1893).

42. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1953); Skiriotes v. Florida, 313 U.S. 69, 73 (1941).

43. Skiriotes v. Florida, 313 U.S. 69, 73 (1941); *see also* Blackmer v. United States, 284 U.S. 421, 437 (1932); United States v. Bowman, 260 U.S. 94 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

44. The term "flags of convenience" refers to the common practice of United States shipowners' registering their vessels in countries with little or no shipping

problem enforcing its jurisdiction as the shipowners normally were domiciled in that state. Confronted with flags of convenience, United States courts "have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them."[45] Flags of convenience have been termed "illusory shield[s]"[46] that do not protect United States shipowners from the jurisdiction of United States law. This is not to say, however, that the United States has ignored foreign registry under flags of convenience. Although United States courts have been willing to enforce legal obligations against United States citizens who own vessels registered under foreign flags of convenience,[47] they have not extended this view to allow United States interference that would be impermissible if the vessels were both of foreign registry and owned by foreign nationals.

The last exception to the general principle of free navigation to be considered is that created by treaty. Such treaties are generally express agreements between states granting authority to one or both states to stop and board flag ships of the other nation if the vessels are stopped within a specified distance from the coastal state. Generally these arrangements are entered into for the purpose of aiding the coastal state in enforcement of some aspect of its criminal code. An example of such a treaty is the Convention between the United States and Great Britain for Prevention of Smuggling of Intoxicating Liquors,[48] signed and ratified in 1924, which provided in part as follows:

---

regulation and with relatively low tax levels.

45. Lauritzen v. Larsen, 345 U.S. 571, 587 (1953).

46. Gerradin v. United Fruit Co., 60 F.2d 927, 929 (2d Cir.), *cert. denied* 287 U.S. 642 (1932). In *Gerradin,* the Second Circuit allowed a seaman to bring suit against a United States shipowner pursuant to the Jones Act even though the seaman's injury occurred aboard a ship of Honduran registry while the vessel was on the high seas.

47. For instance, the Second Circuit in *Gerradin v. United Fruit Co.,* 60 F.2d 927 (2d Cir.), *cert. denied,* 287 U.S. 642 (1932), ruled that the flag of convenience was "illusory" only to the extent necessary to place the United States shipowner under the jurisdiction of the federal courts for purposes of a Jones Act action. The court limited its holding to this question and did not imply that a flag of convenience is insufficient to make the ship a "foreign flag vessel" for freedom of navigation purposes.

48. 43 Stat. 1761. This treaty is now dated, of course, due to repeal of Prohibition. *See also* Treaty between the United States and Panama, 43 Stat. 1875.

> His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws in force. When such enquiries and examinations show a reasonable ground for suspicion, a search of the vessel may be instituted.
>
> If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.
>
> The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.[49]

As illustrated above, the treaty exception is effectuated by a state's waiver of its exclusive jurisdiction over its flag vessels and a simultaneous grant to another state of the authority to stop its vessels in international waters. Normally this authority is restricted geographically, and international law requires strict adherence to these restrictions by the coastal state.[50] Such waiver traditionally has taken place only through formal treaty. A question has arisen recently, however, concerning whether a state may waive its exclusive jurisdiction on an ad hoc basis without the for-

---

49. Convention between the United States and Great Britain for Prevention of Smuggling Intoxicating Liquors, 43 Stat. 1761, 1761-62.

50. *See, e.g.*, United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927). The court characterized a seizure made by the United States outside the geographic restrictions set by the particular treaty as "sheer aggression and trespass . . . not to be sanctioned by any court." *Id.* at 926.

malities of an express treaty.[51]

III. Recent Developments

The following section discusses two interrelated lines of recent United States cases. All involve motions by the defense for suppression of evidence seized by the Coast Guard on board foreign or stateless[52] vessels sailing in international waters. In each case, defendant claimed that the boarding and search of the vessel violated international law and that the seizure of the evidence violated the fourth amendment. The cases are arranged below by the general international law questions they present. The first two cases concern the question of what is required under international law to allow seizure of a foreign flag vessel under the treaty exception.[53] The other cases involve questions regarding the authority of the Coast Guard to stop, board, and search vessels of unknown nationality in international waters under the doctrine of approach.[54] Each of the cases also addresses the more general issue of the limits of the Coast Guard's authority to board ships sailing outside United States territorial waters.

A. *Treaty Cases*

The facts of the first two cases are substantially similar. In both cases the Coast Guard seized foreign flag vessels while they were on the high seas. Both vessels were carrying marijuana allegedly bound for the United States and the flag states in both instances authorized the Coast Guard by telecommunication to stop, board, search and, if warranted under United States law, seize the vessel and arrest its crew.

The first of these cases, *United States v. Dominquez*,[55] is an unreported order of the Eastern District of North Carolina denying a motion by the defendant for suppression of evidence seized on board the Bahamian vessel *Sea Crust*. While the Coast Guard

51. Part II of the note will contain a discussion of recent cases presenting this question.

52. A stateless vessel is one not registered with any nation. Stateless vessels are not protected under international law and thus can be interfered with while on the high seas by warships of any nation.

53. United States v. Williams, 589 F.2d 210 (5th Cir. 1979); United States v. Dominguez, No. 77-39-CR-7 (E.D.N.C. Feb. 17, 1978).

54. CHS, *supra* note 11, at art. 22.

55. No. 77-39-CR-7 (E.D.N.C. Feb. 17, 1978).

was pursuing the *Sea Crust* in international waters, the United States sought and received permission from the Bahamas to stop and search the vessel. In a terse statement, the judge[56] asserted that the authorization of the United States Government to seize the ship and arrest the crew "was commonplace and reasonable under international law."[57] He failed to recognize, however, that defendant's motion raised a question of international law that had never been examined by United States courts. Although authorization is commonplace if made by formal treaty, the permission in *Dominguez* was granted on an informal, ad hoc basis. The question that the judge should have addressed is whether a flag nation can, on an informal basis, authorize another state to interfere with its vessels while they are on the high seas.

United States v. Williams,[58] a 1979 Fifth Circuit opinion, directly addressed the question stated above. In *Williams,* the Coast Guard made an investigatory stop of a Panamanian vessel, *M/V PHGH,* in international waters. Prior to the stop, the Coast Guard received permission from the government of Panama to board the PHGH. The Panamanian embassy in Washington granted the authorization and transmitted it through the United States State Department to the Coast Guard. Although the Government, defendant and amicus curie all stressed the issue of this type of authorization in their briefs, the Fifth Circuit only dealt with the topic as dictum contained in a footnote.[59] The court acknowledged that the seizure of the *PHGH* was in violation of article 22 of the CHS.[60] Relying on *United States v. Cadena,*[61] however, the court held that neither the *PHGH* nor the members of its crew were entitled to rely on article 22 since Panama was not a signatory to the CHS.[62]

Regarding the authorization granted by Panama to stop and

---

56. Judge F. T. Dupree, Jr.

57. United States v. Dominguez, No. 77-39-CR-7 slip op. at 1 (E.D.N.C. Feb. 17, 1978).

58. 589 F.2d 210 (5th Cir. 1979).

59. *Id.* at 212 n.1. The court was able to treat the treaty issue in this manner because one of its earlier cases, *United States v. Cadena,* 585 F.2d 1252 (5th Cir. 1978), was held to be controlling. *Cadena* will be discussed extensively below.

60. *See* note 17 *supra.*

61. 585 F.2d 1252 (5th Cir. 1978), *reh. denied,* 588 F.2d 600 (5th Cir. 1979).

62. In *Cadena* and *Williams,* the Fifth Circuit equates the CHS with the totality of international law. For a fuller discussion of this point, see text accompanying note 135 *infra.*

board the *PHGH,* the court commented in dicta that:

> Panama is not a signatory to this convention. But even if Panama were a party to this convention, we believe that Panama's specific approval of the boarding would divest those on board of any protection under the Treaty. We do not think that the Convention was meant to protect the privacy of those on board but rather the Treaty is a means to protect the national interest implicit in freedom of the seas—an interest that the United States has held dear throughout its history.[63]

In other words, the court stated that a flag state is free to divest itself of its exclusive jurisdiction by any means it chooses since the freedom guaranteed by the CHS is a matter of national sovereignty and not a personal right of those who sail the high seas. It, therefore, appears that a formal treaty is not necessary to trigger the treaty exception in the Fifth Circuit.

Although asserting that sovereign nationals have full power to make such agreements, formally or informally,[64] the Government sought to establish a basis in international law for the informal authorization. The Government claimed that this basis can be found in the Multilateral Single Convention on Narcotic Drugs.[65] The Multilateral Convention provides for close cooperation and full assistance between signatories in the "campaign against the illicit traffic in narcotic drugs . . . ."[66] The Government contended that the Multilateral Convention and the informal arrangement made between Panama and the United States were "additional new exception(s) to the doctrine of international law formalized in the Convention on the High Seas which severely proscribes the conditions on which a warship may intercept a

---

63. United States v. Williams, 589 F.2d 210, 212 n.2 (5th Cir. 1979).

64. Brief for Government-appellee at 5, United States v. Williams, 589 F.2d 210 (5th Cir. 1979).

65. Multilateral Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298 (as amended Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118). Article 35 of the Convention provides *inter alia* that signatories: "(a) Make arrangements at the national level for co-ordination of prevention and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination; (b) Assist each other in the campaign against the illicit traffic in narcotic drugs; (c) Cooperate closely with each other . . . ." The Convention, however, does not permit coastal states to interfere with flag ships of the other signatories while the vessels are on the high seas.

66. *Id.* art. 35(b).

merchant vessel on the high seas."[67] The Fifth Circuit ignored these arguments in the *Williams* decision[68] and merely stated that it believed the authorization was effective.[69] The court's earlier holding in *Cadena* obviated the need to answer the question more persuasively.

B. *Approach Cases*

The cases below are factually related. In each case the Government used the approach doctrine in defending the Coast Guard's actions. Under this doctrine, warships[70] may approach any merchant ship met on the high seas to verify the vessel's nationality.[71] This right stems from the responsibility of states to maintain adequate supervision over their flag vessels. If the merchant vessel responds to the warship's approach by showing her flag, no further interference is justified unless the captain has good cause to believe the ship is engaged in some illegal activity.[72] If he has such a belief, he may then stop and board the ship. If the vessel approached shows a foreign flag, however, even suspicious conduct will not justify active interference except when the flag state has authorized such an action by treaty.[73] If the merchant vessel fails to adequately identify herself, she may be stopped and boarded as a stateless vessel.[74]

The first of the cases to be examined, *United States v. Cadena*,[75] will be discussed separately because of its overall importance and its controlling effect on the holding in *Williams*.

1. United States v. Cadena

Cadena involved the boarding and subsequent seizure of the vessel *Labrador* by the Coast Guard about 200 miles off the Flor-

---

67. Brief for Government-appellee at 10, United States v. Williams, 589 F.2d 210 (5th Cir. 1979).

68. 589 F.2d 210, 212 n.1 (5th Cir. 1979).

69. *Id.*

70. Warships are defined by international law as military vessels or airplanes. Coast Guard cutters are clearly warships. *See generally* KNIGHT, *supra* note 3, at 415-18.

71. SMITH, *supra* note 3, at 49.

72. *Id.*

73. *Id.*

74. *See* Lauritzen v. Larsen, 345 U.S. 571, 587 (1953).

75. United States v. Cadena, 585 F.2d 1252, 1256 (5th Cir. 1978), *reh. denied*, 588 F.2d 600 (5th Cir. 1979).

ida coast. Through the efforts of a two-month investigation and from information gleaned during the approach, the Coast Guard had near-conclusive proof that the *Labrador* had a great quantity of marijuana on board bound for the United States.[76] The Court in *Cadena* justified the seizure of the *Labrador* through a two-step analysis. First, the court found domestic statutory authority for seizure by the Coast Guard of foreign flag vessels in international waters. Second, the court held that article 22 of the CHS did not apply in this case as neither Colombia nor Canada, one of which was the flag state,[77] had ratified the CHS. The court concluded that the CHS, and thus international law, did not bar the United States from interfering with the *Labrador*. These two holdings, when read together, stand for the proposition that the Coast Guard may board, search, and seize flag vessels of states that are not a party to the CHS while the ships are on the high seas without any kind of treaty authorization if the Coast Guard has reasonable cause to believe the vessel is being used for a criminal activity that has been partially planned or carried out within the United States. As the CHS represents customary international law, the court also ruled by implication that so long as the Coast Guard had reasonable cause, nothing in public international law will prohibit its actions. This ruling rendered examination of the treaty exception question in *Williams* unnecessary. An equally significant declaration by the Fifth Circuit in *Cadena* was its statement in dicta that even if the Coast Guard did violate international law by boarding and searching a vessel, suppression of evidence found during the search and dismissal of criminal warrants based on that evidence are not required.

The court in *Cadena* conceded that no United States statute expressly grants jurisdiction over foreign vessels while they are sailing the high seas.[78] The Fifth Circuit, however, found implicit

---

76. *Id.* The parties to whom the defendants agreed to transfer the marijuana were government informants. As the transfer was being made, the informants summoned the Coast Guard. The "investigation" began when the "deal" was made between the informants and the defendants.

77. Although the crew was entirely Colombian, Canada was also involved in *Cadena* because the Coast Guard found a 1975 Canadian registration certificate along with a 1976 Columbian certificate indicating the ship had been inspected for rats. Neither nation, however, had ratified the CHS. The vessel in *Cadena* may have been stateless. It had shown no flag by day and was flying none when boarded. The court did not state whether the vessel was Colombian. *Id.*

78. The court stated: "No statute has been cited to us by the United States,

statutory authority for the seizure in 14 U.S.C. section 89(a), which grants the Coast Guard its general authority to stop and board ships:

> (a) The Coast Guard may make inquiries, examinations, inspection, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board any vessel *subject to the jurisdiction, or to the operations of any law, of the United States,* address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested . . . or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture . . . such vessel or such merchandise or both, shall be seized.[79]

Thus, under this section the authority of the Coast Guard to act upon the high seas depends upon whether a vessel sailing there is "subject . . . to the operation of any law, of the United States,"[80] as it is obvious that such vessels are not within United States "jurisdiction."[81] Because the Coast Guard detained the *Labrador* in order to determine whether certain domestic conspiracy statutes were being violated on board,[82] and because those statutes have been held to have extraterritorial application,[83] the Court ruled that the Coast Guard's actions were authorized by

---

. . . and we have found none, expressly asserting 'jurisdiction' over the vessel by the United States, to be enforced either by the Coast Guard or any other domestic force." 585 F.2d at 1258.

79. 14 U.S.C. § 89(a) (1976) (emphasis added).

80. 585 F.2d at 1259 (quoting § 89(a)).

81. *Id.*

82. "The defendants were engaged in a violation of the domestic conspiracy statute, 21 U.S.C. § 963, which we have applied extraterritorially and to nonresident aliens." 585 F.2d at 1259.

83. *Id.* The court further stated that: "The Coast Guard detained the vessel and searched it to detect and prevent a violation of the laws of the United States, thus acting in accordance with the purpose of the statute as set forth in its opening sentence." *Id.* (footnote omitted).

section 89(a). In a footnote the court implied that one crucial aspect of the defendant's criminal activity rendering the *Labrador* subject to the operation of the United States conspiracy laws was the fact that part of the conspiracy to import marijuana took place within the United States. Additionally, the United States was the ultimate destination of the contraband.[84] The court concluded that in this instance the United States Government had the right to enforce its laws extraterritorially. This right subjected the *Labrador* to the operation of United States laws as required in section 89(a).

Cadena's second major holding is that article 22 protections are not available to flag vessels of non-signatories to the CHS and vessels of states that failed to ratify the CHS.[85] The court first ruled that Colombia and Canada are not parties to the CHS because they have not yet ratified the Convention.[86] Citing as precedent a recent Second Circuit case involving abductions from foreign soil,[87] the court held that "only signatory nations to a treaty, . . . can protest its violation."[88] Using language from the CHS to buttress its holding, the court stated as follows: "The treaty is not an act of disinterested benevolence for the peoples of the world. There is no indication in the treaty, or elsewhere, that it was intended to confer rights on non-member nations or on vessels of non-member nations, let alone on citizens of non-member nations."[89]

The court in *Cadena* based these conclusions on general rules of treaty construction.[90] Defendants argued that the CHS

---

84. 585 F.2d at 1259 n.12. Note 12 reads as follows:

> We need not consider whether Congress intended to reach a conspiracy involving only persons physically outside the United States and having as its objection only the commission of acts outside its territory. Obviously, we do not touch upon whether the statute would apply to acts committed by non-resident aliens within their own states, or whether there is authority to arrest citizens or non-resident aliens while they reside in a foreign country.

85. 585 F.2d at 1260-61.

86. 585 F.2d at 1260.

87. United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) *cert. denied,* 421 U.S. 1001 (1975).

88. 585 F.2d at 1260-61.

89. 585 F.2d at 1260.

90. The court obtained certain rules of treaty construction from RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 139(a) (1965). That section states in part that: "An international agreement may create

presents a special situation because it merely restates principles of general international law,[91] therefore, the protections of article 22 should not be limited to vessels of party states. As a result, defendants contended that they had standing to assert the doctrines of international law underlying article 22.[92] The court addressed this argument in dictum with what is perhaps its most far-reaching statement. The court explained: "Even if we accept these premises, there is no basis for concluding that violation of these international principles must or should be remedied by application of the exclusionary rule or by dismissal of the indictment unless Fourth Amendment interests are violated."[93] The court noted that other remedies are available for violations of article 22 and the international law principles underlying the CHS.[94] In effect, the Fifth Circuit advocated focusing upon fourth amendment issues rather than international law principles.[95]

---

a right in favor of a state not a party to it if the agreement manifests the intention of the parties that it shall have this effect."

91. The preamble to the CHS states as follows:

> The States Parties to this Convention desiring to codify the rules of international law relating to the high seas recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established princples of international law.

CHS, *supra* note 11, at preamble.

92. These "doctrines" are the customary rules of international law discussed in Part II of this Note.

93. 585 F.2d at 1261. The court stated that use of the exclusionary rule "would be a singular application for none of the other signatory nations appears to have a similar exclusionary rule or to attach such consequences to a violation of the Convention." 585 F.2d at 1261. The court did not cite any authority for this assertion.

94. 585 F.2d at 1261. The court stated as follows:

> The violation of international law, if any, may be redressed by other remedies and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct. Article 22 of the Convention, for example, specifies the right to compensation for damages suffered as a consequence of its violation; if only this remedy is available to citizens of vessels of member nations citizens of non-member nations ought not enjoy the benefits of greater prophylaxis, such as exclusion or dismissal of indictments, by virtue of their nation's failure to ratify.

585 F.2d at 1261.

The reasoning, however, is somewhat strained as article 22 does not limit the remedy for violation of the CHS to such compensation.

95. The court felt that excluding evidence seized from a flag vessel of a non-

2. Stateless Vessel Cases

The two cases discussed below, *United States v. Cortes*[96] and *United States v. Petrulla*,[97] involved interference with vessels which the Coast Guard initially determined to be stateless.[98] In *Petrulla*, the district court denied defendants' motions to suppress evidence seized on board the vessel *Heidi*. Evidence produced at the hearing showed that the Coast Guard kept the *Heidi* under surveillance for more than two days during which time she never flew a national flag. Following radio contact with the *Heidi*, the Coast Guard determined that the vessel was stateless and could be boarded to check its documentation and registriation.[99]

The court upheld the boarding on two grounds. First, it found that the boarding and search could be viewed as permissible under the CHS because the facts showed that the Coast Guard had reasonable grounds to believe that the *Heidi* was, in fact, a United States vessel.[100] Alternatively, the court held that these activities were defensible because the CHS was not applicable since the vessel had been properly determined to be stateless.[101] Citing articles 5 and 6 of the CHS,[102] the court ruled that it "was an agreement *among nations* that the high seas would be open to vessels *of all nations*."[103] Having concluded that the vessel was

---

ratifying state "might ultimately undermine [the CHS'] effectiveness by reducing the incentive for ratification. Congress or the Executive might decide that this nation should unilaterally enforce those principles, but, in the absence of such a directive, we find no authority for granting the relief requested." 585 F.2d at 1261.

96. 588 F.2d 106 (5th Cir. 1979).

97. 457 F. Supp. 1367 (M.D. Fla. 1978).

98. Lauritzen v. Larsen, 345 U.S. 571 (1953).

99. 457 F. Supp. at 1370. After two days of questioning the crew of the *Heidi* by radio, it was obvious that the crew members were attempting to deceive the Coast Guard regarding the ship's registry.

100. *Id.* at 1372. The court cited article 22(c) of the CHS, which allows warships to board a merchant ship on the high seas "flying a foreign flag or refusing to show its flag" if the warship has reasonable cause to believe the vessel is, in fact, "of the same nationality as the warship."

101. *Id.* at 1371.

102. *Id.* Article 5 of the CHS outlines the general duties each State has in registering its flag vessels. Article 6 states in part: "1. Ships shall sail under the flag of one State only . . . on the high seas. 2. A ship which sails under the flags of two or more States, . . . may be assimilated to a ship without nationality." CHS, *supra* note 11, at art. 6.

103. *Id.* (emphasis added).

stateless, the court held that "further consideration of the CHS which applies to the vessels of individual nations [was] unnecessary."[104] The court therefore decided that the Coast Guard interference did not violate international law.[105]

Next the court addressed whether the Coast Guard had statutory authorization to board the stateless vessel *Heidi.* Nothing that a vessel must be subject to the jurisdiction or laws of the United States to give the Coast Guard authority to interfere with her in international waters, the court held that:

> [T]he Coast Guard pursuant to 14 U.S.C. § 89 has jurisdiction to determine whether it, in fact, has jurisdiction. In order for the Coast Guard to determine whether it has jurisdiction it must ascertain whether the vessel is of American registry. This inquiry can in a normal instance be determined without the necessity of boarding of inquiry of the vessel and verification of the information with the nation of registry. If the information from the vessel is not verified by the nation of registry and there then becomes a genuine question of registry of the vessel, 14 U.S.C. § 89 would permit the United States Coast Guard to board the vessel and determine whether it was in reality of (sic) a United States vessel. Accordingly, the Court is of the opinion that 14 U.S.C. § 89(a) permits the boarding of stateless vessels to determine nationality.[106]

United States v. Cortes, a 1979 Fifth Circuit opinion, also raised the question of the Coast Guard's authority over stateless vessels in international waters. In that case the Coast Guard approached the vessel *Piter* in international waters to indentify her and inquire about her nationality. In answer to the Coast Guard's questioning, a crewman stated that the captain had gone ashore. At the time, however, the *Piter* was anchored 26 miles from the nearest land. Understandably suspicious, the Coast Guard cutter radioed the Coast Guard Operations Center in Miami. The Center directed the commander of the cutter to board the *Piter* to determine her nationality. During a subsequent search, the

---

104. *Id.*

105. Again, as in *Cadena,* the court equated the CHS with the whole of general international law.

106. 457 F. Supp. at 1372. The court seems to mix the two alternative rationales discussed in the text above. Either the Coast Guard had authority under international law to board the vessel because she was stateless or the Coast Guard had authority under article 22(c) because it was reasonable to assume the vessel was, in fact, of United States registry. At best, the Court's construction of § 89(a) is confusing.

commander found a large amount of marijuana. At no time, however, was the *Piter* determined to be registered to any nation.

Cortes, involving the legality of a Coast Guard search of a vessel-without-a-country on the high seas, was a case of first impression for the Fifth Circuit.[107] The court held that the Coast Guard had ample reason to investigate for the purpose of determining *Piter's* registration and nationality. As international law permits investigatory stops of these vessels, the *Piter* was "subject to the jurisdiction . . . of the United States" as required under section 89(a). The court concluded that the Coast Guard has statutory authority to make investigatory stops of apparently stateless vessels in international waters. The court further held that nothing in the CHS curtails this authority because the CHS was entered into "for the mutual benefits of its signatories"[108] and the *Piter,* as a stateless vessel, could therefore not rely on such an agreement.[109]

3. United States v. Postal

Denouement of the Fifth Circuit cases discussed above came in *United States v. Postal.*[110] The court addressed the issue of whether a court of the United States can assert jurisdiction over persons arrested aboard a foreign vessel seized in international waters in violation of the CHS.[111] Distinguishing *Postal* from the situations in *Cadena* and *Cortes,* the court stated that in *Cadena* the flag state was a non-ratifier of the CHS and in *Cortes* the vessel was stateless.[112]

While in international waters, the Coast Guard boarded the vessel *La Rosa* twice. The Coast Guard's actions before and during the first boarding were similar to its activities in the ap-

---

107. 588 F.2d at 107.

108. *Id.* at 109.

109. The defendants argued unsuccessfully that the CHS, or at least the international law principles it recognizes, operates to restrict the actions of signatory nations towards stateless vessels. *Id.* After examining articles 6 and 23 of the CHS, the court responded that "[s]tateless vessels are not entitled to the same protection afforded vessels registered in a foreign nation which is a signatory of the Convention." *Id.* at 109-10.

110. United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

111. *Id.* at 865.

112. *Id.* at 865 n.1. The court did address this question in *Cadena* but only in dictum. *See* text accompanying note 84 *supra.*

proach cases discussed above.[113] The second boarding, however, greatly differed from the first. Before boarding, the Coast Guard cutter received conclusive verification from the Coast Guard Operations Center in Miami that *La Rosa* was of Grand Cayman registry. The Grand Cayman Islands are a party to the CHS. As a result the court admitted that this second boarding violated the CHS.[114] Moreover, there was no doubt that the criminal charges brought against the crew of *La Rosa* were based upon evidence seized from the vessel during this second boarding. *Postal* dealt with the question of what effects, if any, violation of the CHS should have upon defendants' criminal convictions.[115] This question had not been directly addressed previously.[116]

Defendants contended that because the second boarding was in violation of a United States treaty obligation, United States courts lacked jurisdiction. This contention was based on *Cook v. United States*[117] and *Ford v. United States*,[118] both Supreme Court decisions applying the Convention for Prevention of Smuggling of Intoxicating Liquors.[119] In *Cook* the Supreme Court overturned a criminal conviction based on evidence seized from a British vessel in violation of the Liquor Treaty. The Court held that United States courts lack jurisdiction in such instances because the United States "had imposed a territorial limitation upon its own authority" by entering into the Treaty.[120] *Ford* expressed this same view in dicta.[121]

The Fifth Circuit sought to distinguish *Cook* and *Ford* from *Postal* by noting that the CHS, unlike the Liquor Treaty, is not self-executing,[122] and therefore cannot act to limit the jurisdiction of United States courts. This holding was based on the general

---

113. As in the other cases, the Coast Guard reasonably believed that the vessel was of United States registry.

114. 589 F.2d at 872.

115. *Id.* at 873.

116. In *Cadena* the question was only addressed in dictum. *See* note 103 *supra.*

117. 288 U.S. 102 (1933).

118. 273 U.S. 593 (1927).

119. *See* note 42 *supra* & accompanying text.

120. 288 U.S. at 121.

121. 273 U.S. at 605-06.

122. A self-executing treaty is one which, because of declarations made therein, has the force of domestic law of the ratifying nations. A treaty may also be deemed self-executing if the circumstances of its adoption so indicate. 589 F.2d at 876.

principle that treaty does not control domestic law unless it is given effect by congressional legislation or is self-executing.[123] Combining this doctrine with the holding in *Cook* and the dicta in *Ford,* the court stated that:

> We read *Cook* and *Ford* to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction. The law of treaties teaches, however, *that treaties may have this effect only when self-executing* (emphasis added).[124]

The court found statutory authority under section 89(a) for the Coast Guard's actions, including seizure of the incriminating evidence.[125] Under the court's analysis, however, unless the CHS was found not to be self-executing, *Cook* and *Ford* would deprive the United States of jurisdiction. The Court therefore concluded that the "determinative issue" in the case was whether the CHS is self-executing.[126] Using an analysis that compaired the purposes of the CHS with those of the Liquor Treaty,[127] examined the legislative history of the CHS,[128] and cited United States cases in which the judiciary extended jurisdiction of the United States as far into the sea as possible,[129] the Fifth Circuit concluded that the CHS is not self-executing and therefore "the defendants cannot rely upon a mere violation of international law as a defense to the court's jurisdiction."[130]

---

123. *Id.* at 877.

124. *Id.* at 875.

125. *Id.* at 884-85.

126. *Id.* at 876. The court actually stated that "the determinative issue in the case before us is whether article 6 of the Convention on the High Seas is self-executing." *Id.* The court singles out article 6 because it provides for exclusive jurisdiction by the flag state. The court admits that article 6 on "its face . . . would bear a self-executing construction because it purports to preclude the exercise of jurisdiction by foreign states in the absence of an exception embodied in treaty." *Id.* at 877.

127. *Id.* at 882-83.

128. *Id.* at 881-82.

129. *Id.* at 879-80.

130. *Id.* at 884. Defendants contended that the court lacked jurisdiction because their detention resulted from a violation of the CHS. The court responded:

> A defendant may not ordinarily assert the illegality of his obtention to defeat the court's jurisdiction over him. (Citations omitted). This proposition, the so-called *Ker-Frisbie* doctrine, is equally valid where the illegal-

IV. LEGAL ANALYSIS

Prior to the last few years foreign flag vessels were adequately protected against unwarranted interference by the Coast Guard. Two bodies of law provided this protection. First, international law, both customary and that made by convention, safeguarded vessels against unjustified interference. The fourth amendment provided a second source of protection. Evidence seized on board such vessels could be used by the Government at trial only if its seizure complied with fourth amendment search and seizure requirements. Thus, the fourth amendment and international law formed a two-step protection against unwarranted interference. The vessel could not be stopped unless it fell within an exception to the general principle of free navigation. Once the Coast Guard stopped and boarded the vessel, any search had to comport with fourth amendment search and seizure law. The cases discussed above suggest that the first step in this protective scheme is being eroded.

Although the six cases discussed above were arranged according to the issues raised by their facts, they can be recategorized according to the basic legal question each presents. The courts in the first five cases[131] sought to determine whether the Coast Guard's actions were authorized under domestic and international law. *Postal,* the last case, conceded that the Coast Guard violated international law and then endeavored to determine what the legal effects of that violation should be.[132] The holdings of these cases, and the legal reasoning supporting them will be examined below.

In *Cadena* the Fifth Circuit held that the Coast Guard has authority under section 89(a) to board foreign vessels in international waters if there is probable cause to believe a violation of

---

ity results from a breach of international law not codified in a treaty . . ..
Where a treaty has been violated, the rules may be quite different . . . .
Id. at 3026-27 (footnotes omitted).

The court bases part of its analysis on the *Ker-Frisbie* doctrine. The court in effect holds that if a treaty is not self-executing, the *Ker-Frisbie* rule applies.

131. These five cases include: (1) United States v. Dominguez, No. 77-39-CR-7 (E.D.N.C. Feb. 17, 1978); (2) United States v. Williams, 589 F.2d 210 (5th Cir. 1979); (3) United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *reh. denied,* 588 F.2d 600 (5th Cir. 1979); (4) United States v. Petrulla, 588 F.2d 106 (5th Cir. 1979); and (5) United States v. Cortes, 457 F. Supp. 1367 (M.D. Fla. 1978).

132. The court also addressed the question of statutory authority under § 89(a), completely relying on its holding in *Cadena.*

United States law is being committed on board.[133] The court implied that the criminal activity must have some contact with the United States before this authority could vest[134] because the vessel would only then become "subject" to the laws of the United States as required by section 89(a). As the court noted, certain United States laws have been given extraterritorial effect.[135] That does not mean, however, that the United States is free to extend its jurisdiction into international waters based upon its section 89(a) powers.

As outlined above,[136] United States law requires that its statutes be construed to render them compatible with the law of nations. International law, as embodied in the CHS, does not allow interference with foreign flag vessels on the high seas unless one of the recognized exceptions to free navigation applies. The Fifth Circuit circumvented this problem in *Cadena* by holding that the CHS does not protect vessels of non-signatory and non-ratifying states.[137] Defendants, however, argued that the CHS is but a restatement of underlying international law principles, and that they therefore had standing to assert these principles as a defense.[138] The court never adequately responded to this argument. Instead, the court implied in dicta that even if this assertion were true, the defendants would not prevail since a violation of international law might not necessitate dismissal of the indictment.[139] Thus, the court failed to definitively answer the principle question of the *Cadena* case—whether the Coast Guard violated international law. Additionally, the court held that section 89(a) provided statutory authority for the Coast Guard's actions. As

133. 585 F.2d 1252, 1258-59 (5th Cir. 1978).

134. *Id.* at 1259 n.12. If a conspiracy is only partially carried out within the United States, the conspiracy laws are normally given extraterritorial effect so that the part of the conspiracy being carried on outside the United States can be effectively combatted. This extraterritoriality supposedly places the vessel in *Cadena* under the "operation" of the laws of the United States.

135. *Id.* at 1259.

136. *See* text accompanying note 24 *supra*. A clear statement of this rule of construction was made by Chief Justice John Marshall in *The Charming Betsy*. He wrote: "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce . . . as understood in this country." 6 U.S. (2 Cranch) 64, 118 (1804).

137. *See* note 76 *supra* & accompanying text.

138. *See* note 83 *supra* & accompanying text.

139. *See* note 84 *supra* & accompanying text.

mentioned above, however, United States statutes must not be construed to violate the law of nations. Therefore, since the court did not deem it necessary to determine whether the Coast Guard violated international law, its construction of section 89(a) is not persuasive.

The Fifth Circuit erred in using *Cadena* as precedent for *Postal.* Following *Cadena's* holding, the court in *Postal* found domestic authorization for the Coast Guard's actions under section 89(a). In *Cadena* the court held that its construction of section 89(a) was permissible under international law because the flag state had not ratified the CHS. In *Postal,* however, the flag state was party to the CHS. Therefore, under the Fifth Circuit's own analysis in *Cadena,* the Coast Guard lacked statutory authority to make the search in *Postal.*

Cadena was controlling in *Williams.* Without *Cadena,* the *Williams* court would have been forced to directly answer the question of whether an informal, ad hoc agreement between nations allowing seizure of each other's flag ships is valid under international law. In dicta the court stated that there was no reason why such practice should not be permissible. The court reasoned that a state may forfeit a portion of its sovereignty and individual citizens cannot defend in reliance on international law because that law is designed to order rights and responsibilities between nations, not individuals. Article 22 of the CHS provides that acts of interference are permissible if authorized by "treaty," not telecommunication. Interpreting treaties, such as the CHS, is a permissible function of domestic courts. In *Williams,* the court should have decided whether the term "treaty," as used in article 22, included ad hoc, informal telecommunications. By ruling on the issue, the Fifth Circuit would have raised the question to consideration by the community of nations and a definitive interpretation of the article 22 treaty exception could have been made.

The decisions of the Fifth Circuit in *Cortes* and the district court in *Petrulla* are more easily supported. Under the right of approach, a warship may stop and board an apparently stateless vessel in international waters for the purpose of determining her nationality. It is questionable whether this doctrine places the vessel within the "jurisdiction" of the United States as required by section 89(a). If the statute is so construed, however, it remains consistent with the law of nations.

In *Postal,* the Fifth Circuit admitted that the Coast Guard violated international law when it boarded the vessel the second

time. The court, however, refused to overturn convictions based on evidence seized during the boarding. Defendants contended that United States courts lacked jurisdiction over the case because the Coast Guard violated international law. The court responded that a criminal defendant cannot assert the illegality of his detention to defeat the court's jurisdiction[140] unless the detention was procured through violation of either a self-executing treaty or a treaty given effect by congressional legislation.[141] The court reached this ruling after examining *Cook*[142] and *Ford*[143] in the context of treaty law.[144] According to the court, "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."[145] The court stated that only a treaty with effect of domestic law could disturb the statutory jurisdiction of the Coast Guard to take actions supposedly granted by section 89(a).[146] Concluding after a lengthy discussion[147] that the CHS is not self-executing, the court rejected the defendant's argument.

In *Postal,* the Fifth Circuit correctly stated that treaties do not have the force of law unless they are self-executing or are given effect by congressional legislation. The court was also convincing in its argument that the CHS is not self-executing, although a good argument to the contrary can be made.[148] The analysis, how-

---

140. This rule is the *Ker-Frisbie* doctrine formulated in *Frisbie v. Collins,* 342 U.S. 519, 522 (1952), and *Ker v. Illinois,* 119 U.S. 436, 444 (1886). Due to *Cook v. United States,* 288 U.S. 102 (1933), and *Ford v. United States,* 273 U.S. 593 (1927), application of the *Ker-Frisbie* doctrine in *Postal* is uncertain.

141. This statement is a summary of the court's arguments appearing 589 F.2d at 875-77.

142. 288 U.S. 102 (1933).

143. 373 U.S. 593 (1927).

144. Postal, 589 F.2d at 875.

145. *Id. See* Whitney v. Robertson, 124 U.S. 190, 194 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 311 (1829).

146. 589 F.2d at 875. The court stated that a "self-executing interpretation of article 6 would establish a defense to the jurisdiction of the United States in every case because its prohibition would be as authoritative as a statute of Congress depriving the United States courts of jurisdiction where seizure is effected in violation of the article." *Id.*

147. *See* notes 118-21 *supra* & accompanying text.

148. The court admitted that article 6 of the CHS seems, on its face, to be self-executing. *See* note 117 *supra.* An argument can also be made that the general purpose of the CHS was to restate the existing international law—law that was binding on each member of the community of nations and which is still binding today. These two arguments, among others, seem as convincing as the

ever, fails in at least two respects. First, the reasoning of the court depends upon whether section 89(a) actually grants statutory authority to the Coast Guard to make such stops. The court based this authority on its holding in *Cadena* that the Coast Guard has authority to stop vessels of non-signatories and non-ratifying states to the CHS. The *Cadena* court's construction of section 89(a) depended upon the validity of the seizure under international law as statutes must be construed consistently with the law of nations. The court presented valid argument in *Cadena* supporting the fact that the seizures were not in violation of international law. These arguments, however, cannot be made in *Postal.*[149] Section 89(a) does not authorize conduct that violates international law. Second, although it is true that under United States case law treaties do not affect municipal law unless they are self-executing, the analysis relied on in *Cook* and *Ford* is not affected by this rule. Neither case limited the rule that United States courts should not take jurisdiction over cases based on evidence gained through violation of treaties to those instances when the violation is of a self-executing treaty. The court in *Postal* assumed that only treaties with the force of domestic law could remove the jurisdiction supposedly granted by sectin 89(a). The Supreme Court in *Cook,* however, stated as follows: "Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty."[150] As the Fifth Circuit noted in *Postal,* the Liquor Treaty that was under scrutiny in *Cook* was clearly self-executing.[151] In *Cook,* however, the Supreme Court did not mention a requirement that the treaty be self-executing in order to deprive United States courts of jurisdiction. Therefore, it appears that the reasoning in *Cook* applies as long as the United States is "lacking power to seize." The Coast Guard lacked this power in the factual setting of *Postal.*

VI. CONCLUSION

The infirmities in the opinions outlined above are symptomatic

---

court's arguments to the contrary.

149. The court admitted that the second boarding in *Postal* violated the CHS.

150. 288 U.S. 102, 121-22 (1933).

151. 589 F.2d at 883.

of legal reaching, which the courts felt obliged to perform in order to allow the Coast Guard to control the problem of drug smuggling into the United States by sea. Principles of international law have been stretched too far in order to accommodate this reaching. The decisions in *Cadena, Williams* and *Postal* place the protections of the CHS secondary to fourth amendment law by finding that as long as search and seizure requirements are met, the seized evidence can be introduced at trial.

As the Fifth Circuit outlined in *Postal,*[152] the United States judiciary has consistently sanctioned actions of the United States Government that are arguably contrary to the principle of free navigation, as long as the particular court feels that the actions are essential to the United States interests. There can be no doubt that the United States has a great interest in ceasing importation of marijuana and other contraband into the country by sea. Indeed, the Informal Negotiating Text of the Law of the Sea Conference recognizes the importance of this issue.[153] This importance, however, does not justify minimizing the role of international law as the Fifth Circuit did in *Postal, Cadena* and *Williams.* United States courts should not take jurisdiction of cases based on evidence seized in violation of international law. If *Postal* becomes the accepted rule, the Coast Guard will be encouraged to violate international law as evidence seized will be admissible in court. If section 89(a) is construed as it was in *Cadena,* the statute will be stretched to authorize acts in violation of international law. As emphasized above, such a construction is not permissible. Additionally, if the court can successfully avoid ruling on the difficult question of whether telecommunication comes within the treaty exception, as the Fifth Circuit did in *Williams* by relying on *Cadena,* it is possible that other courts will avoid similar difficult questions by relying on both *Cadena* and *Postal.* In short, the courts are only giving lip-service to the rules contained in the CHS and general international law regarding free navigation. The recent liberal interpretation of the exceptions to free navigation may eventually destroy the general rule.

The issue of adequate control of smuggling still remains. The problem is growing and the effect upon American society is tremendous. The judicial reaching is the product of the struggle to

152. The court recognized this argument. *Id.* at 873 n.16.
153. *Id.*

allow the Coast Guard to effectively deal with the problem while attempting to keep within the spirit of international law.

Rather than misapplying principles of international law, the United States should promote a multilateral treaty that would permit investigatory stops of all vessels in international waters off its shore that are reasonably believed to be carrying contraband headed for the United States. This is, in effect, what the Coast Guard is presently doing with the court's approval. The United States, however, has a responsibility to act within the framework of international law. Such a treaty would make this possible while permitting the Coast Guard to effectively deal with the problem of smuggling.

This proposed treaty could be reached through the Law of the Sea Conference. Instead of simply mentioning the need to combat the problem through cooperation, the negotiating states have the opportunity to take affirmative steps to end the smuggling. United States difficulties with drug traffic are the concerns of the international community as long as that traffic is taking place on the high seas. The efforts of the United States must be channeled through that community and thus are limited by the recognized rules of international law. Without such a treaty, however, it appears that the Coast Guard can effectively deal with the problem only if the courts continue to stretch the exceptions to the free navigation principle.

Edward H. Lueckenhoff