The Marijuana on the High Seas Act and Jurisdiction Over Stateless Vessels

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NOTES

THE MARIJUANA ON THE HIGH SEAS ACT AND JURISDICTION OVER STATELESS VESSELS

The United States government has been conducting a campaign against drug abuse and narcotics trafficking since 1914. In the mid-1970's, the federal government extended its campaign beyond the territorial limits of the United States and began to fight its drug war on the high seas. As a result, United States Coast Guard seizures of drug-laden vessels increased dramatically during the 1970's. Prosecutions actually declined, however, as drug smugglers quickly discovered a loophole in the law. The loophole appeared


4. The Coast Guard is the primary maritime law enforcement agency of the United States. The Coast Guard is responsible for enforcing all federal laws that regulate activity on or under the high seas and other waters subject to United States jurisdiction. 14 U.S.C. § 2 (1976); HOUSE REPORT, supra note 2, at 3.


6. HOUSE REPORT, supra note 2, at 5.
because the Comprehensive Drug Abuse Prevention and Control Act of 19707 ("Comprehensive Act") repealed an earlier statute8 that had prohibited the use of narcotics on board United States vessels on the high seas.8 Under the Comprehensive Act, the possession of narcotics on vessels outside United States territorial waters was not a crime. Thus, unless prosecutors could prove that the crewmembers were attempting or conspiring to import illicit narcotics into the United States, the prosecutions failed.10

Upon boarding drug-laden vessels, Coast Guard authorities often found that crewmembers had destroyed any evidence that might have supported a conspiracy prosecution, such as charts marked with United States destinations.11 Narcotics traffickers further exploited the Comprehensive Act loophole by successfully employing a “mother ship” technique, anchoring large vessels loaded with marijuana just beyond the territorial waters of the United States.12 Under the cover of darkness, smugglers transferred the marijuana to smaller pleasure craft capable of unloading the cargo in shallow, isolated coves along the coastline. Although the Coast Guard seized many mother ships, the government often could not gather sufficient evidence to prove that the crewmembers had conspired to import the drugs into the United States.13

In 1980, Congress enacted the Marijuana on the High Seas Act14.

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10. Id. at 5. For a discussion of the limited success of conspiracy prosecutions, see Note, High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction, 50 Fordham L. Rev. 688, 700-12 (1982).
13. See Hearings, supra note 5, at 63-65.
   955a. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels
   (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with in-
to remedy the Comprehensive Act's inadequate enforcement provisions. As a result, prosecutions and convictions of drug smugglers have risen sharply.\textsuperscript{15} Section 955a(a) of the Marijuana on the High Seas Act, however, has generated considerable controversy. Section 955a(a) prohibits any person "on board a vessel subject to the jurisdiction of the United States on the high seas" from possessing a controlled substance with the intent to distribute it.\textsuperscript{16} Vessels subject to the jurisdiction of the United States on the high seas specific-
ically include vessels without nationality,\textsuperscript{17} which are known as stateless vessels. Under article 6(2) of the Convention on the High Seas,\textsuperscript{18} a vessel acquires stateless status by sailing under the flags of two different nations or by flying the flag of one nation while claiming registry in another.\textsuperscript{19}

| Table 1 |
|-----------------|-----------------|-----------------|
| Total seizures with persons on board (POB) | 25 | 65 | 118 |
| Seizures without POB | 3 | 6 | 11 |
| U.S. vessels seized with POB | 21 | 58 | 97 |
| Foreign vessels seized with POB | 2 | 1 | 15 |
| Stateless vessels seized with POB | 2 | 6 | 6 |
| State prosecution of case | 1 | 5 | 7 |
| Federal prosecution accepted | 10 | 33 | 33* |
| Federal cases in which at least one defendant convicted | 10 | 33 | 33* |
| Federal cases dismissed or all defendants acquitted | 3 | 3 | 1 |
| Number of federal cases pending prosecution | 0 | 1 | 53 |
| Status of federal prosecution unknown at time of compilation | 3 | 14 | 4 |
| Individuals arrested | 126 | 373 | 615 |
| Number of defendants tried as of January 1, 1982 | 51 | 143 | 162 |
| Number of defendants convicted at trial | 23 | 136 | 139 |
| Percent of cases in which federal prosecution accepted (any prosecution) | 64% (68%) | 78% (86%) | 77% (83%) |
| Percent conviction of cases going to trial in which at least one defendant convicted | 77% | 92% | 97% |
| Percent of defendants tried who were convicted | 45% | 95% | 86% |

*6 cases resulted in partial convictions; the remainder resulted in the conviction of all defendants.

Source: LCDR B.E. Weule, U.S. Coast Guard, Legal Advisor, Operational Law Enforcement Division.

\textsuperscript{17} Id. § 955b(d).
\textsuperscript{19} See, e.g., United States v. Dominguez, 604 F.2d 304, 308 (4th Cir. 1979), cert. denied
Defendants, as well as commentators, have criticized section 955a(a) because the provision fails to require proof of an intent to distribute a controlled substance within the United States. The critics have contended that by not requiring proof of an intent to distribute within the United States, the United States courts' assertion of subject matter jurisdiction over cases involving the foreign crewmembers of stateless vessels on the high seas is inconsistent with the established jurisdictional principles of international law. Courts have rejected this argument, however, and have held that the statute's jurisdictional reach comports with the protective principle of international law. As a result, the courts have exercised subject matter jurisdiction over cases involving foreign nationals on stateless vessels on the high seas without requiring proof that the defendants intended to distribute a controlled substance within the United States.


21. The validity of a court's in personam jurisdiction over defendants is rarely an issue. Under the Ker-Frisbie doctrine, a court has in personam jurisdiction over a defendant even if the defendant's presence was secured unlawfully. Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). But see Cook v. United States, 285 U.S. 102 (1933) (in personam jurisdiction over a defendant is invalid if a self-executing treaty imposes a territorial limitation on the jurisdiction of the United States). In personam jurisdiction alone, however, is insufficient to determine whether a court can subject foreign nationals to a criminal trial. Even if foreign nationals are in a court's presence, the court must decide whether subjecting them to trial is appropriate. See infra text accompanying note 132.

22. See infra text accompanying notes 26-58.


24. See supra text accompanying notes 57-58.

25. See infra notes 67-111 and accompanying text. A recent decision has interpreted the phrase "vessel subject to the jurisdiction of the United States on the high seas" to mean that federal courts have subject matter jurisdiction over cases involving foreign crewmembers of a stateless vessel solely as a consequence of the vessel's stateless status. United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982), cert. denied sub nom. Pauth-Arzuza v. United States, 103 S. Ct. 748 (1983). See also United States v. Howard-
This Note analyzes the intended and appropriate reach of the Marijuana on the High Seas Act by reviewing the established jurisdictional principles of international law and examining the Act's legislative history. The Note concludes that, although the statute and its legislative history are ambiguous, the statutory objective does comport with international law. Accordingly, United States courts properly may exercise subject matter jurisdiction over most cases involving foreign crewmembers accused of violating the Act.

**JURISDICTIONAL PRINCIPLES OF INTERNATIONAL LAW**

The primary sources of international law are treaties and custom.²⁶ Treaties manifest a nation's express consent to abide by certain rules of international conduct; custom reflects the implied consent of some nations to the conduct of others.²⁷ Customary international law results from a continuous process of rejection or tacit acceptance of a government's unilateral claims of power or authority in the world community.²⁸ The reciprocal patterns of assertion and deference ultimately produce general principles of international jurisdiction.²⁹ Any nation whose courts exert subject matter jurisdiction over cases involving persons or property outside the nation's territorial boundaries must base that exercise of jurisdiction on some international jurisdictional principle.

International jurisdictional principles are part of the common law of the United States.³⁰ Congress may override these principles

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²⁶ 1 L. Oppenheim, International Law § 19 (M. Lauterpacht 8th ed. 1955). Court decisions, as well as "the teachings of the most highly qualified publicists of the various nations," are subsidiary sources of international law. *Id.* §§ 19a-19b.

²⁷ *Id.* §§ 12, 16-19.


²⁹ R. Falk, The Role of Domestic Courts in the International Legal Order 21-52 (1964). Falk defines jurisdiction as "the process by which the limits of legal competence are specified, that is, how far a decision-maker may go in asserting a claim to exercise legal control over men, things, and events." *Id.* at 53. See also Dickinson, Research in International Law—Pt. II. Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 435, 443 (Supp. 1935).

³⁰ The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdic-
by statute or treaty, but congressional intent to do so must be clear and unequivocal. The legislative history of the Marijuana on the High Seas Act demonstrates that Congress intended that the Act comply with international law. Thus, a federal court must look to international jurisdictional principles to determine whether it has subject matter jurisdiction over cases involving violations of section 955a by foreign crewmembers of stateless vessels.

International law recognizes five general principles of subject matter jurisdiction: passive personality; nationality; territorial; universality; and the protective principle. If these principles do not support the court's assertion of jurisdiction, then the court should dismiss the case.

The Passive Personality Principle

The passive personality principle allows a nation's courts to assert jurisdiction over anyone who injures that nation's citizens. United States courts, however, generally have rejected this principle, as often as questions of right depending upon it are duly presented for their determination.


ple as a legitimate basis for exercising jurisdiction.\(^3\)

**The Nationality Principle**

A nation's courts also may assert jurisdiction on the basis of the nationality principle, which recognizes that the courts have jurisdiction over the criminal acts of nationals committed outside the nation's territory.\(^3\) The nationality principle, therefore, allows United States courts to exercise jurisdiction over the prosecution of United States citizens under section 955a(b). Section 955a(b) prohibits United States citizens on board any vessel from possessing controlled substances with the intent to distribute.\(^3\) Under the law of the flag theory of nationality, United States courts also may exercise subject matter jurisdiction to hear cases involving any person arrested on board a United States vessel.\(^3\) United States courts could exercise jurisdiction under the theory regardless of the nationality of the person arrested or the location of the vessel at


\(^{38}\) Lauritzen v. Larsen, 345 U.S. 571 (1953); United States v. Flores, 289 U.S. 137 (1933); United States v. Baker, 609 F.2d 134 (5th Cir. 1980); Restatement, supra note 31, § 28. Under the United States Supreme Court's interpretation of the law of the flag theory, a ship is constructively a floating part of the flag state. Lauritzen v. Larsen, 345 U.S. at 585; United States v. Flores, 289 U.S. at 155-56. The Supreme Court, therefore, apparently considers the law of the flag theory to be congruent with the territorial principle. See Note, supra note 10, at 695. For a discussion of the territorial principle, see infra text accompanying notes 40-43. Commentators, however, have criticized this approach on the grounds that a vessel should not be viewed as part of the territory of the flag state. See, e.g., Restatement, supra note 31, § 28 comment c; C. COLUMBUS, THE INTERNATIONAL LAW OF THE SEA §§ 303-307 (6th rev. ed. 1987). Several courts have relied upon the law of the flag theory in asserting jurisdiction over cases involving drug smuggling. See United States v. Julio-Diaz, 678 F.2d 1031 (11th Cir. 1982); United States v. Liles, 670 F.2d 989, 990 n.2 (11th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Riker, 670 F.2d 987, 988 (11th Cir. 1982).
the time of the arrest. 39

The Territorial Principle

The territorial principle of international jurisdiction bases jurisdiction on the situs of the crime. 40 Under a theory of objective territoriality, however, a nation’s courts also may assert subject matter jurisdiction over illegal conduct that occurs outside the nation’s territory if the conduct creates an effect within the territory. 41 United States courts have extended the objective territoriality theory by asserting jurisdiction over defendants who intended to cause an effect or consummate a conspiracy within the United States. 42 The objective territorial principle, therefore, supports a United States court’s assertion of subject matter jurisdiction over cases involving violations of section 955a(d), which requires proof of a person’s intent to import a controlled substance into the United States. 43

The Universality Principle

The fourth basis for subject matter jurisdiction under international law is the universality principle. This principle allows the court of any nation to exercise subject matter jurisdiction over a universally condemned crime if the defendant is in the nation’s custody. 44 Most international law authorities limit jurisdiction

based on universality to acts of piracy and slave trading, but have not ruled out the future application of universality to other offenses as well. United States courts never have recognized universality as a basis for jurisdiction over drug smuggling, although some commentators have maintained that courts should exercise jurisdiction based on universality because of the international condemnation of drug smuggling.

Condemnation of drug trafficking is not a recent development. As early as 1912, several nations participated in the first international narcotics convention. Numerous other conventions have occurred since then, including the Single Convention on Narcotic Drugs. Signed by one hundred thirty-one nations, the Single Convention on Narcotic Drugs provides a comprehensive international system of narcotics control. Because of the need to accommodate the participants' differing legal systems, the Convention has no strong enforcement provisions. The treaty relies instead

45. Restatement, supra note 31, § 34; Dickinson, supra note 29, at 563-64. See also Convention on the High Seas, supra note 18, arts. 13-19.
46. Restatement, supra note 31, § 34 reporters' note 2; Dickinson, supra note 29, at 569-72.

Illicit traffic in narcotic drugs or psychotropic substances

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 traffic in narcotic drugs or psychotropic substances may
on the cooperation of the member nations to enforce its provisions. Despite the Convention's condemnation of drug trafficking, the parties to the Convention apparently refused to apply the universality principle. The participants failed to ratify a proposal that would have allowed "serious offenses committed abroad either by nationals or by foreigners [to] be prosecuted by the state in which the offender might be found if otherwise the offender might escape prosecution."

Congress similarly has refused to apply the universality principle to drug smuggling. If Congress intended to rely upon the universality principle, section 955a(d), which requires proof that an individual intended to import a controlled substance into the United States, would have been unnecessary. United States courts, therefore, cannot use the universality principle to support subject matter jurisdiction over drug smugglers accused of violating section 955a.

The Protective Principle

The final principle of international law is the protective principle. Under the protective principle, a nation's courts have subject matter jurisdiction over any case involving a person whose conduct outside the nation's territory has a potentially adverse effect upon the nation's security or the operation of its governmental func-

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55. Congress failed to adopt an international scheme recommended by the State Department to combat drug trafficking. One congressman, however, observed that "[a]bsent an elevation of international drug trafficking to the status of jus gentium through revisions to the Convention on the High Seas . . . incorporating the Single Convention on Narcotic Drugs, . . . [the State Department's] approach appears to have the greatest potential for success. . . ." House REPORT, supra note 2, at 8 (remarks of Rep. John Murphy). Jus gentium describes any law that all nations observe, such as the universally observed prohibition against piracy. See BLACK's LAW DICTIONARY 772 (rev. 5th ed. 1979).
The protective principle, unlike the objective territorial principle, does not require proof that the defendant caused, or intended to cause, an effect within the United States.\(^{57}\)

Few United States courts have exercised subject matter jurisdiction on the basis of the protective principle. Cases in which the courts relied on the protective principle typically involved the forgery of government documents in foreign countries or attempts to obtain illegal entry into the United States.\(^{58}\) Except for these few cases, courts generally have relied on the territorial principle to support the exercise of jurisdiction.\(^{60}\)

Several cases decided before the enactment of section 955a, however, suggested that the protective principle did apply to cases arising from narcotics trafficking on the high seas.\(^{59}\) In *United States v. Egan*,\(^{62}\) for example, the defendants had committed numerous violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970,\(^{63}\) including a conspiracy to import mari-

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57. *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 & n.7 (5th Cir.), *cert. denied sub nom.* Groleau v. United States, 389 U.S. 884 (1967); *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1980); Restatement, supra note 31, § 33 comment c. The Restatement additionally requires the conduct to be "generally recognized as a crime under the law of states that have reasonably developed legal systems." *Id.* § 33(1). The Single Convention on Narcotic Drugs, supra note 50, provides sufficient evidence that narcotics trafficking is a generally recognized crime.


60. See Restatement, supra note 31, § 33 reporters' note.


juana and possession of marijuana with an intent to distribute.\textsuperscript{64} Finding that "[t]he unlawful importation of drugs bypasses the federal customs laws, and thus directly challenges a governmental function,"\textsuperscript{65} the court claimed jurisdiction under both the objective territorial principle and the protective principle.\textsuperscript{66}

**The Protective Principle and Section 955a(a)**

*United States v. Angola*\textsuperscript{67} was the first case involving foreign drug smugglers in which a United States court asserted subject matter jurisdiction solely on the basis of the protective principle. In *Angola*, the Coast Guard arrested foreign nationals aboard a stateless vessel just west of the Bahamian island of San Salvador.\textsuperscript{68} The government indicted the defendants under section 955a(a) for possession of a controlled substance with an intent to distribute while on board a vessel subject to the jurisdiction of the United States.\textsuperscript{69} The defendants moved to dismiss the action for lack of subject matter jurisdiction, claiming that no international legal principle enabled United States courts to hear a case that had no established connection to the United States.\textsuperscript{70} In denying the motion, the United States District Court for the Southern District of Florida upheld its exercise of jurisdiction under the protective principle: "This vessel, full of marijuana, represented a real, not an imaginary, potential for harm to the effective administration of the United States' customs and narcotics laws."\textsuperscript{71}

In *Angola*, the court found that the stateless vessel's eventual destination was irrelevant because the vessel acted as a mother

\textsuperscript{64} 501 F. Supp. at 1258.

\textsuperscript{66} 501 F. Supp. at 1257.
\textsuperscript{68} *Id.* at 936.
\textsuperscript{69} The vessel was subject to the jurisdiction of the United States because of its stateless status. See 21 U.S.C. § 955b(d) (Supp. V 1981).

\textsuperscript{70} 514 F. Supp. at 934.
\textsuperscript{71} *Id.* at 936.
ship, whose cargo would flow eventually into the United States. The Coast Guard had seized the vessel near a frequently used stopping point for marijuana-laden vessels whose cargo was en-route to the United States. The vessel's location on the marijuana trade route was critical. The court implied that if "a stateless vessel was stopped half way around the world in the Gulf of Siam," the protective principle would not have provided the court with subject matter jurisdiction.

The outcome in Angola was precisely the result that Congress intended by enacting section 955a(a). Under previous statutes, United States district attorneys often declined to prosecute mother ship crewmembers because of a lack of evidence that the crews intended to import the drugs into the United States. Congress carefully drafted section 955a(a) so as not to require any proof that crewmen aboard stateless vessels intended to distribute controlled substances within the United States. To obtain a conviction under section 955a(a), the prosecutor needs to establish only that the foreign crewmembers aboard a stateless vessel possessed a controlled substance with an intent to distribute. The presence of a large quantity of marijuana aboard the mother ship is sufficient to establish an intent to distribute.

The legislative history of section 955a also reveals a congressional recognition of the protective principle as a basis for extraterritorial jurisdiction over people committing offenses that may harm the vital interests of the United States. Congress realized that it

72. Id. See supra note 12 and accompanying text.
73. 514 F. Supp. at 936.
74. See Hearings, supra note 5, at 64.
75. See House Report, supra note 2, at 10.
76. The court should not hear the case, however, unless the prosecutor has established a jurisdictional basis sufficient to satisfy one of the jurisdictional principles of international law. See supra notes 26-58 and accompanying text. The need to establish a jurisdictional basis under the protective principle, for example, presents additional problems of pleading and proof beyond the minimal evidence necessary to convict a foreign crewmember under the statutory language of § 955a(a). See infra notes 85-99 and accompanying text.
77. House Report, supra note 2, at 10. See also United States v. Allen, 633 F.2d 1282, 1293 (9th Cir. 1980) ("[P]ersonal consumption of 17,000 pounds of anything, much less marijuana, is a staggering proposition sufficient to compel disbelief, leaving commercial distribution as the only realistic goal of the enterprise."), cert. denied, 454 U.S. 833 (1981).
78. House Report, supra note 2, at 7-8 (citing Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804), the seminal decision enunciating the protective principle).
had “to act now in our national interest to halt the tide of illegal drugs inundating our shores.” The court in *Angola* demonstrated sensitivity to these congressional concerns.

Narcotics trafficking on the high seas undermines vital United States interests in a variety of ways. For example, drug trafficking circumvents federal customs laws, fuels drug-related violence in American cities, and adversely affects the economy, particularly in those areas where indigent addicts must steal to support their habits. Moreover, a steady stream of untaxed dollars flows from the United States to drug-producing countries in Central and South America. Finally, drug smuggling is partially responsible for the influx of illegal aliens from the West Indies and Central America.

Illicit narcotics trafficking, therefore, directly threatens the public health and safety as much, if not more, than the forgery of visa applications or perjury before an American consular officer abroad.

By enacting section 955a(a), Congress empowered the federal courts to decide cases arising from marijuana smuggling on the high seas under the protective principle. Prior congressional preference for the territorial principle of international jurisdiction is irrelevant. As the United States District Court for the Southern District of California noted in *United States v. Rodriguez*, previous narrow use of the protective principle does not restrict its future applicability. The court in *Rodriguez* reasoned:

80. The court adopted the holding of an unreported decision, *United States v. Pauth-Aruzua*, No. 80-577-Cr-CA (S.D. Fla. 1980), in which Chief Judge Atkins stated:

     Jurisdiction is supported by the protective principle. . . . Unlike the objective theory, the protective principle supports assertion of extra-territorial jurisdiction without a showing of actual effect on the nation. It is enough to show that the activity which the nation seeks to regulate has a potentially adverse effect on the nation. Congress reasonably has concluded the growing drug problem presents such a potentially adverse effect on the nation. To protect the nation’s borders from the importation of illegal narcotics, it is necessary to attempt regulation of vessels on the high seas notwithstanding the absence of any objective proof of an intent to import into the United States.

514 F. Supp. at 935.
81. See Raskin, supra note 48, at 170.
83. 182 F. Supp. 479 (S.D. Cal. 1960). Based upon the protective principle, the court in *Rodriguez* asserted jurisdiction over aliens who used false statements to procure documents necessary for admission into the United States. See id.
From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation. The mere fact that, in the past, Congress may not have seen fit to embody in legislation the full scope of its authorized powers is not a basis for now finding that those powers are lacking.84

Critics of the application of the protective principle to high seas narcotics smuggling point to the decision in United States v. James-Robinson85 to support their arguments.86 Although the United States Court of Appeals for the Fifth Circuit ordered the district court to dismiss James-Robinson as moot,87 thus negating the precedential value of the district court's earlier decision, prosecutors should consider the practical implications of the district court's concerns. In James-Robinson, the Coast Guard stopped a stateless vessel on the high seas more than 400 miles from the continental United States and arrested the Colombian crewmembers for possession of marijuana with an intent to distribute.88 From the first sighting of the vessel until its seizure, the vessel was heading towards the Bahamas.89 The government argued that proof of the crewmembers' intent to distribute the seized marijuana within the United States was not necessary to establish the court's jurisdiction because of the applicability of the protective principle.90

The United States District Court for the Southern District of Florida concluded, however, that it lacked subject matter jurisdiction because the government had failed to allege "that the defendants caused, or intended to cause, some kind of effect in or to the

84. Id. at 491. See also Note, supra note 65, at 1191-92.
86. See Ramirez, supra note 20, at 71; Note, supra note 10, at 717-19.
87. Following the district court's decision, the Immigration and Naturalization Service returned the crewmembers to their native Colombia. Over defense objections, the Fifth Circuit granted the government's motion to vacate the district court's judgment, and remanded with instructions to dismiss the indictment as moot. United States v. James-Robinson, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).
88. 515 F. Supp. at 1342.
89. Id.
90. Id.
United States." The court did not require, as some commentators have proposed, that an indictment under section 955a(a) contain an allegation of intent to distribute marijuana within the United States. Whether section 955a(a) implicitly requires proof of intent to distribute controlled substances within the United States was "a question for another day, and for another indictment: one which charges some intent to affect the United States in some fashion." The district court in James-Robinson tested the sufficiency of the indictment solely on the basis of the protective principle of jurisdiction. After extensively reviewing the relevant case law, the court found that the invocation of the protective principle required a showing of a specific demonstrable effect on the national security or governmental functions of the United States. As the court noted, "[n]ever in a published opinion of an American court has a potential generalized effect, which might or might not also be an effect on the United States, been found sufficient to invoke the protective principle." The court further explained the procedural deficiency of the indictment in an important footnote:

This Court agrees that unlawful drugs have created major problems in the United States, with a consequent effect on national security being a possible result. But that is not alleged and the government says it will not prove that here. The fatal problem with this indictment is that it does not allege any specific effect to this country.

The prosecution failed to establish that the vessel in James-Robinson...
Robinson was a mother ship, or that the defendants intended to distribute the cargo. The stipulated facts contained no information about the vessel's size or the quantity of marijuana found on board. The government also failed to inform the court that the Coast Guard first sighted the vessel in a location where mother ships frequently transferred their cargo to smaller vessels. The prosecution apparently did not attempt to prove that the vessel changed its heading after learning that the Coast Guard was in the area. The few facts alleged simply did not convince the court that the vessel threatened the national security or governmental functions of the United States.98

The decision in James-Robinson should alert prosecutors that courts may require specific allegations in the indictment that a stateless vessel carrying marijuana on the high seas is a mother ship, whose presence represents a threat to the national security of the United States sufficient to invoke the protective principle. As the Coast Guard seizes mother ships farther from United States territorial waters, the burden of persuading a court that the vessels threaten national security or governmental functions probably increases. Although Congress enacted section 955a(a) specifically to allow courts to exercise jurisdiction over foreign crewmembers aboard stateless mother ships,99 nothing suggests that Congress anticipated Coast Guard seizures of stateless vessels carrying marijuana half way around the world.

Recent cases reveal greater judicial recognition of the mother ship problem and the objectives of section 955a(a). In United States v. Newball,100 the Coast Guard boarded a fishing boat approximately sixty miles south of Nantucket and discovered numerous bales of marijuana.101 After the vessel's master produced documentation purporting to show Honduran registry, the boarding party withdrew to secure permission from the Honduran government to seize the vessel.102 The Coast Guard trailed the vessel

98. 515 F. Supp. at 1346. The district court in James-Robinson refused to find that "a stateless ship carrying marijuana on the high seas 400 miles from the United States by definition represents a threat to our national security or to our government's functions." Id.
99. See supra notes 74-77 and accompanying text.
101. Id. at 717.
102. Id. at 717-18. The Coast Guard also attempted to verify the vessel's identity. Id.
while awaiting a response, and alertly intervened when the foreign crewmembers attempted to set the vessel on fire and escape in a small launch.\textsuperscript{103}

The United States District Court for the Eastern District of New York exercised jurisdiction on the basis of both the law of the flag principle and the protective principle.\textsuperscript{104} After commenting upon the notoriety of mother ship operations, the court found that the vessel’s location when stopped, and the nearly twelve tons of marijuana aboard, “made it at least likely that the marijuana . . . would enter the country.”\textsuperscript{105} The court maintained that whether the crewmembers actually knew that the marijuana would enter the United States was irrelevant to the court’s ability to hear the case.\textsuperscript{106}

In \textit{United States v. Howard-Arias},\textsuperscript{107} the United States Court of Appeals for the Fourth Circuit viewed the legislative intent of section 955a(a) as a congressional mandate to prosecute foreign crewmembers aboard stateless mother ships. In \textit{Howard-Arias}, the Coast Guard sought to rescue a disabled ship sixty miles off the Virginia coast. An officer boarded the wreckage and discovered 240 bales of marijuana, which the Coast Guard salvaged before the vessel sank.\textsuperscript{108} A crewmember appealed his conviction under section 955a(a) on the theory that the district court lacked subject matter jurisdiction to try a case involving a foreign citizen aboard a stateless vessel on the high seas without proof of an intent to distribute the marijuana within the United States.\textsuperscript{109}

The court’s extensive review of the statute’s legislative history revealed congressional sensitivity to international jurisdictional principles, as well as grave congressional concern about the in-
creased incidence of drug smuggling. The court pointed to the express congressional intent to assert protective jurisdiction over stateless mother ships: "Congress explicitly recognized its right to protect vital aspects of American life, and clearly sought to assert extraterritorial jurisdiction over stateless vessels engaged primarily in 'mother ship' smuggling activities involving controlled substances destined almost exclusively for the United States."111

Every court confronted with a similar challenge to its jurisdiction has recognized, implicitly or explicitly, that the protective principle is a proper basis for subject matter jurisdiction over cases involving drug smuggling operations. Section 955a(a) has aided immensely the prosecution of foreign crewmembers aboard stateless mother ships on the high seas. The protective principle of jurisdiction is limited, however. A court might decline subject matter jurisdiction over cases involving foreign crewmembers, therefore, if the prosecution is unable to prove that the seized vessel was indeed a mother ship whose presence outside United States territorial waters threatened the national security or public welfare of the United States.

THE STATUS OF STATELESS VESSELS IN INTERNATIONAL LAW

Commentators agree that stateless vessel status is undesirable in the scheme of international maritime law.112 The registration of ships is essential to the maintenance of order on the high seas.113 As a result, a stateless vessel "enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State."114 Stateless status deprives a vessel of important privileges, such as the right to enter and leave territorial waters and ports.115

One legal scholar has asserted that a nation's power over a state-

110. 679 F.2d at 369, 371.
111. Id. at 371 (footnote omitted).
114. 1 L. Oppenheim, supra note 26, § 261.
less vessel is determined by whether the nation has established a relationship with the vessel similar to the "genuine link" that exists between a nation and a ship that legitimately flies the nation's flag.\textsuperscript{116} A nation that intends to assume exclusive rights over a ship must exercise sufficient authority to discharge its duties in relation to other nations.\textsuperscript{117} Article Five of the Convention on the High Seas incorporates this concept by requiring a nation to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."\textsuperscript{118}

Any nation may treat a stateless vessel as a vessel registered in that nation, but only if the ship meets the registration requirements of the nation; the nation also must maintain a genuine link through registration and discharge of its duties to protect and supervise the ship.\textsuperscript{119} A nation that is unwilling or unable to register a vessel cannot exercise exclusive jurisdiction over that vessel within the meaning of Article 6 of the Convention on the High Seas.\textsuperscript{118} If a genuine link does not exist between some nation and the vessel, the stateless vessel is subject to the general concurrent jurisdiction of all nations; any nation may remove the vessel from the high seas.\textsuperscript{120} A nation's authority to seize a stateless vessel, however, does not mean that it's courts automatically should hear cases involving the vessel's foreign crewmembers. Stateless vessel status is not illegal,\textsuperscript{122} and no court should try a case involving the crewmembers of a stateless vessel unless the crewmembers violate one of the nation's laws and the nation is able to invoke a recog-

\textsuperscript{116} H. Meyers, supra note 112, at 243-49, 318. The assertion is derived from the judgment of the International Court of Justice in Nottebohm (Liechtenstein v. Guat.), 1955 I.C.J. 4 (Judgment of Apr. 6). In Nottebohm, the Court resolved a conflict over a person's nationality in favor of the nation with which the person had established a genuine link.

\textsuperscript{117} H. Meyers, supra note 112, at 242.

\textsuperscript{118} See Convention on the High Seas, supra note 18, art. 5.

\textsuperscript{119} H. Meyers, supra note 112, at 242, 318.

\textsuperscript{120} H. Meyers, supra note 112, at 318. See Convention on the High Seas, supra note 18, art. 6 ("Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas."). The meaning of "exclusive jurisdiction" in the context of vessel nationality is unclear. See H. Meyers, supra note 112, at 34. Meyers discusses the history of the Convention on the High Seas and concludes that "exclusive jurisdiction" should be interpreted broadly to denote exclusive authority or sovereignty. See id. at 33-40.

\textsuperscript{121} H. Meyers, supra note 112, at 318, 321.

\textsuperscript{122} See id. at 318.
nized principle of international law.\textsuperscript{123}

By enacting the Marijuana on the High Seas Act, Congress did not enable the Coast Guard to exercise exclusive jurisdiction over all stateless vessels carrying controlled substances on the high seas. Section 955b(c) defines "vessel of the United States" to mean "any vessel documented under the laws of the United States, . . . or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States."\textsuperscript{124} An American-owned stateless vessel is a vessel of the United States, but a foreign-owned stateless vessel is not. If all foreign-owned stateless vessels were vessels of the United States, then United States courts could exercise subject matter jurisdiction over cases involving the foreign crewmembers on those vessels under the law of the flag jurisdictional theory.\textsuperscript{125} Congress could have provided that all stateless vessels on the high seas carrying controlled substances automatically qualify as United States vessels, but such a provision would have no basis in international law. Courts, therefore, should not ascribe such an interpretation to section 955b(c).

Courts must be careful to distinguish between the Coast Guard's authority to board and search vessels\textsuperscript{126} and the court's jurisdiction to decide cases involving the foreign crewmembers aboard those vessels. The court in \textit{United States v. James-Robinson}\textsuperscript{127} noted the difference: "While 'any nation may extend its authority over a stateless ship,' . . . the issue before the Court is not of such an in rem nature. Rather, the issue is whether the U.S. may extend its authority over the foreign citizen crewmembers of such a stateless ship."\textsuperscript{128}

Congress may enact laws that apply to stateless vessels,\textsuperscript{129} but federal courts must determine under international law whether they have subject matter jurisdiction over cases involving the for-
eign crewmen. Courts consistently have upheld the Coast Guard’s authority to board and search a ship believed to be stateless to elicit information about the vessel’s identity and registration.\textsuperscript{130} The international legal doctrine of “right of approach”\textsuperscript{131} supports the Coast Guard’s authority in such situations. The Coast Guard’s authority over stateless vessels, however, is limited to searches, seizures, and arrests of crewmembers suspected of violating United States laws. Custody of the crewmembers provides a court with in personam jurisdiction, but the court must refer to international law to determine whether it has subject matter jurisdiction to hear the case.\textsuperscript{132}

THE STATUS OF STATELESS VESSELS AND \textit{United States v. Marino-Garcia}

The elimination of mother ship operations is a commendable goal, but courts have become overzealous in asserting jurisdiction over cases involving foreign crewmembers aboard stateless mother ships. This judicial overzealousness has led at least one court to misinterpret both customary international law and the language of section 955a(a).

In \textit{United States v. Marino-Garcia},\textsuperscript{133} the Coast Guard boarded a stateless vessel sixty-five miles off the west coast of Cuba and 300 miles from Florida.\textsuperscript{134} Upon discovering approximately 57,000 pounds of marijuana, the Coast Guard seized the vessel and arrested the foreign crewmen.\textsuperscript{135} A federal grand jury indicted the crewmen under section 955a for conspiracy to possess marijuana and possession of marijuana with an intent to distribute.\textsuperscript{136} The defendants moved to dismiss for lack of subject matter jurisdiction

\textsuperscript{130} See, \textit{e.g.}, United States v. Rubies, 612 F.2d 397, 402-03 (9th Cir. 1979), \textit{cert. denied}, 446 U.S. 940 (1980); United States v. Dominguez, 604 F.2d 304, 308-09 (4th Cir. 1979), \textit{cert. denied}, 444 U.S. 1014 (1980); United States v. Cortes, 588 F.2d 106, 108-10 (5th Cir. 1979).

\textsuperscript{131} See, \textit{e.g.}, \textit{The Marianna Flora}, 24 U.S. (11 Wheat.) 1, 47-49 (1826); United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979); C. COLUMBOS, \textit{supra} note 38, §§ 334-336; H. Meyers, \textit{supra} note 112, at 82 n.1; L. Oppenheim, \textit{supra} note 26, §§ 266-270.

\textsuperscript{132} See infra text accompanying notes 150-51.

\textsuperscript{133} 679 F.2d 1373 (11th Cir. 1982), \textit{cert. denied sub nom.} Pauth-Aruzua v. United States, 103 S. Ct. 748 (1983).

\textsuperscript{134} 679 F.2d at 1378.

\textsuperscript{135} Id.

\textsuperscript{136} Id.
because no causal nexus existed between the stateless vessel and any potential effect within the United States. In an unreported decision, the district court denied the motion, finding that it had subject matter jurisdiction under the protective principle.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions, but found that consideration of the protective principle was unnecessary because “[j]urisdiction exists solely as a consequence of the vessel’s status as stateless.” The appellate court, therefore, concluded that proof of a nexus between the stateless vessel and the United States was unnecessary.

The Eleventh Circuit’s holding in Marino-Garcia represents a departure from previous judicial interpretations of the status of stateless vessels. No principle of international law allows a court to assert subject matter jurisdiction over cases involving foreign crewmembers of stateless vessels without basing that jurisdiction on one of the accepted international principles of extraterritorial jurisdiction. Moreover, congressional intent to abide by international law pervades the legislative history of section 955a.

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138. 679 F.2d at 1378 & n.4. Although no direct evidence indicated that the defendants intended to distribute the drugs within the United States, the protective principle does not require such a specific intent. A general intent to distribute is sufficient. See supra text accompanying notes 75-77. For a general discussion of the protective principle as applied to drug smuggling, see supra text accompanying notes 67-111.

139. The defendants challenged the district court’s jurisdiction, the admissibility of the marijuana into evidence, the sufficiency of the evidence, and the constitutionality of § 955a. 679 F.2d at 1379, 1383, 1384, 1386.

The Eleventh Circuit also heard the government’s appeal in a companion case with virtually identical facts, United States v. Cassalins-Guzman. See id. at 1373. Claiming that it lacked jurisdiction to decide the case, the district court in Cassalins-Guzman dismissed an indictment charging the foreign crewmen of a stateless vessel with violations of § 955a. The district court maintained that it lacked jurisdiction to hear the case because the government’s allegations failed to establish the requisite nexus between the vessel and the United States. 679 F.2d at 1378-79. On appeal, however, the Eleventh Circuit reversed and remanded Cassalins-Guzman to the district court with orders to reinstate the indictments. 679 F.2d at 1387.

140. 679 F.2d at 1383.
141. Id. at 1379, 1383.
142. See supra note 33 and accompanying text.
143. See supra note 32 and accompanying text.
Eleventh Circuit in *Marino-Garcia*, therefore, misinterpreted the status of stateless vessels and misunderstood the consequences of a vessel being "subject to the jurisdiction of the United States" under section 955a(a).\(^{144}\)

**Vessels Subject to the Jurisdiction of the United States**

Congress explicitly intended to prohibit any person aboard a vessel on the high seas subject to the jurisdiction of the United States from possessing controlled substances with an intent to distribute.\(^{145}\) Section 955b(d) defines "vessel subject to the jurisdiction of the United States" to include a vessel without nationality.\(^{146}\) This definition suggests that foreign crewmembers aboard stateless vessels automatically may be subject to federal jurisdiction. In *United States v. Marino-Garcia*, the court construed section 955b(d) literally and held that "the statute does not require that there be a nexus between stateless vessels and the United States but instead extends this country's jurisdiction to all such vessels."\(^{147}\) As a result, the court concluded that it had jurisdiction over the stateless vessel's foreign crewmembers as well.

The legislative history of the statute, however, does not support this interpretation. Throughout the subcommittee hearings, witnesses indicated that they understood the term "vessel subject to the jurisdiction of the United States" to mean vessels that the Coast Guard could board and search lawfully under the authority of 14 U.S.C. § 89(a).\(^{148}\) At least one witness realized that the definition invited misinterpretation: "I believe the definition confuses jurisdiction over crimes that are cognizable in a Federal court with jurisdiction of the Coast Guard to perform searches and seizures on the high seas."\(^{149}\)

The Coast Guard's limited authority to board stateless vessels on the high seas does not confer subject matter jurisdiction over

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\(^{147}\) 679 F.2d at 1379.


\(^{149}\) Id. at 66 (statement of Ass't U.S. Att'y Michael P. Sullivan, Chief, Crim. Div., S. Dist. Fla.).
cases involving the vessel’s foreign crewmembers because a vessel’s stateless status does not affect the nationality of the individuals on board. In United States v. Marino-Garcia, the Eleventh Circuit incorrectly assumed that stateless status “makes the vessel subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating the proscriptions.” The court thus maintained that stateless status obviated the need to establish a nexus between the activity aboard the stateless vessel and the country asserting jurisdiction over the foreign crewmembers. The court, however, conspicuously failed to cite any international legal principle to support this proposition. In fact, none exists.

Adoption of the Eleventh Circuit’s reasoning in Marino-Garcia could lead to absurd results. If the crewmembers of a stateless vessel on the high seas carrying marijuana are subject per se to the jurisdiction of the United States as a result of the Marijuana on the High Seas Act, then the crewmembers would be subject to the jurisdiction of any nation that enacted a similar statute. Furthermore, a nation might enact a statute prohibiting an activity that international law generally or specifically protects. For example, The Universal Declaration of Human Rights, as adopted by the United Nations, recognizes every person’s right “to seek, receive and impart information and ideas through any media and regardless of frontiers.” Nevertheless, a foreign nation might prohibit the exchange of information. The territorial and protective principles could provide a basis for the exercise of jurisdiction over cases involving foreign nationals who violate the statute while aboard stateless vessels on the high seas. The nation would be required to show, however, that the free flow of information had an adverse effect within the nation. Applying the Eleventh Circuit’s rationale, the nation’s courts conceivably could assert jurisdiction over such

151. H. Meyers, supra note 112, at 309.
152. 679 F.2d at 1383.
153. Id.
155. See supra text accompanying notes 40-43 & 57-58.
cases in the absence of any adverse effect; the vessel's stateless status would be sufficient to support jurisdiction. Absent a requirement that the nation's assertion of jurisdiction over cases involving the foreign crewmembers be based on a recognized international jurisdictional principle, therefore, the right to exchange information would be impaired.

Finally, the per se approach of the court in *Marino-Garcia* extends the subject matter jurisdiction of United States courts to instances of drug smuggling throughout the world. The court in *United States v. Angola* correctly indicated that the protective principle would not support such an extension of subject matter jurisdiction. Nor does the legislative history of the Marijuana on the High Seas Act offer a basis for world-wide federal jurisdiction over the crewmembers of stateless vessels carrying controlled substances on the high seas.

Stateless status deprives vessels of important privileges and protections. Crewmembers, however, do not expose themselves to universal jurisdiction simply because they choose to sail on stateless vessels. Any nation wishing to assert jurisdiction over cases involving the crewmembers of stateless vessels on the high seas must apply one of the customary jurisdictional principles of international law to determine whether the court properly can hear the case. The per se approach is not a customary international jurisdictional principle. The Eleventh Circuit in *Marino-Garcia*, therefore, should have adopted the district court's finding that subject matter jurisdiction existed under the protective principle. By asserting jurisdiction solely on the basis of the vessel's stateless status, the Eleventh Circuit disregarded the congressional intent that jurisdiction over section 955a violations should not exceed the permissible limits of international law.

**Conclusion**

Since the passage of the Marijuana on the High Seas Act, prosecutions and convictions of drug smugglers have increased dramati-
cally. Although this Note has focused primarily on the subject matter jurisdiction of United States courts over cases involving foreign crewmembers aboard stateless vessels, the Act also imposes criminal liability on drug smugglers aboard vessels registered in the United States and foreign countries. The Act's most significant accomplishment has been the elimination of the requirement that prosecutors prove conspiracy to import controlled substances. Coast Guard officials now may attack mother ship drug operations vigorously and know that their efforts will not be in vain.

United States courts, however, should not regard the international legal implications of the Marijuana on the High Seas Act lightly. Congress was sensitive to international jurisdictional requirements when it drafted the Act. In the interest of international judicial comity, United States courts should observe customary international jurisdictional requirements. Otherwise, foreign tribunals might retaliate against United States citizens.

With these considerations in mind, federal courts can exercise jurisdiction over cases involving foreign crewmembers aboard stateless vessels on the basis of the protective principle and remain within the bounds of international law. Interpreting the Marijuana on the High Seas Act to support jurisdiction over foreign crewmembers solely on the basis of a vessel's stateless status ignores established principles of international law. With the unstable international legal order, United States courts cannot ignore the possibility that serious repercussions may result from unprincipled assertions of jurisdiction.

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160. See supra note 14. Section 955a(a) imposes criminal liability on any person aboard a United States vessel on the high seas who possesses a controlled substance with the intent to distribute. Section 955a(d) applies to foreign vessels because it prohibits any person from possessing or distributing a controlled substance intending that it be unlawfully imported into the United States. See supra note 43 and accompanying text.
161. See supra note 10 and accompanying text.