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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 1914.¹ In the mid-1970's,² 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.³ As a result, United States Coast Guard⁴ seizures of drug-laden vessels increased dramatically during the 1970's.⁵ Prosecutions actually declined, however, as drug smugglers quickly discovered a loophole in the law.⁶ The loophole appeared

1. See Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914) (repealed 1970). The Harrison Act required people authorized to handle or manufacture certain drugs to register with the Collector of Internal Revenue and to maintain records of purchases and sales. For an historical review of federal narcotics laws, see S. LEVINE, *NARCOTICS AND DRUG ABUSE* §§ 4.8-4.42 (1973), and J. WEISSMAN, *DRUG ABUSE: THE LAW AND TREATMENT ALTERNATIVES* 116-28 (1978).

2. The current campaign began on March 9, 1973 when the United States Coast Guard seized two drug-laden vessels. H.R. REP. NO. 323, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as *HOUSE REPORT*].

3. The "high seas" refers to the extraterritorial waters of all maritime nations. 21 U.S.C. § 955b(b) (Supp. V 1981). The territorial seas of the United States extend three miles from the coast. See, e.g., *United States v. Marino-Garcia*, 679 F.2d 1373, 1379 n.8 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); *United States v. McRary*, 665 F.2d 674, 677 n.4 (5th Cir.), *cert. denied*, 456 U.S. 1011 (1982). The United States also exercises limited control over foreign vessels in the contiguous zone extending from the three-mile territorial limit to twelve miles from the coast. United States authority in this zone is limited to the enforcement of customs, fiscal, immigration, and sanitary regulations. See *Convention on the Territorial Sea and the Contiguous Zone*, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

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.

5. *Coast Guard Drug Law Enforcement: Hearings on H.R. 2538 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 63-65 (1979) (statement of Asst. U.S. Att'y Michael P. Sullivan, Chief, Crim. Div., S. Dist. Fla.) [hereinafter cited as *Hearings*].

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.⁹ 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

7. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified in scattered sections of 21 U.S.C.).

8. Narcotic Drugs Import and Export Act, Pub. L. No. 77-165, 55 Stat. 584 (1941) (repealed 1970).

9. HOUSE REPORT, *supra* note 2, at 4.

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).

11. See Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 325 (1982).

12. See *Hearings*, *supra* note 5, at 28 (statement of Rep. Thomas Railsback). See generally *Stopping "Mother Ships"—A Loophole in Drug Enforcement: Hearings on S. 3437 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978).

13. See *Hearings*, *supra* note 5, at 63-65.

14. 21 U.S.C. §§ 955a-955d (Supp. V 1981). The relevant provisions of the Act are:
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.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.¹⁶ Vessels subject to the jurisdiction of the United States on the high seas specif-

tent to manufacture or distribute, a controlled substance.

(b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance—

- (1) intending that it be unlawfully imported into the United States; or
- (2) knowing that it will be unlawfully imported into the United States.

. . .

(h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.
955b. Definitions

As used in sections 955a to 955d of this title—

(a) "Customs waters" means those waters as defined in section 1401(j) of title 19.

(b) "High seas" means all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation.

(c) "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended . . . , 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, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.

(d) "Vessel subject to the jurisdiction of the United States" includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958.

15. The Marijuana on the High Seas Act took effect on September 15, 1980. Table 1 tracks the vessel seizures, prosecutions, and convictions in the Eleventh Circuit both before and after passage of the Act. See *infra* text at note 19. The Eleventh Circuit encompasses an area that offers the most convenient geographical entry point for marijuana smugglers whose cargo usually comes from Central and South America.

16. 21 U.S.C. § 955a(a) (Supp. V 1981).

ically include vessels without nationality,¹⁷ which are known as stateless vessels. Under article 6(2) of the Convention on the High Seas,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.¹⁹

Table 1

	1 Jan.-14 Sept. 1980	15 Sept.-31 Dec. 1980	1981
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	16	51	91
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.

17. *Id.* § 955b(d).

18. Convention on the High Seas, opened for signature Apr. 29, 1958, art. 6(2), 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

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.²⁰ 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 jurisdiction²¹ over cases involving the foreign crewmembers of stateless vessels on the high seas is inconsistent with the established jurisdictional principles of international law.²² Courts have rejected this argument,²³ however, and have held that the statute's jurisdictional reach comports with the protective principle of international law.²⁴ 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.²⁵

sub nom. Sarmiento v. United States, 444 U.S. 1014 (1980).

20. See, e.g., *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); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir.), *cert. denied*, 103 S. Ct. 165 (1982); *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981); *United States v. Angola*, 514 F. Supp. 933 (S.D. Fla. 1981); Ramirez, *The New Federal Statute on High Seas Seizures—A Defense View*, 56 FLA. B.J. 69 (1982); Note, *supra* note 10.

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*, 288 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.

23. See *United States v. Newball*, 524 F. Supp. 715 (E.D.N.Y. 1981); *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

24. See *infra* 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

Arias, 679 F.2d 363 (4th Cir.) (alternate holding), *cert. denied*, 103 S. Ct. 165 (1982). No recognized principle of international law supports this view of the status of stateless vessels on the high seas.

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.

28. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955).

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.³¹ The legislative history of the Marijuana on the High Seas Act demonstrates that Congress intended that the Act comply with international law.³² 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:³³ passive personalty; 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 Personalty Principle

The passive personalty principle allows a nation's courts to assert jurisdiction over anyone who injures that nation's citizens.³⁴ United States courts, however, generally have rejected this princi-

tion, as often as questions of right depending upon it are duly presented for their determination.").

31. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 3(3), 145(1) (1965) [hereinafter cited as RESTATEMENT].

32. HOUSE REPORT, *supra* note 2, at 11 (Congress intended that § 955a(a) apply to all acts that the United States can prohibit under international law); see also *United States v. Marino-Garcia*, 679 F.2d 1373, 1379-80 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

33. *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 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967). See also *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 738 (1983); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380-82 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); RESTATEMENT, *supra* note 31, §§ 10-36; Dickinson, *supra* note 29, at 445.

34. *United States v. Pizzarusso*, 388 F.2d 8, 10 & n.5 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 & n.9 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967); *Rocha v. United States*, 288 F.2d 545, 549 n.4 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

ple as a legitimate basis for exercising jurisdiction.³⁵

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.³⁶ 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.³⁷ 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.³⁸ United States courts could exercise jurisdiction under the theory regardless of the nationality of the person arrested or the location of the vessel at

35. See, e.g., *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 n.15 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1179 n.38 (E.D. Pa. 1980); see also *RESTATEMENT, supra* note 31, § 30(2). But see *United States v. Layton*, 509 F. Supp. 212, 216 n.5 (N.D. Cal.) (alternate holding) (finding passive personalty jurisdiction over a defendant accused of killing a United States congressman in Guyana), *cert. denied*, 452 U.S. 973 (1981).

36. *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 & n.6 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967); *RESTATEMENT, supra* note 31, §§ 26-29.

37. 21 U.S.C. § 955a(b) (Supp. V 1981).

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. COLUMBOS, *THE INTERNATIONAL LAW OF THE SEA* §§ 303-307 (6th rev. ed. 1967). 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

39. See 21 U.S.C. § 955a(a) (Supp. V 1981) (applying the law of the flag theory of jurisdiction to possession of a controlled substance with an intent to distribute).

40. *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 & n.5 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967); *Dickinson*, *supra* note 29, at 480.

41. *Ford v. United States*, 273 U.S. 593, 620-21 (1927); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *United States v. Smith*, 680 F.2d 255, 257-58 (1st Cir. 1982); RESTATEMENT, *supra* note 31, § 18.

42. See *United States v. Gray*, 659 F.2d 1296, 1298 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980), *cert. denied*, 454 U.S. 878 (1981); *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *United States v. Baker*, 609 F.2d 134, 138 (5th Cir. 1980).

43. See 21 U.S.C. § 955a(d) (Supp. V 1981). Congress intended that this provision reach people aboard foreign vessels on the high seas who intend to import drugs into the United States. HOUSE REPORT, *supra* note 2, at 13.

44. *United States v. Pizzarusso*, 388 F.2d 8, 10 n.5 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rivard v. United States*, 375 F.2d 882, 885 & n.8 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967).

based on universality to acts of piracy and slave trading,⁴⁵ but have not ruled out the future application of universality to other offenses as well.⁴⁶ United States courts never have recognized universality as a basis for jurisdiction over drug smuggling,⁴⁷ although some commentators have maintained that courts should exercise jurisdiction based on universality because of the international condemnation of drug smuggling.⁴⁸

Condemnation of drug trafficking is not a recent development. As early as 1912, several nations participated in the first international narcotics convention.⁴⁹ Numerous other conventions have occurred since then, including the Single Convention on Narcotic Drugs.⁵⁰ Signed by one hundred thirty-one nations,⁵¹ 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.⁵² 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.

47. See *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 n.16 (11th Cir. 1982) (stating that the court would extend universality to drug trafficking only under congressional direction), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

48. Raskin, *The New Federal Statute on a High Seas Seizure—A Governmental View*, 56 FLA. B.J. 168 (1982); Note, "Double Jeopardy" on the High Seas: *International Narcotics Traffickers Beware*, 10 GA. J. INT'L & COMP. L. 647, 670 (1980).

49. International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612, 8 L.N.T.S. 187. For a history of international narcotics control, see Noll, *International Treaties and the Control of Drug Use and Abuse*, 6 CONTEMP. DRUG PROBS. 17 (1977); Waddell, *International Narcotics Control*, 64 AM. J. INT'L L. 310 (1970).

50. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.

51. U.S. DEPT. OF STATE, TREATIES IN FORCE 260-66 (1982).

52. Single Convention on Narcotic Drugs, *supra* note 50, arts. 35-36. See Waddell, *supra* note 49, at 319. Article 108 of the current draft provision of the Third United Nations Conference on the Law of the Sea contains similar provisions:

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.⁵³ 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."⁵⁴

Congress similarly has refused to apply the universality principle to drug smuggling.⁵⁵ 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.⁵⁶ 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-

request the co-operation of other States to suppress such traffic.

Informal Composit Negotiating Text/Revision 2, Third United Nations Conference on the Law of the Sea, UN Doc. A/Conf.62/WP.10/Rev. 2 (1980).

53. Noll, *supra* note 49, at 18.

54. Collins, *Traffic in the Traffickers: Extradition and the Controlled Substances Import and Export Act of 1970*, 83 YALE L.J. 706, 725-26 (1974).

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).

56. See 21 U.S.C. § 955a(d) (Supp. V 1981). Of course, the objective territorial principle supports jurisdiction over conduct on the high seas that causes an effect within the United States. See *supra* text accompanying notes 40-43.

tions.⁵⁷ 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.⁵⁸

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.⁵⁹ 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.⁶¹ 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-

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.

58. *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); RESTATEMENT, *supra* note 31, § 33 comment c. *See also* *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 & n.14 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

59. *See, e.g., United States v. Khalje*, 658 F.2d 90 (2d Cir. 1981) (false statements on a United States visa application); *United States v. Birch*, 470 F.2d 808 (4th Cir. 1972) (forged military papers to gain illegal entry into the United States), *cert. denied*, 411 U.S. 931 (1973); *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.) (false statements on a United States visa application), *cert. denied*, 392 U.S. 936 (1968); *Rocha v. United States*, 288 F.2d 545 (9th Cir.) (attempt to enter the United States illegally), *cert. denied*, 366 U.S. 948 (1961).

60. *See* RESTATEMENT, *supra* note 31, § 33 reporters' note.

61. *See United States v. Cadena*, 585 F.2d 1252, 1258 n.6 (5th Cir. 1978) (dictum); *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981) (alternate holding); *United States v. Egan*, 501 F. Supp. 1252, 1257-58 (S.D.N.Y. 1980) (alternate holding); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978) (alternate holding), *aff'd sub nom. United States v. Arra*, 630 F.2d 836 (1st Cir. 1980) (applying territorial principle).

62. 501 F. Supp. 1252 (S.D.N.Y. 1980).

63. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified in scattered sections of 21 U.S.C.).

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

THE PROTECTIVE PRINCIPLE AND SECTION 955a(a)

*United States v. Angola*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.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.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.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."⁷¹

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

64. 501 F. Supp. at 1258.

65. *Id.* (citing *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978)). The district court in *Keller* exercised jurisdiction based upon the protective principle because the defendants had conspired to import marijuana into the United States. 451 F. Supp. at 635. On appeal, however, the First Circuit affirmed the convictions on the basis of the territorial principle. *United States v. Arra*, 630 F.2d 836, 840 (1st Cir. 1980). See Note, *Drug Smuggling and the Protective Principle: A Journey Into Uncharted Waters*, 39 LA. L. REV. 1189 (1979).

66. 501 F. Supp. at 1257.

67. 514 F. Supp. 933 (S.D. Fla. 1981).

68. *Id.* at 936.

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).

70. 514 F. Supp. at 934.

71. *Id.* at 936.

ship, whose cargo would flow eventually into the United States.⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ 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.⁷⁶ The presence of a large quantity of marijuana aboard the mother ship is sufficient to establish an intent to distribute.⁷⁷

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.⁷⁸ 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."⁷⁹ The court in *Angola* demonstrated sensitivity to these congressional concerns.⁸⁰

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.⁸¹ 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.⁸² 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*,⁸³ previous narrow use of the protective principle does not restrict its future applicability. The court in *Rodriguez* reasoned:

79. HOUSE REPORT, *supra* note 2, at 8.

80. The court adopted the holding of an unreported decision, *United States v. Pauth-Arzuza*, 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.

82. HOUSE REPORT, *supra* note 2, at 4.

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-Robinson*⁸⁵ 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.

85. 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

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.”⁹¹ 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.⁹² 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.”⁹³

The district court in *James-Robinson* tested the sufficiency of the indictment solely on the basis of the protective principle of jurisdiction.⁹⁴ 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.⁹⁵ 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.”⁹⁶ 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.⁹⁷

The prosecution failed to establish that the vessel in *James-*

91. *Id.* An effect “to the United States” suggests a potential threat to its security or governmental functions. Under the protective principle, such a threat would provide United States courts with jurisdiction over cases involving the foreign crews of stateless vessels. See *supra* text accompanying notes 57-58.

92. See Note, *supra* note 10, at 717-18; Case Comment, *The Enforceability of the Marijuana on the High Seas Act: United States v. James-Robinson et al.*, 13 LAW. OF THE AM. 581, 583-84 (1981).

93. 515 F. Supp. at 1347.

94. *Id.* at 1344.

95. *Id.* at 1345.

96. *Id.*

97. *Id.* at 1345 n.7. The court, therefore, suggested that the protective principle would have applied if the indictment had been sufficient. See *supra* note 91 and accompanying text.

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.

100. 524 F. Supp. 715 (E.D.N.Y. 1981).

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.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.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."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.¹⁰⁶

In *United States v. Howard-Arias*,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 *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.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.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-

103. *Id.* at 718.

104. *Id.* at 720. The court found that the vessel was documented under United States laws and that a United States citizen owned the vessel. *Id.* at 719-20. *See supra* note 38 and accompanying text.

105. 524 F. Supp. at 720.

106. *Id.*

107. 679 F.2d 363 (4th Cir.), *cert. denied*, 103 S. Ct. 165 (1982).

108. *Id.* at 365.

109. *Id.* at 369. The court dismissed the appellant's challenges to certain evidentiary rulings and sentencing procedures, as well as his contention that his convictions under both 21 U.S.C. § 955a(a) and 21 U.S.C. § 955a(d) violated the double jeopardy clause of the fifth amendment. 679 F.2d at 365.

creased incidence of drug smuggling.¹¹⁰ 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).

112. See, e.g., M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 1084-85 (1962); H. MEYERS, *THE NATIONALITY OF SHIPS* 317-18 (1967); 1 L. OPPENHEIM, *supra* note 26, § 261; R. RIENOW, *THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL* 14-15 (1937).

113. 1 L. OPPENHEIM, *supra* note 26, § 260; 9 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 21 (1968).

114. 1 L. OPPENHEIM, *supra* note 26, § 261.

115. H. MEYERS, *supra* note 112, at 323; R. RIENOW, *supra* note 112, at 14.

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.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.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."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.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.¹²⁰ 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.¹²¹ A nation's authority to seize a stateless vessel, however, does not mean that its courts automatically should hear cases involving the vessel's foreign crewmembers. Stateless vessel status is not illegal,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-

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.

117. H. MEYERS, *supra* note 112, at 242.

118. See Convention on the High Seas, *supra* note 18, art. 5.

119. H. MEYERS, *supra* note 112, at 242, 318.

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.

121. H. MEYERS, *supra* note 112, at 318, 321.

122. See *id.* at 318.

nized principle of international law.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."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.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 vessels¹²⁶ and the court's jurisdiction to decide cases involving the foreign crewmembers aboard those vessels. The court in *United States v. James-Robinson*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."¹²⁸

Congress may enact laws that apply to stateless vessels,¹²⁹ but federal courts must determine under international law whether they have subject matter jurisdiction over cases involving the for-

123. See *supra* note 33 and accompanying text.

124. 21 U.S.C. § 955b(c) (Supp. V 1981).

125. See *supra* notes 38-39 and accompanying text.

126. See 14 U.S.C. § 89(a) (1976).

127. 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981).

128. 515 F. Supp. at 1343 n.5 (citation omitted).

129. H. MEYERS, *supra* note 112, at 318-19.

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.¹³⁰ The international legal doctrine of "right of approach"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.¹³²

THE STATUS OF STATELESS VESSELS AND *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 *United States v. Marino-Garcia*,¹³³ the Coast Guard boarded a stateless vessel sixty-five miles off the west coast of Cuba and 300 miles from Florida.¹³⁴ Upon discovering approximately 57,000 pounds of marijuana, the Coast Guard seized the vessel and arrested the foreign crewmen.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.¹³⁶ The defendants moved to dismiss for lack of subject matter jurisdiction

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

131. See, e.g., *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, *supra* note 38, §§ 334-336; H. MEYERS, *supra* note 112, at 82 n.1; 1 L. OPPENHEIM, *supra* note 26, §§ 266-270.

132. See *infra* text accompanying notes 150-51.

133. 679 F.2d 1373 (11th Cir. 1982), *cert. denied sub nom. Pauth-Arzuza v. United States*, 103 S. Ct. 748 (1983).

134. 679 F.2d at 1378.

135. *Id.*

136. *Id.*

because no causal nexus existed between the stateless vessel and any potential effect within the United States.¹³⁷ In an unreported decision, the district court denied the motion, finding that it had subject matter jurisdiction under the protective principle.¹³⁸

On appeal,¹³⁹ 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".¹⁴⁰ The appellate court, therefore, concluded that proof of a nexus between the stateless vessel and the United States was unnecessary.¹⁴¹

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 upon one of the accepted international principles of extraterritorial jurisdiction.¹⁴² Moreover, congressional intent to abide by international law pervades the legislative history of section 955a.¹⁴³ The

137. The defendants apparently relied upon the reasoning in *United States v. James-Robinson*, 515 F. Supp. 1340 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981). See *supra* note 91 and accompanying text.

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

144. See 21 U.S.C. § 955a(a) (Supp. V 1981).

145. HOUSE REPORT, *supra* note 2, at 12.

146. 21 U.S.C. § 955b(d) (Supp. V 1981).

147. 679 F.2d at 1379.

148. See *Hearings*, *supra* note 5, at 48, 51, 54-55.

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 crewmembers¹⁵⁰ because a vessel's stateless status does not affect the nationality of the individuals on board.¹⁵¹ 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."¹⁵² 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.¹⁵³ 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."¹⁵⁴ 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.¹⁵⁵ 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

150. *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 n.5 (S.D. Fla. 1981), *vacated as moot*, 29 CRIM. L. REP. (BNA) 2545 (5th Cir. July 13, 1981); *United States v. Egan*, 501 F. Supp. 1252, 1257 n.2 (S.D.N.Y. 1980).

151. H. MEYERS, *supra* note 112, at 309.

152. 679 F.2d at 1383.

153. *Id.*

154. G.A. Res. 217A, U.N. Doc. A/810, art. 19 (1948).

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.¹⁵⁶ 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.¹⁵⁷ 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 law¹⁵⁸ 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.¹⁵⁹

CONCLUSION

Since the passage of the Marijuana on the High Seas Act, prosecutions and convictions of drug smugglers have increased dramati-

156. See *supra* text accompanying notes 72-73.

157. See *supra* text accompanying notes 114-15.

158. See *supra* note 33 and accompanying text.

159. See *supra* note 32 and accompanying text.

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.¹⁶⁰ The Act's most significant accomplishment has been the elimination of the requirement that prosecutors prove conspiracy to import controlled substances.¹⁶¹ 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.