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for his paper

"DOUBLE JEOPARDY" ON THE HIGH SEAS: INTERNATIONAL NARCOTICS TRAFFICKERS BEWARE

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"DOUBLE JEOPARDY" ON THE
HIGH SEAS: INTERNATIONAL
NARCOTICS TRAFFICKERS BEWARE

Illegal sales of cocaine in America have reached $20 billion annually. Americans presently consume $25 billion of marihuana at the rate of 130,000 pounds per day, four times the consumption of 1974.\(^1\) Illicit sales of marihuana constitute the largest retail business in the state of Florida.\(^2\) The vast majority of this contraband is smuggled into the United States from foreign countries. Colombia alone presently supplies about two-thirds of the marihuana consumed in America as well as 80% of the cocaine purchased in this country.\(^3\)

American authorities have documented an extraordinary illegal trafficking network of "farmers, smugglers, brokers, and fixers that extends more than 5,000 miles from Bogatá to the great markets of New York, Chicago, and Los Angeles. It owns an armada of ships and planes, and it has recruited an army of bush pilots, seamen, electronic experts, roustabouts, and cutthroats."\(^4\) Chief among the motives for the smugglers' brazenness is the enormous profitability of the trade. It is not uncommon for a pilot of a DC-6 loaded with Colombian narcotics to earn $50,000 for one trip.\(^5\) Pure cocaine purchased abroad for $7,000 per pound can be resold in American markets for millions of dollars per pound.\(^6\)

The United States Coast Guard, in an effort to suppress the illicit traffic into the United States, has mobilized to "almost wartime status" and doubled its patrol activities in waters surround-

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2 Id. at 23.
3 Id. at 22-3.
4 Id. at 22.
5 Id. at 25.
6 Id. at 23, 24.
7 Id. at 25. (statement of Coast Guard Adm. John Hayes).
8 14 U.S.C. § 89(a) (1976) provides in part:
   The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes . . . officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all
ing the mainland. Pursuant to 14 U.S.C. § 89(a), the Coast Guard has seized an unprecedented number of domestic and foreign vessels in the United States territorial sea as well as on the high seas. The seizures have led to the arrest and conviction of crew members on charges of conspiracy to import narcotics.

In the last two years, the Fifth Circuit Court of Appeals has handed down four decisions involving seizure of foreign merchant vessels by the Coast Guard outside the territorial sea of the United States. The crew members, all foreign nationals, have been convicted of various drug smuggling charges in United States courts. The appeals by the foreign nationals to the Fifth Circuit have all relied on one particularly significant argument: that the seizure of a foreign merchant ship on the high seas violates the 1958 Convention on the High Seas to which the United States is a signatory and, therefore, the trial court lacked jurisdiction over the defendants. Two articles of the treaty provide the basis for the argument that the seizures were contrary to international law. Article 6, § 1 states:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

Article 6 must be read in conjunction with Article 2:

necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested... or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise,... on board of... such vessel, liable to forfeiture... such vessel or such merchandise, or both, shall be seized.

United States v. Cortez, 588 F.2d 106 (5th Cir. 1979); United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979); United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).

The defendants also challenged, on domestic grounds, the authority of the Coast Guard to search their vessel as well as the jurisdiction of the court over their persons. Only the defendants' contentions under international law are within the scope of this paper. For an examination of the Fourth Amendment issue, see Note, Fifth Circuit Cases Concerning Search and Seizure on the High Seas: The Need for a Limiting Doctrine, 10 GA. J. INT'L & COMP. L. 167 (1980).

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 22(1) expands the general directives of Articles 2 and 6 with respect to rights of foreign merchant ships on the high seas:

Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or
(b) That the ship is engaged in the slave trade; or
(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

An analysis of the four decisions of the Fifth Circuit must begin with the following framework. First, in at least three of the cases, the Fifth Circuit acknowledged that, the Coast Guard’s seizure of a foreign merchant ship on the high seas violated the express terms of Articles 6 and 22 of the 1958 Convention. Second, notwithstanding such violation of the treaty by the United States, the foreign defendants were held to have no standing to raise the violation in a United States court, absent a protest of the seizure from their own government. And third, it was a fact that none of the countries involved raised the slightest objection to the seizure on the high seas of a merchant ship registered in that country. A discussion of the significance of this fact will follow a survey and analysis of the four decisions.

I.

In the first case to come before the Court, United States v. Cadena, the appellants were convicted of conspiracy to import

11 585 F.2d 1252 (5th Cir. 1978).
marihuana into the United States and conspiracy to distribute marihuana. On appeal, they contended that the seizure of their vessel on the high seas violated Article 22 of the Convention. The government conceded that the Coast Guard's vessel was a "war ship" within the terms of Article 22 and advanced no argument that the seizure fell under any of three exceptions in Article 22. The court decided that if the 1958 Convention were "applicable," it would supercede any prior domestic law to the contrary, including 14 U.S.C. § 89(a), which had been enacted in 1949. Moreover, the court acknowledged that "if the Convention of 1958 were applicable, its express terms were violated by the search, seizure, and arrest."

Writing for the court, Judge Alvin Rubin invoked a traditional notion of international law: only nations which have ratified a treaty may assert its provisions on behalf of their citizens. Although both Canada and Colombia (the two countries which conceivably could lay claim to the ship) had signed the Convention, neither state had ratified it. Moreover, no provision of the Convention indicates any intent on the part of the parties that the treaty should convey rights on non-ratifying states. Neither

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18 The defendants' vessel was seized "about 200 miles off the Florida coast." Waters are universally divided into internal waters, territorial sea, and high seas. The United States currently recognizes a territorial sea of three nautical miles. Although many countries recognize a twelve mile territorial sea—and, indeed, the United States presently recognizes a twelve mile contiguous zone for law enforcement purposes—there is no question that the ship was well onto the high seas when it was seized.

19 585 F.2d at 1260 n.16. See also Carmichael, At Sea With the Fourth Amendment, 32 U. MIAMI L. REV. 51, 52 n.6 (1977).

18 Although the defendants' vessel was flying no flag at the time of the seizure, the government did not contend that it was a nationless ship, unprotected under the treaty. Article 5 of the Convention declares that "ships have the nationality of the state whose flag they are entitled to fly." See text accompanying notes 22-26, infra.

18 But see United States v. Postal, 589 F.2d 862, 884 n.35 (1979). See also note 47, infra.

17 Although the United States courts traditionally have strained to avoid interpretations of international law that conflict with interpretations of domestic law, and vice versa, e.g., Shroeder v. Bissell (The Over the Top), 5 F.2d 838 (D. Conn. 1925), when there is a decided conflict, the courts follow the later-in-time principle: the more recent law controls. Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 599 (1884).

18 585 F.2d at 1260.

19 The Coast Guard found a Canadian registration certificate aboard as well as a Colombian inspection certificate.

20 The court's position commands substantial support. In general, agreements among nations neither impose obligations nor confer rights upon third parties: "Pacta tertiis nec cent nec prosunt." The law is based on the principle of sovereignty and the independence of states and, some maintain, on the law of contract. International tribunals have followed the rule closely. In the Free Zone case, [1932] P.C.I.J., ser. A., No. 22, at 17, the Permanent
state, then, could assert rights under the treaty. *A fortiori*, no Canadian or Colombian citizen could raise any provision of the treaty.

Appellants urged alternatively that the Convention on the High Seas merely codified what had been customary international law for centuries. Violation of this principle of international law by the United States, they contended, entitled them to a reversal of their convictions. Without determining whether the search actually violated customary international law, the Fifth Circuit simply rejected the proposition that a violation of either customary international law or the treaty should be remedied by a dismissal of the indictment or the exclusion of any illegally obtained evidence.\[^{21}\]

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\[^{21}\] The court pointed out that no other nation followed such a rule and that to do so would amount to "an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct." Moreover, the court maintained, Article 22 of the Convention itself contemplates its own remedy of compensation to the ship for any loss or damage that may have been sustained as a result of the illegal boarding. Thus, "if only this remedy is available to citizens or vessels of member nations, citizens of non-member nations are not to enjoy the benefits of greater prophylaxis, such as exclusion or dismissal of indictments, by virtue of their nation's failure to ratify." *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). To follow unilaterally such a course advocated by the defendants would do injustice to the treaty in the long run, for such action would discourage non-signatories from signing; only congress or the president have the authority to decide to enforce such principles unilaterally.

Two related questions arising from *Cadena* are whether Colombia or Canada could have asserted the Convention on the High Seas as evidence of customary international law on behalf of the defendants; and whether the United States violated customary international law by seizing the vessel on the high seas. Custom has long been a primary source of international law. Article 38 of the Statute of the International Court of Justice, in listing the sources of international law that the World Court is to apply, places international custom second only to international conventions. In the S.S. *Lotus*, [1927] P.C.I.J., ser. A, No. 10, the Permanent Court of International Justice looked to the practice of states exercising criminal jurisdiction over foreigners in its affirmation of the right of Turkey to try the French commander of a vessel that had collided with a Turkish ship on the high seas. In the celebrated *Paquete Habana* case, 175 U.S. 677 (1900), the United States Supreme Court
The Fifth Circuit implicitly left open the significant issue whether an individual has standing to assert a right under a treaty which his country has ratified. The importance of the issue is that if an individual is deemed to have standing, then he may raise provisions of the treaty regardless of whether his state chooses to assert them in his behalf. Thus, assuming Canada or Colombia had ratified the Convention, individual standing would have enabled the defendants to assert its provisions as a defense regardless of any actions by their country.

In *United States v. Cortes*, the Fifth Circuit examined the legality, under international law, of a Coast Guard search and seizure on the high seas of a vessel which was not registered in any nation. The crew, all Colombian nationals, were indicted for con-

looked primarily to customary international law to support its holding that innocent fishing vessels of a belligerent state are exempt from seizures as prizes of war.

For evidence of customary international law, courts often look to treaties which have been ratified by one or both of the parties to a dispute, as well as to treaties to which neither is a party. See generally A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). Treaties can be viewed as having codified custom which existed prior to the treaty or as having created the custom itself. In utilizing treaties in such a fashion, a court is not holding a non-party to the treaty to be bound by it; rather, the court is holding the non-party to be bound by customary international law, as evidenced or created by the treaty. Conceivably, then, even a party which has ratified a treaty with reservations or which has ratified a treaty but has subsequently withdrawn from it may be bound by the terms of that treaty if such terms are evidence of customary international law. See D'AMATO, id. at 105-8. In the *Nottebohm case* (Lichtenstein v. Guatemala), I.C.J. Rep. 4 (1955), the International Court of Justice looked to several treaties to determine that customary international law held that there must be a "genuine link" between a national and a state which asserts an international claim in his behalf. The court cited the Pan American Convention of 1906 and the Hague Convention of 1930, neither of which was in force between the parties. Of course, the actual ratification of a treaty by a state would be strong evidence that it considers the treaty to represent customary international law.

A treaty which has been signed but ratified by no state also can serve as evidence of international custom, especially if the treaty is multilateral. That the leading legal minds of the international community have drafted the treaty and the representatives of the various states, who are more susceptible to political pressures than jurists, have signed the treaty lends credence to the treaty as evidence of international custom. See generally Baxter, *Multilateral Treaties As Evidence of Customary International Law*, 41 BRIT. Y.B. OF INT'L L. 275, 292-3. Of course, the greater the number of states who have signed a treaty, the greater the weight it will be given as evidence. Conversely, the longer a treaty exists without ratification or with few ratifications, the less weight it will be entitled to as evidence.

There is little doubt that the seizure on the high seas of the defendants' vessel in *Cadena* violated principles of customary international law. As noted, the Preamble to the Convention on the High Seas states that it is "generally declaratory of established principles of international law." In fact, the court in *Cadena* admitted that the express terms of the Convention had been violated. Had Canada or Colombia asserted the Convention on behalf of the defendants, undoubtedly the result would have been different.

* 588 F.2d 106 (5th Cir. 1979).
spiry to import marihuana and conspiracy to possess marihuana with intent to distribute. The District Court granted defendants' motion for dismissal of the indictment and suppression of evidence seized as a result of an illegal search. On appeal by the government, the Fifth Circuit reversed. Defendants' argument was similar to that of the appellants in Cadena: the Convention on the High Seas operated to restrict the actions of ratifying nations on the high seas. Again writing for the court, Judge Rubin noted that Article 5 of the Convention declares that ships have the nationality of the State whose flag they are entitled to fly.23 Because the ship in question had no registration papers, it was entitled to fly no flag. Such a "stateless" vessel was not entitled to the same protection afforded vessels registered in a foreign nation which is a signatory of the Convention.24

Like Cadena, the Cortes decision left open the issue whether an individual has standing to assert provisions of a treaty to which his country is a party. By again implicitly proceeding on the premise that an individual's substantive rights under international law are derived wholly from the rights of his state, and by finding in effect that there was no state from which the crew could derive any rights under international law, the court again avoided the necessity of confronting the issue of individual standing.25

Only five weeks after the decision in Cortes, the Fifth Circuit faced an issue potentially more difficult than those raised in Cadena and Cortes. In United States v. Conroy,26 a Coast Guard Cutter, acting on an informer's tip, had signaled the defendants' boat

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23 Id. at 110.
24 Id. Although the court used the word "signatory," it apparently meant "ratifier," for the Fifth Circuit effectively held in Cadena that a state which had signed, but not ratified, a treaty had no rights under it.
25 Perhaps inadvertently, the court's opinion created an anomaly. As in Cadena, the basis of the opinion was that individual rights derive wholly from their states and that the particular states in both cases had no rights under the Convention. Yet, the language of the court in Cortes was somewhat equivocal on this point: "Even were we able to conclude that a provision of the Convention may be invoked by citizens of a non-signatory nation to restrict the powers of a party to the treaty, Article 22 would not limit the Coast Guard's action here." 588 F.2d at 110. According to Cadena, a non-signatory nation (assuming it is not a third party beneficiary nation under Article 36 of the Treaty on Treaties, see note 20, supra) has no rights under the treaty. The language of the court implies that there may exist circumstances under which a citizen of a non-party state may invoke the provisions of the treaty. Such a conclusion assumes that a non-party state might have rights under the Convention, precisely the opposite of the holding in Cadena.
26 589 F.2d 1258 (5th Cir. 1979).
27 The Coast Guard ship was the Dauntless, the same cutter that had seized the defendants' vessel in Cadena.
to "heave to" in the Windward Passage about nine miles southwest of Haiti. The defendants ignored the orders of the Coast Guard and proceeded post-haste for Haitian territorial waters. The Coast Guard then sought and obtained approval from the Haitian Chief of Staff to enter Haitian waters and search the defendants' vessel. The ship, its crew, and its 7,000 pound cargo of marihuana were seized. The defendants maintained that the Coast Guard's search and seizure of a vessel in the territorial waters of a foreign country was a violation of international law. Judge Rubin, once again writing for the Court, rejected this contention. He pointed out that Article 14, Section 1 of the Convention on the Territorial Sea and the Contiguous Zone, which both the United States and Haiti had ratified, gave vessels of all ratifying states the right of "innocent passage" through the territorial waters of a foreign country. The court emphasized that the Coast Guard was not on a "hostile mission" and, more importantly, that it had received explicit approval from the Haitian government for the search and seizure in its territorial waters.

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**Footnotes:**

1 The court did not specify whether the vessel was registered in a foreign country, nor did it reveal the nationality of the defendants.

2 It is not clear from the opinion exactly on what the defendants' contention was based. From the language in the opinion, one can infer that they may have relied on Article 14(2) of the Convention on the Territorial Sea and the Contiguous Zone, which defines the right of innocent passage as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." See note 30, infra.

3 516 U.N.T.S. 205, 15 U.S.T. 1606 (1958). Article 14(1) states: "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."

4 The Convention departed from an earlier notion of international law that denied the right of innocent passage to warships of a foreign nation without prior permission; namely, that foreign warships "did not enjoy an absolute legal right to pass through a state's territorial waters any more than an army could cross the land territory." P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927).

The Convention allows the right of innocent passage, but there is no indication that it allows a search and seizure in international waters other than pursuant to the exceptions in Article 22. See text following note 10, supra. Although the court excused the act partially by pointing out that the Coast Guard in Cortes was not on a "hostile mission," it undoubtedly based it holding even more on the fact that not only did Haiti fail to object to the action by the Coast Guard, but also that Haiti gave its explicit permission.

5 The court apparently meant that the cutter had no hostile intentions toward the country of Haiti.

6 The court seemed to rely most heavily on the language of Article 14(1) of the convention on the Territorial Sea and Contiguous Zone. The court thus stated, "At least between parties to the Convention, such as the U.S. and Haiti, the warship of one nation may enter the territorial waters of another without first giving notification and receiving authorization." The court left no doubt that the failure of Haiti to object was an integral part of its holding. "Here, where not even a foreign government complains of the American assertion
As in the cases of Cadena and Cortes, the Conroy court never found it necessary to reach the issue of an individual's standing to raise violations of a treaty to which his country is a party. That the Haitian government's grant of permission to the Coast Guard to enter its territorial waters was a significant factor in the court's refusal to reverse the convictions, again supports the proposition that an individual's rights under international law derive from the rights of his country. In other words, the court viewed the treaty as a pact among nations and, absent an objection by the aggrieved nation, the "violation" of international law would go unredressed, regardless of how vigorously the wronged individual might object.  

Relying on precedent established by Chief Justice Marshall in The Richmond, the court held that redress in such situations "is not due to the owner or crew of the vessel involved, but to the foreign government whose territoriality has been infringed by the action." In effect the Conroy court found that, since Haiti raised no objection, there simply was no violation of international law. Of course, such a conclusion obviated the need to reach the issue of standing. The Fifth Circuit confronted the most difficult fact situation in this line of cases to date in United States v. Postal. In that case, the Coast Guard seized a vessel on the high seas which was registered in the Grand Cayman Islands, a territory to which the Convention on the High Seas applied. The crew members were convicted of conspiracy to possess marihuana with intent to distri-
bute and conspiracy to import marihuana. On appeal, the defendants contended that the search violated Article 6 of the Convention on the High Seas.

Although the court in Postal did not explicitly address the issue of individual standing to assert the treaty provision, it focused on a perplexing area of treaty law which inherently encompasses that issue: the question of whether the convention was self-executing. Implicit in the contentions of the defendants in Cadena and Cortes was that the Convention on the High Seas superceded the authority granted the Coast Guard by § 89(a); i.e., the treaty was self-executing. Until the court was confronted with the facts of

40 There were actually two boardings by the Coast Guard of the defendants' vessel, the La Rosa. The first boarding occurred in the twelve-mile contiguous zone of the United States. The Coast Guard cutter approached the La Rosa, which at the time displayed no flag and showed neither name nor home port on her stern, and inquired as to her nationality. Two of the defendants on board the La Rosa held up a flag, later determined to be that of the Grand Cayman Islands, although "at the time there was some doubt as to exactly which country it was." After consulting with Coast Guard Headquarters Operations Center in Miami, the Coast Guard commander decided to board the La Rosa to verify her documentation. The court assumed that the first boarding could not be justified under Article 24 Convention on the Territorial Sea and Contiguous Zone, which authorizes a coastal state to exercise control in its contiguous zone necessary to prevent or punish infringement of its regulations in its zone. The court pointed out that the record was devoid of any "particularized suspicion that one of the enumerated regulations had been or was about to be violated." The court did hold the first boarding to be justified under Article 22, section 3(c) of the Convention on the High Seas. 589 F.2d at 871-72. The court pointed out that although the La Rosa did display a flag that was later determined to be of Grand Cayman registry, "the mere display of a flag is not conclusive." The court then cited several reasonable grounds for suspecting that the La Rosa was of American nationality.

The court held that Article 22 of the Convention on the High Seas, the specific provision at issue in Cadena, was inapplicable to the second boarding. The Coast Guard could not rely on it to justify the boarding

because there could have been no reasonable suspicion that the La Rosa was engaged in piracy or the slave trade or that she was not of Grand Cayman registry. The record discloses absolutely no evidence that would have afforded any suspicion that she was pirating or slaving and the first boarding was aborted precisely because her registry was conclusively verified.

Id. Neither could defendants rely on Article 22 to challenge the Coast Guard seizure. Article 22 prohibits a warship from boarding a foreign merchant ship on the high seas unless one of the three conditions is satisfied. Unlike the freighter in Cadena, the vessel at issue here was never alleged to be anything other than a pleasure craft.

Nor could the Coast Guard rely on the doctrine of hot pursuit, as embodied in Article 23 of the Convention on the High Seas, to justify the second boarding. Article 23 requires that hot pursuit "must be commenced when the foreign ship or one of its boats is within the internal borders or the territorial ...." The court admitted that there was ample ground, by virtue of the first boarding, for believing that the La Rosa had violated customs law, and that the pursuit was uninterrupted. But the court noted that no visual or auditory signal to stop was given by the Coast Guard to the La Rosa, thereby violating Article 23, section 3 and precluding reliance on the doctrine of hot pursuit.

41 See note 8, supra.
Postal, the Fifth Circuit never found it necessary to address the issue because it was able to rely upon other issues, namely non-ratification, statelessness, and consent of the aggrieved nation, as being dispositive.

In Postal, however, the court had no alternative ground of disposition. It directly confronted a situation where the nationals of a ratifying state asserted that the treaty, in and of itself, restricted the authority of the Coast Guard to seize their vessel on the high seas. Whether the defendants could assert the violation of Article 6 as a means of depriving the United States of its domestic jurisdiction in a criminal action depended on "whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of Article 6 . . . into its domestic laws . . . ." Resolution of this central issue of self-execution would determine whether the treaty superseded prior, contrary domestic law and whether it vested an individual with standing to assert its provisions in a domestic court. If it were self-executing, the treaty would do both. Conversely, the provisions of a non-self-executing treaty are not incorporated into domestic law absent congressional implementation. No one except the injured state can raise its provisions in a United States court, simply because the issue of its violation has never entered the realm of domestic law; it remains a question of international law and politics. In the early case of Foster v. Neilson, Chief Justice John Marshall noted that a treaty is

to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the courts.6

589 F.2d at 878.

In the early case of Whitney v. Robertson, 124 U.S. 190 (1888), the United States Supreme Court stated:

A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

Id. at 194.


Id. at 314.
The same may be said where either of the parties engages to refrain from performing a particular act, such as seizure of foreign vessels on the high seas.

Judge Tjoflat conceded in Postal that, among nations, there was no doubt that the Convention on the High Seas represented established principles of international law. Thus, if one party-state to the treaty chose to assert a provision against another party-state, the latter would be bound under international treaty law to the terms of the treaty. But the court drew a sharp distinction between the effect of a treaty among its signatory states under international law and the effect of the treaty upon the domestic law of each party-state. On the issue of applicability to the domestic law of the United States, the court held that the Convention was not self-executing.

The court reached its conclusion following a thorough analysis of the issue. Relying on the traditional standard of interpretation, the court looked to the intent of the parties to the treaty—more specifically, that of the United States—as its polestar. First, the court examined the document itself and concluded that "it is difficult . . . to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nation." Next, viewing the circumstances surrounding the adoption and ratification of the treaty, the court noted that the United States, in a number of statutes throughout its history, had consistently purport ed to extend its jurisdiction

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4 An exception to this principle exists if a party to the treaty has ratified it with reservation.

7 The court disclaimed its statement in Cadena that the treaty, "if applicable, supercedes prior domestic law to the contrary." 585 F.2d at 1260. See text accompanying note 16, supra. The Postal court circumvented this assertion by (1) declaring it "clearly obiter dictum;" and (2) limiting the coverage of the statement to Article 22, not Article 6.

8 That a treaty is deemed self-executing by one party-state does not necessarily mean it will be held self-executing by other party-states. Self-execution, vel non, is purely a question of interpretation by domestic courts of the intent of their country in ratifying the treaty. For example, in Great Britain "the orthodox view is that treaties are not part of the law of England unless legislation has been enacted incorporating them. It seems therefore that British Courts would probably not decline jurisdiction obtained in violation of a treaty." O'Higgins & Dublin, Unlawful Seizure and Irregular Extradition, 36 BRIT. Y.B. INT'L L. 279, 301 (1960).

9 The court also looked at other factors which tipped the balance in favor of non-self-execution. For example, the testimony before congress of the Chairman of the United States delegation to the 1958 Law of the Sea Conference indicated an absence of intent by the United States delegation that its provisions should be self-executing. 589 F.2d at 881.

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over the high seas. Moreover, the court noted that the records of the Convention itself indicate that very little attention was paid to the drafting of Article 6. Had the United States intended Article 6 to supersede the statute, the court reasoned, not only would the United States have made that intention clear, but also it would have paid more attention to Article 6 which, if self-executing, would have severely limited the existing jurisdictional statutes.

The court distinguished, on four grounds, a bilateral treaty with Great Britain, which had been held to be self-executing by the United States Supreme Court in *Ford v. United States* and *Cook v. United States*. That treaty (ratified during Prohibition) allowed the United States to search, on probable cause, any British ship suspected of smuggling liquor into the United States and to subject her to jurisdiction of American courts, provided that the seizure occurred within one hour's sailing distance from the nearest United States coast. In return, Great Britain was granted the right to bring liquor under seal into United States waters (presumably on its way to markets in other countries).

The first distinction drawn was that the treaty was bilateral, imposed specific reciprocal rights and obligations, and set up a specific enforcement mechanism for the assertion and settlement of claims resulting from any violation of the treaty. A second distinction was that, unlike Article 6 of the Convention on the High Seas, which is a "sweeping prohibition on the exercise of jurisdiction against foreign vessels on the high seas, the treaty with Great Britain pertained only to U.S. jurisdiction over British vessels suspected of smuggling liquor outside an agreed zone."

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81 For example, an Act to Provide More Effectually for the Collection of Duties, ch. 35, 1 Stat. 145 (1790) extended to twelve miles the limit in which foreign vessels bound for the United States could be boarded for inspection of their cargoes. The 1935 Anti-Smuggling Act, Act of Aug. 5, 1935, Pub. L. No. 238, 49 Stat. 517, empowers the president to establish temporary enforcement zones up to 62 miles from the coast and 100 miles laterally in both directions from a vessel. And, of course, 14 U.S.C. § 89(a) is the authority presently utilized by the Coast Guard to search and seize vessels on the high seas. See note 8, supra. See also Ficken, *The 1935 Anti-Smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law*, 29 U. MIAMI L. REV. 700 (1975).

82 Compare the reasoning of the World Court in the *North Sea Continental Shelf* case, note 21, supra. The court held that the absence of debate prior to the adoption of a treaty provision is strong evidence that the provision represents customary international law.

83 273 U.S. 583 (1927).

84 288 U.S. 102 (1933).


86 589 F.2d at 883.
Third, contrary to the indications of the United States delegation to the 1958 Convention on the Law of the Sea and of the Department of State concerning the executory nature of the 1958 Conventions, the Secretary of State had declared that the liquor treaty was self-executing. The fourth distinction was that the records concerning the liquor treaty indicated that high among the purposes of the United States in ratifying the treaty was a desire to withdraw the seizures in question from the exclusive realm of international law, where they had been subject to vociferous diplomatic protests by Great Britain, into the more precise area of domestic law, where their validity would be immune from the politics of international law.

The United States had thus compromised. While any British vessels seized beyond the one-hour limit were subject to the possibility of a protest from Britain under principles of international law, the United States gained a guarantee from Britain not to protest any seizures within the one-hour limit. In contrast, the record of the 1958 Convention was devoid of any similar indication that the United States intended to transfer the subject matter of the Conventions — specifically the limitation of its jurisdiction on the high seas by Article 6 — to the realm of domestic law, thereby superseding all prior jurisdictional statutes to the contrary.

II.

Having avoided the issue of individual standing to assert treaty provisions in Cadena, Cortes and Conroy, the Fifth Circuit has effectively closed the door on individuals who challenge the court’s jurisdiction on the basis of any violation of international law other than infraction of a self-executing treaty. There is ample authority for the court’s position. A maxim of international law is that states, rather than their citizens, are the subjects of international law, primarily because international law is a law of nations and depends on their consent for its legitimacy. Thus, subject to the

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57 The views of the State Department are accorded substantial weight in any determination of self-execution of a treaty. Factor v. Laubenheimer, 290 U.S. 276, (1933). See also note 49, supra.

58 However, eminent international jurists have disagreed concerning the scope of the maxim. Some insist that no entity other than a nation can be the subject of international law. See generally C. Norgaard, The Position of the Individual in International Law (1962). Individuals can be the subject, they maintain, only of national laws. Thus, even if international law specifically allows the individual to have special rights before an international tribunal, these individual rights nonetheless belong to the state, because they derive wholly from agreement among states and are given to the individual only by virtue of his
few exceptions enumerated below, only nations may assert violations of treaties or of customary international law.59

United States courts have consistently adhered to this customary rule of international law. As early as 1884, the Supreme Court subscribed to the notion that, in general, provisions of a treaty may be asserted only by a ratifying state, not by its nationals. In Edye v. Robertson (The Head Money Cases)60 the Court confronted a challenge by a shipowner to a head tax which was assessed for each immigrant brought into New York Harbour. The plaintiff claimed in part that the tax was violative of "numerous treaties of our government with friendly nations."61 The Court held that the shipowner had no standing to raise the issue of the treaties:

A treaty is primarily a compact between independent Nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclaims, so far as injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress ... to a party who is injured by the failure of a government to observe the terms of the treaty; such is a political question, and one claiming injury must look to his government for relief.62

being a subject of national law. Other scholars draw the distinction between direct and indirect subjects of international law. Id. at 39-41. The hallmark of a direct subject is the procedural capacity to bring an action to enforce the duty of another. Thus, an individual is only an indirect subject of international law, because although he might benefit from the law, he must rely on his state, the direct subject, to raise the issue of international law on his behalf.

The differences between these two schools are more theoretical than practical. For example, a customary rule of international law has long been that a foreign diplomat has immunity, to one degree or another, from the jurisdiction of the courts of the host country. Under the strict theory he would not be a subject of international law because he is entitled to the privilege only by virtue of his relationship with his country. Under the direct-indirect dichotomy, however, the diplomat is thought to be a subject, albeit indirect, of international law. His state is the direct subject because only his state can consent to the granting of immunity and thereby allow the issue to be raised in the first place. The difference is largely one of semantics, however, for under both theories the result is the same: the diplomat receives immunity from the jurisdiction of the host country, but the grant of immunity is dependent on its invocation by the diplomat's state.

59 For example, Article 34(1) of the Statute of the International Court of Justice states, "Only states may be parties in cases before the Court." [1970] U.N.Y.B. 1089.
60 112 U.S. 580 (1888).
61 Id. at 597.
62 Id. at 597.
The Second Circuit echoed the *Edye* holding in the recent case of *Dreyfus v. Finck*.63 The plaintiff, a Swiss citizen, sought recovery from a citizen of West Germany for alleged wrongful confiscation of property in Nazi Germany. In rejecting the plaintiff's reliance on the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles, and the Four Power Occupation Agreement, the court held that neither a general treaty nor the law of nations vests a mere citizen with individual legal rights.64 Similarly, in *Canadian Transport Co. v. United States*,65 the plaintiff-shipowner attempted to invoke an international maritime treaty66 to support his claim for damages against the United States. The Port of Norfolk had denied entry to his ship because the master and officers were Polish nationals. The court rejected plaintiff's reliance on the treaty, stating that

a federal court has no inherent power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation if the Government of the United States, as a sovereign power, chooses to disregard it. This is a political question for which there is a textually demonstrable constitutional commitment to the Executive and Legislative branches.67

The doctrine has also been applied in the context of a criminal defendant's challenge of his conviction on the basis of a violation by the United States of international law. In *State ex rel Lujan v. Gengler*,68 the defendant appealed the denial of a petition for habeas corpus after his conviction of conspiracy to import and distribute a large quantity of narcotics. The defendant, an Argentine citizen, was kidnapped from Bolivia by federal agents and spirited to the United States to stand trial. The defendant maintained that his abduction violated Article 2(4) of the United Nations Charter69 and Article 17 of the Charter of the Organization of American States.70 The Second Circuit noted, however, that neither Bolivia,

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63 534 F.2d 24 (2d Cir. 1976).
64 Id. at 30.
67 430 F. Supp. at 1172 (citations omitted).
69 Article 2, paragraph 4 of the United Nations Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." [1970] U.N.Y.B. 1001.
70 Article 17 states:
whose sovereignty had been violated by the action, nor Argentina, whose national was the victim of the kidnapping, had "in any way protested or even objected to his abduction." Following the general principle that individuals alone may not assert principles of international law, the Second Circuit held such lack of objection by the states to be fatal to Lujan's reliance upon the Charters. The right can be asserted only by the state, and if the state expressly or impliedly waives that right, it simply is unavailable to the national.

In United States v. Toscanino, the Second Circuit was faced with a fact situation similar to that of Lujan. The defendant, an Italian national, alleged that he had been abducted from Uruguay by federal agents and subjected to brutal torture as he was transported to the United States to stand trial. Among the defendant's contentions was that the kidnapping by United States agents violated the sovereignty of Uruguay in contravention of Article 2(4) of the United Nations Charter and Article 17 of the Charter of the Organization of American States. The Second Circuit noted that the defendant specifically alleged Uruguay's objection to the kidnapping: "'In fact the Uruguaian government claims that it had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws.'" The court remanded in order to allow the defendant an opportunity to prove his allegations.

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The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.


71 510 F.2d at 67.

See also Restatement (Second) of the Foreign Relations Law of the United States §§ 1, Comment (f); 115, Comment (e); & 163, Comment (d).

72 The court even goes so far as to intimate that the failure of a state to object to a violation of its rights under international agreements would preclude existence of a violation in the first place. The comments to the Harvard Research in International Law Draft Convention on Jurisdiction With Respect to Crime reach the same conclusion: "If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality." 29 Am. J. Int'l L. 435, 631 (Supp. 1933).

73 500 F.2d 267 (2d Cir. 1974).

74 See notes 69 & 70, supra.

75 500 F.2d at 270 (emphasis added).

76 That Uruguay actually objected to the violation by the United States of the United Nations Charter and the Organization of American States Charter was not explicitly cited by the court to be dispositive of whether defendant could rely on the charters. The court
Virtually all international and domestic tribunals recognize an exception to the general rule that only nations may assert violations of international law. If the parties to a treaty manifest their intent that individual citizens are to have the procedural capacity to bring an action against a state before a special tribunal, then those individual citizens may assert principles of international law within the range indicated by the treaty. For example, in the Danzig Railway Officials case, the Permanent Court of International Justice upheld individual rights of action by officials of the Danzig Railroad against the Polish Railway Administration. Earlier, Poland and Danzig had concluded a treaty regulating the employment conditions of Danzig employees hired by the Polish Railway Administration and had given the right of action to the employees to protest the conditions.

American courts also recognize a second exception to the general rule: a self-executing treaty may be asserted by an individual in a United States court, even if his country fails to raise that treaty in his behalf. The Supreme Court approved of the principle in the early case of Whitney v. Robertson: "If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effort of a legislation enactment." Whether a treaty is self-executing can often be a difficult question. As the Postal court pointed out, some provisions of a treaty obviously are not self-executing. For example, Article 28 of the Convention on the High Seas specifically calls for further legislative action by the ratifying states to achieve the purpose of the provisions. Other treaties are inherently incapable of being self-executing. For example,
a provision of a treaty which called for the appropriation of money could not withstand the test of self-execution, because the United States Constitution prohibits the drawing of money from the treasury without congressional enactment. Most treaty provisions, however, are not so easily characterized as self-executing or non-self-executing. They require extensive analysis by the courts of the intent of the parties and the circumstances surrounding ratification.

United States courts have ruled differently on the issue of self-execution. In *Sei Fugii v. State,* a Japanese alien living in California challenged a judgment that land earlier purchased by him had escheated under the state's alien land law. The plaintiff relied on the Preamble to the Charter of the United Nations as well as on Articles 1, 55, and 56 of the Charter. The court held, however, that none of these provisions was self-executing. The Preamble and Article 1 merely state "general purposes and objectives of the United Nations organization and do not purport to impose legal obligations on the individual member-nations or to create rights in private persons." Similarly, the court noted, the language of Article 55 ("the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race . . .") and Article 56 ("all members pledge themselves to take joint and separate action . . . for the achievement of purposes set forth in Article 55") indicates simply that the member-nations had obligated themselves to cooperate with one another to these ends. The court maintained that "it is plain that it was contemplated that future legislative action of several nations would be required to accomplish the declared objectives, and that there is nothing to indicate these provisions were intended to become rules for the courts of this country upon the ratification of the Charter." Thus, the plaintiff was precluded from relying on these provisions of the

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82 U.S. Const. art. 1, § 9.
83 Not all countries have a test of self-execution as vaguely defined as that of the United States. As noted in note 46, supra, British courts hold generally that no treaty is self-executing. Thus, a treaty normally may not be considered by a British court absent specific enabling legislation by Parliament. As a practical matter, of course, the Crown usually consults Parliament before entering into an international agreement. A. McNair, Law of Treaties 365 (1961).
84 38 Cal. 2d 718, 242 P.2d 617 (1952).
85 38 Cal. 2d at 720, 242 P.2d at 619.
86 Id. at 620.
87 Id. at 621. The court did rule in favor of the plaintiff on fourteenth amendment grounds.
United Nations Charter to challenge prior domestic law to the contrary.\textsuperscript{88}

A different result was reached in \textit{People of Saipan v. United States Department of Interior},\textsuperscript{89} where the Ninth Circuit addressed the status of the Trusteeship Agreement For the Former Japanese Mandated Islands.\textsuperscript{90} Plaintiffs were citizens of the Trust Territory and appealed an order by the High Commissioner that allowed an international hotel to be built on public land adjacent to an "important historical, cultural, and recreational site for the people of the islands." Although the court held that plaintiffs' appeal lay with the High Court of Saipan and not the Ninth Circuit, it did confirm that the Trusteeship Agreement created substantive rights that could be asserted individually by the islanders. The court looked to such factors as the objectives of the parties to the treaty, the existence of domestic procedures and institutions appropriate for direct implementation of the treaty, and the availability and feasibility of alternative enforcement methods. The court concluded that the international agreement "established affirmative and judicially enforceable obligations without implementing legislation."\textsuperscript{91}

III.

It would appear, then, that the conclusion of the Fifth Circuit in \textit{Postal}, that Article 6 of the Convention on the High Seas is not self-executing, rests on solid ground. While it might be contended that the court paid insufficient attention to the actual language of Article 6,\textsuperscript{92} the court's careful analysis of the circumstances surrounding the passage of the Convention provides valid support for its holding.

The question, however, remains: what is the practical effect of

\textsuperscript{88} The issue of self-execution of Security Council Resolutions has also come before the courts in recent years. \textit{See}, e.g., \textit{Diggs v. Richardson}, 555 F.2d 848 (D.C. Cir. 1976); \textit{Diggs v. Shultz}, 470 F.2d 461 (D.C. Cir. 1972).

\textsuperscript{89} 502 F.2d 90 (9th Cir. 1974), \textit{cert. denied} 420 U.S. 1003 (1978).

\textsuperscript{90} By this agreement following World War II, the United Nations designated the United States to be trustee of the Trust Territory of the Pacific Islands (known as Micronesia). Responsibility for carrying out the obligations undertaken by the United States was delegated by congress to the president, who in turn delegated it to the Secretary of the Interior. The Secretary further delegated the responsibility to a High Commissioner. The High Commissioner is presently appointed by the president and confirmed by the Senate. 502 F.2d at 98 & n.10.

\textsuperscript{91} 502 F.2d at 97.

\textsuperscript{92} "Ships . . . shall be subject to [their state's] exclusive jurisdiction on the high seas." (emphasis added).
the Fifth Circuit's holdings in *Cadena, Cortes, Conroy* and *Postal*? First, it is reasonably certain that few crew members of a foreign merchant ship seized on the high seas by the United States Coast Guard will be able to raise the violation of Articles 6 or 22 of the 1958 Convention on the High Seas as a defense to criminal proceeding brought as a result of the seizure. According to *Cadena*, a citizen of a country which has not ratified the Convention will be precluded from asserting a violation of the treaty because his country has no rights under the treaty. *Cortes* holds that a crew member of a stateless vessel also will not be allowed to rely on the treaty to challenge a seizure on the high seas. And even an individual citizen of a ratifying state, according to *Postal*, may not assert the treaty in a United States court. The only individual who may find protection in Articles 6 and 22 of the Convention is one whose country raises an objection to the violation in his behalf.\(^8\)

An examination of the holdings will raise the possibility of a second practical effect. Let us assume that, instead of the fact situations of the Fifth Circuit cases, the French police seized an American freighter 200 miles off the coast of France and arrested several American crew members on charges of violating French currency laws. The action of the French police certainly would violate the terms of Articles 6 and 22 of the Convention on the High Seas. But were the French court to follow the reasoning of the Fifth Circuit, the hapless Americans would be precluded from raising the violation of the Convention in their own defense.

The question then becomes: has the Fifth Circuit taken the first step in relegating Article 6, and perhaps Article 22 of the Convention, to the realm of meaningless prohibitions? Although on the surface it appears that the court has done precisely that, further analysis indicates that such a conclusion is not necessarily valid. It should be remembered that the Fifth Circuit did not declare the Convention to be a nullity; it held only that Article 6 was not self-executing and thus could not be raised by the defendants in their individual capacities. The aggrieved state has always had, and still has, the option of protesting any seizure on the high seas, save those provided for in the exceptions in Article 22.\(^9\) Faced

\(^8\) Such objection could be made through diplomatic channels or under Article 35 of the U.N. Charter, which permits members to bring "any dispute . . . to the attention of the Security Council or of the General Assembly." Officials of the offended nation also could conceivably appear in the American court on behalf of the foreign national.

\(^9\) See text accompanying notes 11-12, supra.
with such objection, a ratifier of the treaty would be bound by international law to remedy the violation of the Convention. 95

The right of an aggrieved party to the Convention to object may well be the key distinguishing feature between the Fifth Circuit cases and the hypothetical French currency case. Few would deny that the United States or any other country would vehemently protest the seizure of a vessel on the high seas for currency violations committed by a crew member. But it is equally true that none of the countries affected in the Fifth Circuit cases raised the slightest objection to the seizures involved therein. Indeed, in Conroy, the Haitian government gave explicit permission for the United States to enter its territorial waters to search and seize the vessel.

To be sure, the journey of the Fifth Circuit through Cadena, Cortes, and Conroy and its conclusion in Postal, that the 1958 Convention is not self-executing, is significant, if only because the court is the first United States court to have reached that conclusion. What is remarkable, however, is not that the court reached the conclusion that it did in these cases, but that not a single country in which any of the merchant ships was registered raised the slightest objection to the seizure of the ship on the high seas. Why the aggrieved states failed to protest is not difficult to discern: each of the seized vessels was engaged in the illegal trafficking of narcotics.

The illegal narcotics trade is not a new phenomenon, nor has it afflicted only the United States. 96 With the discovery of various

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95 For example, in connection with the illegal kidnapping of Adolph Eichmann from Argentina by Israeli "volunteers," Argentina filed a formal objection in the U.N. Security Council. The Security Council adopted a resolution condemning the incident and "requesting the government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law . . . ." U.N. Doc. s/4349 (June 23, 1960), quoted in W. FRIEDMANN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW, CASES AND MATERIALS 497 (1969). See also United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974). Following the resolution and apologies by the government of Israel, the dispute was settled by a Joint Communiqué issued on August 3, 1960 by the governments of Israel and Argentina. See N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 52 (1973).

The Israeli court subsequently rejected Eichmann's contention that the violation of international law precluded Israel's assertion of jurisdiction over him. The court concluded that the Joint Communiqué was the equivalent of a waiver of objection by Argentina which cured any violation of international law. Attorney General of Israel v. Eichmann, 36 Int'l L. Rep. 5 (D. Ct. of Jerusalem 1961); Attorney General of Israel v. Eichmann, 36 Int'l L. Rep. 227 (Israel Supreme Court 1962). See also United States v. Toscanino, 500 F.2d at 277-78.

96 For example, estimates in 1977 of the opium-addict population of Thailand ranged from 400,000-600,000. Estimates for Burma were 400,000. The United States had an
uses of the opium plant and the invention of the hypodermic needle in the late nineteenth century, the world-wide demand for narcotics steadily increased, producing a concomitant rise in illicit narcotics traffic. The initial recognition of the problem on an international scale came at the Shanghai Conference in 1909, where China and twelve countries with interests in the Far East subscribed to resolutions encouraging the reduction of the use and smuggling of opium. Over the next five decades, both producing and consuming states ratified a variety of bilateral and multilateral treaties regulating the production, manufacture, trafficking, and consumption of narcotics.

The inevitable inconsistencies, redundancies, and confusion resulting from so many uncoordinated efforts led to the adoption in 1961 of the Single Convention on Narcotic Drugs. The Convention set up a comprehensive international control system as well as a policy-making organ and an enforcement organ. A major provision of the Convention is the requirement that each country report information concerning its legitimate production of drugs as well as its enforcement procedures against the illicit production, traffic, and consumption of narcotics. In 1972, these control measures of the 1961 Convention were strengthened by the Protocol amending the Convention adopted by the United Nations Plenipotentiary Conference of 1972. Thus, disdain for narcotics, especially the trafficking of narcotics, is well established in the international policies of the overwhelming majority of the countries of the world. Over one hundred-fifty countries have ratified the 1961 Single Convention on Narcotic Drugs. And since 1961 the estimated addict population in 1977 of 800,000. Nellis, International Narcotic Control Efforts and Policies As Seen in Congress, 6 CONTEMP. DRUG PROBLEMS 479, 490 (1977).


97 See Waddell, supra note 97, at 311-13 for a summary of these multilateral treaties.


100 The Commission on Narcotic Drugs is an arm of the Economic and Social Council of the U.N. and is the primary policy-making body for narcotic drug policy. The Commission is authorized to evaluate international drug control and to make recommendations to the U.N. as well as to individual governments. See Noll, supra note 97, at 20.

101 The International Narcotics Control Board is authorized to take steps to control international narcotics traffic and to enforce the provisions of the Convention. Id.


103 The international movement and domestic enforcement measures have influenced each other. For example, congress drew heavily on the Single Convention in drafting the Comprehensive Drug Abuse Prevention and Control Act of 1970.

104 TREATIES IN FORCE 306-7 (1976).
international war on the evils of the narcotics trade has become more sharply focused. Numerous bilateral treaties have been ratified to fill in the enforcement gaps in the Single Convention and Protocol. As of January 1, 1979, the United States alone was a party to seventy-seven bilateral agreements involving narcotics. In the five year period from 1971 to 1976 the United States entered into thirty separate bilateral agreements involving narcotics.

It may be, then, that illegal trafficking in narcotics is approaching a status akin to piracy or the slave trade under international law. That is, the evil of the drug trade is so universally condemned that any trafficker proceeds at his own risk under international law. It has been said of piracy:

Pirates are deemed by their conduct to have forfeited the right of protection of their home state . . . . For the purposes of proceedings in piracy only, they have no state. This is because the character of piracy is such that it would be impossible to hold any state responsible for their acts and, by pursuing such a lawless occupation on the high seas, they have shown themselves unwilling to keep the laws and regulations of states generally.

The same may be said of narcotics smugglers. Although trafficking in narcotics is not one of the specific exceptions to freedom on the high seas enumerated in Article 22 of the 1958 Convention, the activity may well be on its way to becoming an exception under customary international law. Moreover, by consistently declining to object to the seizure on the high seas of vessels involved in running narcotics, the aggrieved states are slowly, but surely, supporting the proposition that narcotics

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106 Id. at 1-233.
109 The circumstances surrounding the enforcement of American drug laws can be distinguished from those surrounding enforcement of liquor smuggling laws during Prohibition. The nature of the substances sought to be controlled, as well as the general attitude of the international community toward them, distinguished the situations. While narcotics trafficking is universally condemned, possession and sale of alcohol was not. There was much less sympathy for American efforts during Prohibition to control possession and sale of alcohol within its borders and on its surrounding waters. An aggrieved state was more inclined to object to a seizure of one of its merchant ships on the high seas. Indeed, the friction generated by the seizure of British vessels by American authorities is what led to the British-American treaty of 1924, the subject of Cook v. United States and Ford v. United States. See text accompanying notes 53-57, supra.
traffickers are, indeed, entitled to no protection under principles of international law.

IV.

It may be concluded, then, that an international trafficker in narcotics will be subject to “double jeopardy” on the high seas. First, no matter how flagrant the violation of international law, he will not be allowed to assert individually principles of international law to challenge a seizure of his vessel on the high seas. Only if his country raises the violation in his behalf will he be able to assert it in a United States court, or at least in the Fifth Circuit, as a defense to a criminal prosecution for narcotics smuggling. Second, in recognition of the universal condemnation of trafficking in narcotics, no offended nation is likely to raise a violation of international law on behalf of its national who is arrested on charges resulting from his participation in the illegal trade.

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