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THE LONG ARM OF FEDERAL COURTS: DOMESTIC JURISDICTION ON THE HIGH SEAS

The southeastern coast of the United States is a convenient target for narcotics smuggling activity.[1] The Coast Guard frequently apprehends citizens of foreign nations, on the high seas, attempting to smuggle controlled substances into the United States in violation of federal statutes.[2] Defendants have raised the defense that the Convention on the High Seas,[3] a treaty giving every nation exclusive control over its own ships on the high seas, prohibits a United States court's exercise of personal jurisdiction over aliens arrested outside United States waters.[4] In the United States, a defendant may not claim an unlawful arrest as a defense to the jurisdiction of a domestic court.[5] This principle does not apply, however, where a treaty

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[1] Most of the criminal prosecutions for smuggling narcotics into the United States have come before the Fifth Circuit. The Fifth Circuit has consistently held that the United States has jurisdiction to arrest and prosecute aliens who have violated domestic law, even though these aliens are apprehended in waters which are not under United States control. *See* United States v. Conroy, 589 F.2d 1258, 1265 (5th Cir. 1979); United States v. Postal, 589 F.2d 862, 873 (5th Cir. 1979); United States v. Cortes, 588 F.2d 106, 108-09 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1256-57 (5th Cir. 1978); United States v. Winter, 509 F.2d 975, 981 (5th Cir. 1975).

[2] *See* United States v. Postal, 589 F.2d 862, 867 (5th Cir. 1979); United States v. Williams, 589 F.2d 210, 212 (5th Cir. 1979); United States v. Cortes, 588 F.2d 106, 108 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1256 (5th Cir. 1978); 21 U.S.C. §§ 841, 846, 952, 963 (1976); notes 29, 58 *infra*.

[3] *Opened for signature* April 29, 1958, [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82, [hereinafter cited as Convention on the High Seas.]

[4] *See* United States v. Postal, 589 F.2d 862, 870 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1260 (5th Cir. 1978). United States territorial waters include internal waters, the territorial sea, and the contiguous zone. *See* Convention on the Territorial Sea and Contiguous Zone, *opened for signature* April 29, 1958, [1964] 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The territorial sea is a belt of water, three miles in breadth, adjacent to the coast. *Id.* art. 1, 1; *see* United States v. Postal, 589 F.2d 862, 879 (5th Cir. 1979). The contiguous zone adjoins the territorial sea, and extends up to twelve miles from the landward boundary of the territorial sea. [1964] 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205, art. 24, 1-2. The United States may regulate its territorial sea and contiguous zone to the extent necessary to enforce domestic customs, fiscal, immigration and santiary regulations. *Id.* art. 24, 1. The high seas include all open waters beyond the contiguous zone. Convention on the High Seas, *supra* note 3, art. 1.

[5] Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886). In *Ker*, the defendant was kidnapped from Peru and brought to Illinois to be tried on criminal charges. 119 U.S. at 437-38 (1886). Challenging the court's jurisdiction over his person, the defendant alleged that his forcible arrest violated due process of law. *Id.* at 439. The Court held that the fourteenth amendment's due process guarantee was satisfied when the defendant was apprised of the charges against him and given a fair trial. *Id.* at 440. The Constitution does not restrict the means by which a court may obtain personal jurisdiction over an indicted defendant. *Id.; see* Frisbie v. Collins, 342 U.S. 519, 522 (1952). Thus, the indicted defendant's claim of unlawful arrest has no constitutional foundation and cannot defeat personal jurisdiction. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 440 (1886). The Fifth Circuit has repeatedly held that aliens, arrested on the high seas for

which imposes territorial limitations on United States jurisdiction is operative as domestic law, since the treaty then overrides existing domestic law which conflicts with its provisions.[6]

A self-executing treaty becomes domestic law immediately upon ratification.[7] A treaty which requires congressional legislation to effectuate treaty provisions is not self-executing and does not become domestic law upon ratification.[8] The provisions of a non-self-executing treaty cannot be enforced in United States courts until Congress enacts implementing legislation.[9] If a treaty is not expressly self-executing or non-self-executing on its face, courts traditionally look to the intent of its drafters and its legislative history to decide whether the treaty is operative as domestic law.[10] Defendants arrested on the high seas must therefore prove that the Convention is self-executing to escape the jurisdiction of United States courts.[11]

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violation of federal statutes regulating controlled substances, cannot defeat personal jurisdiction by claiming that their presence before the court was unlawfully secured. United States v. Postal, 589 F.2d 862, 873 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978); United States v. Winter, 509 F.2d 975, 985-86 (5th Cir. 1975); *accord,* United States v. Keller, 451 F. Supp. 631, 634 (D.P.R. 1978).

[6] Article VI of the United States Constitution declares that all properly made and ratified treaties become the supreme law of the land. U.S. CONST. art. VI, § 2, cl. 2. An executed or self-executing treaty is operative as domestic law. *See* text accompanying note 7 *infra.* Where an executed or self-executing treaty is inconsistent with an existing federal statute, and cannot be construed so as to give effect to both, the treaty will supercede the federal legislation. Cook v. United States, 288 U.S. 102, 118-19 (1932); Chae Chan Ping v. United States, 130 U.S. 581, 600 (1888); Head Money Cases, 112 U.S. 580, 598-99 (1884).

[7] Foster v. Nielson, 27 U.S. 108, 121 (1829); Saipan v. United States Dep't of Interior, 502 F.2d 90, 100-01 (9th Cir.), *cert. denied* 421 U.S. 911 (1975) (Trask, J., concurring); Aerovias Interamericanas de Panama v. Board of County Comm'rs., 197 F. Supp. 230, 245 (S.D. Fla. 1961), *rev'd on other grounds,* 307 F.2d 802 (5th Cir. 1962); Comment, *Criteria for Self-Executing Treaties,* 1968 U. ILL. L.F. 238, 239 (1968) [hereinafter cited as *Criteria for Self-Executing Treaties].* A self-executing treaty itself provides the means for its administration and enforcement, so that domestic courts are competent to enforce treaty provisions without legislative aid. 27 U.S. at 121 (1829). An executed treaty is a non-self-executing treaty that has been legislatively implemented. *See* text accompanying notes 8-9 *infra.*

[8] In Ortman v. Stanray Corp., 371 F.2d 154 (7th Cir. 1967), *rev'd on other grounds,* 431 F.2d 231 (7th Cir. 1971), the Seventh Circuit held that ratification of a non-self-executing multilateral treaty, without subsequent legislative implementation, was insufficient to make the treaty enforceable federal law. *Id.* at 157; *see* Aerovias Interamericanas v. Bd. of County Comm'rs, 197 F. Supp. 230, 245 (S.D. Fla. 1961); Note, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing,* 57 TEX. L. REV. 233, 236-37 (1979).

[9] Saipan v. United States Dep't of Interior, 502 F.2d 90, 101 (9th Cir. 1974) (Trask, J., concurring); Aerovias Interamericanas v. Board of County Comm'rs, 197 F. Supp. 230, 245 (S.D. Fla. 1961); Comment, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem,* 25 BUFFALO L. REV. 773, 773 (1976) [hereinafter cited as *Self-Executing Treaties].*

[10] *See* Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976); Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974); Aerovias Interamericanas v. Board of County Comm'rs, 197 F. Supp. 230, 248 (S.D. Fla. 1961); *Criteria for Self-Executing Treaties, supra* note 7, at 240-43.

[11] *See* notes 6 & 7 *supra;* text accompanying note 8 *supra.*

The Convention was one of four treaties signed by the United States at Geneva in 1958.[12] President Eisenhower submitted the four treaties and an "Optional Protocol"[13] to the Senate for ratification.[14] The Optional Protocol gave the International Court of Justice compulsory jurisdiction over all disputes involving the interpretation or application of the treaties.[15] After a public hearing before the Senate Committee on Foreign Relations, the Senate ratified the treaties without further debate.[16] The Senate did not, however, ratify the Optional Protocol.[17]

The Convention is founded on the principle of freedom of the seas and the proposition that every nation has a right to sail its ships on the high seas free from foreign interference.[18] Coastal and noncoastal states are free to navigate on the high seas, and no state may subject any part of those waters to its sovereignty.[19] A ship is subject to the exclusive jurisdiction of the state whose flag it flies while on the high seas.[20] That state has sole

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[12] On April 29, 1958, the United States signed the Convention on the High Seas, *supra* note 3; the Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205; the Convention on Fishing and Conservation of the Living Resources of the High Seas, [1960] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; and the Convention on the Continental Shelf, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. These four treaties are collectively known as the "Law of the Sea Conventions." *See* 106 CONG. REC. 11189 (1960).

[13] Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes Arising Out of the Geneva Conventions on the Law of the Sea, *opened for signature* April 29, 1958, 450 U.N.T.S. 169. [hereinafter cited as Optional Protocol].

[14] 106 CONG. REC. 11187 (1960) (remarks of Sen. Mansfield).

[15] Optional Protocol, *supra* note 13, art. 1. The Optional Protocol exempts certain articles in the Convention on Fishing and Conservation of the Living Resources of the High Seas, [1960] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285, from the compulsory jurisdiction of the International Court. Optional Protocol, *supra* note 13, art. 2; *see* note 64 *infra.*

[16] 106 CONG. REC. 11192 (1960) (remarks of Sen. Mansfield). The Senate Committee on Foreign Relations heard debate on the Conventions on January 20, 1960. *See generally Conventions on the Law of the Sea: Hearing Before the Committee on Foreign Relations United States Senate,* 86th Cong., 2d Sess. (1960); [hereinafter cited as SENATE HEARINGS]. On April 5, 1960 the Committee voted unanimously to report the conventions favorably to the Senate. 106 CONG. REC. 11192 (1960). The Senate ratified the four Law of the Sea Conventions on May 26, 1960. *Id.* at 11195-96.

[17] *Id.* at 11193.

[18] *See* Convention on the High Seas, *supra* note 3, art. 2; 106 CONG. REC. 11190 (1960).

[19] Convention on the High Seas, *supra* note 3, art. 2. The Convention declares that every state must exercise its right to freedom of the high seas with "reasonable regard" for the interests of other states. *Id.; see* 106 CONG. REC. 11190 (1960).

[20] Convention on the High Seas, *supra* note 3, art. 6. The Convention's principle of exclusive jurisdiction is subject to two limited exceptions. A warship may board and search a foreign merchant vessel when there is reason to suspect that the vessel is engaged in piracy or slave trade, or is of the same nationality as the warship. *Id.* art. 22, 1(a), (b), (c). Coast Guard vessels are "warships." *See* United States v. Conroy, 589 F.2d 1258, 1267 (5th Cir. 1979); Convention on the High Seas, *supra* note 3, art. 8, 2. In addition, when a coastal state's law enforcement officers reasonably believe that a foreign ship discovered within territorial waters has violated domestic law, they may commence "hot pursuit" of the vessel and continue the chase into the high seas. Convention on the High Seas, *supra* note 3, art. 23, 1; *see* 589 F.2d at 872; note 4 *supra.*

authority to promulgate regulations to control its vessels.[21] The Convention neither states that its provisions are to be self-executing, nor that they must be affirmatively implemented to become effective domestic law of a ratifying state.[22] Because the treaty failed to provide specifically for enforcement of its terms, the only court deciding the question of self-execution had difficulty determining whether the Convention was domestic law.[23]

In *United States v. Postal*[24] the Fifth Circuit addressed the issue whether the Convention was self-executing. The court found that extrinsic evidence was insufficient to support a self-executing interpretation of the Convention, and therefore rejected defendants' assertion that the treaty was effective as domestic law.[25] In *Postal,* the Coast Guard encountered a foreign ship on the high seas off the Florida coast.[26] The ship displayed no

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[21] *See* 106 CONG. REC. 11190 (1960).

[22] *See* Convention on the High Seas, *supra* note 3, art. 31-34. United States courts normally hold an international agreement to which the United States is a party to be self-executing only when the writing indicates that its provisions will become effective as domestic law upon ratification. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(2) (1962) [hereinafter cited as RESTATEMENT OF FOREIGN RELATIONS].

[23] In both United States v. Postal, 589 F.2d 862, 870 (5th Cir. 1979), and United States v. Cadena, 585 F.2d 1252, 1260 (5th Cir. 1978), the defendants asserted an alleged breach of the Convention as a defense to the Fifth Circuit's jurisdiction. However, the court decided the issue of self-execution only in *Postal. See* text accompanying notes 51-62 *infra.* In *Cadena,* an informant's tip and subsequent undercover investigation led the Coast Guard to a ship known to be carrying marijuana for importation into the United States. 585 F.2d 1252, 1256 (5th Cir. 1978). The Coast Guard forcibly stopped and boarded the vessel, 200 miles from the Florida coast, and discovered fifty-four tons of marijuana in the hold. *Id.* the defendants were convicted of conspiracy to import and distribute a controlled substance in the United States, in violation of federal law. *Id.; see* 21 U.S.C. §§ 841, 952 (1976).

On appeal to the Fifth Circuit, defendants alleged that, since none of the Convention's exceptions to the exclusive jurisdiction requirement of Article 6 applied to their case, *see* note 20 *supra,* the Coast Guard's boarding on the high seas constituted a breach of the treaty. Brief for Appellants at 21, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978). However, the appellants merely asserted that the Convention was "the controlling law," and did not argue the issue of self-execution. *See id.* The Fifth Circuit found statutory authorization for the boarding and held that the existence of probable cause and exigent circumstances justified the warrantless search under the fourth amendment. 585 F.2d at 1259, 1263. The court found that defendants lacked standing to assert the treaty as a defense to United States jurisdiction, because neither of the nations having jurisdiction over the defendants and the vessel were parties to the Convention. *Id.* at 1260-61; *see* notes 65-66 *infra.*

[24] 589 F.2d at 862.

[25] *Id.* at 884.

[26] *Id.* at 866. The Coast Guard initially boarded the foreign vessel within United States territorial waters to verify its nationality and destintion. *Id.* Federal statutes authorize the Coast Guard to board vessels which are within territorial waters or otherwise subject to United States jurisdiction, in order to examine the ship's papers and conduct a search. 14 U.S.C. § 89 (a) (1976); 19 U.S.C. § 1581 (1976); 19 C.F.R. § 162.3 (1979). On the first boarding the Coast Guard conducted no search, although defendant Postal offered an unexpected bribe to a Coast Guard officer. 589 F.2d at 866. Immediately following the first boarding, the vessel changed course and headed for the high seas. *Id.* at 867 Believing the ship to be transporting contraband, the Coast Guard approached a second time and compelled it to stand by for boarding. *Id.*

flag and exhibited no name or home port.[27] The Coast Guard boarded the ship and discovered 8,000 pounds of marijuana on board.[28] Defendants were convicted of conspiring to possess marijuana with intent to distribute and conspiring to import marijuana into the United States.[29]

On appeal to the Fifth Circuit, the defendants contended that the boarding and search of their vessel violated the Convention and that, because of the treaty violation, a United States court could not assert jurisdiction over them.[30] The government disagreed with the defendants, maintaining that the court had jurisdiction to prosecute defendants despite a treaty violation because the Convention was not enforceable as domestic law.[31] The Fifth Circuit agreed with the government, holding that violation of the non-self-executing Convention did not divest the court of personal jurisdiction.[32]

To defeat United States jurisdiction, an alien defendant must show that the Coast Guard breached a treaty ratified by the Senate and that the treaty was either executed or self-executing.[33] To ascertain whether the Convention was self-executing, the Fifth Circuit first looked to the language of the treaty.[34] Although Article 6, prohibiting any state from exercising jurisdiction over foreign vessels on the high seas, appeared to be self-executing, the court examined the Convention as a whole to determine whether the United States intended to deprive itself of jurisdiction.[35] The court did not decide whether the Convention was self-executing on its face.[36] Instead the court relied on extrinsic evidence of Senate intent, finding that the Senate meant to ratify the treaty without making it binding as domestic law.[37] The *Postal* court found abundant evidence to support a conclusion that the United States did not intend to relinquish jurisdiction

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[27] 589 F.2d at 866.

[28] The second boarding took place outside territorial waters, when the foreign ship was 16.3 miles from the United States coastline. *Id.* The ship was under continuous surveillance between the first and second boardings. *Id.* However, the "hot pursuit" exception did not justify the second boarding, since the Coast Guard had not given the requisite stop signal within territorial waters before continuing the chase into the high seas. *Id.* at 872; *see* Convention on the High Seas, *supra* note 3, art. 23, 3.

[29] 589 F.2d at 865. Persons who knowingly or intentionally possess a controlled substance with intent to manufacture, distribute or dispense, may be imprisoned, fined, or both. 21 U.S.C. § 846 (1976). Persons who conspire to unlawfully import controlled substances into the United States are similarly punishable. 21 U.S.C. § 963 (1976).

[30] 589 F.2d at 870.

[31] *See id.* at 865.

[32] *Id.* at 884.

[33] *See* text accompanying notes 7-11 *supra.* In *Postal,* the Fifth Circuit first determined that the Coast Guard had breached the Convention, and then evaluated the effect of that breach on domestic law. 589 F.2d at 873. Had the court found that the Coast Guard's actions did not constitute a breach of the Convention, it would not have reached the question whether the treaty was self-executing. *See* 589 F.2d at 868.

[34] 589 F.2d at 877.

[35] *Id.* at 877-78; *see* text accompanying notes 46-49 *infra.*

[36] *See* 589 F.2d at 877-78.

[37] 589 F.2d at 878-83; *see* text accompanying notes 51-62 *infra.*

over aliens apprehended beyond its territorial limits.[38]

The court noted several examples of long-standing United States policy extending both federal law and the jurisdiction of federal courts beyond territorial limits when persons outside those limits threaten to violate United States law or endanger domestic interests.[39] The court indicated that defendants could only overcome the compelling interest in domestic security, apparent from records of Senate hearings on the Convention, by a strong showing of legislative intent to supercede existing federal statutes by implementing Article 6 as enforceable United States law.[40] According to the court, the hearings not only failed to show Senate intent to limit United States jurisdiction,[41] but clearly demonstrated that the Senate did not intend to depart from existing domestic law.[42] Finding that the Convention had not been executed and was not self-executing, the Fifth Circuit rejected defendants' claim that their illegal arrest precluded exercise of personal jurisdiction over them by United States courts.[43]

The *Postal* court briefly noted that Article 6 appeared to be self-executing on its face, but did not further construe the language of the Convention.[44] The language of the Convention provides no basis for a positive conclusion that the treaty is either self-executing or non-self-executing.[45] While the Convention articulates broad principles to promote freedom of the seas, it fails to specify any means of enforcement or sanctions for violations of its terms.[46] Several articles are expressly non-self-executing, requiring individual states to draft regulations to enforce their provisions.[47] However, since a treaty often includes both self-executing and

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[38] 589 F.2d at 878-83; *see* text accompanying notes 51-62 *infra*.

[39] 589 F.2d at 879-81. The United States has long subscribed to the "protective principle" which gives a nation jurisdiction to enact laws attaching criminal consequences to extraterritorial acts which threaten its domestic security. *See* Ford v. United States, 273 U.S. 593, 599 (1927); Strassheim v. Daily, 221 U.S. 280, 285 (1911); United States v. Winter, 509 F.2d 975, 981 (5th Cir.), *cert. denied sub nom.* Parks v. United States, 423 U.S. 825 (1975); Rivard v. United States, 375 F.2d 882, 886 (5th Cir.), *cert. denied sub nom.* Groleau v. United States, 389 U.S. 884 (1967); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, § 33(1). Courts also refer to the protective principle as the "objective view of the territorial principle of jurisdiction," or jurisdiction which reaches all acts which take effect within the sovereign although the actor is elsewhere. *See, e.g.*, United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978); United States v. Keller, 451 F. Supp. 631, 635 (D.P.R. 1978). Application of the protective principle requires that the relative weights of domestic and international concerns be balanced to determine whether the interest of the United States in prosecution of the domestic criminal charge, or the world interest in state sovereignty, is more compelling. *See* United States v. Conroy, 589 F.2d 1258, 1265-66 (5th Cir. 1979); United States v. Postal, 589 F.2d 862, 871 (5th Cir. 1979); United States v. Williams, 589 F.2d 210, 213 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978).

[40] 589 F.2d at 881, 884.

[41] *Id.* at 881-82.

[42] *Id.* at 879, 882-84; *see* text accompanying notes 51-62 *infra*.

[43] *See* 589 F.2d at 884.

[44] *Id.* at 877.

[45] *See generally* Convention on the High Seas, *supra* note 3.

[46] *See, e.g.*, Convention on the High Seas, *supra* note 3, arts. 6, 22, 23.

[47] *See, e.g., id.* arts. 24, 25, 27-29. These provisions deal with pollution of the seas and

non-self-executing articles, the Convention's non-self-executing articles are not determinative of the construction of the whole treaty.[48]

A self-executing treaty or article becomes binding domestic law in every ratifying nation.[49] None of the Convention's individual articles state that they will become binding law without legislative implementation. Nor does a single article make self-executing all provisions in which the drafters expressed no intent. On its face, therefore, the Convention is ambiguous regarding self-execution.

In *Postal,* the Fifth Circuit relied heavily on legislative intent to resolve the ambiguity inherent in the Convention.[50] The *Postal* court noted that as early as 1790 the United States had asserted authority to board and search foreign ships outside its territorial waters.[51] For nearly 200 years the United States has enacted laws reaching beyond its territorial limits to protect compelling domestic interests,[52] and has established sanctions for violations of those laws.[53] The Anti-Smuggling Act of 1935[54] authorized the President to designate a temporary "customs enforcement zone" extending up to sixty-two miles from the coast, within which the Coast Guard could board and inspect suspicious vessels.[55]

If the Convention were construed as self-executing, Article 6 would unconditionally prohibit seizure or arrest of aliens threatening a coastal nation's domestic security by that coastal state, unless specifically authorized by another international treaty.[56] The Fifth Circuit therefore reasoned

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the installation of cables and pipelines on the ocean floor. *See id.*

[48] *Self-Executing Treaties, supra* note 9, at 773 n.6.

[49] *See* note 7 *supra.* In all nations which recognize a distinction between self-executing and non-self-executing treaties an expressly self-executing treaty will automatically become domestic law upon ratification. *Id.* However, even a treaty which specifically provides for self-execution cannot become enforceable law in a state which does not recognize the concept of self-execution, in the absence of legislative implementation. *See* 589 F.2d at 878; *Self-Executing Treaties, supra* note 9, at 773-75.

[50] *See* 589 F.2d at 878-84; text accompanying note 10 *supra;* text accompanying notes 57-61 *infra.*

[51] 589 F.2d at 879. In 1790, Congress passed legislation enabling the Coast Guard to board foreign ships beyond the three-mile limit of the territorial sea, in order to collect taxes imposed by federal statutes. 1 Stat. 145 (1790). The Supreme Court sustained the statute, holding that the United States was competent to compel compliance with its laws beyond the territorial sea in order to protect domestic interests and ensure domestic security. Church v. Hubbart, 6 U.S. 187 (1804).

[52] *See* 589 F.2d at 879, 885. Current narcotics control legislation is based on a congressional finding that a great part of the traffic in controlled substances moves through interstate and foreign commerce. Controlled Substances Act, 21 U.S.C. § 801(3) (1976). The commerce clause of the United States Constitution gives Congress the power to regulate commerce between the United States and foreign nations. U.S. CONST. art. I, § 8, cl. 3.

[53] *See, e.g.,* note 29 *supra.*

[54] 19 U.S.C. §§ 1701-1711 (1976). The Anti-Smuggling Act of 1935 imposes criminal penalties for illegal importation of liquor. *See id.* The Act is founded on the Church v. Hubbart doctrine of extraterritorial jurisdiction. United States v. Postal, 589 F.2d at 880; *see* Church v. Hubbart, 6 U.S. 187, 233-35 (1804); note 51 *supra.*

[55] 19 U.S.C. § 1701(a) (1976).

[56] *See* 589 F.2d at 878.

that the Convention's drafters and the Senate would have given considerably more attention and debate to Article 6 had it been intended to be self-executing.[57] In the absence of either an express provision for self-execution or strong extrinsic evidence of Senate intent, the court declined to hold that the Senate meant summarily to reverse the United States' settled principle of extraterritorial jurisdiction.[58] The court's conclusion is sound, since a self-executing reading of Article 6 would be entirely inconsistent with existing legislative policy.[59]

Legislative history of the Convention indicates that the United States intended to adhere to its traditionally broad assumption of jurisdiction. In *Postal,* the Fifth Circuit quoted testimony before the Senate Committee on Foreign Relations stating that the Convention did not contain provisions which would supercede domestic legislation.[60] In addition, a representative of the State Department testified before the Committee that new implementing legislation might be "necessary or desirable."[61] The *Postal* court found that these statements weighed in favor of a non-self-executing reading of Article 6.[62]

The Fifth Circuit's holding that Article 6 is not self-executing enables the United States to enforce domestic law against aliens arrested on the high seas, although a court which assumes jurisdiction may have to rule on a treaty based claim.[63] The International Court of Justice is the judicial

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[57] 589 F.2d at 878.

[58] *Id.* at 884.

[59] *See* note 29 *supra.* Congress has enacted federal statutes creating strict registration requirements for distributors of controlled substances (21 U.S.C. §§ 821-829 (1976)), prohibiting unlicensed manufacture or distribution of controlled substances (21 U.S.C. §§ 841, 952 (1976)), and establishing sanctions for violation of, or conspiracy to violate any statute regulating controlled substances (21 U.S.C. §§ 846, 963 (1976)). By definition, the process of importation begins in another country, indicating that Congress intended the statutes to be operative beyond United States territorial limits. United States v. Cadena, 585 F.2d 1252, 1259 (5th Cir. 1978).

[60] 589 F.2d at 881. Mr. Arthur Dean, Chairman of the United States Delegation to the 1958 Law of the Sea Conference, testified before the Senate Foreign Relations Committee that the Conventions on the Law of the Sea contained no provisions which would override domestic legislation. SENATE HEARINGS, *supra* note 16, at 75, *reprinted in* 106 CONG. REC. 11191 (1960).

[61] 589 F.2d at 881-82. A statement of self-executing intent by the State Department may be conclusive evidence on the question whether a particular treaty operates as domestic law immediately upon ratification. *See Criteria for Self-Executing Treaties, supra* note 6, at 243. Conversely, the Fifth Circuit found that the absence of a State Department statement indicated that the treaty should be construed as non-self-executing. 589 F.2d at 881-82.

[62] 589 F.2d at 882.

[63] Since Article 6 is not self-executing and has not been legislatively implemented, it is not a part of domestic law. *See* text accompanying notes 7-8 *supra.* United States courts are not competent to enforce Article 6 because they have no guidelines to determine whether a violation has taken place. *See, e.g.,* Diggs v. Richardson, 555 F.2d 848, 850 (D.C. Cir. 1976); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976); Saipan v. United States Dep't of Interior, 502 F.2d 90, 101 (9th Cir. 1974), (Trask, J., concurring); *Self-Executing Treaties, supra* note 8, at 774. Thus, where defendants allege a violation of Article 6, a United States court can decline to exercise jurisdiction over the treaty-based defense while deciding the domestic question. *See* United States v. Postal, 589 F.2d at 884-91.

branch of the United Nations,[64] and has jurisdiction to decide all questions of international law which are properly before it.[65] The Optional Protocol submitted to the Senate with the Convention provided that the International Court would have compulsory jurisdiction over all disputes involving interpretation or application of the Convention.[66] Thus, the Optional Protocol mandated that every ratifying state relinquish jurisdiction over all cases in which a party pleaded a claim or defense based on the Convention.[67] The Convention's drafters intended that the Optional Protocol would designate the International Court as the single judicial forum for resolving disputes founded on the treaty.

The Senate did not agree, however, that the International Court should have sole jurisdiction to decide treaty questions. Even though the United States formally declared its acceptance of the International Court's jurisdiction in 1946,[68] an amendment introduced by Senator Thomas Connally reserved to the United States the right to determine whether a treaty

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[64] U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 1. The Court is composed of elected judges. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 2. No two of its fifteen members are nationals of the same state. *Id.* art. 3, 1.

[65] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, 1. Only a sovereign state may bring an action in the International Court. *Id.* art. 34, 1. A private citizen has no standing to sue in the International Court alleging a treaty violation since his rights under the treaty are derived from those of a party state. United States v. Conroy, 589 F.2d 1258, 1268 (5th Cir. 1979). In *Conroy*, the government of Haiti consented to the Coast Guard's boarding, search and seizure of a Haitian ship in Haitian waters. *Id.* at 1263. The search disclosed 7,000 pounds of marijuana. *Id.* The Fifth Circuit held that the individual defendants lacked standing to assert the improper seizure as a defense, where the offended sovereign refused to protest. *Id.* at 1268.

[66] Optional Protocol, *supra* note 13, art. 1. *But see* note 15 *supra*. Only a nation that has ratified the Optional Protocol has standing to require the International Court to assume jurisdiction over an aggrieved citizen's Convention-based claim or defense. Optional Protocol, *supra* note 13, art. 1; *see* United States v. Williams, 589 F.2d 210, 212 n.1 (5th Cir. 1979).

The foreign ship in *Postal* was registered in the United Kingdom and its crew claimed Australian citizenship. 589 F.2d at 866. Both the United Kingdom and Australia have ratified the Convention and the Optional Protocol. *See* Department of State, Treaties in Force (1979); 589 F.2d at 868 n.8. Although either state could have sued in the International Court alleging a violation of the Convention, neither chose to do so. Since the individual defendants could not bring an action in the Court, and Convention was not enforceable law in the United States, the defendants were without a judicial forum competent to hear and rule on their treaty defense. *See* notes 65-66 *supra*.

[67] 106 CONG. REC. 11193 (1960) (remarks of Sen. Russell Long). When the Optional Protocol came before the Senate for ratification, Senator Long expressed concern that its ratification would deprive the United States of the ability to decide questions of domestic law. *Id.* at 11193, 11195-96. Some weeks after the Senate's initial consideration and rejection of the Optional Protocol, Senator Long submitted to the Senate a reservation to the Protocol. 106 CONG. REC. 15748 (1960). The proposed amendment reserved to the United States the power to decide that a particular matter was essentially a domestic question, and thus properly within domestic jurisdiction rather than that of the International Court. *Id.* The Optional Protocol and accompanying reservation have never been reconsidered by the Senate.

[68] 61 Stat. 1218 (1946). President Truman signed a declaration acknowledging the International Court's compulsory jurisdiction in disputes concerning interpretation of a treaty and questions of international law, on behalf of the United States. *Id.*

dispute concerned a domestic matter and, if so, to exercise jurisdiction over both the domestic question and the treaty dispute.[69] The Optional Protocol is clearly inconsistent with the Connally Amendment. The United States did not ratify the Optional Protocol, however, and thus did not deprive federal courts of the ability to exercise jurisdiction where defendants allege a violation of the Convention.[70]

The United State presently has a compelling interest in controlling the ever increasing supply of narcotics smuggled into its territories. Historically the United States has subscribed to the principle of freedom of the seas enunciated in the Convention.[71] However, the treaty promotes freedom of the seas only to the extent that the exercise of that privilege does not infringe upon the sovereignty of any individual state.[72] A foreign ship carrying a cargo of narcotics, which lies on the high seas adjacent to a coastal nation, abuses the rights and privileges conferred by the Convention. It is unlikely that the Convention's drafters or its signatories contemplated that Article 6 would enable the crew of such a vessel to claim automatic immunity from prosecution.[73]

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[69] *See id.;* 106 CONG. REC. 11193, 11195-96 (1960). The amendment is known as the Connally Reservation. *Id.* The United States will therefore assume jurisdiction over any dispute in which domestic considerations outweigh international concerns. *Id.*

[70] *See* 106 CONG. REC. 11193 (1960). Ostensibly, the Optional Protocol failed because less than two-thirds of the Senators were present when the Senate voted to ratify. *Id.* at 11193. A newspaper article published soon after the vote suggested that those senators who were not present for the vote may have sought to thwart the Protocol without affirmatively voting against it. Moley, *Executive Bypass of the Connally Amendment Perils U.S. Interests,* Los Angeles Times, June 24, 1960, at 5, col. 1; *reprinted in* 106 CONG. REC. 15749 (1960). Since President Eisenhower sought to introduce the four conventions and the Optional Protocol for simultaneous ratification, *see* 105 CONG. REC. 18673 (1959) (message from the President), many senators may not have realized the conflict between the Protocol and the Connally Reservation prior to Senator Long's comments. *Id.; see* text accompanying note 60 *supra.*

[71] *See* 106 CONG. REC. 11191 (1960). Self-interest motivates a coastal nation to protect its vessels and its territory from harmful or threatening foreign intrusion. United States v. The Winds Will, 405 F. Supp. 879, 882 (S.D. Fla. 1975). Ideally, every nation's desire to maintain internal security will encourage it to supervise and control its own vessels. *Id.* However, the drug smuggler's home state may lack the receiving nation's direct interest in preventing drug traffic. Policing measures by the receiving nation may therefore be the only effective means of controlling international shipment of controlled substances. *See* Church v. Hubbart, 6 U.S. 187, 233-35 (1804); United States v. Cadena, 585 F.2d 1252, 1263-64 (5th Cir. 1978).

[72] The Convention does not create an absolute right to non-interference on the high seas. *See* notes 19-20 *supra.* The Convention's drafters sought both to promote freedom of the seas and to protect national sovereignty. *See* notes 18-20 *supra.*

[73] A rule that a coastal nation cannot seize a ship known or believed to be transporting controlled substances for importation into its territory, merely because the vessel lies outside territorial waters, thwarts the nation's ability to control drug traffic effectively. *See* text accompanying note 71 *supra.* When a coastal nation arrests alien drug smugglers it furthers the international interest in controlling the availability and use of narcotic drugs. *See generally* Single Convention on Narcotic Drugs, Mar. 30, 1961, Preamble [1967] 18 U.S.T. 1409, T.I.A.S. No. 6298, 520 U.N.T.S. 204; note 52 *supra.* Arrest of foreign drug smugglers in international waters and their prosecution under the laws of the arresting coastal nation, does

The language of the Convention on the High Seas, its legislative history, and the Senate's refusal to ratify the Optional Protocol, indicate that the treaty did not become enforceable domestic law upon ratification. Thus, the Fifth Circuit has properly found that the Convention is non-self executing.[74] Since the treaty has not been legislatively implemented into domestic law, the United States has imposed no binding territorial limitations upon its jurisdiction.[75] The long-standing domestic principle that defendants may not defeat a court's jurisdiction by asserting an unlawful arrest therefore continues to govern aliens apprehended by the United States on the high seas.[76]

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not necessarily injure the sovereign interests of their home state. *See, e.g.*, United States v. Postal, 589 F.2d 862, 879 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1260-61 (5th Cir. 1978).

[74] United States v. Postal, 589 F.2d at 884. *See* text accompanying notes 51-62 *supra.*

[75] *See* notes 7-9 *supra*, and accompanying text.

[76] *See* notes 5-6 *supra*, and accompanying text.