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JURISDICTION OVER FOREIGN FLAG VESSELS AND THE U.S. COURTS: ADRIFT WITHOUT A COMPASS?

*Stefan A. Riesenfeld**

Jurisdiction of a nation over vessels flying a foreign flag and over persons aboard such vessels should be a relatively simple and well settled matter. The sad fact, however, is that it is not. Moreover, the recent 1986 Maritime Drug Law Enforcement Act¹ has added unnecessary and unexplainable confusion.

Looking at recent cases on the circuit level one gets the impression that our judges are adrift without instruments for obtaining a fix. A case in point is *United States v. Peterson*,² in which defendants were convicted in the United States District Court for the Southern District of California for possession of marijuana in United States customs waters with intent to distribute,³ and for conspiracy to destroy goods to prevent seizure.⁴

The ship seized, the *Pacific Star*, was a vessel of Panamanian registry. With the assent of Panama, she was arrested by the United States Coast Guard cutter *Citrus*, while travelling from the Philippines to Panama. The place of the seizure was on the high seas approximately one hundred miles south of Cabo San Lucas (on the southern tip of Baja California). The interception of the *Pacific Star* was the culmination of a story involving a plot to smuggle thirty-two tons of marijuana from Thailand to the United States and the discovery of that venture by the Bangkok office of the U.S. Drug Enforcement Agency. The smuggling operation consisted of several phases, some of which were discovered by the cooperation of Thai, Philippine and Panamanian narcotics authorities, involving wire-taps of the principal conspirator and his associates.

The conviction was challenged on appeal on the ground that the

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1. Maritime Drug Law Enforcement Prosecution Improvements Act, constituting Title III, Subtitle C of the Anti-Drug Abuse Act of 1986, P.L. 99-570, codified at 46 U.S.C. app. §§ 1901-1904. This legislation was substituted for Public Law 96-350, 94 Stat. 1159 (1980), an act to facilitate increased enforcement by the Coast Guard of laws relating to the importation of controlled substances, and for other purposes, codified at 21 U.S.C. § 955a-955d.

2. 812 F.2d 486 (9th Cir. 1987).

3. 46 U.S.C. App. § 1903(a), at the time of the commission of the offense, 21 U.S.C. § 955a.

4. 18 U.S.C. § 2232.

marijuana recovered during boarding of the *Pacific Star* was inadmissible because unlawfully seized. The bases for appellants' evidentiary challenge were: that the discovery of the ship and its contraband was tainted by unlawful wiretaps participated in by United States officials; that the boarding was without statutory authority in any event, among other reasons because the consent of Panama was required and not obtained; and that the search was unlawful because no warrant was obtained.

The United States Court of Appeals for the Ninth Circuit, by a panel composed of Judges Browning, Kennedy and Beezer, affirmed the judgment of the U.S. District Court, Judge (as he then was) Anthony Kennedy writing the opinion of the court. While the opinion dealt at length with the constitutional aspects of the discovery of the location of the vessel by means of wiretaps and the search without warrant, it made short shrift of the international and statutory authority of the Coast Guard to seize a foreign flag vessel on the high seas. In the words of Judge Kennedy:

The question whether boarding the *Pacific Star* violated appellants' rights under international law need not detain us. Appellants claim that the seizure of the ship was in violation of Article 6 of the Convention on the High Seas, *opened for signature*, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962). The ramifications of international law are largely political and any violation of international law here is relevant only as it informs our decision on whether the search was or was not in violation of our statutory and constitutional standards. The treaty is not self-executing in the sense that it confers individual rights on these litigants to suppress evidence. If the search was properly authorized, a violation of the treaty would not allow for exclusion of the evidence. See *United States v. Williams*, 617 F.2d 1063, 1089-90 (5th Cir. 1980). In any event, as we discuss below Panama's consent removes international law concerns from the case. *Id.*⁵

With all due respect, this statement (except the last sentence) was not only totally unnecessary, but actually disturbing and erroneous.⁶ It was unnecessary to comment either on the effect of the Convention on the Law of the High Seas or on the ramifications of a violation of international law, because Panama is not one of the 57 parties to the treaty and the self-executing nature of Art. 6 of the Convention was immaterial. The international legality of the seizure depended totally on customary international law. Equally regrettable is the fact that Judge Kennedy rested his statement on the effect of Art. 6 of the Con-

5. 812 F.2d at 492.

6. Nevertheless, it was needlessly quoted with approval in *U.S. v. Biermann*, 678 F.Supp. 1437, 1443 (N.D. Cal. 1988).

vention solely on a dictum in *United States v. Williams*⁷ which likewise involved a Panamanian vessel and the consent of Panama to the seizure. Moreover, the court in *United States v. Williams* noted expressly that the seizure of the vessel involved, the *PHGH*, did not constitute a violation of the Convention but, if at all, of customary international law.⁸ Hence the reference in *Williams*⁹ to *U.S. v. Postal*¹⁰, the only case where the self-executing nature of Art. 6 of the Convention was actually material, was not called for and is only explainable by the fact that the author of the opinion in *U.S. v. Postal* was also the author of the en banc opinion in *United States v. Williams*. *U.S. v. Postal*, however, has not remained without criticism.¹¹

U.S. v. Postal held that a seizure on the high seas in violation of customary international law would not defeat the jurisdiction of U.S. courts over an offense committed in violation of United States criminal law, relying for that proposition on the *Ker-Frisbie* doctrine. This doctrine was named after the judgments of the Supreme Court in *Ker v. Illinois*¹² and *Frisbie v. Collins*.¹³ In *Ker* plaintiff in error had been convicted for larceny in Illinois, and brought the case to the U.S. Supreme Court on the ground that the conviction violated his rights under the Fourteenth Amendment because the jurisdiction of the Illinois courts had been obtained by his forcible abduction from Peru by a federal official without compliance with the Treaty of Extradition between the United States and Peru. The U.S. Supreme Court rejected this assignment of error and held that the Due Process Clause was not violated by "mere irregularities in the manner in which [the offender] may be brought in the custody of the law."¹⁴ The Court added the

7. 617 F.2d 1063 (5th Cir. 1980) (en banc).

8. 617 F.2d at 1090.

9. 617 F.2d at 1082.

10. 589 F.2d 862 (5th Cir. 1979). The case involved the seizure on the high seas of a vessel of Grand Cayman registry. The vessel actually was boarded twice. The first time the boarding was justified under article 22 of the Convention on the High Seas, while the second boarding was in violation of art. 6 of that convention. The panel of the Court of Appeals, Fifth Circuit, held that art. 6 of the Convention was not self-executing and that therefore the so-called *Ker-Frisbie* doctrine precluded a claim of lack of jurisdiction based on the illegality of the seizure by reason of a violation of customary international law.

11. See the statement by Judge Alvin B. Rubin, speaking for the dissenting minority of four judges: "Respectfully, I also differ with the majority analysis of international law and the discussion of self-executing treaties," 617 F.2d at 1094 n.2. See also Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 455 (1987). Justice Kennedy's unfortunate though indirect reliance on *Postal* regrettably is not an isolated occurrence but quite common among federal judges. *Id.* at n.48.

12. 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886).

13. 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952).

14. 119 U.S. at 440.

cryptic reasoning:

The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. . . . However this may be, the decision of that question is as much within the province of the State court, as a question of common law, or the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.¹⁵

Hence, the Supreme Court in 1886 felt that a violation of the law of nations presented no question of federal law reviewable on writ of error. Although it is settled today that customary international law is federal law and that its application by a state court is subject to review by the U.S. Supreme Court¹⁶, unfortunately it is still accepted that abduction in violation of the sovereignty of a foreign nation does not vest the victim with an independent right to resist the exercise of criminal jurisdiction by the nation to whose territory the abductee was brought.¹⁷

The principal exception to that rule, first announced by Justice Brandeis in *Cook v. United States*,¹⁸ permits challenge of the jurisdiction of the court when such jurisdiction is based on seizures by U.S. officers made in violation of a self-executing treaty. Although in *Cook* the relevant treaty was a bilateral treaty fixing the distance from the coast within which a lawful seizure was authorized, the Court held that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty."¹⁹ There is no reason to apply a different rule to Article 6 of the Convention on the High Seas and the attempts at justifying a distinction are unpersuasive.²⁰

15. 119 U.S. at 444.

16. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S. Ct. 923, 939, 11 L. Ed. 2d 804, 822 (1964).

17. See, e.g., *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir.1988); *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987); *United States v. Yunis*, 681 F.Supp. 909, 918 (D.D.C. 1988).

18. 288 U.S. 102, 53 S. Ct. 102, 77 L.Ed. 641 (1933).

19. 288 U.S. at 121-122.

20. Professor Rogers' suggestion that art. 6 of the High Seas Convention did not mean to

Ker correctly emphasized that the mere existence of an extradition treaty did not restrict the adjudicatory jurisdiction of the receiving state, if presence of the offender was obtained by other means, for instance by expulsion.²¹ Moreover, *Ker* appropriately stressed that the exercise of jurisdiction over an individual whose presence was obtained by abduction would not bar a damage action by the victim against the kidnapers.²² An interesting modern example of these aspects of the *Ker-Frisbie* doctrine is the tale of Sidney Jaffe.²³

Sidney Jaffe, a lawyer born in the United States and subsequently naturalized in Canada and a resident of that country, was arrested in Florida on charges of violations of the Florida Uniform Land Sales Practices Act.²⁴ Accredited Surety and Casualty Co. (Accredited) posted bail totalling \$137,500 to secure Jaffe's release. Trial was set for May 18, 1981. Jaffe, who had meanwhile returned to Canada, failed to appear, claiming health reasons. Accredited's bond was forfeited and a Florida judge issued a warrant for Jaffe's arrest and directed the state attorney to seek extradition. The applications to the Governor of Florida for the initiation of extradition proceedings were rejected for formal reasons. The judge suspended the forfeiture of Accredited's bond on condition that Accredited place the amount of the bond in escrow and produce Jaffe's presence within ninety days. As a result two professional bailbond recovery agents (bounty hunters), named Timm Johnsen and Daniel Kear, went to Canada and seized Jaffe in front of his apartment building in Toronto (Canada) on September 23, 1981. They forcibly transported Jaffe across the Rainbow Bridge at Niagara Falls and from there by air to Orlando, Florida. The state court (Circuit Court for Putman County) convicted Jaffe in 1982 on 28 counts under the Land Sales Practices Act and for failure to appear at his scheduled hearing.²⁵

The kidnapping of Jaffe caused a furor in Canada. Canada lodged several diplomatic protests with the U.S. Government and in addition sought judicial relief in the United States District Court.²⁶ Secretary

prohibit adjudications after wrongful seizures, *supra* note 11, at 460, flies in the face of the sound reasons for the contrary result given by Justice Brandeis in *Cook*.

21. 119 U.S. at 442, 444. *Accord*, United States v. Yunis, 681 F.Supp. 909, 915 (D.D.C. 1988).

22. 119 U.S. at 444.

23. The facts set forth are gleaned from the cases cited in the text and the footnotes of the cases, and various reports in the daily press. The relevant cases are Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987); Jaffe v. Boyles, 616 F.Supp. 1371 (W.D.N.Y. 1985); Jaffe v. State of Florida, 438 So.2d 72 (Fla. App. 5 Dist. 1983); Jaffe v. Sanders, 463 So.2d 318 (Fla. App. 5 Dist. 1984).

24. Fla. Stat. § 498.033(3) (1979).

25. Fla. Stat. § 843.15 (1979).

26. In re Application of Canada, U.S. Dist. Ct. Fla. 83-661-Civ-J-16.

of State Shultz and Attorney General Smith attempted to obtain release of Jaffe from Florida's Probation and Parole Board but their efforts remained unsuccessful until October 11, 1983.²⁷ In the interim, on July 13, 1983, new charges were brought against Jaffe for violating the Florida organized fraud act.²⁸ But on October 11, 1983 he was also released on that charge after posting \$150,000 bail. Ultimately, on October 4, 1983, the Florida District Court of Appeal, Fifth District reversed the conviction of Jaffe on the charges of unlawful land sales practices on technical grounds, but upheld the conviction for failure to appear.²⁹ Upon his release on October 11, 1983, Jaffe went home to Canada.³⁰ He did not return to Florida to stand trial for the remaining fraud and perjury³¹ charges, after an appeal to the state court on grounds of double jeopardy³² and habeas corpus petition³³ had failed.

Jaffe, however, brought an action in the U.S. District Court, Western District of New York, against various New York and Florida state officials, Accredited and other persons under the Civil Rights Act,³⁴ and the Alien Tort Statute.³⁵ The U.S. District Court transferred the case to the U.S. District Court for the Central District Court of Florida,³⁶ which dismissed the action without prejudice on motion of the plaintiffs.³⁷ The bounty hunters, after Canada's request for extradition, appeared in Canada and were convicted and sentenced.³⁸

While the rule that, in the absence of a treaty, forcible abduction of a person accused of an offense against the laws of the country to which that person is abducted does not bar a prosecution, is still widely recognized — also in other countries³⁹ — it cannot be ignored that it has

27. Details are reported in the N.Y. Times, Aug. 9, 1983, at A6, col.3.; N.Y. Times, Oct. 6, 1983 at A18, col.6.; N.Y. Times, Oct. 12, 1983 at A14, col.3.

28. Fla. Stat. § 817.034 (1981).

29. Jaffe v. State of Florida, 438 So.2d 72 (Fla. App. 5 Dist. 1983).

30. Reuter's International News, Oct. 12, 1983.

31. The perjury charge was brought after Jaffe's return to Canada, on March 2, 1984, Jaffe v. Boyles, 616 F.Supp. 1371, at 1374 (W.D.N.Y. 1985).

32. Jaffe v. Sanders, 463 So.2d 318 (Fla. App. 5 Dist. 1984 *rh'g. denied*, 1985).

33. Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987).

34. 42 U.S.C. § 1983 (1982).

35. 28 U.S.C. § 1350 (1982).

36. Jaffe v. Boyles, 616 F.Supp. 1371 (W.D.N.Y. 1985).

37. Unpublished opinion of Judge Moore of the U.S. District Court for the Middle District of Florida of Nov. 5 1986, Docket 85- 1128-Civ-T-16.

38. Associated Press, Oct. 31, 1986, Domestic News.

39. See cases cited in Mann, *Zum Strafverfahren gegen einen völkerrechtswidrig Entführten*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 469, 476-478 (1987). See also , with respect to Canadian law, Regina v. Sunila and Solayman, 26 C.C.C.

come under increasing criticism from scholars of international law,⁴⁰ and that it has been convincingly argued that modern international law may attribute self-executing character even to rules of customary international law.⁴¹ All the more, it is deplorable that Justice Kennedy embellished his gratuitous discussion on the effects of a seizure in violation of international law with the comment: "The ramifications of a violation of international law are largely political."⁴² This echoes the restrictive views to the same effect espoused by former Judge Bork in the *Tel-Oren* case.⁴³ Since consent of the flag state to the arrest removes the illegality of a seizure by another nation's vessel both under the convention⁴⁴ and customary international law,⁴⁵ the only real question pertained to the authority of the foreign agency to grant such consent. Had Panama not consented but insisted on immediate return of the *Pacific Star* and its crew, other and more difficult questions would have arisen.⁴⁶

(3d) 177 at 185 (Nova Scotia S. Ct., App. Div., 1986) (actually the vessel was seized under the right of hot pursuit). Cf., the cases discussed *infra*, note 44.

40. See, e.g., Mann, *supra* note 37.

41. Kirgis, *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323, 330 (1988).

42. 812 F.2d 486, 492; quoted with approval in *United States v. Biermann*, 678 F. Supp. 1437, 1443 (N.D. Cal. 1988).

43. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C. Cir. 1984).

44. Convention of the High Seas, art. 6.

45. See, e.g., *United States v. Williams*, 617 F.2d 1063, 1089, 1090 (5th Cir. 1980).

46. In a recent case decided by the Supreme Court of the Federal Republic of Germany (BGH) on December 19, 1987 (N.J.W. 1987 p. 3087, 41 MDR 1987 p. 427), a Turkish national and resident of the Netherlands, accused of trafficking in narcotics, was induced by trickery practiced by an undercover agent of the German criminal police to travel with him to Germany to complete a deal. The dope dealer was arrested and brought to trial. He was convicted by the trial court in Limburg a.d. Lahn on March 20, 1985, and sentenced to eleven years imprisonment. The accused sought a reversal of the conviction on the ground that he was not subject to the criminal jurisdiction of the F.R.G. because of a general rule of international law requiring respect for the territorial sovereignty of other nations. By order of October 23, 1985, the Federal Supreme Court rejected that argument but vacated the sentence, remanding the case to another chamber of the Limburg court to reconsider the sentence. By *note verbale* of January 6, 1986, the Dutch Government protested the abduction and demanded immediate reconduction of the victim to the Netherlands. The accused filed a constitutional complaint with the Federal Constitutional Court, but the complaint was declared to be inadmissible by a three judge chamber of the Second Senate in an order of June 3, 1986 - 2 BvR 1451/85 (unpublished). For its holding the Chamber relied on a prior order of another chamber of the Second Senate which, after extensive review of foreign cases, concluded that the abduction of a criminal from another country and subsequent prosecution violated neither a rule of customary international law within the meaning of Art. 25 of the Organic Law of the F.R.G. nor any other constitutional right of the accused, Order of July 17, 1985, 2 BvR 1190/84, N.J.W. 1986 p. 1427. In the prior case, however, as well as in a companion case, involving another abduction from the Netherlands and decided on the same day as the case at bar, BVerfG (3 Ch. of the Second Senate, Order of 3.6.1986, 2 BvR 837/85, N.J.W. 1986 P. 3021), the nation whose territorial sovereignty had been violated, had not filed a demand for the immediate return of the abducted individual. Because such a request had been made in the instant case, the Federal Constitutional Court observed that such demand would bar the further exercise of criminal jurisdiction. Therefore, although on May 30, 1986 the accused had been sentenced again to 11 years imprisonment, the BGH, on a second petition for

Perhaps the most aggravating feature of Judge Kennedy's unfortunate passage is the fact that at the time of the case Congressional legislation had made the whole problem obsolete.

In 1980 Congress enacted an Act "to facilitate increased enforcement by the Coast Guard of laws relating to the importation of controlled substances and for other purposes".⁴⁷ To the extent of any inconsistency this statute supercedes both any self-executing provisions of the Convention on the High Seas and prior domestic legislation. This act declared it to be a criminal offense for *any* person to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance

- 1) on board a vessel of the United States;
- 2) on board a vessel subject to the jurisdiction of the United States on the high seas; or
- 3) on board any vessel within the customs waters of the United States.⁴⁸

"Customs waters"⁴⁹ were defined as meaning those waters as defined in section 401(j) of the Tariff Act of 1930.⁵⁰

This signified that to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance did not constitute a criminal offense, if committed by a non-citizen on board a foreign flag vessel, unless that vessel was within the customs waters of the United States.

The only crime the definition of which was established without reference to any specified location was the separate offense of possession, manufacturing or distributing a controlled substance with the intent that it be, or the knowledge that it will be, unlawfully imported into

revision, refused to reverse the conviction but suspended further prosecution, Order of December 19, *supra*. For a discussion of the case, see Herdegen, *Die Achtung fremder Hoheitsrechte als Schranke nationaler Straf Gewalt*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 221, 239 (1987). Herdegen seems to surmise that the Netherlands request for reconduction followed the order of the Constitutional Court of June 3, 1986, an assumption which differs from the facts recited in the report in the N.J.W.

47. Public law 96-350, 94 Stat. 1159 (1980), codified at 21 U.S.C. §§ 955a-d and 960. For an explanation of the purpose and effects of the act, see Senate, 96th Cong., 2d Sess., Sen. Report 96-855.

48. 21 U.S.C. § 955a(a)-(c). These were the subsections under which the defendants in *United States v. Peterson* were charged.

49. 21 U.S.C. § 955b(a).

50. Section 401(j) of the Tariff Act of 1930, 19 U.S.C. § 1401(j) provides:

The term "customs waters" means in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize or otherwise to enforce upon such vessel upon the high seas to enforce the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement. . . .

the United States.⁵¹

Hence in the case of subsection (c) of the Act (relating to offenses by non-citizens on board foreign flag vessels), the spatial scope of the exercise of *legislative* jurisdiction and the spatial scope of the exercise of *enforcement* jurisdiction⁵² were congruous.⁵³ This clearly enabled an alien charged with a violation of 21 U.S.C. § 955a(c) to invoke the absence of an authorization by the flag state as a defense to prosecution without being disarmed by the *Ker-Frisbie* doctrine. This would have been the situation in *Peterson*, but for the consent of the Panamanian authorities.⁵⁴ The only real jurisdictional issue existing at the time of the events, therefore, was the authority of the Panamanian agency to enter into such an arrangement and its meaning.⁵⁵

Unfortunately in 1986 the respective provisions were revised,⁵⁶ thereby creating new problems and confusion. The new Maritime Drug Law Enforcement Act makes it an offense, "for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." "Vessel subject to the jurisdiction of the United States" received a new definition, including a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;⁵⁷ a vessel located within the customs waters of the United States;⁵⁸ and a vessel located in the territorial waters of another na-

51. P.L. 96-350(d), codified at 21 U.S.C. § 955a(d).

52. For the distinction between the jurisdiction to prescribe (legislative jurisdiction) and jurisdiction to enforce (enforcement jurisdiction), see *RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS OF THE UNITED STATES*, 1986, §§ 401,402, and 431 (1987).

53. The enforcement jurisdiction is governed by 14 U.S.C. § 89(a), providing: "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." Hence the enforcement jurisdiction of the Coast Guard excludes a foreign flag vessel with respect to acts committed thereon if these acts are not offenses under laws of the United States. They are such offenses only if the vessel is within the customs waters of the United States. *Cf.* *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir. 1988).

54. The situation might have been different if the charge had been under 21 U.S.C. § 955a (d).

55. *United States v. Peterson*, 812 F.2d at 492,493.

56. The revision was inserted into two major pieces of legislation: The Anti-Drug Abuse Act of 1986, P.L. 99-570, 100 Stat. 3207 et. seq., Title III, Subtitle C, Sec. 3201, and the Coast Guard Appropriation Act of 1986, P.L. 99-640, 100 Stat. 3545, Sec. 17, both codified to 46 U.S.C. §§ 1902-1904.

57. 46 U.S.C. § 1903(c)(1)(C). For the difficulties created by the requirement of a foreign nation to the application of U.S. law, see *United States v. Robinson*, 843 F.2d at 4.

58. 46 U.S.C. § 1903(c)(1)(D). The reference to the definition of customs waters found in former 21 U.S.C. § 955b was not retained. Nevertheless, 19 U.S.C. § 1401(j) and 19 U.S.C.

tion, where the nation consents to the enforcement of United States law by the United States.⁵⁹ In addition the new statute specified that “[a] claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter”⁶⁰ — thereby seemingly codifying the *Ker-Frisbie* doctrine. This addition, however, suffers from internal inconsistency: the proscribed acts when committed on a foreign flag vessel on the high seas constitute a crime only if the flag state consents to the enforcement of United States law. Absence of such consent still would constitute a defense to a charge under 46 U.S.C. § 1983 subsection (a) in conjunction with subsection (c)(1)(C) and (D), because the criminalization of the acts described in subsection (a) does not include the location described in subsection (c)(1)(C) and (D). This result would not be altered by subsection (d), because the absence of the consent of the flag state would not only make the seizure and prosecution a failure to comply with international law, but would also constitute the lack of an element of the offense.

Subsection (d), in addition, leaves open the question of whether the term “international law” includes a self-executing provision of a treaty, thus resurrecting the *Postal* issue.

Finally, to accord to the foreign state expressly the right to invoke the breach of international law raises the further dilemma whether such right can be invoked *in the domestic courts of the United States*, thereby giving increased importance to the difficulties discussed before in connection with the Tale of Sidney Jaffee and the Turkish narcotics trafficker.

As a matter of draftsmanship as well as of policy, therefore, U.S.C. § 1903(d) seems to be a built-in defect in the new compass.

§ 1709(c) have been held to remain applicable. *United States v. Biermann*, 678 F. Supp. at 1441 (N.D. Cal. 1988).

59. 46 U.S.C. § 1903(c)(1)(E). The statute specifies that consent or waiver under (C) and (E) may be obtained by radio, telephone, or similar oral or electronic means.

60. 46 U.S.C. § 1903(d). According to the Senate Report pertaining to the provision, 46 U.S.C. § 1903(d) was needed “because defendants in cases involving foreign or stateless vessel boardings and seizures have been relying heavily on international jurisdictional questions as legal technicalities to escape conviction.” S.Rep. No.99-530, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 5986, 6000. For that reason it specified that a failure to comply with international law in the enforcement of the act could only be invoked by a foreign nation. The legislative history was cited in *United States v. Biermann*, 678 F.Supp. at 1440. Nevertheless, the court examined carefully whether the United Kingdom had given its consent to the enforcement of the United States, by the United States, as required by 46 U.S.C. § 1903(c)(1)(C) and (D).