University of Miami Law School
Institutional Repository

University of Miami Law Review

7-1-1975

The 1935 Anti-smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law

Ivan W. Ficken

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation

Ivan W. 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)
Available at: http://repository.law.miami.edu/umlr/vol29/iss4/3

This Leading Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

THE 1935 ANTI-SMUGGLING ACT APPLIED TO HOVERING NARCOTICS SMUGGLERS BEYOND THE CONTIGUOUS ZONE: AN ASSESSMENT UNDER INTERNATIONAL LAW*

IVAN W. FICKEN**

I. INTRODUCTION 700
II. HISTORY OF ANTI-HOVERING LEGISLATION 703
III. POST 1935 CONTIGUOUS ZONE COMMENTARY AND REACTIONS TO THE ACT 711
A. *General Commentary* 711
B. *The Opinions of McDougal and Burke* 714
IV. SMUGGLING PROBLEMS UNDER THE LASSWELL-MCDOUGAL ANALYSIS 716
V. ALTERNATIVE PROPOSALS 727
VI. CONCLUSIONS 729

I. INTRODUCTION

In proclaiming National Drug Abuse Prevention Week, October 20-26, 1974, President Ford noted that during the past five years the United States has given the highest priority to the elimination of the drug trade which threatens "the very fabric of our society." During this period, international drug traffic has seen its complexion change with the establishment of the so-called "Latin-American Connection." As the major port of entry from Latin-America and the southern hemisphere, Miami has fallen heir to much of this illicit traffic. Thus, in early 1974, in response to an interviewer's inquiry whether Miami had replaced New York as the main port of entry during the growth of the "Latin-American Connection," John R. Bartels, Administrator of Drug Enforcement, Department of Justice, replied, "It's starting to, yes."[1]

The extensive Florida coastline and the island chain of the Florida Keys present a formidable problem to all levels of law enforcement in attempting to intercept drug smuggling activities. The inherent geographical problems are aggravated by the use of a technique formerly employed by rumrunners shortly after prohibition, and likely to be increasingly utilized by narcotic traffickers. The technique, which minimizes the risk of arrest or conviction, involves the use of a boat lying to or hovering on the high seas immediately beyond the 12-mile limit of the United States' customs enforcement zone, out of jurisdictional reach of any state, awaiting either a pickup boat from shore or a cover of fog or darkness to make a landing of the contraband. Fortunately, this technique is not as law enforcement-proof as most smugglers would like to believe. If the vessel is owned or registered in

* This article, in less expanded form, appeared as an Ocean and Coastal Law Community Legal Problem Services report in the University of Miami Sea Grant Institutional Program.
** Member of the Nebraska Bar; J.D. University of Nebraska; LL.M. Ocean and Coastal Law Program, University of Miami Law School.

1. U.S. NEWS AND WORLD REPORT, Apr. 1, 1974, at 39.

the United States, the Coast Guard is empowered to board and arrest anywhere on the high seas in the effort to enforce laws falling under the Special Maritime and Territorial Jurisdiction.

Although prosecution under the Comprehensive Drug Abuse Prevention and Control Act of 1970[2] would seem the obvious method of preventing smuggling of narcotics outside the three-mile territorial limit, the possession of controlled substances on the high seas does not fall within the Special Maritime Jurisdiction, apparently due to a Congressional oversight.[3] However, another approach has successfully been used. Assuming that most ventures of this sort involve more than one actor and have been hatched as a joint product of several minds, law enforcers have used the federal crime of conspiracy to perform heavy duty as a backstop.[4] But though the charge of conspiring to violate United States law is instrumental in drawing in all who have been caught up in the web of conspiring, it, too, has limitations in the dependence of its enforcement upon agent infiltration or informants privy to the conspiracy and willing to testify to its existence. Moreover, most conspiracy prosecutions proceed as if it were a requirement that at least one of the conspirators have committed an overt act in furtherance of the conspiracy, or that an agreement have been made within the territorial jurisdiction of the district court.[5]

---

2. 21 U.S.C.A §§ 801-803, 811, 812-829, 841-851, 871-886, 901-904, 951-966 (1970).

3. For an explanation of the criteria used to determine the intent of Congress as to which laws fall within the Special Maritime and Territorial Jurisdiction, *see* note 5 *infra*.

4. Several cases using the conspiracy approach will be discussed later in this article.

5. Some indecisiveness appears to surround the question of whether conspiring to import a controlled substance requires proof of the commission of an overt act. The common law crime of conspiracy was indictable upon the formation of the agreement with no requirement of proving an overt act in furtherance of the conspiracy. Since there are no federal common law crimes, a general federal conspiracy statute was enacted which included the requirement that an overt act in furtherance of the conspiracy be proved. 18 U.S.C. § 371. Numerous other federal criminal statutes include self-contained conspiracy sections providing penalties for conspiring to violate particular sections of the criminal law, often *without* requiring proof of an overt act. *See, e.g.*, Nash v. United States, 229 U.S. 373 (1913) (a charge of conspiracy to restrain or monopolize trade in violation of the Sherman Anti-Trust Act need not allege an overt act) and Singer v. United States, 323 U.S. 338 (1945) (same with respect to conspiracy to violate the Selective Training and Service Act). These decisions are grounded on the principle that although conspiracy is part of a statutory offense, the particular section punishes it on a "common law footing" not requiring proof of an overt act.

In United States v. Gardner, 202 F. Supp. 256 (N.D. Cal. 1962) a Ninth Circuit District Court convicted the defendants under §§ 174 and 176(a) of 21 U.S.C. (the predecessors to 21 U.S.C. §§ 952(a) and 963—unlawful importation of controlled substances and attempt and conspiracy) which created a separate conspiracy offense that need not refer to 18 U.S.C. § 371 and need not allege an overt act. This principle was cited approvingly by the Ninth Circuit in Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967) and Ewing v. United States, 386 F.2d 10 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968) and has been followed in the Third Circuit, United States v. DeLazo, 497 F.2d 1168 (3d Cir. 1974) and the Seventh Circuit, United States v. Garfoli, 324 F.2d 909 (7th Cir. 1963), being noted without resolving the question in the First Circuit, United States v. Clayton, 450 F.2d 16 (1st Cir. 1971), the Second Circuit, United States v. Armone, 363 F.2d 385 (2d Cir. 1966) and most recently in the Fifth Circuit, United States v. Winter, 509 F.2d 975 (5th Cir. 1975). While the Second Circuit has not ruled on the question, at least one Second Circuit District Court has held that overt acts need not be alleged under the new drug law, United States v. DeViteri, 350 F. Supp. 550 (E.D.N.Y. 1972).

Yet, even here, the Coast Guard is not impotent under statutory authority to deal with the problem. Upon finding that vessels are

---

Since the Comprehensive Drug Abuse Prevention and Control Act of 1970 contains a separate section covering attempting or conspiring to import controlled substances, it would seem unnecessary to allege overt acts within the court's jurisdiction. Since few of these criminal enterprises are conceived solely outside of the United States' territory and some overt act within the United States can usually be proven, drug importation conspiracy defendants continue to be charged with the commission of overt acts, most likely due to an overabundance of caution on the part of prosecutors fearful that a trial judge may not adhere to this line of cases supporting the punishment of conspiracy on a "common law footing" and believing that the court's jurisdiction stands on a more solid foundation when overt acts furthering the crime are committed within the territorial United States.

While the 1970 Comprehensive Drug Abuse Prevention and Control Act contains no explicit provision allowing it to fall within the United States Special Maritime and Territorial Jurisdiction, this is not the sole determinant whether any of the Act's provisions apply beyond the United States territorial limits. A distinction was pointed out in United States v. Bowman, 260 U.S. 94 (1922) where, in reversing the District Court's sustaining of a demurrer to an indictment charging a conspiracy to defraud the United States while the defendants were on board an American vessel on the high seas, the Supreme Court commented on the applicability of the statute outside the United States territorial limit:

> We have in this case a question of statutory construction. The necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crimes under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.
>
> . . .
>
> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Id. at 97-98.

This latter principle was summarized and reaffirmed by the Court in Skiriotes v. Florida, 313 U.S. 69 (1941) at 73-74, citing *Bowman*:

> Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.

A statute declaring importation of or conspiring or attempting to import certain substances to be unlawful arguably deals with "acts that are directly injurious to the government" inasmuch as the nature of the offense presumes an activity having some origins beyond the United States territorial limits. This is the rationale used in a Ninth Circuit decision, Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) where the defendant was charged with conspiring to import amphetamine tablets from Mexico in violation of the general smuggling statute, 18 U.S.C. § 545 and the general conspiracy statute, 18 U.S.C. § 371. The Court relied on the rule in *Bowman, supra,* and went on to say:

> Since smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of 18 U.S.C. § 545

hovering off the coast of the United States outside customs waters and that unlawful introduction or removal into or from the United States of merchandise or persons is likely to occur, the President[6] is empowered under the 1935 Anti-Smuggling Act[7] to designate temporary extended customs enforcement zones out an additional 50 miles from the 12-mile boundary and laterally up to 100 miles in both directions. But this authority has been used sparingly: the last such zone designated was in 1935, and the statute has never been used to its fullest extent against a ship of a foreign flag.

In view of this as well as intervening developments during the last forty years, the question is presented as to the propriety, under principles of international law and obligations of international conventions undertaken by the United States, of employing this act against narcotics smuggling by ships of foreign flags.

II. History of Anti-Hovering Legislation

An assessment of the propriety of the proposed use of the 1935 Anti-Smuggling Act under international law must necessarily include a discussion of the historical development of a state's competence to enforce its laws in areas adjacent to its coast. In addition, past approaches and solutions to smuggling problems and improper uses of contiguous high seas may prove instructive in avoiding pitfalls liable to be encountered in an attack on narcotics smuggling.[8] For this purpose, the high points of anti-smuggling legislation and attempts at extension

---

> should extend to foreign countries at least as to citizens of the United States, and that 18 U.S.C. § 371, the conspiracy section, is extended along with it.

Id. at 350.

Therefore, even though there is no express declaration to the effect that 21 U.S.C. § 952(a) and § 963 are within the Special Maritime and Territorial Jurisdiction, it would lead to an absurd result to conclude that Congress had not intended these sections to apply extraterritorially.

This principle dovetails with the proposition that no overt act is necessary within the territorial limits of the judicial district where the defendants are being tried for conspiracy. It also goes far in explaining why, in the absence of Congress' declaring a territorial limitation upon any of the provisions of the Comprehensive Drug Abuse Act, possession of a controlled substance on the high seas is not an offense, whereas conspiring to import the same substance is an offense: Mere possession, being a status and a crime against one's person, would not be a crime beyond the United States territorial limits without Congress' explicit mandate; whereas conspiring to import the same substance, being a crime against the United States customs laws, would surely be an offense on the high seas even without Congress' declaration, following the line of reasoning in *Brulay*.

6. This authority was later delegated to the Secretary of the Treasury. Exec. Order No. 10,289, 3 C.F.R. 184 (1972), 3 U.S.C. § 301 (1970) (note). Since then, these functions of the President under the 1935 Act have been transferred to the Secretary of Transportation. 19 U.S.C. § 1709 (1970).

7. 19 U.S.C. §§ 70, 1401, 1432a, 1434, 1436, 1441, 1581, 1584-87, 1592, 1615, 1619, 1621, 1701, 1703-11 (1970).

8. An exhaustive treatment of this subject was prepared by Dr. H. E. Yntema, at that time Professor of Law, University of Michigan, as an opinion on the validity of hovering legislation in international law. It was submitted by the Treasury Department in support of H.R. 5496, which upon enactment became the 1935 Anti-Smuggling Act. It appears as a 42-page annex to the record of hearings on H.R. 5496. *Hearings on H.R. 5496 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. (1935) [hereinafter cited as *1935 Hearings*].

of customs enforcement zones up to 1935 can be reconstructed.[9] The following discussion draws heavily upon the history of and interaction between British and American assertions of authority beyond the territorial sea since documentation of areal assertions of these two states is exceptionally complete and varied. Moreover, during the relevant period (the 18th and 19th centuries), Great Britain was a major world power providing influential leadership in the development of the international law in this area.

British hovering acts[10] first appeared in the early 18th century and limited the enforcement authority to visitation of ships within 2 leagues[11] of the coast. As the smuggling trade grew and flourished over the next 125 years, legislative enactments tried to keep pace in prescribing new enforcement measures as well as in extending limits: by 1807, all vessels which had been liable to forfeiture if hovering within the four or eight league limits set by previous enactments applicable to *all* vessels (the variation of limit depending upon the geographical location along the English coastline), were now forfeitable within 100 leagues of the coast if so much as part ownership was held by British subjects or one-half of the crew were British subjects.[12]

The legality of this law was apparently not questioned until 1851, when, upon asking the Queen's Advocate General for an opinion on certain questions relative to the capture of a French vessel and her crew, the Lords of the Treasury were given the reply that

> [i]t is now generally understood and admitted that the territory of a country within which the rights of sovereignty may be exercised extends to a distance of 3 miles from the shore and that it would be an unwarranted assumption of power against which other nations would have a right to remonstrate, if a government were to attempt to enforce its municipal regulations beyond those limits.[13]

---

9. *Id. See also* W. MASTERSON, JURISDICTION IN MARGINAL SEAS (1929).

10. *I.e.*, acts pertaining to "hovering vessels." Although the following definition is that used in 19 U.S.C.A. § 1709(d) (1955) only for purposes of United States customs enforcement, the words are descriptive of what has historically been meant by the term "hovering vessel":

> any vessel which is found or kept off the coast of the United States within or without the customs waters, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States in violation of the laws respecting the revenue.

11. One marine league equals approximately three nautical miles. A nautical mile is approximately 2000 yards.

12. An Act to Make More Effectual Provision for the Prevention of Smuggling, 47 Geo. 3 (2d Sess.), c. 66 (1807). One hundred league statutes superseded the four- to eight-league limits as to British-connected vessels.

13. W. MASTERSON, *supra* note 9, at 127. The circumstances surrounding this statement indicate that there had been no French protest; it was only an interdepartmental opinion which apparently was not the consensus of other departments of the government. *Id.* at 129. Furthermore, Great Britain was at this time politically favoring the French, the smuggling trade had declined to where it no longer posed a threat and the Advocate General (being an officer of the Admiralty) likely was reflecting the Admiralty's position of desiring narrow territorial jurisdiction on the seas. (One cannot help being reminded of the United States Defense Department's present posture in this same regard relative to the Law of the Sea negotiations on territorial limits.)

While the Advocate General's opinion subsequently provoked some discussion at various levels of government concerning the desirability of repealing the existing law, the propriety of the prescribed limits was not seriously questioned for the next 25 years.[14] A new customs act was finally passed in 1876[15] which drew back the jurisdictional limits to one league with minor exceptions for a few specific infringements.

Great Britain apparently felt obligated by some principle of international law to draw back her jurisdictional limits; at least she later depended upon it as an excuse for doing so.[16] This is illustrated by the statement made in 1923 in negative response to a proposed treaty with the United States allowing customs inspection out to 12 miles, that "the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law and His Majesty's Government cannot admit that the municipal legislation of any country can override these principles."[17]

In the United States, case law has consistently approved the right of a coastal state to protect itself beyond the limits of its territorial sea. Precedent is usually traced to the opinion of Chief Justice Marshall in *Church v. Hubbart,*[18] concerning the seizure of an American vessel five leagues off the Brazilian coast:

> Any attempt to violate the laws made to protect this right [to control colonial trade], is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harrass foreign lawful commerce, foreign nations will resist their exercise. If they are such as reasonable and necessary to secure their laws from violation, they will be submitted to.[19]

14. This is implied by the enactment in 1857 of a law extending and applying the various one-, three-, four-, eight- and 100-league customs and hovering laws to those British possessions abroad which had not legislated on the subject. An Act for the Alteration and Amendment of the Laws and Duties of Customs, 20 & 21 Vict., c. 62, § 15 (1857).

15. An Act to Consolidate the Customs Laws, 39 & 40 Vict., c. 36 (1876).

16. At about this same time (1874-75), diplomatic correspondence was initiated between Great Britain and the United States inquiring as to views about the Spanish claim of exercising general maritime jurisdiction for a distance of two leagues from her coast. While Spain had previously made the assertion without reservation, tracing its Spanish law origins to 1760, her communication with the British acknowledged that for purposes of "military jurisdiction" three miles was the rule, but in regard to "fiscal jurisdiction," Spain maintained that a state could set a limit at whatever distance necessary to defend itself and to prevent the perpetration of revenue fraud by smugglers. With their own customs hovering laws extending far beyond two leagues, the British were not in a position to challenge the Spanish assertion of "fiscal jurisdiction" beyond one league, nor were the Americans with their four-league customs enforcement laws. Thus, as late as 1875 it appears that no government had protested against the hovering laws of the United States, Great Britain or Spain. W. MASTERSON, *supra* note 9, at 257-62.

17. W. MASTERSON, *supra* note 9, at 342, *citing* British Government Note of Sept. 17, 1923 (U.S. press release, Feb. 16, 1927).

18. 6 U.S. (2 Cranch) 187 (1804).

19. *Id.* at 235.

Although the words were actually obiter dictum, they have been consistently and frequently quoted as precedent for this principle. Referring to British case law, in *Queen v. Keyn*[20] Lord Cockburn quoted Chief Justice Marshall's statement approvingly and added:

> Hitherto, legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first the legislation is altogether irrespective of the three-mile distance, being found on a totally different principle, namely, the right of a state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws.[21]

There seems to have been but little protest of the United States' exercise of customs jurisdiction out to a four-league zone[22] until the probition era began. With the bulk of the rumrunners flying the British flag, Great Britain bore the brunt of enforcement when in 1922 the United States began seizing British smuggling vessels beyond the three-mile territorial sea. The strength of British protest and the unwillingness of the United States to back down from its position that seizures of hovering vessels were not contrary to international law induced the United States to propose a treaty arrangement. In anticipation of such negotiations, British vessels taken beyond three miles from shore were released.

Keeping in mind the controversy surrounding a previous Russian extension of jurisdiction,[23] the British were reluctant to enter a treaty prescribing the same 12-mile jurisdiction limit. In fact, their objection to such a treaty was not to the exercise of United States jurisdiction against ships outside its three-mile territorial sea but to the specifica-

20. [1876] 2 Ex.D. 63.

21. *Id.* at 214.

22. The year 1790 marks the enactment of legislation specifying a four-league limit on customs manifest examination and prohibition of unloading of any vessel bound for the United States. An Act to Provide More Effectually for the Collection of Duties, ch. 35, § 11, 1 Stat. 145 (1790). Subsequent reenactments in one form or another are still applicable today without the requirement that the vessel be bound for the United States. *See, e.g.*, 19 U.S.C. § 1581 (1970) (boarding vessels), § 1586 (unlawful unlading or transshipment), § 1709(c) (definition of "customs waters"). In addition, in 1807, forfeiture was provided as the penalty for any ship found "in any river . . . or on the high seas, within the jurisdiction limits of the United States, or hovering on the coast thereof" having on board any negroes for the purpose of selling them as slaves, or "with intent to land the same." An Act to Prohibit the Importation of Slaves into . . . the United States, ch. 22, § 7, 2 Stat. 426 (1807).

23. In 1910 and 1911 when, against the protests of Japan and Great Britain, Russia extended its customs and fisheries jurisdiction to 12 miles (FOREIGN REL. U.S. 1289 (1912)), subjecting "every vessel" to supervision, it relied on the United States customs jurisdiction of 12 miles and the French marine customs zone of 20 kilometers as precedent for its action, stating that the limit to which customs supervision could be extended was not a question of international usage but of domestic regulation. The bulk of the controversy concerning the Russian extension centered around the fisheries issue, however, and by and large the extension of its revenue laws jurisdiction came to be forgotten.

tion, in miles, of any distance other than that claimed by Britain herself.[24] Thus, to preserve the sanctity of the three-mile limit, the treaty specified for smuggling activities a one-hour's sailing distance measured either by the speed of the hovering ship or by the speed of the boats making contact from the shore. Having made this agreement with Great Britain, the United States negotiated with 15 other nations, treaties similar in their limitation of jurisdiction to a one-hour's sailing distance.[25] The treaties were essentially agreements that the foreign flag states would pose no objection if one of their vessels engaged in smuggling liquor into the United States was seized within one-hour's sailing distance of the United States coast.

Even at this time, the charge of conspiracy was being used in an attempt to plug loopholes in liquor smuggling enforcement. In *Ford v. United States (The Quadra)*,[26] the British defendants were arrested for conspiring to violate United States prohibition laws at a disputed location.[27] Concluding the contact boat capable of 6.6 knots unloaded, the Supreme Court upheld the District Court's finding that the seizure had occurred within a one hour's sailing distance.[28]

---

24. W. MASTERSON, *supra* note 9, at 333.

25. These treaties were interpreted to be self-executing to the extent that legislation was not necessary to authorize executive action in pursuance of their provisions. With respect to treaty vessels, the treaties took precedence over and superseded inconsistent legislation authorizing Coast Guard boarding, searches and seizures within 12 miles of the coast. Still, they did nothing to extend the limits of internal United States revenue law which remained under the 12-mile restraint. In other words, for a treaty vessel to be liable for prosecution, the offense must be committed not only within the one-hour's sailing distance set by the treaties, but also within the 12-mile customs enforcement zone.

26. 273 U.S. 593 (1927).

27. *I.e.*, either 5.7 or 13.6 nautical miles off the Farallon Islands near San Francisco. There was also a dispute whether speed should be measured in a loaded or unloaded condition.

28. It was noted, however, that if the arrest had been made outside the enforcement jurisdiction permitted by the liquor treaty, that reliance on Ker v. Illinois, 119 U.S. 436 (1886) (holding that a defendant could not challenge an indictment or conviction on the grounds that his person had been improperly brought before the court) would be improper since such an arrest would violate a treaty of the United States, which the Court felt constitutionally bound to uphold as the law of the land. But the Court stated that even if the arrest had taken place outside the one-hour distance enforcement zone permitted under the treaty, the proper procedural vehicle would have been a plea to the Court's jurisdiction over the person of the defendants prior to the entry of a not-guilty plea. The failure to so plead amounted to a waiver of the jurisdictional objection. The liquor treaty restrictions immediately, then, became a procedural device by which foreign defendants arrested outside one-hour's sailing distance could successfully challenge the court's jurisdiction even though a conspiracy were otherwise provable. In two cases shortly following *Ford*, conspiracy charges were dismissed using this approach: United States v. Schouweiler, 19 F.2d 387 (S.D. Cal. 1927) (a Panamanian-registered vessel 66 nautical miles from the United States coast) and United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927) (a British-owned vessel of Panamanian registry arrested 270 miles from the United States coast).

In 1933 the Supreme Court went one step further in Cook v. United States (The Mazel Tov), 288 U.S. 102 (1933), where a British-registered vessel capable of ten miles per hour was arrested 11½ miles from the Massachusetts coast and charged with failure to include liquor in the manifest. Although the defendant, as master of the vessel, excepted to the court's jurisdiction, he answered to the merits of the case with the United States contending that his answer waived any right to object to the enforcement of the penalties. In dismissing the libel against the vessel and its cargo, the Supreme Court found that by entering into the treaty with Great Britain, the United States had imposed a territorial limitation upon its own authority which wholly took away its

With the repeal of prohibition, it was anticipated that liquor smuggling would cease. While it temporarily had this effect, the price differential imposed by United States alcohol taxes ensured that smuggling would remain a profitable business. By early 1934, alcohol smuggling began expanding to the levels of the prohibition era and the disability in the criminal statutes resulting from the failure of internal law to provide for any arrest of a foreign flag vessel outside the 12-mile limit[29] began to seem a serious weakness. Since the alcohol treaties were not repealed when prohibition ended, the United States Treasury Department sought to force more mileage out of them by closing this gap of internal law which prevented applying those treaties outside the 12-mile customs zone. The 1935 Anti-Smuggling Act[30] was proposed to effect this purpose, as well as to provide for designation of temporary customs enforcement zones against hovering vessels of non-treaty nations beyond the 12-mile customs zone and to impose criminal penalties on United States nationals violating customs laws of foreign states if reciprocal legislation were in effect. Although carefully worded to avoid conflict with the liquor treaties, the Act went beyond

---

power to seize. This was to be distinguished from such cases as where there was merely a lack of authority on the part of the person wrongfully making the seizure or abduction, followed by a forfeiture or conviction which would ratify the unauthorized act and render it completely immaterial.

In support of the view that this particular jurisdictional defect could not be cured by an answer to the merits on the part of the individual claimant, Professor Dickinson noted that

> [i]t is of course true that an individual defendant may waive an objection which he is personally entitled to make to the jurisdiction of a particular court by appearing and pleading to the merits. . . . But such a waiver of personal privilege cannot invest the nation with a competence which it would not otherwise possess.

Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Laws*, 28 AM. J. INT'L L. 231, 236 n.13 (1934).

Thus the *Mazel Tov* established the exception to *Ker* that in those cases where the United States had imposed upon itself certain territorial limitations of jurisdiction by means of a treaty, the treaty would prevail over common law.

29. *See* note 25 *supra*.

30. 19 U.S.C. § 1701 (1970). The most pertinent passage reads:

> (a) Whenever the President finds and declares that at any place or within any area on the high seas adjacent to but outside customs waters any vessel or vessels hover or are being kept off the coast of the United States and that, by virtue of the presence of any such vessel or vessels at such place or within such area, the unlawful introduction or removal into or from the United States of any merchandise or person is being or may be occasioned, promoted, or threatened, the place or area so found and declared shall constitute a customs-enforcement area for the purposes of this chapter. Only such waters on the high seas shall be within a customs-enforcement area as the President finds and declares are in such proximity to such vessel or vessels that such unlawful introduction or removal of merchandise or persons may be carried on by or to or from such vessel or vessels. No customs-enforcement area shall include any waters more than one hundred nautical miles from the place or immediate area where the President declares such vessel or vessels are hovering or are being kept and, notwithstanding the foregoing provision, shall not include any waters more than fifty nautical miles outwards from the outer limit of customs waters. Whenever the President finds that, within any customs-enforcement area, the circumstances no longer exist which gave rise to the declaration of such area as a customs-enforcement area, he shall so declare, and thereafter, and until a further finding and declaration is made under this subsection with respect to waters within such area, no waters within such area shall constitute a part of such customs-enforcement area. The provisions of law applying to the high seas adjacent to customs waters of the United States shall be enforced in a customs-enforcement area upon any vessel, merchandise, or person found therein.

them in that the proposed special customs enforcement zones could be designated for non-liquor smuggling activities.

Even before its passage, the 1935 Act encountered diplomatic protest by Great Britain[31] which refused to recognize any interference outside the 12-mile zone with respect to ships not covered under the liquor treaty. There does not, however, appear to have been any protest after adoption of the Act, but as Whiteman notes, this is "a circumstance which is not in itself decisive seeing that, for the purposes of safeguarding rights, a protest is essential at the time of the application of the enactment as distinguished from its adoption."[32]

The major item of discussion at the hearings[33] was the propriety of such legislation under international law, to which Professor Yntema's memorandum opinion[34] lent support.[35] Professor Yntema intimated that events have shown existing law to be inadequate and that the proposed Anti-Smuggling Act was reasonable to prevent a breach of the revenue laws. The issue of reasonableness was stressed in House Report 868 on the bill, where it was declared that the legislation "is predicated upon the rule of international law stated by Chief Justice Marshall in *Church v. Hubbart* that a nation may exercise jurisdiction such distance beyond the three-mile limit as may be reasonable and necessary to secure its revenue or for national protection." And explaining section One of the bill:

> [S]ince the bill makes applicable in such areas only a limited number of laws and since only such of those laws may be enforced in such areas upon such vessels as the President finds and declares to be necessary to secure the revenue of the United States . . . it is evident that the extension of our customs control provided in § 1 meets the test of reasonableness required under international law.[36]

---

31. 4 M. WHITEMAN, DIGEST OF INT'L LAW 490-92 (1965).

32. *Id.* at 505.

33. *1935 Hearings, supra* note 8.

34. *See* note 8 *supra*.

35. In his conclusions, Yntema states:

> 10. That all reputable English and American text writers upon international law, with one exception, namely, Dana, who, upon misconceived grounds, admits but deplores the historic practice, recognize the principle involved in hovering legislation, either as establishing a *special right* to take preventative measures in the interest of the revenue to be exercised within reasonable limits, or as providing a *privilege* so to do, against the reasonable exercise of which other nations do not protest, on the ground that a state is in comity bound not to protect its subjects who violate the just and necessary revenue laws of other nations, and that, on either view, there can be no question as to the right of a state to enact appropriate hovering legislation. In view of this evidence, it is difficult, so far as international practice and precedent is concerned, to conceive how the principle involved in hovering legislation could be more satisfactorily proved. . . .
>
> In any view, then, the fundamental principle expressed in hovering legislation does not appear open to question. There being, consequently, no sustainable issue, from the viewpoint of international law, as to the right of the United States to enact legislation of this character or as to the propriety of its extension to the residual category of nontreaty vessels, the real issue, if there be such, is as to the reasonableness and necessity of the several provisions of the proposed legislation. This is a legislative question, the solution of which, in our system of laws, is vested in Congress, and is beyond the scope of this memorandum.

1935 Hearings, supra note 8, at 122-23.

36. H.R. REP. No. 868, 74th Cong., 1st Sess. 4-5 (1935). Testimony at the hearings

Although the State Department refrained from voicing a public opinion and merely advised the Treasury Department that it would not oppose the enactment of the bill, this was interpreted by a member of Congress and observers not only to signify a desire to remain uninvolved but also as an indication that it had some reservations about the bill.[37]

Five customs enforcement zones were designated shortly after the passage of the Act in 1935, but none has been designated since.[38] Of the 16 vessels seized pursuant to these early designations, 11 were of American registry and therefore did not raise any international law issues. Of the remaining five foreign vessels, two were seized while in a United States port, two within the 12-mile customs zone and the last, although of British registry and seized between 15 and 36 miles from the coast, was forfeited as a vessel substantially owned and controlled by a United States citizen within the meaning of section 3(b) of the Act.[39] With Britain's own customs laws extending discriminatorily beyond the three-mile limit for vessels partially owned by British subjects, the failure to register a protest to this seizure and forfeiture was understandable. Thus the full panoply of provisions of the 1935 Anti-Smuggling Act has never been exercised nor its acceptability tested by the international community so that the absence of protest by foreign governments may be attributed primarily to a lack of enforcement by the United States in a manner potentially contrary to international law. Because of the innovative approach utilized in the 1935 Act, the traditional primary sources of international law (treaty, custom and general principles of law recognized by civilized nations) have not been particularly helpful as touchstones to gauge its international acceptance except in relation to later provisions in the 1958 Law of the Sea Conventions. The lack of potentially controversial use of the Act has prevented even the development of any case law as a subsidiary source of international law. This leaves the teachings and commentary

---

reinforces the fact that the Treasury Department was concerned about meeting the reasonableness test. Mr. Hester, the attorney for the Treasury Department observed:

> There is another angle that enters into this that might support the vesting of this authority in the President, and that is that foreign nations might be less liable to object if this authority is vested in the head of the Government . . . . We are trying in this statute to meet the test of reasonableness required under international law. That is one of the reasons why our customs control is extended only to particular areas where the smugglers are actually present. We think it will be so much easier to meet the test of reasonableness of international law if it is done that way.

1935 Hearings, *supra* note 8, at 81.

37. Jessup, *The Anti-Smuggling Act of 1935*, 31 AM. J. INT'L L. 101-02 (1937).

38. Noting the provision of 19 U.S.C. § 1701 that

> [w]henever the President finds that, within any customs-enforcement area, the circumstances no longer exist which gave rise to the declaration of such area as a customs-enforcement area, he shall so declare, and thereafter, and until a further finding and declaration is made under this subsection with respect to waters within such area, no waters within such area shall constitute a part of such customs-enforcement area,

there appears to be no record of a declaration of cancellation of any of these five designated zones which raises the possibility, at least in theory, that they may be still in effect.

39. H. BRIGGS, THE LAW OF NATIONS 375 (2d ed. 1952).

of qualified international law publicists as the most persuasive standard against which to gauge the Act.

III. Post 1935 Contiguous Zone Commentary and Reactions to the Act

A. *General Commentary*

Referring in 1937 to writings of publicists following the 1935 enactment, Philip C. Jessup (later to become a justice on the International Court of Justice) voiced his opinion. In reference to the reliance by Professor Yntema and the Treasury Department on the test of reasonableness, he stated, "It is believed that this is a sound position under international law. We then have a mixed question of fact and law as to whether enforcement of this Act will meet the test of reasonableness."[40] In 1939, Professor H. W. Briggs analyzed the seizures made under the 1935 Act and also favored its propriety under international law.[41] This was countered shortly thereafter by an Associate of the Institut de Droit International, T. Baty, who remarked:

> What is alarming is that so very learned and open-minded a jurist as Professor Briggs should come forward to justify its unrestricted operation. He is prepared to allow drastic interference on the part of the United States with foreign vessels, bound for foreign ports, for nearly one hundred miles from the American shore and his only restriction is, that interference must be reasonable."
>
> This is no restriction at all against a powerful state: a powerful state will always uphold its interferences as "reasonable" ones.[42]

Baty's arguments rested on the concept of freedom of the seas which could not be "whittled away by a few obscure instances," and on the "permissive" theory that past interferences had been tolerated out of friendliness without any admission of legality.

Later, in 1953, Professor P. M. Brown, in discussing together the 1935 Anti-Smuggling Act, the Truman Proclamation and the Submerged Lands Act, condemned American legal authorities and courts who have "timidly and illogically accepted the outmoded interpretation of doctrine of three-mile limit" which, he asserted, was not a delimitation of jurisdiction but simply the enunciation of the sound principle of protective jurisdiction which is now firmly established in international law.[43]

---

40. Jessup, *supra* note 37, at 105.

41. Briggs, *Les Etats-Unis et la Loi de 1935 sur la Contrebande,* 20 Revue de Droit International et de Legislation Comparée, 217-255 (no. 2, 1939).

42. Baty, *The Free Sea—Produce the Evidence!,* 35 Am. J. Int'l L. 227 (1941).

43. Brown, *Protective Jurisdiction over Marginal Waters,* 47 Am. J. Int'l L. 452, 453 (1953).

Earlier (in 1940), Professor P. M. Brown had discussed the Declaration of Panama whereby

Professor H. A. Smith, a British authority, expressed a similar view on contiguous zones in 1950:

> The basic principle upon which the right to exercise jurisdiction outside territorial waters rests is that of self-defense . . . . Up to a reasonable distance outside territorial waters, such distance to be defined and notified, every state may exercise such jurisdiction as may be necessary to protect the security and internal order of the state over foreign vessels approaching the shore for illegal purposes.[44]

During this time period, from the late 1920's to 1950's there were attempts made by the international community to codify various parts of international law pertaining to the seas. While a consensus of the states favored a contiguous zone in one form or another, an agreement on the various drafts (which ranged from an open-ended right based on custom or necessity to a maximum of 12 miles) was not obtained. In addition to the disagreement concerning the width of such a zone, a consensus could not be obtained concerning the content of the zone, especially security and fishing rights.

It was not until the four Conventions on the Law of the Sea[45] in 1958 that some agreement was obtained in this area. Nevertheless, the Conventions were relatively unsuccessful in resolving many disputed issues. Article 22 of the Convention on the High Seas states that:

> 1. 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

---

21 American republics declared a security zone designed to protect inter-American communications. Defined by latitude and longitude coordinates, it extended up to 300 miles from the coasts. He believed such action to be justified under the principle of protective jurisdiction and cited for support the liquor treaties of the prohibition era, where, in spite of Britain's unwillingness to recognize a United States contiguous zone, her signing of a one-hour sailing distance treaty amounted to a recognition of the basic sovereign right of every nation to protect itself over an indefinable zone outside conventional territorial waters. Brown, *Protective Jurisdiction*, 34 AM. J. INT'L L. 112 (1940). (The State Department justified the Declaration as "a practical measure designed to maintain certain vital interests," and a "statement of principle, based on the inherent right of self-protection rather than a formal proposal for the modification of international law.") 7 G. HACKWORTH, DIGEST OF INT'L LAW 703-04 (1943).

44. H. SMITH, THE LAW AND CUSTOM OF THE SEA 21, 22 (2d ed. 1950).

45. Convention on the High Seas, April 29, 1958, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, April 29, 1958, T.I.A.S. No. 5578, 449 U.N.T.S. 311; Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of Living Resources of the High Seas, April 29, 1958, T.I.A.S. No. 5969, 559 U.N.T.S. 285. These four United Nations Geneva Conventions on the Law of the Sea represent an attempt by the international community to come to some agreement regarding use of the oceans.

> flag, the ship is, in reality, of the same nationality as the warship.[46]

Article 24 of the Convention on the Territorial Sea and Contiguous Zone provides, on the other hand:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.[47]

Because of the wording of the conventions and their subsequent interpretation, only the High Seas Convention is considered as a codification of pre-existing international law; the Convention on the Territorial Sea and Contiguous Zone is not. In 1959 Professor Jessup commented on the Convention on the Territorial Sea and Contiguous Zone:

> The present writer believes that Mr. [Arthur] Dean (Chairman of the United States delegation to the Geneva Conference) is quite right in saying that the Conference did not, and indeed it could not, change an existing rule of international law, certainly not by majority vote. . . . [I]t remains true that "validity of the delimitation (of territorial sea) with regard to other States depends upon international law." (Quoting from the Anglo Norwegian Fisheries Case (1951) I.C.J. Rep. 116, 132.)[48]

In another article, Arthur Dean commented:

> The United States would have preferred a stronger provision giving the coastal State the power to punish activities within the contiguous zone which had deleterious effects in the territory or territorial sea, even though the offending vessel had never entered the territorial sea. But the present provision is a step forward. By adopting it, the Geneva Conference succeeded where prior conference had failed. It may be hoped that practice under the present provision will encourage the adoption of a stronger provision at a later time.[49]

---

46. Convention on the High Seas, April 29, 1958, T.I.A.S. No. 5200, 450 U.N.T.S. 82 at 92.

47. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, T.I.A.S. No. 5639, 516 U.N.T.S. 205 at 220.

48. Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUM. L. REV. 234, 246 (1959).

49. Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished,* 52 AM. J. INT'L L. 607, 624 (1958).

One outright critic of contiguous zones, Sir Gerald Fitzmaurice (Britain's representative on the I.L.C. to the 1958 Convention), interprets Article 24, § 1(a) of the Convention on the Territorial Sea and Contiguous Zones as merely authorizing preventative measures rather than actual arrests: "The basic object is anticipatory. No offence against the laws of the coastal State is actually being committed at the time."[50] Conversely, Article 24, § 1(b) (punishment) can only be applied to outgoing vessels which already have committed offenses within the territorial sea, according to Fitzmaurice.[51] This literal interpretation does not comport with the previous practice of states both in prescribing and in applying certain laws in their contiguous zones and it is doubtful whether Article 24 has changed that practice. Moreover, there seems to be little support for Fitzmaurice's point of view, and Professor Shigeru Oda of Japan has specifically published his non-subscribance to it.[52]

Despite Article 24's non-recognition of a fisheries zone, the United States in 1966 extended its fisheries jurisdiction out to 12 miles, blessed with the State Department's affirmation that, in view of recent developments in international practice, the extension would not be contrary to international law. Security, fisheries and the manner of enforcing laws and punishing offenses in the contiguous zone provide three examples of situations where states are not presently adhering to the literal interpretation of Article 24, due in part to the international community's expectation that no one would be bound in that manner.

B. *The Opinions of McDougal and Burke*

During the late 1950's, Professors McDougal and Burke published several articles applying to the developing law of the sea the Lasswell-McDougal technique of analyzing the interaction of various sociological processes occurring in the international world arena in an effort to explain and predict more successfully outcomes of international disputes. These articles, plus their culmination in book form (*The Public Order of the Oceans,* 1962), offer an alternative approach to predicting the degree of authority which a coastal state might properly apply in areas contiguous to its coast.

Stepping back and taking an overview of the entire problem, one might ask what international community policy governs the establish-

50. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea,* 8 INT'L & COMP. L.Q. 73, 114 (1959).

51. Fitzmaurice also agrees with the exclusion of fisheries from the contiguous zone on the bases that: 1) existing contiguous zone rights do not act to exclude vessels from the zone, whereas a fisheries zone would; 2) existing contiguous zone rights do not involve a proprietary element, whereas a fisheries zone would; and 3) existing contiguous zone rights involve the protection of public laws and interests, whereas a fisheries zone would protect only private interests of fishermen. *Id.* at 119-20.

52. Oda, *The Concept of the Contiguous Zone,* 11 INT'L & COMP. L.Q. 131 (1962).

ment of a contiguous zone? A sensible explanation advanced by McDougal and Burke is that

> [t]he real function of the contiguous zone concept has been to serve as a safety valve from the rigidities of the territorial sea, permitting the satisfaction of particular reasonable demands through exercise of limited authority which does not endanger the whole gamut of community interests.[53]

Professor Jessup likewise concluded that it would be impractical to attempt to establish a precise limit of so many miles for a contiguous zone and that some flexibility was necessary.[54] Professor P. M. Brown believed any definition in terms of miles would be futile and illogical,[55] while the Harvard Research committee,[56] which formulated one of the drafts for the 1930 Hague Conference stated that "[t]he distance from shore at which these powers may be exercised is determined not by mileage but by the necessity of the littoral state and by the connection between the interests of its territory and the acts performed on the high sea."[57] Few commentators have expressed any satisfaction with the inflexible 12-mile limit as defined in Article 24. Thus, in the face of the flexible distances to which states have projected their contiguous zone regulations, McDougal and Burke dismiss the International Law Commission's recommendation of a single 12-mile zone as anachronistic. In attacking this section they suggest that it

> could scarcely confound confusion more. Reference is made to one contiguous zone, not to the many actually existing in practice, and that one zone is limited to 12 miles, without regard to differences in factors affecting the multiple demands of coastal states. Perhaps the most explicit evidence of the Commission's narrow view lies in the restricted range of interests which it suggests a state ought to be authorized to protect in contiguous areas: "customs, fiscal or sanitary regulations." The most surprising of the omissions, one explicitly mentioned in the commentary as deliberate, is that of security, surely the most serious concern of every state.[58]

---

53. M. McDougal & W. Burke, The Public Order of the Oceans 76 (1962).

54. P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 460 (1972).

55. Brown, *Protective Jurisdiction*, 34 Am. J. Int'l L. 112, 114 (1940).

56. In response to a resolution adopted by the Eighth Assembly of the League of Nations on September 27, 1927, that questions of nationality, territorial waters and responsibility of states should be examined with a view towards codification in international law, Harvard Law School organized an Advisory Committee of 44 scholars and jurists to direct the research in international law and to prepare draft articles on numerous areas of international law.

57. Comment to Draft of Convention on Territorial Waters, Art. 20, 23 Am. J. Int'l L., Spec. Supp. 334 (1929).

58. McDougal & Burke, *Crisis in the Law of the Sea*, 67 Yale L.J. 539, 582 (1958).

Among comments accompanying the International Law Commission's (I.L.C.) Draft Article (upon which Article 24 was based) are the following:

Believing that the concept of the contiguous zone offers the most economic method of accommodating a state's exclusive security interest with the more general inclusive interests of other states, McDougal and Burke go on to state:

> For this reason, continued recognition of a special competence in each state to declare reasonable contiguous zones would appear merely as another expression of broad community interest. And what is so demonstrably economic, in the area of security, could by appropriate detail be shown to be similarly economic, if in varying measure, in regard to other problems as well.[59]

Thus, McDougal and Burke predict that states accepting the Geneva Convention will not feel obligated to repeal such legislation as contiguous customs enforcement or in the case of the United States, the Anti-Smuggling Act. According to this view, it is more realistic to expect the continued prescription and active enforcement of policies to be observed in contiguous zones to secure the reasonable protection of important interests, without regard to the literal wording of Article 24:

> From the perspectives of general community policy, there would appear to be nothing inimical in states continuing to act, as in the past, to secure their legitimate interests by exercise of a reasonable authority to apply policy in contiguous areas.[60]

Nevertheless, since 1962, following United States ratification of Article 24 and its coming into force, the question has been raised whether contrary internal laws would remain valid. Although there appears to have been no authoritative decision as to the self-executing effect of Article 24, few have contended seriously that it has repealed contrary internal legislation.

IV. SMUGGLING PROBLEMS UNDER THE LASSWELL-MCDOUGAL ANALYSIS

At the beginning of this paper it was noted that analysis of approaches and solutions to past smuggling problems and to improper uses of contiguous high seas would illuminate any approach taken to narcotics smuggling. An attempt will be made to analyze three smuggling problems: importation of slaves; alcohol smuggling (both during and after prohibition); and narcotics smuggling under the Lasswell-

---

[In regard to security] It (the I.L.C.) considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the state. [The comment referenced international law and the United Nations charter in cases of self defense for security.]

[In regard to fisheries] Nor was the commission willing to recognize any exclusive right of the coastal state to engage in fishing in the contiguous zone.

[1956] 2 Y.B. INT'L L. COMM'N 294-95, U.N. DOC. A/CN. 4/101 (1956).

59. McDougal & Burke, *supra* note 58, at 584.

60. M. MCDOUGAL & W. BURKE, *supra* note 53, at 630.

McDougal approach. The employment of this analysis, which is necessarily somewhat superficial here, is useful primarily in determining which law prescription and enforcement measures might meet the test of reasonableness. Since the establishment of a contiguous zone involves by definition the assertion of a claim by a coastal state which is likely to be followed by acquiescence or rejection by the world community, the whole process is particularly well-suited to this system of examination.

As a starting point, McDougal and Burke's analysis requires an understanding of three different processes: the process of interaction, which serves to develop the factual background significant for the policy of enjoyment of the oceans; the process of claim, which identifies the two sets of competing interests which states assert to inclusive and exclusive uses; and the process of authoritative decision, whereby interests are honored, protected or rejected.[61]

The earlier part of this paper reviewed much of the historical background of hovering statutes, extensions of limited jurisdiction offshore and states' interactions in that regard. Suffice it here to say that, traditionally, when the territorial interest of a state has been threatened by an element from the sea, the coastal state has felt justified in asserting its laws and enforcement procedures seaward a distance sufficient to subdue that element and that in the main and where the coastal state's claim is not manifestly unreasonable, this has been acquiesced in by other states in the international community, whether simply by non-protest or by the conclusion of treaties authorizing such extensions of limited jurisdiction. Thus it was the rise and continuance of smuggling that caused Great Britain to extend its customs jurisdiction in leapfrog fashion out to sea; it was only *after* the smuggling problem had declined that the Queen's Advocate General in 1851 rendered his opinion that it was an "unwarranted assumption of power" to extend Britain's jurisdiction beyond the three-mile limit, and it was not until 1876, when organized smuggling was all but eradicated, that Parliament retracted the customs jurisdiction over foreign vessels to one league, a principle to which she held so tenaciously thereafter, as representing the proper statement of international law. Similarly, it was not prohibition itself which led to the conclusion of liquor treaties, but rather the gathering of hordes of rumrunners off the coast and the concomitant recognition by the concluding nations that the United States had a right to protect itself from an instrumentality which had the potential to land contraband cargo within the span of one hour.[62] And it was the *unexpected continuance* of liquor

61. *Id.* at 13, 14.

62. In the proper perspective, it should be noted that the treaties had the element of a bargain contained in them in that, with respect to the treaty nations, the United States made the concession of permitting foreign vessels containing liquor cargo bound for non-United States ports or sea stores liquor to enter the waters and ports of the United States as long as the alcohol

smuggling after prohibition ceased which led to the enactment of the 1935 Anti-Smuggling Act. While that Act remains latent on the books but ready for application should the need arise, it is apparently the decline in organized smuggling by means of hovering vessels which has led to its disuse since 1935. On the issue of the United States' willingness to recognize another state's right to pass similar legislation, one has only to turn to the words of the Act and the Congressional hearings. One of the Act's provisions, § 2(a) (now 18 U.S.C. § 546), provided for the prosecution of United States citizens engaged in smuggling activities against the laws of a foreign government if under that foreign government's laws penalty or forfeiture was provided for the violation of United States customs laws. This was included expressly with the hope that it would encourage other states to enact similar reciprocating legislation.

The objectives of the coastal state in enacting provisions for limited jurisdiction in contiguous zones should be identified. Although the following does not conform exactly with the McDougal terminology, it is flexible in order to accommodate terms which are more descriptive of these objectives. Referring to the first of the three smuggling situations, the 1807 statute prescribing forfeiture of any vessel hovering on the coast with the intent to introduce slaves into United States territory apparently was rooted in the moral ethic mandating that human beings not be placed unwillingly in subjugation, despite the rather widespread practical acceptance of slavery at that time. The evil sought to be corrected was as pernicious on board the vessel itself (perhaps more so) than that awaiting the slaves on debarkation. This justified a high degree of exclusive interference into the inclusive free use of the sea. Moreover, the statute was justifiable on economic grounds: given a policy of discouraging the practice of slavery, it would be more efficient and less expensive to attack the slave trade prior to its introduction into the country, before the "cargo" had been dispersed and "property rights" had become vested in buyers. As interaction among civilized countries developed in regard to this problem and anti-slavery principles began to be accepted in the international community, the recognition of a right to interfere with the slave trade became so universal that it was recognized, first in numerous early treaties and later in the Convention on the High Seas, as an act which might be interfered with by any warship anywhere on the high seas. The inclusive right of freedom of the seas had to give way to the exclusive right of any state to free enslaved human beings.

An analysis of the smuggling acts of Great Britain during the 18th and 19th centuries, when the range of goods being smuggled varied widely and reflected changing tastes over a long time period, reveals

remained under seal. This enabled treaty states to get around the unpopular decision of Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923), holding to the contrary, which had become a source of irritation to foreign governments.

the primary objective as an economic one—to protect the customs revenues of the Crown. The extensions out to 100 leagues, thus grounded essentially in little more than economic arguments, met with the acquiescence of the world community.

It is profitable to consider the United States' experience with alcohol smuggling from a dual perspective—both during and after prohibition. The Volstead Amendment imposing prohibition was brought about by moral sentiment condemning the evils of spiritous drink. The objectives in attacking liquor smuggling, then, were primarily the protection of the country's morals and to a lesser degree the economic efficiency of attacking the problem at its source. But since the moral evil was consumed after its entry and did not linger afterward, as did slavery, to plague the country, the primary concern was preventing its introduction in the first place. Moreover, unlike slavery, which, even in the early 19th century, was condemned by most civilized countries, there was little international sentiment favoring the United States' experiment with prohibition. Foreign states were understandably incensed by the United States' effort to prohibit foreign nationals from engaging in the sale of liquor beyond the 3-mile or 12-mile limit since, from the viewpoint of foreign states, this was entirely legitimate commerce; extended interference thus constituted a serious infringement of their rights to engage in commerce upon the high seas. It is surprising, then, that the United States obtained as much agreement as it did in completing 16 liquor treaties permitting enforcement within one-hour's sailing distance. The willingness of the United States, as noted earlier, to reciprocate by reversing the effect of *Cunard S.S. Co. v. Mellon*[63] may have been effective persuasion to these foreign states.

In 1933, however, repeal of prohibition changed the complexion of the United States' enforcement objectives. While it was no longer considered morally objectionable to introduce liquor into United States territory, failure to pay the alcohol tax and customs duties still rendered it illegal. During the hearings on the 1935 Anti-Smuggling Act, movements of known alcohol smugglers during the latter one-third of 1934 were extrapolated to show an annual revenue loss of $30 million.[64] The emphasis in objectives was correspondingly shifted from moral to economic.

The objectives of attacks on drug smuggling are primarily grounded in health and moral considerations, but also in the economic efficiency of attacking the problem before the contraband enters United States territory, becoming more expensive and difficult to deal with. While this sounds similar to the objectives in attacking alcohol smuggling during prohibition, a key difference lies in the increased seriousness of the perceived hazards in health and morals, as well as in

63. 262 U.S. 100 (1923).

64. *1935 Hearings*, *supra* note 8, at 2.

the existence of almost universal support in the international community for the suppression of narcotics traffic. While in this respect it is similar to its counterpart in slavery traffic, the urgency of attack is less demanding, since the presence of a narcotics laden ship on the high seas, until it comes into port, does not present the same human threat as does a slave galley operating anywhere.

Turning to the claims process, the two competing interests asserted by states in claiming inclusive and exclusive authority must be considered and the important conditions identified which must continue to affect the claims. The claims process by which states seek their objectives is related to the degree of inclusiveness or exclusiveness of the use demanded, the degree of comprehensiveness of authority asserted, and the geographic area in which such use and authority are demanded. For each of these claims, there exists a counterclaim, generally freedom from the claimant's authority and competence of the state to exercise its own authority to protect its own use, both subsumed under the term freedom of the seas.[65] For this reason, the various British smuggling acts were limited by reference to types of activities or ships which fell under their extended provisions, *e.g.*, certain dutiable commodities, ships hovering or ships of a certain construction. The initial United States slavery statute was limited to ships carrying slaves with the intent to land them, the counterclaim being that of states wishing to engage in the slave trade, which declined in strength as the anti-slavery movement was recognized worldwide. To achieve uniformity in enforcement the liquor treaties specified as targets ships suspected to be endeavoring to commit an offense and expressed the distance in functional terms of the offending ships' ability to escape. The use of treaties as vehicles provided greater uniformity and ensured a clear understanding of the rights and obligations of both parties to prevent misapplication to other inclusive uses.

The 1935 Act, in an abundance of caution to avoid any interference with legitimate freedoms on the high seas, limits the areal extent as well as the temporal duration of zones, besides requiring the presence of a hovering vessel believed to be engaged in or liable to be engaged in smuggling activities as the necessary evidence before the President shall designate a customs enforcement zone outside the normal 12-mile contiguous zone. Nevertheless, even when applied against the offenders or potential offenders that it was designed to deal with (i.e., ships carrying liquor), it may, in the eyes of many states in the international community, constitute a serious infringement on the inclusive use that those states would claim: that of transporting and selling alcoholic beverages on the high seas. When specifically applied to the narcotics trade, however, one reasonably anticipates nearly universal agreement among states that such an inclusive use as trans-

65. M. McDOUGAL & W. BURKE, *supra* note 53, at 29.

porting narcotics on the high seas for potential sale demands far less protection vis-à-vis a coastal state's right to prevent a landing on its shores. Thus any counterclaim against such use must lack strength in its assertion and should not be asserted to the fringes of the high seas.

Lastly, considering the process of authoritative decision-making, the international community has sought to establish certain objectives which, in terms of decreasing levels of abstraction, may be variously expressed as: the promotion of full, peaceful use of the ocean by all participants; or the securing of common interests of all participants in both inclusive and exclusive uses, maintaining a balance between different common interests; or the promotion of stability in expectations of participants that power will be exercised uniformly and not arbitrarily.[66] It follows that to maintain a common policy regarding protection of inclusive interests, the general community consensus of what that policy should be must be maintained, and it becomes essential that states recognize their community of interests. To identify what, if any, community interest exists in attacks on smuggling, one must identify the evil being attacked. Community interest in regard to the transportation and sale of liquor on the high seas would tend far more to favor inclusive uses and freedom of the seas than would be likely in the case of narcotics smuggling, where community interest, given nearly universal condemnation of the use of narcotics, would tolerate a much greater exercise of exclusive competence by the coastal state to exclude the smuggling from its shores. And as observed earlier in regard to the interaction among the British, Americans, and Spanish, up to 1875 there appeared to be broad recognition of international community interests in honoring and upholding customs enforcement far beyond the territorial sea, even when its roots were purely fiscal or economic, falling far short of the level of a universal moral harzard.

The import of this brief analysis is that only by looking at a particular context of conflicting exclusive and inclusive uses can one determine what is reasonable in terms of the assertion of an exclusive use and competence. The analysis seems to favor applying the 1935 Anti-Smuggling Act against hovering vessels engaged in narcotics smuggling, but due to events subsequent to its passage, the analysis cannot be applied in a vacuum. There are certain impediments to the Act's application, primarily in the provisions of Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone, as well as in possible misinterpretations by other states of the United States' behavior if the Act were to be applied.

Another example of the McDougal and Burke analysis, which may be applied by analogy to the potential problems involving the use of the 1935 Act to resolve difficulties of enforcement of narcotics

66. *Id.* at 37.

smuggling laws, is their consideration of marine oil pollution. The conclusion of the analysis was that general community policy would probably tolerate a coastal state's requirement that ships install any effective and available equipment to reduce or eliminate effects of pollution discharge.[67] Yet, when Canada passed the Arctic Waters Pollution Prevention Act,[68] which imposed certain safety and construction standards on any ship coming within 100 miles of the Arctic coast, the United States State Department protested vehemently that international law did not recognize such a unilateral extension of jurisdiction, that it might lead other countries to make other invalid claims, and that it adversely affected not only the right of freedom of the seas but the effort to reach international agreement on the use of the seas. Although the Canadian Act is distinguishable from the 1935 Act in its application to all ships and in the permanence of its zone, this reaction shows a definite preference, at least on the part of the United States Department of State, to establish such zones under international agreement rather than by unilateral action, even though the United States shares a concern for the prevention of Arctic pollution.[69]

With regard to the United States' fear that using the 1935 Act may lead to other states passing similar valid or invalid legislation, the 1935 Act was passed, as noted earlier, with the hope and expectation that other countries would, in fact, reciprocate, at least as to certain portions of the act. During the ensuing 40 years, however, the complexion of international politics may have changed sufficiently that this is no longer a declared United States objective. If the Act were used sparingly and only with sufficient reasonable cause to believe that narcotics smuggling was actually being engaged in, it seems doubtful that temporary assertions of competence would lead to invalid extensions of competence by other states. In regard to the general inhibiting effect of the existence of Article 24 of the Convention on the Territorial Sea and Contiguous Zone, the authorities cited earlier, pointing out its weaknesses in terms of flexibility and failure to provide for such contiguous coastal interests as security and fishing rights,[70] seem to feel that it has no substantial effect on established state practices. Nevertheless, many signers of the Convention would not so interpret Article 24 and furthermore would believe it an act of inconsistency on the part of the United States on the one hand to protest Canada's Arctic pollution control statute and on the other to try to justify a temporary customs

---

67. *Id.* at 849.

68. CAN. REV. STAT. c.2 (1st Supp.) (1970).

69. *See, e.g.*, provisions in the United States' draft articles for a 200-mile economic resource zone (Doc. No. A/CONF. 62/C.2/L. 47 of 8 August 1974), 3d U.N. Conf. on Law of the Sea, 3 Off'l Records 222 (1975), which were presented as a basis for negotiation at the Third Law of the Sea Conference held at Geneva, March 17 to May 9, 1975. This point is best illustrated by article 16, *id.* at 223.

70. *See* Part III *supra*.

enforcement zone up to 62 miles seaward. Given the United States' adherence to Article 24, it is at least questionable whether the international world community would acquiesce in such an enforcement zone.

Even assuming that the United States would want to adhere strictly to the commitment it signed under Article 24, the question arises whether it would be bound by that Article vis-à-vis a state which had not signed the convention. In view of the principles set forth by the International Court of Justice in the *North Sea Continental Shelf Cases,*[71] where it was held in delimiting the continental shelf median line between Denmark, Holland, and Germany, that the method of boundary delimitation prescribed by the convention would not be applicable since Germany was not a signatory of the Convention on the Continental Shelf, one is led to conclude that the United States would not be bound as against nonsignatories. In dealing with the argument that such a principle had become part of customary international law and that Germany should be bound, the court found that the practice of boundary delimitation emanated from the conviction that it was rendered obligatory by the existence of a rule of law requiring it; custom would have been found to exist only if the principle amounted to a settled practice. Considering the various disagreements among states concerning the width of their territorial sea (which in many cases extends beyond the 12-mile contiguous zone permitted by Article 24), the width of the contiguous zone and assertions of other contiguous claims not recognized by Article 24, such as security, fishing rights, etc., by both signatory and nonsignatory states, it seems doubtful that the principles of Article 24 have fallen into the domain of customary international law. Thus, by virtue of the principle of reciprocity, the United States should not feel bound by Article 24 as against a nonsignatory state to the Convention who is not bound by it.

Moreover, the United States arguably could declare its adherence to Article 24 and still find support for applying the Act. Under the principle that a treaty should be interpreted, if at all possible, not to conflict with a statute, it is reasonable to interpret Article 24 as contemplating only continuous, permanent contiguous zones and not the temporary exertions of jurisdiction under the 1935 Act requiring a heavy burden of proof of potential smuggling activities. These may be considered as completely outside the realm contemplated by Article 24, which was not aimed at such simple short-term restrictions on inclusive uses.

The more international cooperation and agreement existing on the subject, the greater the likelihood of international acceptance. The success of the reciprocity provisions of the Act which encouraged other states to pass similar legislation might serve as a barometer measuring

71. [1969] I.C.J. 4.

the international community's tolerance and acceptance of such legislation.

Consideration should be given particularly to the states against which this act would most likely be applied. While the majority of foreign flag narcotics smuggling has so far involved Jamaican or Colombian vessels, nationals of any number of other Latin and South American states may likely act as links in the "Latin-American Connection." Due to the large number of Latin and South American states sympathetic to or claiming a 200-mile territorial sea, reciprocity principles would prevent their asserting a violation of international law against the United States. However, keeping in mind the United States' preference to settle such issues by international agreement and considering the uncertainty as to future provisions which may be inserted in the new conventions on the Law of the Sea, this may be an inopportune time to exercise the provisions of the 1935 Act, due to possible prejudice of the United States' negotiating position.

Still another unresolved question which poses potential problems in relation to any application of the 1935 Act to smuggling is: whether a United States court would uphold a seizure or arrest in view of the *Mazel Tov* exception indicating the possibility that the United States has by treaty imposed upon itself a territorial restriction of its jurisdiction.[72] With respect to the internal application of Article 24 as a self-imposed limitation upon the territorial jurisdiction of the United States, the approach to the issue is similar to the construction of the liquor treaty in the *Mazel Tov* case, the issue turning upon whether the treaty provisions were given a self-executing character. As pointed out in an earlier section, while there does not seem to be any authoritative decision in this regard, it is doubtful whether it has changed any existing internal legislation.

In a context slightly different from that of the 1935 Anti-Smuggling Act, the issue of whether Article 24 imposed a restraint on internal legislation was brought before the Court of Appeals for the Fifth Circuit in the recent case of *United States v. Winter.*[73] However,

72. *See* note 28 *supra*.

73. 509 F.2d 975 (5th Cir. 1975). The Coast Guard arrested an American-owned and registered vessel carrying 1,130 pounds of marijuana 35 miles from the coast of Florida and 11.9 miles from the nearest island of the Bahamas. The court found adequate evidence of overt acts made in furtherance of the conspiracy within the jurisdiction of the district court and the defendants (two American citizens, two Jamaican nationals and one Bahamian national) were charged with conspiring to import a controlled substance pursuant to 21 U.S.C.A. §§ 952(a) and 963. With all defendants pleading nolo contendere, the appeal by the two Americans and the two Jamaicans was limited to challenging the trial court's jurisdiction over their persons and the crime. One of the bases for contesting the validity of the arrest was that the Coast Guard has exceeded its jurisdiction to arrest, which they asserted could extend only to a maximum of 12 miles from the United States coast as prescribed by statute (14 U.S.C.A. §§ 2, 89(a)) and treaty (Article 24 of the Convention on the Territorial Sea and Contiguous Zone).

The court stated that there was "little, if any current authority, construing the jurisdictional prerequisites of the Statute" (*id.* at 984, n.30) and noted that most of the case law dated from the days of prohibition construing either the former customs statutes authorizing boarding, search,

Winter involved the boarding of a United States registered vessel, which is authorized under Article 6(1) of the 1958 Convention on the High Seas. Even if Article 24 were held to be self-executing, its jurisdictional limitation would not apply to United States flag vessels, but only to those of a foreign flag.[74]

The more difficult case, then, would be that involving a non-United States flag vessel boarded beyond the 12-mile customs enforcement zone whether or not under authority of the 1935 Anti-Smuggling Act. In such a case, the court could not longer sidestep the decision whether Article 24 is self-executing with respect to foreign flag vessels since the jurisdictional outcome would turn upon that issue.[75]

Recalling the earlier discussion of whether the world community would acquiesce in the exercise by the United States of extended jurisdiction under the Anti-Smuggling Act and whether principles of reciprocity would permit the United States to utilize it as against a nonsignatory state, it is evident that there is some doubt as to how the jurisdictional issue should be decided if the issue of application against a nonsignatory state were brought before a United States court. Even if a court held Article 24 to impose a 12-mile territorial restriction upon the United States' customs jurisdiction (as a *Mazel Tov* exception to *Ker*),[76] that jurisdictional limitation should apply only to other signatories to the convention, similarly to the application of the self-executing effect of the liquor treaties only to treaty states.

It may be helpful to break down the various arrest situations.

---

seizure and arrest within four marine leagues of the coast or the liquor treaties, giving as examples a paragraph of citations of prohibition-era cases in which the *Mazel Tov* was buried.

In rejecting this jurisdictional attack, the court stated that the challenges "raise interesting and perhaps difficult questions of law, largely unresolved by federal precedent" and went on to say that

> we do not find it necessary to decide these questions at this time, however, since we are convinced that under a well-established case law of the Supreme Court and this Circuit, a defendant in a federal criminal trial whether citizen or alien, whether arrested within or beyond the territory of the United States may not successfully challenge the District Court's jurisdiction over his person on the grounds that his presence before the Court was unlawfully secured.

Id. at 985-86. The precedent cited for this consisted of the progeny of Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952). In the latter case the Supreme Court reaffirmed *Ker*, even where the defendant was forcibly abducted from another state potentially in violation of federal kidnapping statutes. No mention was made of the territorial jurisdiction treaty limitation of *Mazel Tov* (*see* note 28, *supra*) or of the question of imposing that same limitation by interpreting Article 24 to be self-executing.

74. Thus, while it appears that the Court in *Winter* came to the correct result, its line of reasoning does not deal properly with the defendant's jurisdictional challenge and does not discuss why Article 24 would fail to eliminate the district court's jurisdiction over their persons.

75. That such a decision would be necessary is shown by RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965) which states: "Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts of the United States if the issue arises in litigation." Whether established by treaty or custom, international law cannot be disregarded by a court in the adjudication of cases applying internal law. The Paquete Habana, 175 U.S. 677 (1900). *Accord*, Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923).

76. *See* note 28 *supra*.

Assuming a conspiracy with overt acts or agreement within the court's jurisdiction and a seizure or arrest outside the 12-mile customs enforcement zone, under international law principles or case law precedent, a court might resolve the jurisdictional issues as follows:

Circumstances of arrest	*Would court assert jurisdiction?*	*Jurisdictional basis or lack thereof*
1. U.S. flag vessel, U.S. citizen or alien arrested	Yes	Law of the flag, Art. 6 of High Seas Convention, Restate. 2d, Foreign Relations Law, 1965 § 32(1)(a)[77] *Ker-Frisbie, Winter*
2. Foreign Flag of state nonsignatory to Convention on Territorial Sea & Contiguous Zone, under Anti-Smuggling Act, alien arrested	Yes	Anti-Smuggling Act, *Ker-Frisbie,* et al.
2(a) Same as above, U.S. citizen arrested	Yes	Anti-Smuggling Act, *Ker-Frisbie,* et al. Active Personality-Nationality
3. Foreign flag of signatory state to Convention on Territorial Sea & Contiguous Zone, under Anti-Smuggling Act, alien arrested	Yes, if Art. 24 not self-executing No, if Art. 24 is self-executing	Anti-Smuggling Act, *Ker-Frisbie,* et al. *Mazel Tov* exception to *Ker.*
3(a). Same as above, U.S. citizen arrested	Yes	Anti-Smuggling Act, *Ker-Frisbie,* et al. Active Personality-Nationality
4. Foreign flag of state nonsignatory to Convention on Territorial Sea & Contiguous Zone, without application of Anti-Smuggling Act, alien arrested.	Yes	*Ker-Frisbie,* et al.
4(a). Same as above, U.S. citizen arrested	Yes	*Ker-Frisbie,* et al. Active Personality-Nationality
5. Foreign flag of signatory state to Convention on Territorial Sea & Contiguous Zone, without application of Anti-Smuggling Act, alien arrested	Yes, if Art. 24 is not self-executing No, if Art. 24 is self-executing	*Ker-Frisbie,* et al. *Mazel Tov* exception to *Ker.*
5(a). Same as above, U.S. citizen arrested	Yes	*Ker-Frisbie,* et al. Active Personality-Nationality

With the exception of the first situation, it is likely that a foreign state would assert a diplomatic protest in all cases where a foreign vessel had been boarded beyond the 12-mile customs zone under the customary international law principle of freedom of the high seas without regard to whether the boarding or arrest had been undertaken pursuant to the Anti-Smuggling Act, the countervailing defense being all of the previously discussed commentary that such protective assertions of customs jurisdiction were "reasonable." On the premise, then, that to a United States court it would be irrelevant whether the

defendant's person had been brought before the court by legal or illegal means (with an exception when the arrest had violated a self-imposed territorially restrictive treaty), what value would lie in the use of the Anti-Smuggling Act to effect an arrest beyond the 12-mile enforcement zone? Whether determinative of jurisdiction or not, compliance with the Act would cloak such an extra-territorial arrest with a greater aura of internal legality than would exist were it not used. This would be useful in bolstering the validity of jurisdiction of a United States court as well as in providing at least an internal law defense to a later civil suit by the defendant against arresting officials alleging damages caused by an illegally accomplished arrest.[78]

V. ALTERNATIVE PROPOSALS

In maintaining an effective attack on narcotics smuggling, a number of alternatives to the use of the Anti-Smuggling Act should be taken under consideration. Most obvious would be the inclusion in any new convention on the high seas or contiguous zone of a provision which either would add illicit narcotics traffic to the list of acts for which principles of universal jurisdiction may be extended (similar to the slave trade) or would offer more flexibility generally on the part of a coastal state to protect its coastal interests. Due to the desire to achieve consensus in the new Law of the Seas conventions, however, it is doubtful whether such a proposal would meet with much success since, by distilling each article down to the lowest common denominator to achieve consensus, it is likely that the required flexibility would be lost. Suppression of international drug traffic is in many ways analogous to the pursuance of peace: all states profess it as a common goal, but there exist wide differences of opinion on the proper means of securing it. Furthermore, by the couching of universal jurisdiction or extended flexibility within the provisions of a law of the sea convention, specters of abuse and harassment of ships on the high seas would be raised to a greater extent than if the same agreement were made in a different context.

---

77. Section 32(1)(a) provides that "a state having jurisdiction to prescribe a rule of law has jurisdiction to enforce the rule outside of its territory . . . aboard a vessel or aircraft having its nationality while under the control of its commanding officer."

78. Events at the on-going sessions of the Third United Nations Conference on the Law of the Sea could significantly change the likely non-self-executing nature of articles equivalent to the present Article 24. One of the declared objectives of the conference is to fashion an agreement which is acceptable to all the participants, the idea being that by adhering to a rule of consensus, when the instrument is adopted, it will become "instantaneous customary international law" thereby circumventing the confusing problems of which states are bound by it vis-à-vis which other states and whether the 1958 Conventions have any continuing efficacy for their signatories which are not bound by Article 24. If this consensus objective is successful and a similar restrictive customs enforcement limitation is included, it is much more likely to be interpreted as having a self-executing character than is the present Article 24 of the Convention on the Territorial Sea and Contiguous Zone. To the extent that such a limitation would be in conflict with provisions of the 1935 Anti-Smuggling Act, the Act's utility and effectiveness would be seriously undermined.

Such a context might be the 1961 Single Convention on Narcotic Drugs. While the original text of that convention contains language alluding to international, cooperative action,[79] it apparently has not been interpreted as falling within the descriptive phrase, "Except where acts of interference derive from powers conferred by treaty, . . ." of the Convention on the High Seas, which would permit states to exercise jurisdiction on the high seas under the principle of universality. The 1961 Single Convention does however, have 106 signatories at present, indicating a high degree of consensus as to the principles embodied in its text. There have been several protocols to this convention since 1961 and it would seem likely that another would be met with approval by a number of states which would be willing to agree to an extended enforcement zone on the part of reciprocating coastal states in regard to narcotic drugs smuggling. By attaching such a protocol to the narcotic drugs convention, a greater number of agreeing states might be anticipated, in addition to the advantage of not being burdened by the consensus target prevailing at the Law of the Sea Conference.

Another approach may lie with single bilateral agreements similar to the liquor treaties of the 1920's. Although the treaties were limited solely to alcohol smuggling and did not include narcotic drugs, the 1935 Anti-Smuggling Act, although gaining its primary impetus from liquor smuggling, is not limited to that.[80]

A parallel might be drawn to the attack on slave trading, the development of which assumed the pattern of initial internal prohibiting legislation, followed by bilateral and multilateral international

79. *See, e.g.*, the Preamble:

> Considering that effective measures against abuse of narcotic drugs requires coordinated and universal action.
>
> Understanding that such universal action calls for international cooperation guided by the same principles and aimed at common objectives, . . .

and Article 35:

> The Parties shall:
>
> . . . .
>
> (b) Assist each other in the campaign against the illicit traffic in narcotic drugs;
>
> (c) Cooperate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic; . . .

Single Convention on Narcotic Drugs, March 30, 1961 [1961] 18 U.S.T. 1407, T.I.A.S. No. 6298.

80. This is evidenced by the testimony at the hearings:

> Mr. McCormack. "But this goes beyond liquor, as it should. You have other things in mind besides liquor, as you should."
>
> Mr. Hester. "Yes."
>
> Mr. McCormack. "Particularly if you have drugs in mind you have a much stronger case. That is really one of the main things you have in mind, is it not?"
>
> Mr. Hester. "No, the particular thing that we have in mind is the stopping of the liquor smuggling into the United States. That is what this bill is really aimed at."
>
> Mr. McCormack. "Yes, but you also have drugs in mind, have you not?"
>
> Mr. Hester. "This is an enabling act which later on can be extended and enlarged if it is necessary."
>
> Mr. McCormack. "But you have also drugs in mind, have you not?"
>
> Mr. Hester. "Yes, we have drugs in mind."

1935 Hearings, supra note 8, at 40.

agreements until a general consensus was obtained and incorporated as an act under the universal jurisdiction of the High Seas Convention. If the United States believes that it would be desirable ultimately to place narcotics traffic under that same principle of universality, but that it is doubtful whether the international community is now ready to take such a large step, it may consider the best beginning to engage in treaties and protocols as a means of swaying international sentiment in that direction. Assuming that any new provision in a Law of the Sea Convention did not totally destroy the effectiveness of the Anti-Smuggling Act, the Act itself might be useful in the formation of a trade-off to encourage bilateral treaties using a policy similar to the reversal of the effects of *Cunard S.S. Co. v. Mellon*[81] as a trade-off for the liquor treaties.[82]

If attempts at treaties or protocols are unsuccessful or if for any reason it is determined that those approaches would not be in the United States' best interests, the only remaining method of dealing with hovering vessels suspected of engaging in smuggling would be on a case-by-case basis, requesting permission to board the vessel from the flag state through diplomatic channels. Although this would involve a greater amount of effort and a loss of time (although probably no more than forwarding a request to the Secretary of Transportation as the President's representative to designate a customs enforcement zone under the 1935 Act), upon furnishing assurances that all proper protection would be afforded the vessel in terms of requiring probable cause for a search and seizure, most states would grant permission to the United States Coast Guard to investigate and, as long as investigative efforts were confined to the scope granted by that permission, the United States would be assured of not provoking an international protest.

VI. CONCLUSIONS

1. Historically, hovering legislation and assertions of coastal state competence for limited purposes of protecting revenues, morals, security or enforcement of internal legislation upon the high seas in areas contiguous to the coast have been accepted under customary international law.

81. 262 U.S. 100 (1923).

82. A treaty might be proposed, for instance, wherein the United States agrees not to employ the 62-mile extent of the 1935 Anti-Smuggling Act against drug-smuggling activities or vessels of state X if state X agrees not to object to the boarding and searching of hovering narcotics laden vessels flying state X's flag within some lesser distance than 62 miles or within a stipulated sailing time of the United States coast. But since no country officially sanctions the use of its registered vessels to carry on trade in narcotics as compared to the approval of liquor commerce in the 1920's, there would be less compelling motivation for any state to enter such a bargain. Such an approach would also presume that the United States had something of "real value" to trade off. In view of the isolated cases in which the Act has been applied and even then, never to its fullest extent against a foreign flag vessel, a more recent application of the Act (preferably a successful one to demonstrate continued viability) against a foreign flag vessel would be almost a prerequisite to any attempt to bargain away its provisions.

2. The 1935 Anti-Smuggling Act was drafted meticulously to comply with the standard of reasonableness required of hovering or contiguous zone legislation under international law. Congressional hearings gave primary attention to assuring that the Act complied with international law and it was passed in the belief that it was a reasonable exercise of jurisdiction. The United States State Department did not submit an objection to the enactment nor did the department affirmatively support it.

3. Post-1935 commentary by international law authorities generally confirms its compliance with and reasonableness under international law.

4. Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone has generally not been interpreted as self-executing, although no authoritative decision in this regard has been made. Thus, the 1935 Anti-Smuggling Act's continued efficacy as valid internal legislation has not been destroyed by the 1958 Law of the Sea Conventions.

5. There is a substantial body of international law writers and publicists who believe that, in view of the failure of most signatories to accept the literal wording of Article 24 (authorizing punitive measures in the contiguous zone only for violations committed in the coastal territory or its territorial sea), and considering the prevalence of states, assertions of fisheries contiguous zones and the taking of security measures beyond the territorial sea, states will continue to act as they did before the 1958 Conventions came into force. Assuming the coastal state's claim to be reasonable, it will probably continue to be accepted by the international community. This is based on the premise that the coastal state's interests and objectives must necessarily be of variable strength and distance and that a 12-mile boundary to protect any and all interests is too inflexible.

6. On the other hand, the United States may feel bound by the 12-mile provision of Article 24 and thus unwilling to exercise its enforcement jurisdiction to the extent authorized by the 1935 Anti-Smuggling Act. With respect to nonsignatories of the Convention on the Territorial Sea and Contiguous Zone, however, the principles of reciprocity and mutuality should release the United States from the 12-mile limitation of Article 24, unless its provisions have fallen into the domain of customary international law. The existence of such custom is doubtful, considering that there are only 43 signatories, which are not, themselves, adhering fully to the literal language of Article 24. Even if Article 24 were held to be self-executing, any United States territorial jurisdiction limitation imposed thereby would be available only to vessels of signatory states as a jurisdictional challenge in a United States court.

7. Considering the United States State Department's policy of settling issues of a coastal state's competence to apply its laws in areas

of the high seas through agreement rather than by unilateral declarations, and weighing the potential effect of unilateral declarations of high seas competence upon positions and negotiations currently under consideration within the international community in attempting to reach an agreement on a new Law of the Sea Convention, it may be advisable not to use the extended provisions of the 1935 Anti-Smuggling Act until the delineation of a new territorial sea or contiguous enforcement zone is internationally agreed upon, at which time the advisability of using it should be reassessed.

8. Due to the consensus objective prevailing at the sessions of the Third United Nations Conference on the Law of the Sea, any new provision territorially restricting a coastal state's enforcement competence may be interpreted to be customary international law which would supersede prior inconsistent internal legislation. If such action would appear to threaten the continued validity of the Anti-Smuggling Act, consideration should be given to dealing with the issue of an international attack on narcotics smuggling under the new Law of the Sea Convention itself.

9. If a consensus regarding an international attack on narcotics smuggling is doubtful or unsuccessful and use of the Anti-Smuggling Act is ineffectual or inadvisable, it may be wisest to address the issue of a coastal state's right to attack narcotics smuggling in areas extending more than 12 miles into the high seas in a different context, by a protocol to the 1961 Single Convention on Narcotics or by separate multilateral or bilateral treaties, providing assurance that adequate protections would be observed prior to instituting a search or seizure of a foreign flag vessel.

10. An ultimate enforcement mode objective in suppressing international narcotics traffic should be determined, that is, whether it would be desirable to place such an offense under principles of universal jurisdiction or merely to permit reciprocal enforcement between certain states, proceeding with the course of action best calculated to achieve that objective.