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Shaun Gehan
University of Maine School of Law

UNITED STATES v. ROYAL CARIBBEAN CRUISES, LTD.: USE OF FEDERAL "FALSE STATEMENTS ACT" TO EXTEND JURISDICTION OVER POLLUTING INCIDENTS INTO TERRITORIAL SEAS OF FOREIGN STATES

Shaun Gehan[*]

I. INTRODUCTION

On July 21, 1999, the United States Department of Justice announced a record $18 million settlement with Royal Caribbean Cruises, Ltd. (RCCL) ending criminal cases for environmental law violations against the company pending in six federal district courts in five different circuits.[1] Anticipating its impact, former Attorney General Janet Reno stated: "This case will sound like a foghorn throughout the entire maritime industry."[2] This settlement followed one for $9 million in June 1998 with RCCL for similar violations in two jurisdictions.[3]

Reno's statement rings true, and does so beyond the simple facts relayed in the press release. Certainly the case was important for establishing a high floor for particularly egregious violations of U.S. anti-pollution laws such as the Oil Pollution Act of 1990[4] and the Clean Water Act.[5]

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* University of Maine School of Law, Class of 2002.

1. U.S. Dept. of Justice, Royal Caribbean to Pay Record $18 Million Criminal Fine for Dumping Oil and Hazardous Chemicals, Making False Statements, *available at* http://www.usdoj.gov/opa/pr/1999/July/316enr.htm (July 21, 1999). Criminal indictments are being filed in Miami, New York City, Los Angeles, Anchorage, St. Thomas, U.S. Virgin Islands, and San Juan, Puerto Rico. *Id.*

2. *Id.*

3. *Id.* "The 1998 pleas . . . involved charges that the company engaged in a fleet-wide conspiracy to dump oil into U.S. coastal waters and lied to the U.S. Coast Guard to cover the crime by falsifying oil logs required by law." *Id.*

4. 33 U.S.C. §§ 2701–2761 (1994).

5. 33 U.S.C. §§ 1251–1387 (1994).

However it is the use of the federal Fraud False Statements Act,[6] (False Statements Act or § 1001), as a basis for criminal charges culminating in the 1998 settlement that portends a real clarion call to the international maritime community.

On February 1, 1993, the RCCL-owned cruise ship *Nordic Empress* was found discharging oil in violation of the International Convention for the Prevention of Pollution from Ships[7] by a U.S. Coast Guard aircraft equipped with special infra-red radar.[8] What makes this situation unique from all other violations charged against the company is that the discharge occurred in the territorial sea of the Bahamas, not the United States. Ordinarily, the United States would have no jurisdiction to prosecute such a crime. To overcome this limitation, however, the United States charged the company solely with a violation of the False Statements Act, to wit, presenting a falsified "Oil Record Book" to Coast Guard officials when the vessel made port in Miami.[9] The court in *United States v. Royal Caribbean Cruises, Ltd.* rebuffed all arguments that the United States lacked jurisdiction over this offense,[10] allowing the prosecution to go forward, and ultimately prompting the settlement.

This Note examines this use of a domestic law of general applicability to essentially extend State jurisdiction into that of other sovereign States in order to further the aims of conventional international law. Some might argue that by so employing § 1001, the United States ran roughshod over the sovereign rights of both the *Nordic Empress*'s flag State, Liberia, and, to some extent, that of the coastal State damaged by the discharge, the Bahamas.[11] This Nnote will argue, however, that such applications of domes-tic law are entirely consistent with the aims of the applicable

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6. 18 U.S.C. § 1001 (1994).

7. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546 (entered into force Oct. 2, 1983) [hereinafter MARPOL].

8. United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1361–62 (S.D. Fla. 1998).

9. *Id.* The *Nordic Empress*'s Oil Record Book, required to be carried under MARPOL, of course, contained no notations referring to illegal discharges of oil. *Id.*

10. *Id.* at 1363–1374.

11. *See, e.g.*, United Nations Convention on the Law of the Sea, Arts. 218, 220, 228, Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

international treaties[12] and offer a viable means of protecting the marine environment, particularly when flag States themselves are hesitant to act.

II. THE INTERNATIONAL LEGAL REGIME ON POLLUTION

While there are many treaties dealing with the problem of marine pollution on the high seas,[13] the primary instruments which lay out the international legal and regulatory regime are the United Nation's Convention on the Law of the Sea, 1982, (UNCLOS)[14] and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, collectively known as "MARPOL."[15] Unlike the UNCLOS, which was negotiated under the auspices of a United Nations conference, MARPOL was negotiated by member nations of the International Maritime Organization (IMO), a separate and smaller multilateral body formed in 1948.[16]

A. Differences Between UNCLOS and MARPOL

With respect to maritime pollution regulations, the mandates of the two instruments are somewhat overlapping. However, it is important to note the differences between UNCLOS and MARPOL. According to Agustin Blanco-Bazán, an IMO Senior Deputy Director, UNCLOS has more the status of a "'Constitution of the oceans'" whereas MARPOL sets out a highly detailed regulatory framework, specifically enforceable amongst the signatory States.[17] Elaborating, Blanco states:

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12. *See Royal Caribbean*, 11 F. Supp. 2d at 1368 ("Rather than barring this § 1001 prosecution, MARPOL/APPS seems to complement § 1001 so as to maximize pollution enforcement efforts in both the domestic and international arena [sic].").

13. *See, e.g.*, The International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403; The International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, reprinted in 64 AJIL 481 (1970), with protocol, London, Nov. 19, 1976, reprinted in 16 I.L.M. 617 (1977).

14. UNCLOS, *supra* note 11, at pt. XII, § 5.

15. MARPOL, *supra* note 7; *see also* International Maritime Organization, *An introduction to IMO*, *at* http://www.imo.org/imo/introd.htm (visited February 10, 2001) [hereinafter IMO website].

16. IMO website, *supra* note 15.

17. Agustin Blanco-Bazán, *IMO interface with the Law of the Sea Convention*, presented at Twenty-Third Annual Seminar of the Center Ocean Law and Policy, Univ. of Virginia School of Law (Jan. 6–9, 2000), at http://www.imo.org/imo/Library/papers/blanco/blanco.htm [hereinafter *IMO interface*].

> UNCLOS provisions . . . aim at the effective implementation of substantive safety and antipollution rules, but in the end they remain basically *jurisdictional* provisions, namely, provisions which regulate the features and extent of state jurisdiction but not the enforcement of measures regulated in other treaties. Compliance with IMO rules and standards cannot be dissociated from the treaty framework in which these rules and standards are contained. Thus UNCLOS obligations to enforce IMO rules and standards should be understood as operative on condition that parties to UNCLOS also become parties to the IMO conventions where these rules and standards are contained.[18]

With respect to the oil pollution rules, however, UNCLOS contains very specific port State jurisdiction rules[19] and responsibilities that come very near to the regulatory scope of MARPOL.[20] Blanco refers to this section as "unique" when contrasted with the overall "umbrella" framework approach of UNCLOS as a whole.[21]

The significance of this fact, it seems, is that it suggests a large degree of consensus was garnered among States on the importance of combating marine pollution in all ranges of the oceans. This consensus enabled UNCLOS member States to negotiate fairly specific measures addressing the problem. This specificity, however, is relative to the more hortatory language of other sections of UNCLOS and stands in starker contrast to the regulatory document that is MARPOL. To highlight the difference between the scope of each, Blanco states:

> Both treaties aim at the protection of the marine environment by means of ensuring that antipollution preventative measures are properly implemented. However, UNCLOS focuses more on measures to be taken to prevent and penalize discharges in ocean spaces while in the case of MARPOL violations are not only related to illegal discharges but also to the non-compliance of preventative measures to be applied on board irrespective of whether discharges [occur].[22]

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18. *Id.*

19. UNCLOS, *supra* note 11, at art. 218. UNCLOS also contains rules covering flag and coastal States. *Id.* at arts. 217, 220.

20. *See* UNCLOS, *supra* note 11, at pt. XII, § 5 ("International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment"); MARPOL, *supra* note 7.

21. *IMO interface*, *supra* note 17.

22. *Id.*

Thus, both treaties generally speak to whom has jurisdiction with respect to proceedings against a vessel for violations,[23] though UNCLOS is the more authoritative on these questions. MARPOL, on the other hand, goes much further specifying, for example, the need for tankers of a certain size to have segregated ballast tanks[24] and for member nations to provide certain port side facilities.[25]

B. Specific MARPOL and UNCLOS Provisions Relevant to Royal Caribbean

MARPOL requires the maintenance of an "Oil Record Book" for logging disposal of all regulated materials.[26] This book must also reflect any accidental (or intentional) discharges.[27] The Oil Record Book "shall be kept in such a place as to be readily available for inspection at all reasonable times."[28] Such rules aid enforcement of MARPOL, which is largely done through States exercising port State control initiatives to ensure compliance.[29] Thus, for example, port State authorities are entitled to examine a foreign vessel's Oil Record Book, required certificates, and inspect machine spaces and equipment.[30]

Both UNCLOS and MARPOL give port States significant authority to sanction foreign flag violators committing violations of the conventions within their territorial waters or exclusive economic zones (EEZ).[31] That

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23. UNCLOS, *supra* note 11, at art. 228; MARPOL, *supra* note 7, at art. 4.

24. MARPOL, *supra* note 7, at Annex I, Regulation 13. The United States has not ratified UNCLOS, but some courts have recognized it as law. *See* United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155, 159 (D.P.R. 1998) (noting that "[a]lthough the treaty arising from the convention [UNCLOS] is currently pending ratification before the Senate, it nevertheless carries the weight of law from the date of its submission by the President to the Senate.").

25. MARPOL, *supra* note 7, at Annex I, Regulation 12.

26. *Id.* at Annex I, Regulation 20 (1).

27. *Id.* at Regulation 20(3). The time of the recordation is to be when the discharge occurs. *Id.* at Regulation 20(4).

28. *Id.* at Regulation 20(5).

29. *See id.*, arts. 5, 6; *see also* Dr. Heike Hoppe, *Port State Control—An Update*, IMO NEWS 1/2000, *at* http://www.imo.org/publications.

30. MARPOL, *supra* note 7, at Annex II, pt. A. For example, MARPOL requires ships to maintain an Oil Water Separator which must be certified to reduce oil contaminated bilge waste to the required level of 15 parts per million. Inspection of both the certificate and equipment are permissible, and ships can be detained if either are found deficient.

31. UNCLOS, *supra* note 11, at art. 220; MARPOL, *supra* note 7, at art. 4. Neither even attempts to delineate any international limitations on enforcement of domestic laws—pollution or otherwise—in a State's ports or internal waters. The only constraints these sections pose on a port State is with respect to measures it may undertake to respond

authority is more restricted with respect to violations including "substantial discharge[s] causing or threatening significant pollution of the marine environment," beyond their jurisdiction.[32] Flag States (or the "Administration of the ship" in MARPOL terminology) have the right to be informed of all violations, and appear to have authority to preempt a port State's investigation and institute their own proceedings.[33] Under UNCLOS, penalties for violations of both "national laws and regulations [and] applicable international rules" are restricted to monetary levies only, unless the violations occur in a State's territorial waters *and* constitute "a wilful and serious act of pollution."[34] MARPOL holds that any violations "within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party."[35]

These treaties are not self-executing, but rather must be implemented by member States through national legislation.[36] In the United States, the

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to treaty violations from the territorial sea outward.

32. UNCLOS, *supra* note 11, at art. 220; MARPOL, *supra* note 17, at art. 6.

33. It appears that on the plain language of UNCLOS Article 220, port States have plenary power to investigate and punish violations occurring within their jurisdiction, subject only to the limitations on criminal punishment contained in Article 230. However, the reference to "applicable international rules" in Article 220.3 can be inferred to mean MARPOL. *See IMO interface*, *supra* note 17. MARPOL gives flag States preemptive rights in all cases noting that "[i]f an inspection indicates a violation of the Convention, a report *shall* be forwarded to the Administration for any appropriate action." MARPOL, *supra* note 7, at art. 6(2) (emphasis added). While MARPOL, Article 4(2)(a), allows a State to institute proceedings for treaty violations occurring within its jurisdiction under its own laws, section (b) allows referrals to the flag State, and Article 4(3) and Article 6(2), taken together, appear to grant the flag State the right of preemption. An example of this process is given by the *Royal Caribbean* Court:

> Based upon the suspicion that an alleged discharge violation had occurred, the United States referred this matter to a representative of the government of Liberia via the Department of State. The referral letter addressed an "alleged discharge violation" but referred the Coast Guard Report in its entirety, including the reference to potential violations of the Oil Record Book, to Liberia. On February 10, 1994, Liberia filed its Determination that there was reasonable doubt that the Nordic Empress was in contravention of MARPOL and that it was "difficult" to respond to the allegations of "improperly recorded" Oil Record Book entries under the facts as presented, and recommended expunging the allegation. There was no appeal for reconsideration or review made to the International Maritime Organization pursuant to the protocol set forth in MARPOL.

United States v. Royal Carribean Cruises, Ltd., 11 F. Supp. 2d 1358, 1361–62 (S.D. Fla. 1998). This right of review of disputes and the process to be employed are outlined in MARPOL, Article 10 and Protocol II.

34. UNCLOS, *supra* note 11, at art. 230(2).

35. MARPOL, *supra* note 7, at art. 4(2).

36. *Royal Caribbean*, 11 F. Supp. 2d at 1367.

provisions of MARPOL have been codified through the Act to Prevent Pollution from Ships (APPS).[37]

III. CASES

A. United States v. Royal Caribbean Cruises, Ltd.

In 1998, the United States charged the Miami-based cruise ship company, Royal Caribbean Cruises, Ltd., with "the knowing use or presentation of a false writing, specifically an Oil Record Book for the cruise ship the *Nordic Empress*, during a United States Coast Guard inspection on February 1, 1993."[38] Royal Caribbean moved to dismiss on several grounds.[39] Three of these related to domestic U.S. law, three others were premised on international law.[40] Of greatest relevance here, RCCL argued that because the violation supporting the Fraud and False Statements Act[41] claim occurred outside of U.S. jurisdiction, "the necessary predicate for a § 1001 claim, a false statement over which there is jurisdiction, cannot be established."[42] Secondly, it argued that APPS is specific legislation that preempts application of the more general statute, § 1001.[43] RCCL also argued that "binding provisions of international law under both MARPOL and UNCLOS" preempted this prosecution.[44] And, finally, that this prosecution was contrary, as a matter of policy, to the Law of the Sea Convention.[45]

1. Application of Domestic Law

The thrust of nearly all of the Defendant's arguments was that the prosecution was centered on the polluting incident occurring in Bahamian

37. 33 U.S.C. §§ 1901–1915 (1994).

38. *Royal Caribbean*, 11 F. Supp. 2d.. Thus violating Section 1001 of the Fraud and False Statements Act.

39. *See supra* text accompanying notes 7–10.

40. *Royal Caribbean*, 11 F. Supp. 2d at 1362.

41. *See supra* note 6.

42. *Royal Carribean*, 11 F. Supp. 2d at 1362.

43. *Id.* The third claim dealt with principles of lenity, due process, and notice. RCCL tried to argue that ambiguities in the scope of the penal provisions favored dismissal of the charges. The court rejected these arguments. *Id.* at 1362, 1365–66 (distinguishing United States v. Apex Oil, 132 F.3d 1287 (11th Cir. 1997)).

44. *Royal Carribean*, 11 F. Supp. 2d at 1366.

45. *Id.* at 1362.

waters,[46] and thus the United States was without jurisdiction over the matter, both under domestic and international law. The court rejected all such suggestions. RCCL argued that since MARPOL imposes the duty to report discharges at the time of discharge, then the offense, if any, occurred outside of U.S. jurisdiction.[47] The *Royal Caribbean* court "start[ed] with the premise that jurisdiction based upon § 1001 should not be unnecessarily confined.... [T]he fact that the alleged false statement... was not made within the jurisdictional bounds of the United States is not necessarily fatal to the claim."[48] MARPOL, the court continued, imposes a duty on the United States to "board and inspect ships while in port and to pursue appropriate measures to address any violations thereof."[49] Given that such inspections are "part of the regularly conducted activities of the [U.S.] Coast Guard," the court held that "false statements made in connection with those activities" were "within the jurisdiction of § 1001."[50]

Interestingly, the court went on to find an alternate basis for jurisdiction: "[T]he extraterritoriality doctrine provid[es] jurisdiction over certain extraterritorial offenses whose 'extraterritorial acts are intended to have an effect within the sovereign territory.'"[51] This potentially sweeping mandate was not justified—as was the first ground—on any notion of international law, but rather by a finding that U.S. laws are necessarily undermined by "deliberate use of false documents" within the sovereign territory.[52] The court then rejected the notion that the existence of specific regulations promulgated under APPS, and designed to give effect to MARPOL's rules, "impliedly repealed" application of § 1001 on the theory that the specific trumps the general.[53] Instead, the *Royal Caribbean* court held that absent express congressional intent, APPS was intended to "supplement and not repeal existing laws."[54]

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46. *See supra* text accompanying notes 7–10.
47. *Royal Caribbean*, 11 F. Supp. 2d at 1363.
48. *Id.*
49. *Id.* at 1364.
50. *Id.*
51. *Id.* (citing United States v. Padilla-Martinez, 762 F.2d 942, 950 (11th Cir. 1985)).
52. *Id.* Though the court did not elaborate, it is entirely plausible that false Oil Record Book entries are "intended to have the [territorial] effect" of speeding the ship through an IMO inspection and to avoid various liabilities, some of which may accrue to the port State. *Id.*
53. *Id.* at 1364–65.
54. *Id.* at 1365.

2. Application of International Law Principles

Turning to the international law contentions, the court refused to hold that MARPOL and UNCLOS precluded this prosecution.[55] The court heard extensive expert testimony on international law at the request of the Defendant.[56] RCCL argued that port States are limited in their role by MARPOL to "providing assistance to the flag state by enforcing the recordkeeping requirement through inspections," referring any alleged violations to the flag state, and that the U.S. has no jurisdiction to enforce Oil Record Book violations outside of its navigable waters.[57] The government responded that MARPOL does not and cannot limit United States jurisdiction to enforce its criminal laws in internal waters and ports[58] and that RCCL has no standing to "litigate rights under international law treaties[,] as treaty rights . . . accrue to sovereign nations."[59] The court agreed with the United States, stating that individuals have such standing only under treaties that are "self-executing,"[60] which MARPOL is not.[61]

The court, however, refused to decide whether RCCL had standing to seek rights under MARPOL, because it held no treaty rights were violated.[62] "Rather than barring this § 1001 prosecution, MARPOL/ APPS seems to complement § 1001 so as to maximize pollution enforcement efforts in both the domestic and international arena."[63] While respecting

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55. *Id.* at 1369–74.

56. *Id.* at 1361. Testifying were: Elliot Richardson, former Ambassador-at-Large and Special Representative to the Third U.N. Conference on the Law of the Sea; Professor Bernard Oxman, a senior member of the U.S. delegation to the Third Conference; Rear Admiral Paul Blaney, Chief Counsel, U.S.C.G.; Capt. Thomas Gilmour, of the U.S.C.G.'s Marine Safety and Environmental Protection office; and Robert K. Harris, Ass't Legal Advisor for Oceans Int'l Environment and Scientific Affairs, Dept. of State. *Id.* at 1366.

57. *Id.* at 1367. "For jurisdictional purposes, the requirements concerning the Oil Record Book apply to a ship that operates under the authority of a country other than the United States, such as the Nordic Empress, while the ship is 'in the navigable waters of the United States, or while at port or terminal under the jurisdiction of the United States.' 33 C.F.R. § 151.09(a)(5)." *Id.* The term "navigable waters" for the purpose of this section means the territorial seas, tidal inland waters, and certain non-tidal inland waters. 33 C.F.R. § 2.05–25(a) (2000).

58. *Royal Caribbean*, 11 F. Supp. 2d at 1367.

59. *Id.* For the flag State's response *see supra* note 33.

60. "A treaty is self-executing if it both requires no implementing legislation and provides a specific private right of action." *Royal Caribbean*, 11 F. Supp. 2d at 1367 (citing Haitian Refugees Center v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991)).

61. *Royal Carribean*, 11 F. Supp. 2d at 1367.

62. *Id.* at 1368.

63. *Id.*

the "careful international regulatory balance created by MARPOL," the court agreed with the government's view that presentation of a false Oil Record Book in a U.S. port is a separate crime.[64] Nothing in MARPOL, the court said, requires the U.S. merely to refer this case to Liberia, as the flag State; whether or not to do so is a policy decision "reserved for consideration by the Executive Branch."[65]

Turning to certain UNCLOS provisions, which RCCL characterized as binding law on the United States,[66] three challenges to the United States action were made: (1) as the United States initially referred its report on the polluting incident to Liberia—including the Oil Record Book violations—it was precluded by the "double jeopardy" provision of Article 228.1[67] from continuing this prosecution; (2) that the three year statute of limitations in Article 228.2 had run; and (3) that no request for this investigation and prosecution was made by either the coastal or flag State, as required by Article 218.2, thus the court lacked jurisdiction to hear the case.[68] The United States again argued the standing issue, and further argued that UNCLOS does not effect a nation's sovereignty with respect to enforcing criminal laws for infractions occurring in its ports, and, finally, that even if it did extend so far, the treaty was simply not violated here.[69]

The court simply could not find any jurisdictional basis for applying the UNCLOS provisions cited by RCCL to the facts at issue. "The fact that international issues are implicated is not enough to divest the United States of jurisdiction. . . . Presentation of a false Oil Record Book seems more

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64. *Id.* The *Royal Caribbean* court also agreed with the court in the related case in Puerto Rico, United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 155 (D.P.R. 1997), that MARPOL, Article 4(2), results in "concurrent jurisdiction" in both the flag State and the port State. *Royal Carribean*, 11 F. Supp. 2d at 1368.

65. *Royal Caribbean*, 11 F. Supp. 2d at 1368–69.

66. Either as a matter of collateral estoppel, because the determination that the district court in Puerto Rico made with respect to this issue in the sister case, *United States v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp. 155 (D.P.R. 1997), that the United States was so bound, *see id.* at 159, or because it reflects customary international law.

67. "When proceedings instituted by the flag State have been brought to a conclusion, the suspended proceedings [of the coastal State] shall be terminated." UNCLOS, *supra* note 10, at art. 228.1. After the Coast Guard inspected the *Nordic Empress* and uncovered the Oil Record Book violation in February 1993, the United States referred to Liberia "an 'alleged discharge violation,'" but included the Coast Guard report in its entirety. *Royal Caribbean*, 11 F. Supp. 2d at 1361. On February 10, 1994, Liberia filed its Determination that there were no grounds for sanctions, and stated "that it was 'difficult' to respond to the allegations of 'improperly recorded' Oil Record Book entries under the facts as presented, and recommended expunging the allegation." *Id.* at 1361–62. Thus, RCCL is arguing here that this matter was passed upon and decided by the flag State, as is its' prerogative.

68. *Royal Caribbean*, 11 F. Supp. 2d at 1369–70.

69. *Id.* at 1370.

appropriately characterized . . . as an essentially domestic law violation over which the United States properly has jurisdiction."[70] The *Royal Caribbean* court, however, went on to analyze the case under the relevant UNCLOS provisions, which the court found, on the basis of expert testimony and case law, to be "properly considered customary international law."[71] As with MARPOL,[72] the court refused to decide RCCL's standing to claim rights under UNCLOS, but analyzed the treaty as if standing existed.[73]

The basic principle the court applied to its analysis of customary international law as reflected in UNCLOS is that "U.S. statutes are not to be interpreted and applied in a manner inconsistent with international law if any other interpretation is possible. . . ."[74] The primary conflict to be resolved revolved around UNCLOS, Article 218, "Enforcement by port States," which reads:

> When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings *in respect of* any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.[75]

The question becomes: Does Article 218 apply to a criminal charge under Section 1001 for presenting a falsified Oil Record Book when the falsity of the statement is "in respect of" a discharge of oil in another State's Exclusive Economic Zone? Territorial seas? Internal waters? If so, then where, as here, neither the coastal State (Bahamas) nor the flag State (Liberia)[76] requests action by the port State, Article 218.2 specifically

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70. *Id.* at 1371.

71. *Id.* at 1372.

72. *See supra* notes 59–63 and accompanying text.

73. *Royal Caribbean*, 11 F. Supp. 2d at 1373.

74. *Id.* at 1372. This is an application of what is known as the "Charming Betsy canon" which derives from the case *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 546 (1999). As the discussion below makes clear, this canon is shared by other common law States. *See infra* notes 95–96 and accompanying text.

75. UNCLOS, *supra* note 11, at art. 218.1 (emphasis added).

76. Which not only failed to request the proceeding, but, indeed, lodged a Diplomatic Note of protest with the U.S. State Department. *Royal Caribbean*, 11 F. Supp. 2d at 1370.

forbids any proceedings under 218.1.[77] The *Royal Caribbean* court resolved the UNCLOS/§ 1001 conflict by holding that "[w]hile the interpretation of the term 'in respect of' is admittedly imprecise, Article [218.2] plainly directs its prohibitions to discharge violations and not domestic port violations."[78] In other words, this prosecution is solely about false statements made in a U.S. port and all the other trappings—the MARPOL-required Oil Record Book, the location of the act giving rise to the false statement—are extraneous to the domestic crime.[79]

The last issue addressed—i.e., that such prosecutions "threaten[] to upset the international balance of" UNCLOS—was sharply disposed of as a nonjusticiable political question.[80] Said the *Royal Caribbean* court:

> While we appreciate the position of the Government of Liberia as communicated to us . . . , as well as the position of the United States Department of State regarding this matter . . . , we cannot take such considerations into account. The arguments concerning the implications for the international balance of powers presented by this prosecution are policy arguments concerning matters of foreign diplomacy, matters by definition most properly reserved to the executive branch of our government. . . .[81]

B. Analogous Case Law

A search of case law in Canada, the United Kingdom, France, Australia, and the International Court of Justice revealed no similar extensions of national jurisdiction against foreign flag vessel, either on the high seas or into other State's territorial waters, to enforce rights enshrined in either MARPOL or UNCLOS. In a British case, *Pianka v. The Queen*,[82] however, the Privy Council, hearing the case on appeal, discussed a State's jurisdiction over a foreign flag vessel in a State's own waters in light of the

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77. *Royal Caribbean*, 11 F. Supp. 2d at 1373; UNCLOS, *supra* note 11, at art. 218.2.

78. *Royal Caribbean*, 11 F. Supp. 2d at 1373–74.

79. The court applied similar reasoning to RCCL's contentions under UNCLOS, Article 228.1 (requiring port States to suspend its proceedings when the flag State conducts its own) and 228.2 (noting that "Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of three years from the date on which the violation was committed . . ."). The court reasoned that "[b]y its own terms, Article 228.1 applies to violations committed at sea[,]" and that "the three-year statute of limitations [in 228.2] is inapplicable to this matter, as the violation alleged in this action is a violation of *18 U.S.C. § 1001*, not UNCLOS." *Royal Caribbean*, 11 F. Supp. 2d at 1373–74.

80. *Id.* at 1374.

81. *Id.*

82. [1979] A.C. 107, [1977] 3 WLR 859.

Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958's (1958 Convention) provisions on "the right of innocent passage."[83] Although the main issues in the case involved the jurisdiction of Jamaican parish courts over summary criminal offenses under Commonwealth law, the Defendant also set up the 1958 Convention as a defense because the Jamaican authorities had seized his U.S.-flagged vessel, loaded with marijuana, within its territorial waters.[84]

Similar to the *Royal Caribbean* case, Pianka asserted that the State's assertion of jurisdiction contravened international law, specifically, the 1958 Convention's Article 19.[85] While this treaty specifically authorizes interference with innocent passage in case of "narcotic drug" violations, for reasons not entirely clear, the *Pianka* court analyzed the arrest in terms of Article 19(1)(a) and (b) which authorize arrests of foreign vessels when effects of the crime either extend to the State or are of a nature likely to disturb the peace thereof.[86] As did the *Royal Caribbean* court, the Privy Council gave a "liberal construction" to the treaty provisions and found that the possession of large amounts of marijuana within the territorial seas had sufficient effect in Jamaica to warrant the exercise of jurisdiction.[87]

A more closely analogous case is *Spain v. Canada*.[88] There the International Court of Justice was faced with charges that Canada violated "principles of international law which enshrine freedom of navigation and freedom of fishing on the high seas" by seizing a Spanish-flagged fishing

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83. *Id.* at 125.

84. *Id.* Under the 1958 Convention, territorial seas extended only three miles from the coastal State's baseline, reflecting customary international law, whereas under the 1982 amendments to UNCLOS, Article 3, territorial seas could be extended out to 12 nautical miles. Thus, it is quite possible that the incident at issue in *Piankas* occurred much closer to the coastal State than did the polluting incident at issue in *Royal Carribean*.

85. *Id.* Article 19 of the Geneva Convention on the Territorial Sea and Contiguous Zone reads, in relevant part:

> 1. The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal state; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities had been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

Pianka v. The Queen, [1979] A.C. 126.

86. Pianka v. The Queen, [1979] A.C. 126–127.

87. *Id.* at 128.

88. Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 96 (Dec. 4).

vessel on the high seas for harvesting "straddling stocks" of turbot outside of Canada's exclusive economic zone.[89] Canada was applying its Coastal Fisheries Protection Act,[90] recently amended to target Spanish and Portuguese vessels fishing on stocks in the Northwest Atlantic Fisheries Organization's controlled zones outside of Canada's EEZ.[91] However, Canada withdrew jurisdiction from the ICJ, leaving the issues raised undecided.[92]

There is, however, some court record as Gonzalez, the Captain of the Spanish vessel seized and its corporate owner, brought suit for damages against the Canadian government under theories of tort including malicious prosecution.[93] Gonzalez argued that his vessel, the *Estai*, "was subject to the exclusive jurisdiction of Spain pursuant to Maritime Law, established principles of international law, Spanish Law, Canadian Law, Article 6 of the Geneva Convention on the High Seas, 1958, and Article 92.1 of the United Nations Convention on the Law of the Sea, 1982."[94] Plaintiffs argued that this seizure violated principles of international law, while Canada argued that the court was without jurisdiction to hear these claims because they necessitate a judicial determination that international law supercedes Canadian statutory law on the same point.[95] To this point, the court iterated the familiar rule that "accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless, of course, they are in conflict with domestic law."[96]

The case was solely before the court on a motion by the Defendant to strike certain pleadings for failure to state a claim—there have been no substantive determinations yet.[97] In allowing the case to go forward, however, the court held that Plaintiffs may raise the issue of whether the regulations under which they were arrested were valid under Canadian law, but found it unnecessary to make

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89. International Court of Justice, "Case concerning Fisheries Jurisdiction (Spain v. Canada): Court declares that it has no jurisdiction to adjudicate on the dispute," (December 4, 1998) *at* http://www.icj-cij.org/icjwww/presscom/iPress1998/ipr9841.htm (visited January 31, 2001) [hereinafter *ICJ Fisheries Jurisdiction*].

90. Coastal Fisheries Act, R.S.C., ch. C-33 (1985) (Can.).

91. Jose Hijos, S.A. v. Canada, No. T-1602-95, 1996 Fed. Ct. Trial LEXIS 72, at *13, (Fed. Ct. Dec. 13, 1996).

92. *ICJ Fisheries Jurisdiction, supra* note 89.

93. Hijos v. Canada, 1996 Fed Ct. Trial LEXIS 72, at **6–7.

94. *Id.* at *10.

95. *Id.* at **11–13.

96. *Id.* at *14.

97. *Id.* at **1–2.

> reference in the pleadings or particulars to specific international treaties or conventions which, insofar as they are considered a source of law, will be applied in the action only if they are incorporated in Canadian domestic law by legislation specifically so providing. To the extent that international conventions or treaties are considered authority for international law principles, it is unnecessary to plead them specifically, in the same way that it is unnecessary to plead other authority . . . .[98]

In essence, the court determined that international law will have no role in the trial, as in *Royal Caribbean*, unless and only to the extent it is embodied within, or fails to conflict with, Canadian law. There appears to be no concern by the court with the extension of jurisdiction beyond Canadian waters, unless such is shown to be *ultra vires* under Canadian law and not conventional, international law.

IV. LAW OF THE SEA IMPLICATIONS

Clearly, as RCCL attempted to argue in federal court, uses of generally applicable laws against foreign flagged vessels in the manner employed by the U.S. Justice Department could significantly impact the carefully balanced jurisdictional rules for environmental enforcement laid out in Part XII of UNCLOS and MARPOL.[99] These provisions sought to limit the use by port States of criminal law against foreign crew and vessels to a narrow category of cases involving "willful and serious act[s] of pollution in the territorial sea."[100]

The results of such injections of one State's sovereignty into that of another simultaneously affect two different interests—those of the coastal State and of the flag State—and the potential consequences of each may be different. Of the two, it is arguable that those of the coastal State, to the extent it takes umbrage and would prefer to take action on its own, is the more pressing of the two. The coastal State's harm in having its territorial waters polluted is greater than the affront to the port State official presented with false statements. There is little danger that coastal States exercising

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98. *Id.* at *15.

99. United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1374 (S.D. Fla. 1998).

100. UNCLOS, *supra* note 11, at art. 230(2). According to Blanco-Bazán: "Violations to MARPOL rules resulting in substandard navigation *without* both wilful misconduct and polluting discharges can only be sanctioned with monetary penalties." *IMO interface*, *supra* note 17 (emphasis added).

rights under UNCLOS and MARPOL would do so inefficaciously, given the interests involved, thus the policies embodied by these agreements are likely to be upheld.[101] Conversely, there is great potential harm to comity and the system of international law when port States ignore the sovereign rights of injured coastal States.

On the other hand, there seems little reciprocal danger in pursuing such actions as against the wishes of the flag State, when, as in the case of *Royal Caribbean*, the flag State chooses to ignore persuasive evidence of a MARPOL violation.[102] Nations operating what are derisively referred to as "flags of convenience"[103] (FOC) generally have much more of a disincentive to punish vessels operating under their flag for violations of international law than do large port States. This is because the "market" for flag coverage is quite competitive and there is very little cost to switching the affiliation of particular vessels. Further, as many flag States representing a vast amount of the world's tonnage, for example Liberia, are not themselves large port States (or, as in the case of Luxembôurg, even coastal), these States do not face the same threat of coastal pollution as do States like the United States, members of the European Community, Canada, Japan, and others receiving large volumes of traffic.

When owners, masters, and crews of vessels flying these flags face the prospect of criminal liability under laws like the American False Statement Act, flag States will have a much greater incentive to put in place systems of meaningful investigation and punishment (presumably short of reciprocal criminal sanctions) for violations by their vessels on the high seas and in other State's waters. This is because they would be unable to provide cover, as Liberia apparently tried to do, by simply exercising prerogatives under UNCLOS and MARPOL to investigate and dismiss all charges, thereby shielding their owners from all liabilities.[104]

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101. *See supra* notes 19–20 and accompanying text.

102. *Royal Caribbean*, 11 F. Supp. 2d at 1361–62.

103. According to the International Transport Workers' Federation (ITF), an international federation of labor organizations representing workers in various transportation related industries, including maritime, flags of convenience "allow shipowners, who have no genuine link to the flag State, to register their ships there in order to avoid the taxation and regulation which their own countries would impose." ITF, *ITF Maritime Department, at* http://www.itf.org.uk/SECTIONS/Mar/mar.html (last visited Feb. 10, 2001). Among others, the ITF lists Bahamas, Bermuda, Cayman Islands, Cyprus, Germany (second register), Honduras, Liberia, Luxembourg, Malta, Marshall Islands, Vanuatu, and the world's largest registry, Panama, as flags of convenience. ITF, *Flags of Convenience, at* http://www.itf.org.uk/SECTIONS/Mar/FOC_flags/flags_2000.htm (last visited Feb. 10, 2001).

104. *Royal Caribbean*, 11 F. Supp. 2d at 1361–62.

This presupposes, of course, that countries like the United States would forgo the imposition of criminal charges for false statement violations if the flag State accepts competent evidence and imposes some lesser measure of punishment. This seems a fair assumption. After all, as the *Royal Caribbean* court noted, while the United States exercised its prerogatives to investigate a violation occurring beyond its waters, as allowable under UNCLOS Article 218.1, it fulfilled its duties under subsection 4 by relaying the results of the investigation to the flag State.[105] Only after "Liberia filed its Determination that there was reasonable doubt that the *Nordic Empress* was in contravention of MARPOL" that the United States sought the False Statements Act indictment.[106]

V. CONCLUSIONS

This paper has argued that jurisdictional reach by port States into even the territorial waters of other States by means of the False Statement Act does no great violence to the principles of the international law as embodied in UNCLOS and MARPOL under the circumstances present in *Royal Caribbean* if: (1) the coastal State directly affected by the violation chooses not to pursue remedies under such treaties, and (2) the flag State demonstrates an unwillingness to punish its violators in the face of competent evidence of a clear violations. Indeed, an increasing use of such tools, which by their very terms involve solely matters of domestic concern,[107] can have the salutary effect of promoting the aims and spirit embodied in treaties such as Part XII of UNCLOS and MARPOL.

105. *Id.* at 1361.

106. *Id.* at 1361–62.

107. That is, a violation of a domestic statute of general applicability when the violation clearly occurs in jurisdiction of the port State.