CRUISE SHIPS, POLLUTION, AND INTERNATIONAL LAW: THE UNITED STATES TAKES ON ROYAL CARIBBEAN CRUISE LINES

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I. INTRODUCTION

At 3 a.m. on February 1, 1993, the United States Coast Guard caught a Royal Caribbean cruise ship, the Nordic Empress, dumping oil in Bahamian waters as it made its way to Miami.[1] This and other pollution incidents led the Coast Guard and Justice Department to begin what would grow into a four-year inquiry that led to the discovery of a fleet-wide conspiracy within Royal Caribbean Cruise Lines (RCCL) to save millions of dollars by dumping oily waste into the ocean.[2] During the course of this investigation, RCCL, a Liberian corporation with its headquarters in Miami, denied the charges. In addition to the denial, RCCL made the unprecedented claim that it was immune from criminal prosecution in the United States because its ships fly foreign flags.[3] RCCL maintained that under the International Convention for the Prevention of Pollution from Ships (MARPOL), the international law that addresses the discharge of pollutants at sea, only Liberia had jurisdiction to prosecute because the Nordic Empress flew a Liberian flag.[4]

While the Justice Department and Coast Guard were conducting their investigation, in July 1993, the matter was referred to Liberia. Predictably, on February 10, 1994, Liberia accepted the company's claims that no dumping occurred, filed its determination that there was reasonable doubt that the Nordic Empress had contravened MARPOL, and asked the Coast Guard to erase the incident from its records.[5] The Justice Department did not give up, however, and used a novel approach to gain jurisdiction over the Nordic Empress: on February 19, 1998, RCCL was indicted in Miami on a single count, not for dumping oil, but for making a false statement to the Coast Guard.[6] The Nordic Empress discharged its waste in international waters, but the ship had presented the Coast Guard in Miami with an oil

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1 U.S. v. Royal Caribbean Cruises Ltd., 11 F.Supp.2d 1358, 1361 (S.D. Fla. 1998).

2 Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N.Y. TIMES, January 3, 1999 at A1. *See* Note 13, *infra*.

3 *Id.*

4 *Id.*

5 Royal Caribbean, 11 F.Supp.2d at 1361.

6 Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N. Y. TIMES, January 3, 1999.

record book that omitted the discharge.[7] While making a false statement to the Coast Guard is a crime in the United States, this was one of the first times that the statute was used in this manner.[8]

On April 22 and 23, 1998, a hearing took place in the Federal District Court of Miami in which RCCL asked the judge to dismiss the charges.[9] At the hearing, RCCL argued that the United States overreached its prosecutorial authority because only Liberia had jurisdiction over the matter and that Liberia had determined there was insufficient evidence of a crime.[10] The United States argued in response that international law did not preclude the prosecution.[11] On May 12, 1998, the District Court returned its decision, refusing to grant RCCL's motion to dismiss.[12] Having lost the argument over jurisdiction and faced with indisputable evidence that the Nordic Empress had polluted, Royal Caribbean pled guilty on June 3, 1998, and agreed to pay $9 million in fines.[13]

This case demonstrates both how difficult it is for authorities to police the booming cruise industry and how determined the industry is to make itself exempt from American regulation.[14] It is also important because it reveals the questionable effectiveness of the international regulatory regime

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7 The United States alleged a violation of 18 U.S.C. § 1001, The False Statements Act, which states: "(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both."

8 This charge was also used against RCCL in a very similar dumping incident that occurred in October, 1994. *See* note 13, *infra.*

9 *Id.*

10 *Id*

11 Royal Caribbean, 11 F.Supp.2d 1358 at 1362.

12 Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N. Y. TIMES, January 3, 1999.

13 *Id.* RCCL was indicted by a federal grand jury in July 1996 for another dumping episode that occurred in October 1994, from its ship The Sovereign of the Seas in San Juan, Puerto Rico. RCCL was indicted on almost identical charges as for the Nordic Empress violation: dumping oily bilge into the water, falsifying its log books, and making false statements to the US Coast Guard. The settlement in June 1998 for 9 million dollars covered both of these violations. *See id.*

14 Frantz, *Gaps in Sea Laws Shield Pollution by Cruise Lines.* All major cruise lines sail under foreign flags. By registering with flag countries in exchange for substantial fees, the owners avoid American corporate taxes and can pay lower wages to foreign crews. Royal Caribbean saves approximately $30 million a year in United States taxes by registering its ships in Norway and Liberia. Cruise lines, it should be noted, have also been accused of using their registration in foreign countries to avoid criminal culpability for acts committed by their employees while in international waters. *See id.*

that guards the world's waterways. The case raises important issues of international law because the boundaries of controlling law in this area have been shifted through the unilateral action of one country. Despite the fact that this case represents a defeat for RCCL, and perhaps the cruise ship industry in general, it also serves to indicate a fundamental weakness in this regulatory framework.

The foregoing introduction has provided an initial view of the case and its potential ramifications. Section II, which follows immediately, provides necessary background information, analyzing both the prevailing international law schemes implicated by this case, as well as the precedent cited by the United States District Court to support its conclusions. Section III examines the arguments of both sides in this litigation, viewing them in light of the regulatory regimes imposed by international law, in addition to the other important areas of international law this case implicates. The court's resolution of these contending claims will also be analyzed in depth. Finally, in Section IV, this paper concludes that while this case has changed the regulatory landscape in a manner detrimental to cruise ships, it also arguably demonstrates the ineffectiveness of MARPOL, and calls into question the continuing ability of international law to control pollution in the world's waterways.

II. BACKGROUND

A. APPLICABLE INTERNATIONAL LAW

Customary international law does not contain many rules relevant to questions of marine pollution.[15] Usually, customary law is too indefinite to permit effective regulation. There is a general rule that member states must not permit their nationals to discharge matter into the sea that may cause harm to the nationals of other states, but detailed emission and liability standards, considered indispensable to effective oversight, are lacking.[16] Most international law relating to marine pollution, therefore, is contained in treaties. The two treaties implicated in this case that deal with pollution of the marine environment, MARPOL and UNCLOS, will be discussed in detail below. Emphasis will be given to the provisions of the treaties relevant to issues in this case.

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[15] R.R. Churchill & A.V. Lowe, THE LAW OF THE SEA, 245 (1988).

[16] *Id.*

1. MARPOL

The United Nations Maritime Conference in Geneva created the International Maritime Organization (IMO) in 1948, to encourage cooperation between ship-owning nations.[17] All members of the United Nations that ratify the Maritime Conference are eligible for membership in the IMO.[18] At first, the IMO concentrated on designing regulations concerning shipping safety.[19] However, in the 1970s, at the behest of one of its members, the IMO organized a new convention that widened its focus to include the prevention and control of marine pollution.[20] Today, the IMO emphasizes the twin goals of "safe shipping and cleaner oceans."[21]

Under the IMO scheme, members may propose conventions to alter the scope of its jurisdiction. Before a convention is adopted, IMO member countries must specify the number of countries that will be required to ratify the convention before it may become effective.[22] Once a sufficient number of countries ratify a convention, the responsibilities of monitoring and enforcing shift from the IMO to the ratifying countries.[23] By ratifying a convention, a member-state assumes the obligation to ensure both that its internal laws conform to Convention requirements and that the country will enforce convention regulations.[24] As with all multinational treaties, countries that do not ratify a convention are not bound by its terms.

In 1973, the IMO convened the International Conference on Marine Pollution, which produced the International Convention for the Prevention of Pollution from Ships (MARPOL 73). This convention, modified by a 1978 protocol, is known alternatively as MARPOL or MARPOL 73/78, and entered into force on October 2, 1983.[25] The United States is a party to this treaty, and its provisions are codified in the United States Code as the Act to Prevent Pollution from Ships (APPS) at 33 U.S.C. §1901 et seq.[26]

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17 Rebecca Becker, *MARPOL 73/78: An Overview in International Law Enforcement*, 10 GEO. INT'L ENVT'L L. REV., 625, 627 (1998).

18 *Id.*

19 *Id.* at 627.

20 *Id.*

21 *Id.*

22 *Id* at 628.

23 *Id.* The term "sufficient" refers to the fact that the convention wants the number of countries that ratify it to comprise a significant number of affected ships. *Id.*

24 *Id.*

25 *Id.*

26 Royal Caribbean, 11 F.Supp.2d 1358, 1366 (S.D. Fla. 1998). As of November 30, 1997 there were 156 parties to the IMO Convention, and 103 countries have adopted MARPOL 73/78. Becker, *supra* note 17 at 629.

MARPOL consists of five annexes, each regulating individual sources of pollution.[27] Annex I, which regulates the operational discharge of oil into the water, mandates that member states issue compliance certificates to each ship inspected under its requirements.[28] It is important to note that one of the primary obstacles MARPOL has faced has been the determination of which state has the authority and jurisdiction to investigate and prosecute polluters – the flag-state, the port-state, or some combination thereof.

Under flag-state jurisdiction, each state is required to ensure that vessels flying its flag comply with international rules and standards.[29] Thus, flag-states must issue certificates of compliance with MARPOL.[30] A port-state's primary responsibility when a violation is detected is to inform the ship's flag-state of the transgression.[31] MARPOL states in relevant part,

> A ship to which the present Convention applies may, in any port or off-shore terminal of a Party, be subject to inspection by officers appointed or authorized by that Party for the purpose of verifying whether the ship has discharged any harmful substances in violation of the provisions of the Regulations. If an inspection indicates a violation of the Convention, a report shall be forwarded to the Administration for any appropriate action.[32]

Despite this language, flag-states are reluctant to prosecute vessels that fly their flags.[33]

When a ship bearing a compliance certificate enters a foreign port, the port-state may inspect the ship.[34] This search, however, is "limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate."[35] If a violation is detected, MARPOL instructs the port-state to take necessary steps

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27 Becker, *supra* note 17, at 629.

28 *Id.* Ratification of Annexes I and II was compulsory with the ratification of MARPOL 73. *See id.* at 631.

29 *Id.* at 631.

30 *Id.*

31 *Id.*

32 *Id.*

33 Becker, 10 GEO. INT'L ENVTL. L. REV. at 631.

34 *Id.* at 632.

35 MARPOL Article 5 § 2, 12 I.L.M. 1319, 1323.

to ensure the ship does not sail until it no longer presents, "an unreasonable threat of harm to the marine environment."[36] However, and most importantly to the case at hand, MARPOL does not explain the precise steps the port-state may take to ensure that the ship does not sail.

2. *UNCLOS*

The activities of the International Law Commission (ILC) laid much of the groundwork for the first two United Nations conferences on the law of the sea.[37] The commission's deliberations were the first systematic multilateral attempt to deal with the regulation of the world's waterways under United Nations auspices.[38] The ILC was established in 1947 to fulfill the mandate of Article 13 of the United Nations Charter, which ordered its members, "[t]o initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification."[39] Under the auspices of the ILC, the First United Nations Conference on the Law of the Sea (UNCLOS I) met in Geneva from February 24 to April 28, 1958, with delegates from 86 countries attending.[40] The second conference (UNCLOS II) met from March 17 to April 26, 1960.[41] UNCLOS I and II dealt primarily with the nature and extent of coastal state jurisdiction in offshore areas.[42]

UNCLOS I and II assured every state freedom of navigation and the right to extend its nationality to ships registered under its laws.[43] It gave each state absolute jurisdiction over the construction, design and manning standards of its flag vessels.[44] It also left each state the discretion to ensure that those standards conformed to generally accepted international standards and to ensure that its flag vessels observed those standards.[45] As a corollary, UNCLOS granted the flag-state sole jurisdiction to initiate any legal and

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36 *Id.*
37 Ann L. Hollick, U.S. FOREIGN POLICY AND THE LAW OF THE SEA, 122 (1981).
38 *Id.*
39 *Id.*
40 *Id.* at 127.
41 *Id.* at 128.
42 *Id.*
43 David M. Dzidzornu & B. Martin Tsamenyi, *Enhancing International Control of Vessel-source Oil Pollution under the Law of the Sea Convention, 1982: A Reassessment*, 10 Univ. of Tasmania L. Rev. 269, 271 (1991).
44 *Id.*
45 *Id.*

disciplinary process against its vessels if they were involved in any pollution incident on the high seas.[46]

As with MARPOL, UNCLOS placed the duty of enforcement on flag-states.[47] Article 217 of the Law of the Sea Convention provides that flag-states must enforce violations of pollution laws applying to their ships so as to, inter alia, discourage future violations, and investigate alleged violations of the rules by their vessels.[48] The principle of restricting jurisdiction and enforcement to flag-states is important because it leaves states in which pollution incidents occur completely powerless.[49] Thus, a boat, such as a cruise ship, travelling within a few miles of a state is only regulated by a far-off legal regime existing possibly thousands of miles away.[50] Flag-state jurisdiction, as contemplated by the Law of The Sea convention, therefore, raises serious concerns about enforcement.[51] The United States has never formally ratified UNCLOS I and II, though it does recognize its principles regarding flag and port-state jurisdiction.[52] While its most recent iteration, UNCLOS III, was submitted to the Senate on September 23, 1994, it has yet to be affirmed.[53]

B. PRECEDENT

In deciding *Royal Caribbean*, the Court did not buttress its opinion with much precedent. This is in part because this case presented novel legal theories and prior cases did not provide many analogous situations. However, in several hotly contested issues in the case, the court applied relevant precedent in support of its decision.

One of the hurdles facing the United States involved its ability to prosecute an alleged violation of the False Statements Act, codified at 18 U.S.C. § 1001, when the false statement was attendant to an event taking place outside its jurisdiction. The court relied on several federal appellate

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[46] *Id.*

[47] Craig J. Capon, *The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea*, 7 Pac. Rim L.& Pol'y J. 117, 128 (1998).

[48] *See* Churchill & Lowe, *supra* note 15, at 257.

[49] Craig J. Capon, *supra* note 47 at 128 (1998). But, a port-state may take legal proceedings against a vessel that committed a pollution violation in the waters of another State, but only when that State or the flag-state so requests. Churchill and Lowe, THE LAW OF THE SEA at 257. *See* notes 131-2, *infra*.

[50] Craig J. Capon, 7 Pac. Rim L. & Pol'y J. 117 at 128 (1998).

[51] *Id.*

[52] Churchill & Lowe, THE LAW OF THE SEA, Appendix 2.

[53] Royal Caribbean, 11 F.Supp.2d 1358 at 1368.

cases to reach the conclusion that a false statement in a § 1001 case need not be made within the precise jurisdictional boundaries of the United States.[54] In *U.S. v. Cox*, the Eleventh Circuit upheld a defendant's conviction on a § 1001 violation where the relevant documents were filled out in Guatemala.[55] Similarly, in *U.S. v. Godinez*,[56] a § 1001 conviction was upheld for a false statement regarding the importation of plywood into the United States, where the relevant papers were signed in Latin America and the alleged false statement was considered true in the exporting country.[57] Most notably, the Eleventh Circuit held in *U.S. v. Lawson*[58] that once the five elements of a § 1001 claim are met (a statement, falsity, materiality, specific-intent, and agency jurisdiction), the statement is actionable under § 1001.[59] Apparently, the location of the incident that serves as the basis of the false statement is not considered relevant.

The court did not restrict its analysis to holdings in the Eleventh Circuit. *U.S. v. Williams*[60] presented a defendant who was charged with conspiracy to import marijuana in violation of federal law. Williams, the defendant, was an American who boarded a Panamanian vessel, the PHGH, from a smaller boat that was delivering cargo to the PHGH when it stopped off the coast of Colombia.[61] The United States Drug Enforcement Agency (DEA) was monitoring this exchange from a plane. When a Coast Guard cutter stopped the PHGH because of evidence the boat was carrying illegal contraband, the Coast Guard seized the vessel and arrested Williams.[62]

Williams was convicted by the trial court and appealed, contending that the trial court lacked jurisdiction over the crime because no overt act occurred within the court's territorial jurisdiction.[63] In considering the appeal, the Fifth Circuit ruled that the Coast Guard had the statutory authority via 14 U.S.C. § 89(a) to stop and board a ship anywhere on the high seas.[64] Further, the court held that the jurisdiction was not limited to American flag vessels, and indeed, that it embraced offenses having an effect within its sovereign

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54 *Id.*
55 United States v. Cox, 696 F.2d 1294 (11th Cir. 1983).
56 United States v. Godinez, 922 F.2d 752 (11th Cir. 1991).
57 *Id.* at 753. Also Royal Caribbean, 11 F.Supp.2d at 1364.
58 U.S. v. Lawson, 809 F.2d 1514 (11th Cir. 1987)
59 *Id.* at 1517.
60 U. S. v. Williams, 617 F.2d 1063, 1070 (5th Cir.1980).
61 *Id.* at 1071.
62 *Id.*
63 *Id.*
64 *Id.* at 1077.

territory even though the acts constituting the offense occurred outside the territory.[65]

The conclusion reached by these cases seems unassailable: the United States had jurisdiction to charge defendants for violations of § 1001 even where the alleged false statements occurs outside the territorial boundaries of the United States. Thus, it would seem clear that the prosecution of RCCL followed a long line of similarly decided cases. However, another key issue presented by the prosecution of RCCL that threatened to alter this analysis was how jurisdiction of United States' courts may be affected by treaty.

Wilson v. Girard,[66] addresses this issue. In *Wilson*, the United States and Japan were involved in a controversy as to whether an American soldier could be tried by a Japanese court for causing the death of a Japanese woman in Japan.[67] While serving in Japan, an army soldier fatally wounded a Japanese woman who was gathering expended cartridge cases on or near a firing range.[68] American authorities insisted that he was acting "in performance of official duty," within the meaning of an administrative agreement.[69] The agreement was authorized by a treaty between the United States and Japan; thus, the United States argued that it had the "primary right" of prosecution in a situation of concurrent jurisdiction.[70] Japanese authorities argued that the soldier was acting beyond the scope of official duty and, therefore, Japan had the primary right to exercise jurisdiction.[71] After lengthy negotiations, the United States yielded to the Japanese position, agreed to waive whatever jurisdiction it might have under the administrative agreement, and delivered the soldier to Japanese authorities for trial.[72] Japan indicted him for causing death by wounding.[73]

After he was indicted, the soldier, Girard, then sought a writ of habeas corpus in a United States District Court. The court denied the writ but granted declaratory relief and enjoined his delivery to Japanese authorities.[74] On appeal, the United States Supreme Court reversed the grant of declaratory relief and affirmed the denial of the writ of habeas corpus.[75] The Court based

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65 *Id.*

66 Wilson v. Girard, 354 U.S. 524 (July 11, 1957).

67 *Id.* at 525.

68 *Id.* at 526.

69 *Id.* at 529.

70 *Id.*

71 *Id.*

72 *Id.* at 526.

73 *Id.*

74 *Id.* at 530.

75 *Id.*

its decision on the theory that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."[76] The Court ruled that the treaty allowed the United States to cede jurisdiction, and that the wisdom of such a treaty was in the province of the legislative and executive branches.[77]

This outcome left open the possibility that a sovereign state can consent to surrender its jurisdiction over domestic crimes by subscribing to the regulatory scope of a treaty. It was not certain, therefore, that the False Statements Act was completely insulated from the scope of MARPOL. Based on the language it quoted from *Wilson v. Girard*, the court could have found that the United States had impliedly consented to surrender its authority to prosecute violations of the False Statements Act by its acceptance of the MARPOL scheme.

III. ANALYSIS

RCCL contended that the prosecution of this matter was barred for three reasons. First, RCCL argued that a prosecution under the False Statement Act for an alleged omission of a record of a discharge was not permissible because it did not occur within the navigable waters of the United States.[78] Because the alleged false statement concerned an oil discharge that took place in Bahamian waters, RCCL argued that the Coast Guard did not have jurisdiction, and a false statement over which there is no jurisdiction could not be established.[79]

Second, RCCL argued in its motion to dismiss that the prosecution was barred by binding provisions of international law, namely MARPOL and UNCLOS.[80] Specifically, RCCL maintained that MARPOL required dismissal of this case, as domestic prosecution of the alleged false statement is only properly addressed via the international regime that mandates referral to Liberia, the flag-state.[81] Because Liberia had already considered the issue and found insufficient evidence of a crime, the matter was resolved.

Third, RCCL argued that this prosecution was inconsistent with the principles of the Law of the Sea Convention, particularly with respect to the allocation of jurisdiction, and thus allowing the prosecution to proceed would

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[76] *Id.* at 528.
[77] *Id.* at 530.
[78] Royal Caribbean, 11 F.Supp.2d 1358, 1362.
[79] *Id.*
[80] *Id.*
[81] *Id.*

undermine the international balance of the convention.[82] In sum, the goal of RCCL's legal arguments was not to refute the accusations, which were incontrovertible given the Coast Guard's evidence, but rather to dispute the authority of the United States to even bring charges.

The United States, in turn, countered that Royal Caribbean's false statement to the Coast Guard, plus its extensive presence in the United States, subjected the company to American law.[83] Although its ships fly various flags of convenience, one government official explained, "Royal Caribbean is as much a part of Miami as the Miami Dolphins."[84]

The key issues the case presented will be addressed as the court considered them.

A. DOMESTIC LAW AND APPLICABILITY OF 18 U.S.C. § 1001

The indictment against RCCL charged a violation of 18 U.S.C. § 1001, which in pertinent part alleged:

> On or about February 1, 1993, in the port of Miami, within the Southern District of Florida, the defendant...knowingly and willfuly used a false writing, in a matter within the jurisdiction of the United States Coast Guard, knowing the same to contain materially false, fictitious and fraudulent entries, to wit, an Oil record book for the Nordic Empress, that falsely represented...and which failed to record the overboard discharge of oil contaminated bilge waste ... [85]

As stated above, RCCL began by arguing that because the United States has no authority to regulate discharges occurring outside its territorial waters, the existence or non-existence of records in an oil record book are not within the jurisdiction of the United States, much less the Coast Guard.[86] Under MARPOL, codified in United States law as APPS, the duty to make entries regarding discharges of oil occurs at the time of the alleged discharge, which in this instance took place more than three miles off shore.[87] Because APPS only allows the United States to regulate foreign

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[82] *Id.*
[83] *Id.* at 1363.
[84] Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N. Y. TIMES, January 3, 1999.
[85] Royal Caribbean, 11 F.Supp.2d at 1362.
[86] *Id.* at 1363.
[87] *Id.*

flag vessels while they are in its navigable waters, RCCL argued that the United States could not impose a duty to make any entry in the Nordic Empress' oil record book when it was three miles off shore. Consequently, the United States was barred from prosecuting RCCL for a violation of this putative duty.[88]

The United States responded that the alleged violation was not the discharging of oil at sea and failure to record the discharge, but rather it was the presentation of a materially false oil record book to the Coast Guard while in port at Miami.[89] Presenting such a book to the Coast Guard thus satisfied the § 1001 requirement that an act be within the jurisdiction of a government agency.[90] The alleged criminal conduct, therefore, encompassed the failure to record the alleged oil discharge, affirmatively recording false information about the discharge, and presenting the falsely recorded oil record book while in port.[91] Accordingly, the government contended, jurisdiction existed under § 1001 and the Coast Guard was thereby authorized to enforce any violation.

In resolving the issue in favor of the United States, the court started with the premise that jurisdiction under § 1001 should not be narrowly circumscribed.[92] Specifically, the court said that § 1001 is "necessarily couched in very broad terms to encompass the variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex government."[93] The court then relied on the precedent described in Section II, specifically *U.S. v. Cox*, *U.S. v. Godinez* and *U.S. v. Lawson*, ruling that if the documents are presented to an agent of the United States government during the course of their regularly conducted activities, and the prima facie elements of a § 1001 violation are met—a statement, falsity, materiality, specific intent, and agency jurisdiction—then the statement is actionable under § 1001.[94]

The court determined that these 5 elements were satisfied and held that whether or not § 1001 was implicated by the dumping of oil off shore, was conceptually separate from the entirely domestic crime of presenting a false statement to the Coast Guard.[95] The court stated,

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88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*, quoting U.S. v. Gafyczk, 847 F.2d 685, 690 (11th Cir. 1988).
94 *Id.* at 1363-64.
95 *Id.* at 1364.

> whether or not the United States had the authority to regulate either the February 1, 1993 unauthorized discharge from the Nordic Empress or any attendant Oil record book violations at that time does not bear upon our inquiry as to whether the United States had jurisdiction to enforce its laws in port in Miami, Florida regarding the commission of false statements made to a United States agency performing its regular and proper duties.[96]

The court opined that a contrary ruling would jeopardize the government's ability to enforce domestic laws dealing with false statements concerning bank fraud, immigration, etc., where the false statements were made outside the United States and were acceptable under a foreign regulatory scheme.[97] The court also noted an alternative basis for jurisdiction under § 1001, holding that the False Statements Act provided jurisdiction over certain extraterritorial offenses where those offenses are intended to have an effect within the sovereign territory.[98] To support this proposition, the court cited *U.S. v. Williams*, discussed in Section II.

RCCL attacked the § 1001 prosecution on other grounds that will be described very briefly. First RCCL maintained that the False Statements Act was preempted because the United States had enacted a more specific "false statement" law, namely APPS, that regulated the specific conduct at issue, and thus could not elect to proceed under § 1001.[99] RCCL argued that according to principles of statutory construction a specific statute is given precedence over a more general statute addressing the same conduct and that APPS, which contains specific penalty provisions, was the proper statute under which to prosecute.[100] Rejecting this argument, the court noted that there is no contradiction between the laws and that it is well settled that when an act violates more than one statute a defendant may be charged with either crime.[101]

The very broad interpretation given § 1001 may be regarded as a setback for the cruise ship industry, which now faces the possibility of incurring domestic criminal liability, not for dumping waste in the ocean, but for presenting false and inaccurate records to the government about it. The overall impact of this may be mitigated, however, by the fact that it is

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1365.

extremely difficult to catch a ship blatantly dumping oil as the Nordic Empress was. Furthermore, even in the face of such inscrutable evidence, RCCL was able to delay prosecution for several years. In the meantime, however, it is now settled that cruise ships in RCCL's position can and will be prosecuted for failure to record discharge of oil or other hazardous substances. This threat provides a powerful corollary to the MARPOL enforcement regime, one that was sorely missing.

B. International Law and Applicability of 18 U.S.C. § 1001: MARPOL

Complementing its argument that the United States did not have jurisdiction to prosecute violations of the False Statements Act, RCCL argued that MARPOL was the controlling law and it thereby precluded domestic prosecutions of offenses existing within its sphere.[102]

MARPOL, as described above, establishes a framework for addressing the discharge of pollutants on the high seas. It requires that ships maintain an oil record book in which entries of activities relating to the discharge of oil are recorded.[103] As a result, the Nordic Empress was obligated under MARPOL, as RCCL conceded, to make proper entries in that book regarding discharge activities and to keep the book available for inspection.[104] The requirements concerning the oil record book, however, apply to a ship operating under the authority of a country other than the United States, only 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."[105] While MARPOL authorizes a port-state to inspect a ship to verify a discharge of oil, it requires a port-state that finds a discharge violation to forward the report to the flag-state for further action:

> [u]pon receiving such evidence (that the ship has discharged harmful substances) the Administration (the flag-state) so informed shall investigate the matter, and may request the other Party (the port-state) to furnish further or better evidence of the alleged contravention. If the Administration is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of

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[102] *Id.* at 1366.
[103] MARPOL, Nov. 2, 1973, Annex 1, Regulation 20, 12 I.L.M. 1319, 1359-61.
[104] Royal Caribbean, 11 F. Supp.2d at 1366-67.
[105] *Id.* at 1367.

> the alleged violations, it shall cause such proceedings to be taken in accordance with its law as soon as possible. The Administration shall promptly inform the party which has reported the alleged violation, as well as the Organization, of the action taken.[106]

RCCL argued that the authority of port-states is strictly limited to providing assistance to the flag-state, in this case Liberia, by enforcing the record keeping requirements through inspections, and that the United States does not have jurisdiction to enforce oil book violations occurring outside the navigable waters of the United States. Any violation of the oil book requirements may only be referred to the flag country, not independently prosecuted.[107] Exercising its legitimate flag-state power, Liberia had examined the issue and determined that there was insufficient evidence of a crime.[108] Thus, because the controlling legal authority was invoked, RCCL claimed it was inoculated against further prosecution. To find otherwise RCL maintains would be to controvert valid international law.

In response, the United States reiterated the arguments made in reference to the § 1001 prosecution, namely that RCCL was charged not with a violation of MARPOL/APPS, but rather with a violation of domestic law.[109] MARPOL, the government acknowledged, establishes a framework for the regulation of international maritime law, but it does not limit the jurisdiction of the United States for crimes committed in its ports and internal waters.[110] MARPOL, furthermore, does not explicitly or implicitly regulate what a sovereign state may do to enforce domestic law violations.[111]

In deciding this issue, the court rejected all of RCCL's arguments for the same reasons it refused their claims about the validity of a § 1001 violation: the court held that the MARPOL/APPS scheme is not irreconcilable with § 1001, but it is complementary, and serves to maximize pollution enforcement efforts in both the international and domestic arenas.[112] The court acknowledged that while the careful international regulatory balance created by MARPOL must be respected, there existed

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[106] MARPOL Article 6 §4, 12 I.L.M. 1319, 1324. (It is interesting to contrast this language with the text of the False Statements Act, under which RCCL was prosecuted, that appears in note 7, *supra*.)

[107] Royal Caribbean, 11 F. Supp.2d at 1367.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1368.

an equally compelling, if not superceding, value in assuring the United States the right to enforce its domestic laws. The court viewed this complementary regulatory scheme as essential to maintaining effective pollution control.[113]

As a brief aside, the United States presented a very interesting question in litigating this issue: when does a private company such as RCCL have standing to litigate rights under international treaties? This question is relevant, the government argued, because if treaty rights exist they accrue to sovereign states and not to individual defendants.[114] Individual defendants may have standing under an international treaty if the treaty is self-executing, that is, if it requires no implementing legislation and provides a specific private right of action.[115] The court commented that MARPOL is not self-executing because it contains many provisions that require signatory states to execute the treaty, and therefore, cannot be regarded as self-executing.[116] Despite the apparent support for the government's contention, the court ultimately concluded that it did not have to decide whether RCCL had standing to litigate its rights under MARPOL because the prosecution did not violate any of the defendant's rights under the treaty.[117]

C. International Law and Applicability of 18 U.S.C. § 1001: UNCLOS

RCCL also invoked UNCLOS, the United Convention on the Law of the Sea, contending that several provisions thereunder precluded this action.[118] This argument was decidedly difficult to make, given that the United States had yet to formally ratify the treaty. Nonetheless, RCCL

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[113] *Id.* at 1367.
[114] *Id.*
[115] *Id.*
[116] *Id.* The court refers to two cases holding that treaty rights accrue to sovereign states, not individuals. In U.S. v. Noriega, a District Court stated, "The rational behind this rule is that treaties are designed to protect the sovereign interests of nations, and it is up to the offending nations to determine whether a violation of sovereign interests occurred and requires redress." 746 F.Supp. 1506, 1533 (S.D.Fla. 1990). Next, in Haitian Refugee Center v. Baker, the Eleventh Circuit held that Article 33 of the 1967 United Nations Protocol Relating to Status of Refugees did not afford enforceable rights to Haitian refugees because, "it is not self-executing and thus provides no enforceable rights." 949 F.2d 1109, 1110-11 (11th Cir. 1991).
[117] *Id.* at 1368.
[118] *Id.* at 1369.

argued that UNCLOS deserved the weight of law and that it barred this prosecution.[119]

To support the proposition that UNCLOS should be considered binding, RCCL argued that customary international law principles, which can be binding as a component of domestic law when their principles have been universally accepted, mandate that the court consider the treaty as setting forth binding principles of international law.[120] RCCL maintained that recognition of UNCLOS by three successive presidential administrations, as well as expert testimony and affidavits produced in court, established that UNCLOS should be regarded as binding law in the United States.[121] Along these same lines, RCCL argued the principles of customary international law. That is, the Law of the Sea Convention, which binds the United States by Article 18 of the Vienna Convention on the Law of Treaties, provides that a country which has expressed its consent to be bound by an international treaty—even one not yet entered into—shall not act in ways that would defeat the object and purposes of that agreement.[122] RCCL believed that the criminal prosecution crossed this Article 18 threshold because it undermined fundamental navigation safeguards.[123]

Having tried to establish that UNCLOS should be afforded the status of binding law, RCCL next argued that this prosecution violated three provisions of the treaty.[124] First, RCCL maintained that this prosecution offended Article 228.1 of UNCLOS, which effectively sets out the international equivalent of double jeopardy.[125] Article 228.1 applies to, "proceedings to impose penalties in respect to any violation of ...international rules and standards relating to the prevention, reduction, and control of pollution from vessels beyond the territorial sea of the State instituting proceedings ...."[126] Because Liberia had already instituted and completed it's own proceedings, RCCL argued that the subsequent prosecution by the United States was barred.[127]

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[119] *Id.*

[120] *Id.* at 1369. RCCL relied on Lauritzen v. Larsen, 345 US 571 (1953) ("international maritime law of impressive maturity and universality...has the force of law...from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial regulations.")

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] United Nations Conference on the Law of the Sea, October 7, 1982, reprinted in Kenneth R. Simmonds, THE LAW OF THE SEA 1982, Appendix B125.

[127] Royal Caribbean, 11 F. Supp.2d at 1369.

Next, RCCL claimed a violation of Article 228.2, which establishes 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..."[128] The alleged violation occurred on February 1, 1993, and the case was filed on February 19, 1998.[129] RCCL thus argued that the prosecution violates the statute of limitations proscribed in Article 228.2.

Finally, RCCL argued that the District Court should have dismissed the case for lack of jurisdiction because, under UNCLOS 218.2, the United States is prohibited from prosecuting absent a request from the flag-state, or the state damaged or threatened by the discharge violation, in this case the Bahamas.[130] Article 218.2 of UNCLOS states:

> No proceedings...shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag-state, or a state damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.[131]

Because no such request was made, RCCL maintained that a United States court lacked jurisdiction.[132]

In response to these three arguments, the United States contended that RCCL lacked the standing to raise provisions of UNCLOS in its defense, because the treaty, even if it constituted customary international law, is not self-executing and does not afford the defendant standing to litigate rights or seek protection under it.[133] Beating a familiar drum, the United States argued that UNCLOS doesn't apply to this case in any event because the charge addressed a crime committed in port, and UNCLOS does not regulate what a state may do to enforce its domestic laws.[134]

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[128] United Nations Conference on the Law of the Sea, October 7, 1982, reprinted in Kenneth R. Simmonds, THE LAW OF THE SEA 1982, Appendix B125.
[129] Royal Caribbean, 11 F. Supp.2d at 1369.
[130] *Id.* at 1370.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

The government contended that Article 228.1 of UNCLOS is premised on the idea that jurisdictional limits for searches, seizures, enforcement, proceedings, and penalties for certain discharge involve violations beyond the territorial sea, not in port.[135] Further, the United States asserted that the double jeopardy provisions of UNCLOS did not apply in this instance because no alleged violation of § 1001 was referred to Liberia and adjudicated. The government also pointed out that even if the issue had been referred under MARPOL or UNCLOS, Liberia did not have venue or jurisdiction to apply United States domestic law to prosecute a violation of the False Statements Act.[136] The government also rejected the statute of limitations argument, contending that UNCLOS does not restrict the enforcement of domestic laws for violations committed while the ship is still in port.[137]

In deciding this issue in favor of the United States, the court first addressed whether UNCLOS could be considered customary international law, which would be binding on the court.[138] Based on expert testimony, the court concluded that UNCLOS was appropriately considered customary international law and thus its provisions should be respected under international law.[139] This proved a very minor victory for RCCL, however, since the court accepted the United States' argument that the treaty was not self-executing, and therefore held that RCCL did not have standing to claim protection under it. The court found that UNCLOS did not provide RCCL with a private right of action to litigate.[140]

The court next found that even assuming UNCLOS was properly considered customary international law and RCCL had standing to litigate rights under it, no violation of the treaty had occurred.[141] The court, citing two expert witnesses, pointed to a hypothetical example that demonstrated this point: an assault and battery of a Coast Guard Boarding Officer investigating a possible pollution incident is not a violation in respect to pollution, and thus the United States has jurisdiction to prosecute.[142] Similarly, an attempt to bribe an officer of a ship to conceal a pollution violation is not properly regarded as a violation in respect to pollution.[143]

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[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1370-71.
[139] *Id.* at 1371.
[140] *Id.* at 1372-73.
[141] *Id.* at 1371.
[142] *Id.*
[143] *Id.*

Citing a familiar refrain, the court held that UNCLOS had no bearing on the domestic prosecution because "[t]he fact that international issues are implicated is not enough to divest the United States of jurisdiction."[144]

Reinforcing this point, the court went on to note that whether the alleged discharge occurred was "irrelevant to this action."[145] If the oil record book reflected all of the alleged discharges of oil, for example, a § 1001 prosecution would not be possible. Alternatively, if there were no oil discharge but the oil record book was materially false, this prosecution could still proceed. The action revolved around the misrepresentation in port, not the pollution itself, nor even the oil record book violation occurring at the time.[146]

IV. CONCLUSION

It is easy to underestimate and overestimate the impact of this decision on the conduct of cruise lines. On the one hand, it was crucially important in removing a primary weapon cruise lines had in their arsenals to avoid prosecution: no longer will cruise lines be able to assert that the United States does not have jurisdiction to prosecute them for lying about discharges they make in foreign waters. After years of denying the conduct, and almost arrogantly challenging the authority of a port-state to prosecute, several subsequent events indicate what a severe setback this presented to RCCL. First, it is quite noteworthy that Royal Caribbean entered the first guilty plea only after the court rejected its arguments that the United States had no jurisdiction to prosecute.[147] Second, in July 1999, RCCL pleaded guilty to 21 counts of routinely dumping oil and other hazardous materials in coastal waters around the United States, and presenting false documentation, and agreed to pay an $18 million fine.[148] The plea was entered in six Federal District Courts in whose jurisdiction the violations occurred and the fine represents the largest ever imposed on a cruise line.[149] Moreover, as a result of this case and their guilty pleas, RCCL agreed to extend a court-supervised probation program from Miami to other areas where it has faced allegations

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[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N.Y. TIMES, January 3, 1999.
[148] Douglas Frantz, *Cruise Officials to Report Accusations of Crimes at Sea*, N.Y. TIMES, July 27, 1999.
[149] Matthew Wald, *Cruise Line Pleads Guilty To Dumping of Chemicals*, N.Y. TIMES, July 21, 1999.

of dumping, including New York, Los Angeles, Anchorage, and the Virgin Islands.[150]

These pleas were especially helpful in revealing the widespread and severe pollution problem at RCCL. When making the pleas, RCCL admitted to putting dry-cleaning fluid and silver from photography shops, both of which are dangerous pollutants, into water from the ships' sinks and showers, known as "gray water," which is routinely discharged in the ocean.[151] A statement signed by the company's president, Jack Williams, said, for example, that the Song of America visited the Port of New York weekly in the summer and fall of 1994 and 1995 and drained about 50 gallons each week from the photography laboratories, containing silver, a toxic metal, and 20 gallons a month from the dry-cleaning shop, including toxic perchlorethylene. [152] Some ships also dumped toxic chemicals from printing presses.[153]

This case also called attention to the myriad ways in which cruise lines use their foreign registration to avoid regulation in areas other than the environment, such as income tax and worker safety rules, and how companies profit from this course of conduct.[154] Partly as a result of this case, Congress began to consider the possibility of imposing new regulations on the industry.[155] For example, Representative Peter DeFazio (D-OR) said the RCCL guilty pleas underlined his concern about the foreign registry of ships, stating: "[i]f anything we are beginning to chip away at the veneer that these are American ships operating under American laws."[156]

Yet, the specific violations for which RCCL was prosecuted reveal just how flimsy the international regulatory structure is and how it still relies in large part on two untrustworthy features: the serendipity of catching ships in the act of discharging pollutants into the sea, and placing the primary enforcement responsibility in the hands of countries that have no economic incentive to do so. As severe as the consequences have proven to be to RCCL, all of this flowed from one instance of dumping where they had been caught red-handed. While no data exist indicating just how rare an occurrence this is, catching cruise ships in the act is not a reliable means of

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] Douglas Frantz, *Cruise Officials to Report Accusations of Crimes at Sea*, N. Y. TIMES, July 27, 1999.
[155] *Id.*
[156] *Id.*

detection and enforcement. Even in the face of incontrovertible evidence of dumping, RCCL was still able to avoid any type of prosecution for five years.

As the court implicitly acknowledged in this case, the MARPOL scheme of port-state referral suffers from the unrealistic expectation that the expensive and time consuming job of prosecuting cruise ships for pollution violations will be borne by countries that have almost no incentive to conduct thorough or accurate investigations. There is very little incentive for flag-states to prosecute for several reasons. First, flag-states generally do not suffer from the environmental consequences of the pollution they are charged to prosecute, though they do incur the costs of the legal proceedings.[157] Second, flag-states reap great financial benefits from cruise lines and are loathe to give these companies a reason (e.g. strict oversight and enforcement of pollution laws) to find another home. Third, it is not clear that even if Liberia had the incentive to prosecute it would be very effective, since Liberia has been devastated by ethnic warfare and divided government most of the last decade.[158]

Combining all these factors, it is no surprise that so few flag-states take any action. Out of the 1,000 alleged violations that were reported to the IMO, 534 involved situations in which the flag-states had not complied with the notification requirement.[159] Of the 206 cases in which some type of action was taken and reported, 111 found the vessel innocent or not prosecutable because of insufficient evidence.[160] Seventy-seven of the cases resulted in fines, eight resulted in warnings, and ten resulted in unspecified actions.[161] One federal study found that foreign states took action in only 2 of 111 dumping cases referred to them by the United States.[162]

By holding that port-states such as the United States have jurisdiction for violations of domestic law that are not superceded or precluded by international law, the court unilaterally gave MARPOL significantly more teeth than it had previously. Without the jurisdiction defense to rely on, the cruise ship industry will increasingly find itself susceptible to more prosecutions, providing a deterrent that previously was lacking. At the same time however, it is equally easy to doubt the

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157 Rebecca Becker, *MARPOL 73/78: AN OVERVIEW IN INTERNATIONAL LAW ENFORCEMENT*, 10 Geo. Int'l Env'l L. Rev., 625, 632 (1998).

158 Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N. Y. TIMES, January 3, 1999.

159 Becker, Geo. Int'l Envtl. L. Rev. at 632.

160 *Id.*

161 *Id.*

162 Douglas Frantz, *Sovereign Islands: A Special Report; Gaps in Sea Laws Shield Pollution by Cruise Lines*, N.Y. TIMES, January 3, 1999.

effectiveness of the international law schemes that monitor pollution of the world's waterways.