

ARTICLE

In Defense of the U.S. Maritime Drug Law Enforcement Act: A Justification for the Law's Extraterritorial Reach

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Abstract

Despite the fact that certain drug crimes take place thousands of miles from the United States, aboard vessels registered in foreign countries and crewed by foreign nationals, drug traffickers are often successfully prosecuted in U.S. federal courts. This system is firmly grounded in international and domestic law and enables the U.S. government to deliver serious criminal consequences to regional drug trafficking organizations (DTOs), as well as to individual drug smugglers. Smugglers often receive lengthy prison sentences for violating U.S. laws like the Maritime Drug Law Enforcement Act (MDLEA).

Some commentators have argued, however, that international law principles of prescriptive jurisdiction and constitutional notions of due process would seem to prohibit the criminal prosecution of foreign nationals with little, if any, connection to the United States, especially when they are apprehended aboard foreign vessels far from U.S. territory or interdicted within the territorial seas of foreign nations. These scholars also argue that drug trafficking is not subject to universal jurisdiction because it is not yet recognized as a universal crime like slavery or genocide. This article argues that there are other, equally valid bases under international law supporting the MDLEA that do not require maritime drug trafficking to be considered a universal crime to enable prosecution in the United States.

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Picture an interconnected system of arteries that traverse[s] the entire Western Hemisphere, stretching across the Atlantic and Pacific, through the Caribbean, and up and down North, South, and Central America. Complex, sophisticated networks use this vast system of illicit pathways to move tons of drugs, thousands of people, and countless weapons into and out of the United States, Europe, and Africa with an efficiency, payload, and gross profit any global transportation company would envy.

General John F. Kelly
Commander, SOUTHCOM¹

Introduction

Deep in the Caribbean, the lookout aboard a U.S. Coast Guard cutter² scans the darkening horizon through her binoculars, searching for the white “rooster tail” indicating a smuggling vessel traveling at high speed. As the daylight fades into a balmy Caribbean dusk, she switches to her night vision goggles to increase the odds of detecting the smugglers that the most recent intelligence reports indicate. Peering intently through her scope, the lookout sees movement across the water about five miles away and reports the northbound vessel to the watch officer on the bridge. The cutter turns in the vessel’s direction, and the gentle hum of the engines becomes a dull roar as the ship increases its speed. The captain quickly makes his way to the bridge, and the cutter launches its embarked helicopter to intercept.

The three-man crew of the speedboat, colloquially known as a go-fast vessel (GFV), hears the helicopter before they see it and turns the speedboat in the direction of Panama, trying to reach the cover of the rugged coastline. Refusing repeated orders from the helicopter to stop, the GFV’s driver begins maneuvering erratically, attempting to elude the pursuing helicopter. The helicopter’s Coast Guard sniper fires several warning shots in front of the fleeing vessel and, when it fails to stop, shoots and disables the three outboard engines with several .50-caliber rounds. Once the vessel is stopped, the Coast Guard boarding team arrives in the cutter’s small boat. They observe the three men dressed in well-worn clothing, with jugs of water and snack wrappers strewn about the bilges of the open-hull vessel. The boarding officer locates approximately 1,000 kilograms of cocaine, conservatively valued at over \$20 million, tightly packed in burlap sacks and hidden under a blue tarp in the middle of the vessel. The team takes the three crew members and their illicit contraband into Coast Guard custody for eventual

¹ *U.S. Southern Command Posture Statement Before the S. Comm. on Armed Services*, 113th Cong. 10 (2013) (Statement of Gen. John F. Kelly, Commander, U.S. Southern Command).

² A Coast Guard cutter is “any Coast Guard vessel 65 feet in length or more, having adequate accommodations for the crew to live on board.” GEORGE E. KRIETEMEYER, *THE COAST GUARDSMAN’S MANUAL* 33 (9th ed. 2000). Much like the term “ship” is used to describe a naval vessel, “cutter” is the generic description for a Coast Guard vessel.

transfer to law enforcement agents ashore, and the cutter resumes its counterdrug patrol.

Interdictions like this occur on a weekly basis as the Coast Guard patrols the waters of the Eastern Pacific Ocean and Western Caribbean Sea in search of maritime drug traffickers.³ Despite the fact that these crimes take place thousands of miles from the United States aboard vessels that are registered in foreign countries and crewed by foreign nationals, these drug traffickers are often successfully prosecuted in U.S. federal courts, receiving lengthy prison sentences for violating U.S. laws like the Maritime Drug Law Enforcement Act (MDLEA).⁴

Recently, some commentators and jurists have argued that international law principles of prescriptive jurisdiction and constitutional requirements of due process prohibit the criminal prosecution of foreign nationals who have little connection to the United States beyond smuggling drugs northward, especially when they are apprehended aboard foreign vessels far from U.S. territory or even apprehended within the territorial seas of foreign nations.⁵ Despite these seeming problems, this counterdrug system is firmly grounded in international and domestic law and enables the U.S. government to deliver serious consequences to South and Central American drug trafficking organizations (DTOs) as well as individual drug smugglers.

Perhaps reflecting an emerging sense that prohibition-based drug control policy has been largely ineffective,⁶ several federal court cases and scholarly articles have questioned key provisions of the MDLEA.⁷ Using a dubious interpretation of the Define and Punish Clause of the U.S. Constitution, these jurists and scholars argue that some provisions of this law impermissibly rely on the doctrine of universal jurisdiction (UJ). To review, the Define and Punish Clause grants Congress the authority to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”⁸ and

³ Adam Kredo, *Coast Guard Intercepts Record-Breaking Amount of Cocaine*, WASH. FREE BEACON (Feb. 4, 2016), <http://freebeacon.com/issues/coast-guard-intercepts-record-breaking-amount-of-cocaine-2/>.

⁴ Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501-70508 (2016).

⁵ See *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006) (“In addition to the MDLEA’s ‘statutory jurisdiction’ requirements, where the MDLEA is being applied extraterritorially . . . due process requires the Government to demonstrate that there exists ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant.”) (quoting *United States v. Medjuck (Medjuck II)*, 48 F.3d 1107, 1111 (9th Cir. 1995)).

⁶ See Steven Nelson, *Davos: Kofi Annan Urges ‘Rising Up’ Against Drug Prohibition*, U.S. NEWS & WORLD REP. (Jan. 23, 2014), <http://www.usnews.com/news/articles/2014/01/23/davos-kofi-annan-urges-rising-up-against-drug-prohibition>.

⁷ See, e.g., *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012); *United States v. Cardales-Luna*, 632 F.3d 731, 739 (1st Cir. 2011) (Torruella, J., dissenting); Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINN. L. REV. 1191 (2009); Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009).

⁸ U.S. CONST. art. I, § 8, cl. 10.

contains three related, but distinct, grants of power: “[1] the power to define and punish piracies, [2] the power to define and punish felonies committed on the high seas, and [3] the power to define and punish offenses against the law of nations.”⁹ Because maritime drug trafficking is neither piracy nor a recognized UJ crime under customary international law, the aforementioned proponents contend that the MDLEA is an unconstitutional exercise of congressional power under the Felonies Clause. Recent judicial opinions have also cast doubt on a possible alternative constitutional basis for the law based on a constricted reading of the term “Law of Nations.”¹⁰

While novel, these narrow interpretations of the Define and Punish Clause are not required by the Constitution, international law, or domestic legal precedent. Although drug trafficking is not subject to UJ because it is not recognized as a universal crime like slavery or genocide,¹¹ the MDLEA remains a valid exercise of congressional power pursuant to the Define and Punish Clause because UJ is not the only rationale for the exercise of U.S. criminal jurisdiction over maritime drug trafficking. Rather, there are other, equally valid bases under international law supporting the MDLEA that do not require maritime drug trafficking to be considered a universal crime to enable prosecution by U.S. authorities.¹² Moreover, an original analysis of the language in the Felonies Clause as well as a more reasonable interpretation of the term “Law of Nations” in the Offenses Clause will dispel the doubts raised about the MDLEA’s jurisdictional reach into a foreign nation’s territorial seas.

To that end, this paper proceeds as follows. Part II describes the history of maritime drug trafficking in the Western Hemisphere and the serious challenges that DTOs pose to regional governments, emphasizing the threat to security that results from the horrific violence endemic to the drug trade. Part III then outlines the intricate counterdrug law enforcement regime that regional governments have enacted to counter the threat of illicit drug trafficking, explaining the importance of the far-reaching MDLEA within this legal framework. Part IV analyzes the recent federal court cases and scholarly articles that denounce the extraterritorial application of the MDLEA while also examining the logical foundations of these arguments. Part V examines another potential basis for the exercise of U.S. criminal jurisdiction pursuant to the Define and Punish Clause—the protective principle of international law—and discusses a useful limiting principle to ensure that all maritime crimes are not subject to the criminal jurisdiction of the United

⁹ *Bellaizac-Hurtado*, 700 F.3d at 1248.

¹⁰ *See id.* at 1248.

¹¹ *See, e.g.*, Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 2 Martens Nouveau Recueil (ser. 1) 392. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

¹² *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. § 402 cmt. f (1987). This list includes the protective principle of international criminal jurisdiction, which allows states to punish a limited class of offenses committed outside its territory by persons who are not its nationals. These offenses include, “those directed against the security of the State or other offenses threatening the integrity of governmental functions that are generally regarded as crimes by developed legal systems.” *Id.*

States. Finally, Part VI discusses the likely effects on regional counterdrug efforts if the MDLEA's core provisions are eviscerated, including the possibility that drug traffickers will exploit the resulting gaps in the law and the advantageous geography of the Western Hemisphere to more easily move illegal narcotics northward into Central America, Mexico, and the United States.

Maritime drug trafficking does not have to be treated as a UJ crime for Congress to criminalize it under the authority in the Define and Punish Clause. The deleterious effects of drug trafficking in the United States and on regional stability are more than enough to establish links to the United States sufficient to justify the exercise of the protective principle of international law. The U.S. government should not have to wait until its own civic institutions and law enforcement agencies are under siege by DTOs to recognize the serious threat they pose. While regional stability is a very broad basis for criminal intervention, the interconnected nature of Western Hemisphere drug trafficking demands a comprehensive, coordinated response, and the Define and Punish Clause of the U.S. Constitution does not stand in the way.

I. Maritime Drug Trafficking in the Western Hemisphere

A. *The Geographic Zones of Counterdrug Focus*

Latin America, the Eastern Pacific, and the Caribbean Basin all have a history of intimate involvement with illicit narcotics stretching back to the beginning of the South American drug trade.¹³ Multiple components of the global supply chain are located in the Western Hemisphere, including plant cultivation, production, and trafficking.¹⁴ Consequently, there are three primary geographic areas of focus in U.S. counterdrug policy:¹⁵ (1) the Transit Zone; (2) the Source Zone; and (3) the Arrival Zone.

The Transit Zone is a seven million square mile area between the countries in South America where illegal narcotics are produced and the delivery points along the coast of Central America and Mexico.¹⁶ It includes Central America, the Eastern Pacific Ocean, and the Western Caribbean Sea, which are regularly patrolled by Department of Homeland Security (DHS), U.S. Coast Guard (USCG), and Department of Defense (DOD) air and surface assets.¹⁷

¹³ See Tom Brown, *Caribbean drug trade rises under new generation of 'Cocaine Cowboys'*, REUTERS (Oct. 9, 2013), <http://www.reuters.com/article/us-caribbean-drugs-idUSBRE9981C520131009>.

¹⁴ See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 1 (2011).

¹⁵ See *Transit Zone Operations*, OFFICE OF NAT'L DRUG CONTROL POLICY, <https://www.whitehouse.gov/ondcp/transit-zone-operations> (last visited Dec. 8, 2015); JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, JOINT COUNTERDRUG OPERATIONS GL-7 (June 13, 2007).

¹⁶ See *id.*

¹⁷ See *id.*

The Source Zone describes the supplier countries in South America. For example, the entire supply for the global cocaine market is grown and produced in only three Andean Ridge countries: Colombia; Peru; and Bolivia.¹⁸ Colombia, Guatemala, and Mexico are also sources of opium poppies,¹⁹ while marijuana is cultivated throughout the region.²⁰ Mexico is also the primary source of foreign methamphetamine in the United States.²¹ Unfortunately, demand for these illegal narcotics remains high throughout the region, including in the United States.²² For example, the United Nations Office on Drugs and Crime (UNODC) recently estimated that almost 200 metric tons of cocaine was required to satisfy North American demand, an amount valued at over \$35 billion.²³ While there are annual fluctuations in the total amount of cocaine consumed, North America is consistently the largest market for this drug in the world.

The Arrival Zone is the geographic area where the narcotics arrive for shipment to distributors in the United States and Canada. It is usually geographically described as the Atlantic and Pacific coasts of Mexico, the adjacent maritime areas, and across the southwest U.S. border, including the border states of California, Arizona, New Mexico, and Texas.²⁴ In 2015, the primary pathway for illegal drugs entering the United States was the Central American-Mexico corridor.²⁵ As of 2016, the UNODC estimated that 87 percent of all cocaine entering the United States transits through Mexico or its territorial waters.²⁶ Along this corridor, drug traffickers use a combination of land-based smuggling, short airplane flights, and large maritime loads to transport narcotics.²⁷ This route is a major shift from the Caribbean-South Florida corridor that was used in the 1980s and early 1990s.²⁸

¹⁸ See SEELKE, *supra* note 14, at 1.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See Kredon, *supra* note 3, at 1.

²³ See U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT, at 16–18 (U.N. Sales No. E.10.XI.13) (2010).

²⁴ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, *supra* note 15.

²⁵ See JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 9 (2015).

²⁶ See U.N. OFFICE OF DRUGS AND CRIME, WORLD DRUG REPORT, at 38 (U.N. Sales No. E.16.XI.7) (2016).

²⁷ See *id.*

²⁸ See SEELKE, *supra* note 14. (“The Caribbean-South Florida route continues to be active . . . although it is currently less utilized than the Central America-Mexico route.”). This shift demonstrates the so-called “Balloon Effect” of drug smuggling. As law enforcement assets blanketed the Caribbean-South Florida route, DTOs simply shifted their routes to the Central America-Mexico corridor, a process akin to squeezing one end of a balloon only to have the trapped air pass to the other side rather than disappear. See also U.N. OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT, at 31 (2012) (“This can be seen in the seizure figures. In the mid-1980s, over 75% of the cocaine seized between South America and the United States was taken in the Caribbean, and very little was seized in Central America. By 2010, the opposite was true: over 80% was seized in Central America, with less than 10% being taken in the Caribbean.”).

B. *Continuously Evolving Smuggling Tactics and the U.S. Response*

Maritime drug trafficking techniques over the past forty years have been marked by evolution and adaptation as DTOs and law enforcement agencies have jockeyed to stay one step ahead. In the early days of drug smuggling, trafficking methods were relatively simple and consisted of little more than acquiring a freighter, fishing boat, or yacht to carry contraband north into Florida.²⁹ Law enforcement agencies responded by increasing interdiction activities within key maritime choke points, aggressively covering the area with patrol assets and developing intelligence profiles of likely smuggling vessels.³⁰ In response, DTOs developed clever concealment methods that allowed them to hide contraband from law enforcement agents.³¹ Law enforcement agencies upped the ante with additional agent training to help them recognize hidden compartments and technologies like magnetometers, bore scopes, and ion scanning machines to investigate unaccounted for spaces and suspicious voids aboard suspect vessels.

The U.S. government also enhanced its presence in the Transit Zone by stationing USCG law enforcement detachments (LEDETs) aboard naval vessels³² and signing counterdrug bilateral agreements with many Source and Transit Zone nations, including Colombia, Honduras, and Panama, to reinforce its regional counterdrug strategy.³³ DOD, with its considerable array of sensors, platforms, and vessels, was enlisted into U.S. counterdrug efforts and designated as the “lead agency . . . for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.”³⁴ In addition to increased law enforcement operations, Congress also passed additional laws designed to more widely cast the net of criminal jurisdiction around the ever-elusive maritime drug traffickers.

For example, the Marijuana on the High Seas Act (MHSA)³⁵ was an improvement to the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA).³⁶ The MHSA, designed to counter the traffickers’ “mother-

²⁹ See SCOTT H. DECKER & MARGARET T. CHAPMAN, DRUG SMUGGLERS ON DRUG SMUGGLING: LESSONS FROM THE INSIDE 69–74, 78 (2008).

³⁰ See *id.* at 71–72.

³¹ See *id.* at 70. To highlight how difficult it was for the Coast Guard to detect and seize cocaine hidden in vessel compartments, one smuggler recounted packing a load of cocaine under his vessel’s gas tank and sealing the cover with an impervious sealing compound. The tank was then installed and two-part foam used to seal it in. To get the load out, the foam would have to be cut out, the gas pumped out of the tank, the sealing compound cut through, and the tank pulled out. Before leaving the pick-up point, the smuggler would ensure the gas tank was full, thereby making it less likely that law enforcement would want to check under the tank by pumping the gas overboard while at sea. *Id.* at 76.

³² See 10 U.S.C. § 379 (2012).

³³ See, e.g., Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.-Nicar., Nov. 15, 2001, T.I.A.S. No. 13153.

³⁴ 10 U.S.C. § 124 (2012).

³⁵ See 21 U.S.C. § 955a(a) (1982), *repealed by* Maritime Drug Law Enforcement Act of 1986, 46 U.S.C. app. §1903 (current version at 46 U.S.C. §§ 70501–70508 (2016)).

³⁶ See Comprehensive Drug Abuse Prevention and Control Act of 1970 Pub. L. No. 91-513, 84 Stat. 1236 (1970).

ship” strategy, targeted the larger vessels sailing just outside U.S. territorial seas that were sending smaller, faster vessels to bring contraband ashore.³⁷ Unlike the CDAPCA, the MHSA did not require prosecutors to prove intent to distribute illicit contraband within the United States, allowing the statute to reach both the mother-ships and the smaller vessels.³⁸ Despite this innovation, the MHSA proved difficult to enforce because it was hard to prove the nationality of vessels in federal court, especially when communication with the claimed flag state was at issue.³⁹ These challenges led to the enactment of the MDLEA,⁴⁰ which extended U.S. criminal jurisdiction to even more categories of vessels, including vessels with some type of connection to the United States (such as being owned by a U.S. person or business); foreign vessels on the high seas and in foreign territorial seas; and stateless vessels.⁴¹

As the USCG and U.S. Navy (USN) became more adept at disrupting the early methods, DTOs began using multi-engine speedboats (i.e., “go fast” vessels or GFVs) with the ability to outrun slower law enforcement assets. In response, the USCG pioneered an airborne use of force (AUF) program at the turn of the century that relies on armed helicopters to deliver warning shots and disabling fire against GFVs.⁴² Along with high-speed surface interceptor craft and aggressive prosecution of the smugglers under the newly-enacted MDLEA, the Coast Guard’s AUF program was so successful that it forced the DTOs beneath the waves.

The traffickers’ first foray into submarines was the self-propelled semi-submersible vessel (SPSS). Emphasizing stealth over speed, SPSSs ride extremely low in the water and are nearly impossible to detect at visual ranges greater than one mile.⁴³ Capable of carrying up to 15 tons of cocaine, these vessels are an elusive and effective smuggling method.⁴⁴ To combat this emerging threat, the USCG and the Department of Justice (DOJ) worked together to urge Congress to enact the Drug Trafficking Vessel Interdiction Act (DTVIA), which made it a felony to operate or embark a stateless SPSS outside any State’s territorial sea.⁴⁵ Several successful federal criminal prosecutions have occurred under this statute.⁴⁶ Unfortunately, DTOs did not stop with SPSS and are now building fully

³⁷ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1197.

³⁸ See Ann Marie Brodarick, *High Seas, High Stakes: Jurisdiction Over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act*, 67 U. MIAMI L. REV. 255, 259 (2012).

³⁹ See S. REP. NO. 99-530, at 15 (1986).

⁴⁰ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1199–1200.

⁴¹ See 46 U.S.C. § 70502 (2012).

⁴² Rachel Canty, *Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard’s Airborne Use of Force*, 31 U. MIAMI INTER-AM. L. REV. 357 (2000).

⁴³ SELF-PROPELLED SEMI-SUBMERSIBLE (SPSS) WATERCRAFT, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/para/spss.htm>.

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. § 2285 (2012).

⁴⁶ See, e.g., *United States v. Saac*, 632 F.3d 1203, 1206 (11th Cir. 2011).

submersible vessels (FSV) in the coastal jungles of South America.⁴⁷ The Internet is replete with disturbing examples of these “narco subs,” and it is evident that DTOs are now constructing rudimentary submarines to move drugs through the Transit Zone.⁴⁸

C. *The Effect of Drug Trafficking on Regional Stability*

Given North America’s dubious distinction as the largest regional cocaine market in the world, the price of failure is high.⁴⁹ The deleterious effects of drug trafficking in the Western Hemisphere are well-documented.⁵⁰ Many DTOs are powerful, multi-national organizations with the firepower and intelligence capabilities to rival state security forces and regional governments.⁵¹ They maintain extensive networks of corrupt officials in critical government offices in South and Central America that enable them to operate with impunity, and they use violence to corrupt and undermine police and criminal justice institutions throughout the region.⁵²

For example, Mexican DTOs have used political assassinations, coordinated attacks, and car bombs to intimidate rival gangs, citizens, and even the Mexican government.⁵³ In recent years, drug trafficking violence has surged in Mexico (tracking the shift in primary smuggling routes), and specific targets have included the police, military and government officials, journalists, and even civilians.⁵⁴ The criminality directly associated with the drug trade includes kidnapping, money laundering, and arms trafficking, further taxing already strained law enforcement agencies and civil institutions.⁵⁵ Additionally, the cash generated by drug sales and smuggled back into Mexico is used to bribe Mexican border officials as well as Mexican police, security forces, and public officials to either ignore DTO activities or to actively support and protect them.⁵⁶ When such

⁴⁷ Jeremy Bender, *Cartels are using these ‘narco-submarines’ to move tens of thousands of pounds of drugs at a time*, BUS. INSIDER (Apr. 6, 2015), <http://www.businessinsider.com/cartel-narco-submarines-2015-4>. Note that, to date, neither the U.S. government nor a foreign nation government has interdicted an FSV in the Transit Zone.

⁴⁸ *Id.*

⁴⁹ WORLD DRUG REPORT, *supra* note 26, at 36–38.

⁵⁰ See ROBERTO SAVIANO, *ZEROZEROZERO* 34 (2015) (“[The leaders of the cartels] are sharks who, in order to dominate the drug market, which today is worth between \$25 billion and \$50 billion in Mexico alone, are eroding Latin America at its very foundations.”).

⁵¹ *Id.* at 105 (“From a military point of view, it’s hard to compete with Los Zetas: They have bulletproof vests and Kevlar helmets, and their arsenal includes: AR-15 assault rifles; thousands of [AK-47s]; MP5 submachine guns; grenade launchers; frag grenades like those used in Vietnam; surface-to-air missiles; gas masks; night-vision goggles; dynamite; and helicopters.”).

⁵² *Id.* at 70 (“In the first six years of the Mexican drug war, thirty-one Mexican mayors were killed, thirteen of them in 2010 alone. Honest people are now afraid to run for office; they know that sooner or later the cartels will arrive and try to replace them with a more welcome candidate.”).

⁵³ See SEELKE, *supra* note 14, at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 6.

⁵⁶ SAVIANO, *supra* note 50, at 131.

corruption fails to achieve cooperation and acquiescence, violence against these officials is often the alternative.⁵⁷ Corruption is so extensive that law enforcement officials working for the DTOs sometimes carry out violent assignments for them.⁵⁸

The “continuing challenge of police corruption” was on stark display when Mexico fired 10 percent of its federal police force in mid-2010.⁵⁹ Mexican authorities also arrested several mayors and 18 other state and local officials in the state of Michoacán for ties to DTOs.⁶⁰ Such bribery and corruption is not limited to Mexico, but instead can be found for nearly every country along the Central America-Mexico smuggling route and demonstrates that DTOs thrive in the context of weak government institutions and intimidated officials.⁶¹

Accordingly, DTOs benefit from undermining strong civil institutions, which in turn creates a more permissive environment for their criminal behavior. They do so with brutal efficiency, using methods that resemble the insurgency tactics employed in the recent wars in Afghanistan and Iraq.⁶² In short, DTOs directly target the security of the state, hoping to destabilize existing governance to the point where the government is powerless to resist, or even actively aids their illegal activities.

II. The Maritime Counterdrug Framework

A. *The International Legal Regime*

Governments around the world have enacted a number of conventions and multi-national agreements to combat the scourge of international narcotics trafficking. The three primary international drug control conventions are the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol,⁶³ the Convention on Psychotropic Substances of 1971,⁶⁴ and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Vienna Convention).⁶⁵ These treaties are complementary and codify internationally applicable control measures for drugs and narcotic

⁵⁷ See BEITTEL, *supra* note 25, at 7.

⁵⁸ *Id.*

⁵⁹ See JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO’S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE 4 (2011)

⁶⁰ *Id.*

⁶¹ SAVIANO, *supra* note 50, at 131.

⁶² *Id.* at 70.

⁶³ Single Convention on Narcotic Drugs of 1961, *amended by* 1972 Protocol, Mar. 25, 1972, 976 U.N.T.S. 105.

⁶⁴ Convention on Psychotropic Substances of 1971, Feb. 21, 1971, 1019 U.N.T.S. 175.

⁶⁵ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Vienna Convention].

substances as well as set forth many provisions addressing drug smuggling at sea.⁶⁶

Regarding maritime drug trafficking and law enforcement, any discussion must occur within the context of the United Nations Convention on the Law of the Sea (UNCLOS).⁶⁷ Concluded in 1982, this multi-national convention is the foundational framework for peacetime ocean governance and defines the rights and responsibilities of all nations, coastal or landlocked, with respect to the use of the world's oceans.⁶⁸ Although the United States has not ratified UNCLOS, it considers the Convention's navigation and overflight articles as codifications of customary international law.⁶⁹ As such, any maritime law enforcement agency must chart a course through UNCLOS to determine when law enforcement operations against a particular vessel comply with international law.

Specifically, one of the fundamental tenets of maritime law is the principle of exclusive flag state jurisdiction, which means that a vessel on the high seas is not subject to boarding, search, seizure, or arrest by any nation other than its flag state.⁷⁰ A vessel's flag state is the state in which it is registered.⁷¹ Vessels of any state have the right to lawfully transit the seas with minimal interference from another state.⁷² The corresponding duty of these vessels is to sail under the flag of a single state and comply with that state's rules regarding technical, social, and administrative matters.⁷³ Concomitantly, UNCLOS explicitly requires states to "fix the conditions for the grant of [their] nationality to ships" and to "issue to ships to which [they have] granted the right to fly [their] flag documents to that effect."⁷⁴ In other words, UNCLOS envisions a system of ocean governance in which every vessel on the ocean is registered in a corresponding state to which it has a "genuine link" with documentation to that effect carried onboard.⁷⁵

⁶⁶ U.N. OFFICE ON DRUGS AND CRIME, *Treaties*, <https://www.unodc.org/unodc/en/treaties/> (last visited Feb. 8, 2016).

⁶⁷ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 297 [hereinafter UNCLOS].

⁶⁸ UNITED NATIONS, *THE LAW OF THE SEA I* (2001).

⁶⁹ James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT'L L. REV. 543, 548 (2007).

⁷⁰ Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DEN. J. INT'L L. & POL'Y 287, 295–96 (2007). Exceptions to this general rule include obtaining flag State permission, the master's consent, or boarding pursuant to U.N. Security Council Resolution. See James Kraska, *Broken Taillight at Sea: the Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L.J. 1, 6 (2010).

⁷¹ UNCLOS, *supra* note 67, at art. 91 ¶1.

⁷² *Id.* at art. 92 ("Ships shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas.")

⁷³ *Id.*

⁷⁴ *Id.* at art. 91.

⁷⁵ *Id.*

Given the preeminent importance of exclusive flag state jurisdiction, which extends to the exercise of both prescriptive and enforcement jurisdiction,⁷⁶ complying with UNCLOS requires a maritime law enforcement agency determine its authority to take law enforcement action with regard to a specific suspect vessel.⁷⁷ In practical terms, three factors are critical to this determination: the flag state of the vessel; its location with reference to the primary divisions of the ocean pursuant to UNCLOS (such as a territorial sea, contiguous zone, or Exclusive Economic Zone (EEZ));⁷⁸ and the criminal activity of which the vessel is suspected.⁷⁹ In practical terms, a vessel that is registered in a particular state, located on the high seas, and suspected of illicit trafficking in narcotics is subject only to the law enforcement jurisdiction of its flag state, not the United States or another country.⁸⁰ As such, a law enforcement agency from another country needs the permission, or consent, of the flag state to board and search that suspect vessel for evidence of narcotics violations.⁸¹ Put another way, any law enforcement activities that occur aboard that vessel *without* the flag state's consent are, with few exceptions (principally, crimes for which there is universal jurisdiction), violations of international law.⁸²

To prevent maritime drug traffickers from exploiting the principle of exclusive flag state jurisdiction,⁸³ UNCLOS requires states to cooperate in the suppression of illicit trafficking by sea.⁸⁴

Specifically, it grants them the ability to request assistance if a state's law enforcement assets encounter a vessel reasonably suspected of trafficking drugs registered in another state.⁸⁵ While UNCLOS provides the broad outlines of cooperation, the specific mechanism is fully described in 1988 Vienna Convention.

⁷⁶ Klein, *supra* note 70, at 296.

⁷⁷ *Id.* at 295–96.

⁷⁸ UNCLOS, *supra* note 67, at art. 2 ¶1 (“The sovereignty of a coastal state extends, beyond its land territory and internal waters...to an adjacent belt of sea, described as the territorial sea.”). This territorial sea may be up to 12 nautical miles (NM) wide. *Id.* at art. 3. The contiguous zone, immediately adjacent to the territorial sea, may not extend beyond 24 nautical miles from the baseline, and coastal states may exercise control in the contiguous zone to prevent violation of their customs, fiscal, immigration, and sanitary laws and regulations. *Id.* at art. 33 ¶ 1–2. The EEZ is an area adjacent to the territorial sea that may extend up to 200 NM from the baseline in which the coastal state has sovereign rights over the living or non-living natural resources. *Id.* at arts. 56–57.

⁷⁹ See Kraska, *supra* note 70, at 3 (“Consequently, legal analysis for MIO and VBSS can become complex because it involves addressing . . . questions of mixed fact and law.”).

⁸⁰ *See id.*

⁸¹ *Id.* at 10–11.

⁸² *See id.* at 4.

⁸³ *Id.* at 11–12.

⁸⁴ UNCLOS, *supra* note 67, at art. 108.

⁸⁵ *Id.*

As of 2016, the vast majority of countries in the world are party to this convention,⁸⁶ which requires participating states to cooperate to the fullest extent possible to suppress maritime illicit traffic “in conformity with the law of the sea.”⁸⁷ Key among the treaty’s provisions is article 17, which specifically addresses illicit trafficking by sea. Article 17 authorizes states with “reasonable grounds to suspect that a vessel . . . flying the flag or displaying marks of registry of another Party is engaged in illicit traffic” to notify the flag state of the suspicious vessel, request confirmation of registry, and request permission to stop, board, and search that vessel under the authority of the claimed flag state.⁸⁸ The mechanics are fairly simple and involve official communications between the “competent authorities” of the involved governments.⁸⁹

However, such communications are often slow, and a more expedited mechanism is desirable.⁹⁰ To that end, article 17 allows states to enter into bilateral or regional agreements or arrangements to facilitate expedited maritime law enforcement operations.⁹¹

The United States government has entered into 27 of these agreements with South American, Central American, Caribbean, and West African nations.⁹² They provide a consistent, repeatable process by which the two nations can operate to suppress drug trafficking while also respecting exclusive flag state jurisdiction. While each agreement differs slightly, they contain a standard set of provisions that facilitate U.S. counterdrug operations with many different countries.⁹³ Rather than approaching the flag state through diplomatic channels for permission to board and search a suspect vessel—a process which can take hours or days under article 17 procedures—these bilateral agreements facilitate

⁸⁶ UNITED NATIONS, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=VI-19&chapter=6&clang=_en. 189 states are party to this convention. *Id.*

⁸⁷ 1988 Vienna Convention, *supra* note 65, art. 17(1).

⁸⁸ *Id.* at 17(3).

⁸⁹ *Id.* at 17(7) (“At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests.”). For the U.S. government, the designated competent authority is the U.S. Coast Guard liaison officer (LNO) to the Department of State (DOS) Bureau of International Narcotics and Law Enforcement Affairs (INL).

⁹⁰ Consider the fact that maritime law enforcement operations often take place hundreds or thousands of miles from the nearest point of land, usually well out of cell phone or radiotelephone range. Communications from the on-scene enforcement asset must be relayed through command centers via high frequency (HF) radio or satellite telephone, resulting in delays of hours and even days as official requests are sent, received, clarified, and acted upon by the respective governments of the involved countries.

⁹¹ 1988 Vienna Convention, *supra* note 65, at art. 17(9).

⁹² Kraska, *supra* note 70, at 12.

⁹³ *Id.* These provisions include, among others, shiprider, shipboarding, and pursuit and entry to investigate. For example, the shiprider provisions allow foreign law enforcement personnel to embark on U.S. government vessels, with the goal of the shiprider authorizing those vessels to take certain law enforcement actions in foreign waters and aboard vessels of the flag State encountered in international waters *on behalf of* the foreign nation.

near real-time authorization for operations, allowing for faster case processing.⁹⁴ In many cases, this enables the USCG vessel to control the situation at sea before the drug traffickers have time to jettison drugs overboard, otherwise destroy evidence, or escape.⁹⁵ The agreements also contain a clause that reserves primary criminal jurisdiction over the vessel to the flag state while also authorizing it to waive the primary right of jurisdiction over the vessel in favor of the United States.⁹⁶

Operating in concert, the legal trident of UNCLOS, the 1988 Vienna Convention, and the bilateral counterdrug agreements create a powerful and effective framework for enforcing domestic counterdrug laws against foreign-registered vessels suspected of trafficking in narcotics in the Transit Zone.

B. *The Domestic Legal Regime*

Recognizing that the international legal framework is ineffective without corresponding domestic laws, the 1988 Vienna Convention requires states to adopt measures establishing criminal offenses for the production, manufacture, sale, distribution, delivery, importation, and exportation of narcotic drugs or psychotropic substances.⁹⁷ The MDLEA satisfies this mandate for the United States.⁹⁸ While there are other U.S. laws prohibiting the sale and distribution of controlled substances,⁹⁹ the MDLEA is the primary criminal statute that the U.S. Coast Guard enforces in the Western Hemisphere Drug Transit Zone involving the distribution or possession of narcotics. Specifically, the MDLEA prohibits an individual from:

[K]nowingly or intentionally manufactur[ing] or distribut[ing], or possess[ing] with intent to manufacture or distribute, a controlled substance on board – (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or (2) any vessel if

⁹⁴ *Id.* at 12–13 (“Typically, bilateral agreements establish a streamlined procedure for a nation seeking to board the vessel of another state to obtain consent from the flag state on a case-by-case basis.”).

⁹⁵ *Id.* at 12.

⁹⁶ *See, e.g.*, Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, with Implementing Agreement, U.S.–Hond., art. VII, Mar. 29, 2000, T.I.A.S. No. 13088 [hereinafter U.S.–Honduras bilateral agreement] (“[T]he State of Honduras shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the State of Honduras may, subject to its Constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel, cargo and/or persons on board.”).

⁹⁷ 1988 Vienna Convention, *supra* note 65, at art. 3.

⁹⁸ *See* 46 U.S.C. § 70501 (2016).

⁹⁹ *See, e.g.*, 21 U.S.C. § 844 (2010) (Simple possession); 21 U.S.C. § 952 (2006) (Importation of controlled substances); and 21 U.S.C. § 959 (2016) (Possession, manufacture, or distribution of controlled substance).

the individual is a citizen of the United States or resident alien of the United States.¹⁰⁰

Additionally, despite the ordinary presumption against such application, one essential feature of the MDLEA is that it applies extra-territorially.¹⁰¹ The law also emphasizes the destructive effects of the drug trade on global governance, stating that “Congress finds and declares that . . . trafficking in controlled substances is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States”¹⁰² Reflecting these broad themes, the MDLEA’s criminal prohibitions apply to both vessels of the United States and vessels that are subject to the jurisdiction of the United States.¹⁰³

From a definition perspective, “vessels of the United States” are those with some type of connection to the United States.¹⁰⁴ Under the statute, this includes being registered in the United States, being owned in any part by an U.S. citizen or company, or operating in U.S. territorial seas.¹⁰⁵ However, vessels of this type are rarely interdicted in the Transit Zone, and vessels with large loads of contraband are rarely encountered in the U.S. territorial sea.

“Vessels subject to the jurisdiction of the United States,” however, are interdicted with much greater frequency in the Transit Zone and come in four primary varieties: (1) stateless vessels; (2) vessels treated as stateless; (3) foreign vessels registered in a state which has consented to U.S. jurisdiction (i.e., flag state consent); and (4) vessels located in a state’s territorial seas that has consented to U.S. jurisdiction (i.e., coastal state consent).¹⁰⁶ Such consent is obtained through the applicable bilateral counterdrug agreement, which allows for the enforcement of U.S. criminal law against the crew if the flag or coastal state waives its primary right to exercise criminal jurisdiction.¹⁰⁷ The waiver is typically delivered by oral communication between the competent authorities in the flag or coastal state and the United States, by fax, e-mail, or similar communications between operations centers, or by exchange of diplomatic notes between governments.¹⁰⁸

¹⁰⁰ 46 U.S.C. § 70503(a) (2016). For the purposes of the MDLEA, the term “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. 21 U.S.C. § 802(6) (2016).

¹⁰¹ Congress stated that the prohibitions under the MDLEA “appl[y] even though the act is committed outside the territorial jurisdiction of the United States.” 46 U.S.C. § 70503(b) (2016). *But see* Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1200 (“Moreover, the [MDLEA] brushes aside any presumptions against extraterritoriality”) (emphasis added).

¹⁰² 46 U.S.C. § 70501 (2016).

¹⁰³ 46 U.S.C. §§ 70502(b)–(c) (2016).

¹⁰⁴ 46 U.S.C. § 70502(b) (2016).

¹⁰⁵ *Id.*

¹⁰⁶ 46 U.S.C. § 70502(c) (2016).

¹⁰⁷ *See* U.S.-Honduras bilateral agreement, *supra* note 96, at art. VII.

¹⁰⁸ 46 U.S.C. § 70502(c)(2) (2016).

Regarding stateless vessels, they are those vessels are those that are not registered in any state and are therefore subject to boarding and search by all states.¹⁰⁹ Under the MDLEA, a vessel is considered stateless if one of three conditions exists: the master makes a claim of registry that is denied by the claimed flag state; the master fails to make a claim of nationality or registry in response to a law enforcement officer's request; or the master makes a claim of registry that the claimed flag state can neither confirm nor deny.¹¹⁰ These conditions are non-controversial, especially given the obligation under UNCLOS for ships to sail under the flag one state and that state's corresponding obligation to maintain an accessible vessel registry.¹¹¹ Supporting this assertion, U.S. courts have specifically determined that stateless vessels are "international pariahs [that] have no internationally recognized right to navigate freely on the high seas,"¹¹² allowing any nation to subject stateless vessels on the high seas to its criminal jurisdiction.¹¹³ In other words, stateless vessels have no internationally recognized right to navigate freely on the high seas.¹¹⁴ Rather than pushing the limits of international law,¹¹⁵ the stateless vessel provisions of the MDLEA ensure that drug traffickers cannot exploit the potential vessel registry gaps in international maritime law to escape detection and apprehension.¹¹⁶

In summary, the MDLEA applies to all three categories of vessels, including U.S. vessels, vessels subject to the jurisdiction of the United States (including foreign vessels), and stateless vessels. Operationally, these are the three categories of vessels encountered most frequently in the Transit Zone.

III. The Arguments Against the MDLEA

Several recent arguments have been levied against the core jurisdictional provisions of the MDLEA, essentially alleging that they are unconstitutional for one reason or another. This section examines the underlying logical foundations for each of these arguments.

A. *The MDLEA Is an Unconstitutional Exercise of the Felonies Power*

Despite the generally positive treatment of the MDLEA in U.S. federal courts since its enactment, recent opinions have criticized the flag and coastal state consent provisions of the law.¹¹⁷ Noting that the constitutional challenges to

¹⁰⁹ Kraska, *supra* note 70, at 26.

¹¹⁰ 46 U.S.C. § 70502(d)(1) (2016).

¹¹¹ See UNCLOS, *supra* note 67, at 58.

¹¹² United States v. Marino-Garcia, 679 F.2d 1373, 1382 (11th Cir. 1982).

¹¹³ United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003).

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1228 ("[T]he MDLEA's definition of statelessness goes far beyond what is recognized by international custom or convention.").

¹¹⁶ Marino-Garcia, 679 F.2d at 1383.

¹¹⁷ See, e.g., Cardales-Luna, 632 F.3d at 739 (Torruella, J., dissenting).

the MDLEA have so far focused on the drug traffickers' connections to the United States and resulting Fifth Amendment due process concerns,¹¹⁸ these opinions concentrate on the “logically prior question” of whether Congress even has the power to legislate over certain conduct which they argue lacks a nexus to the United States.¹¹⁹

Essentially, the objection is to certain drug smuggling vessels being subject to U.S. criminal prosecution based on what they contend is an unacceptably broad interpretation of the Define and Punish Clause. The conclusion of this argument can be summarized as follows:

By the enactment of [certain provisions] of the MDLEA, allowing the enforcement of the criminal laws of the United States against persons and/or activities in non-U.S. territory in which there is a lack of any nexus or impact in, or on, the United States, Congress has exceeded its powers under Article I of the Constitution. Any prosecution based on such legislation constitutes an invalid exercise of jurisdiction by the United States and is void *ab initio* . . . This is a fundamental structural problem that goes to Congress's power to legislate under Article I of the Constitution which *cannot be waived* by any individual or foreign nation.¹²⁰

This conclusion is based on two premises: *first*, that maritime drug trafficking is not a UJ crime,¹²¹ and, *second*, that certain maritime drug trafficking cases have no “nexus or impact in, or on, the United States” that would implicate another grant of congressional power, such as the Felonies Clause.¹²²

The proponents maintain that Congress, through the MDLEA, has tried to make the non-universal crime of maritime drug trafficking into the universal crime of piracy in order to take advantage of piracy's unique jurisdictional

¹¹⁸ See, e.g., *United States v. Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998) (“In addition to the statutory jurisdictional element, we require that, in order for extraterritorial application of United States penal statutes, such as the MDLEA, to satisfy . . . due process, the Government must demonstrate . . . ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute would not be arbitrary or fundamentally unfair . . .”). *But see* *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006) (“[T]his circuit and other circuits have not embellished the MDLEA with [the requirement of] a nexus [between a defendant's criminal conduct and the United States].”).

¹¹⁹ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1207.

¹²⁰ Cardales-Luna, 632 F.3d at 739 (Torruella, J., dissenting) (emphasis added). In this case, the defendant, a non-U.S. citizen, was aboard a Bolivian flag vessel when it was boarded and searched by the U.S. Coast Guard. During the search, the officers eventually discovered 400 kilograms of cocaine in a hidden compartment near the stern of the vessel. *Id.* at 732.

¹²¹ *Id.* at 745 (“Drug trafficking is not recognized in customary international law as a universally cognizable offense, and all U.S. courts to have consider this issue have so ruled.”). *See also* Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1224 (“Drug trafficking is not recognized in [customary international law] as a universally cognizable offense.”).

¹²² Cardales-Luna, 632 F.3d at 739.

status.¹²³ By assuming that maritime drug smuggling does not have a connection or nexus to the United States implicating another basis of jurisdiction, the argument requires that UJ become the basis to define and proscribe such conduct by default.¹²⁴ And because drug smuggling is not a UJ crime, Congress has exceeded its authority under the Define and Punish Clause. To be valid, of course, both premises must be true. The first is; the second is not.

1. Maritime Drug Trafficking Is Not a Universal Jurisdiction Crime

The articles and judicial opinions argue that maritime drug smuggling has never been and should not now be regarded as a UJ crime, but this is not in doubt.¹²⁵ To start, UJ allows states to define and prescribe certain criminal offenses recognized as being of “universal concern,” such as piracy, the slave trade, and genocide.¹²⁶ These crimes are alike in their “extraordinary heinousness.”¹²⁷ Unlike most crimes, which require a territorial or other nexus before a state can punish them,¹²⁸ UJ crimes are not required to have a connection to a state’s territory or its nationals or an impact on its territory or citizens.¹²⁹

UJ over these offenses is “the result of universal condemnation of those activities and general interest in cooperating to suppress them.”¹³⁰ If the conduct in question is not a UJ crime, however, international law requires certain links with the State to justify the exercise of criminal jurisdiction.¹³¹ Without these links, a state may not define and punish that conduct. As one scholar pithily states, “[the U.S.] Congress cannot punish dog-fighting by Indonesians in Java because Congress has not been authorized by the Constitution to make such laws.”¹³²

In support of the premise that maritime drug smuggling is not a UJ crime, the argument first focuses on the specific grants of congressional power. Domestically, the Define and Punish Clause gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹³³ This clause enumerates three grants of

¹²³ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1207 (“[P]iracy was different from all other felonies in one crucial way: it was universally cognizable.”).

¹²⁴ *Id.* at 1251 (“Therefore, many applications of the MDLEA . . . exceed Congress’s powers under the Define and Punish Clause, and other constitutional sources of authority do not provide an alternate basis.”).

¹²⁵ See RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 402.

¹²⁶ *Id.*

¹²⁷ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1226.

¹²⁸ See RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 402. International law also recognizes the territoriality, nationality, protective, and passive personality principles of jurisdiction. *Id.* at cmts. a, f, & g.

¹²⁹ *Id.* at § 404 cmt. a.

¹³⁰ *Id.*

¹³¹ *Id.* at § 402 cmt. a.

¹³² Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1194.

¹³³ U.S. CONST. art. I, § 8, cl. 10.

authority.¹³⁴ This means that Congress has the power to define and punish: (1) piracies committed on the high Seas; (2) felonies committed on the high Seas; and (3) offenses against the law of nations.

As a corollary, Congress's power to legislate differs depending on which category of conduct is being addressed.¹³⁵

The separate treatment of piracy, felonies on the high seas, and offenses against the law of nations in the Define and Punish Clause supports the conclusion that the United States has UJ over only those crimes that are universally cognizable under international law.¹³⁶ Historically, the only crime that met this standard was piracy, defined as robbery committed on the high seas.¹³⁷ In contrast, the other two categories, felonies on the high seas and offenses against the laws of nations, appear to require links to the United States sufficient to support criminal jurisdiction.¹³⁸

This distinction between piracy, as *hostis humani generis* (enemy of all mankind),¹³⁹ and other types of crimes has been affirmed throughout most of the history of the United States.¹⁴⁰ For example, when Congress enacted the first federal criminal statute in 1790, it criminalized “murder or robbery” when committed by “any person” on the high seas.¹⁴¹ This had the practical effect of extending U.S. criminal jurisdiction to a wide variety of crimes aboard any vessel on the high seas,¹⁴² and the enacted statute was immediately and widely criticized by preeminent Founding jurists, including Justice James Wilson, who noted the distinction between “general piracy and other maritime crimes a nation may penalize.”¹⁴³ Congressman John Marshall asked rhetorically, in a speech criticizing the same criminal statute, “[c]ould the United States punish desertion by British seamen from a British vessel to a French one, or pick-pocketing among British sailors?”¹⁴⁴ These explanations make clear that at that time while any state

¹³⁴ Cardales-Luna, 632 F.3d at 740.

¹³⁵ *Id.* at 741.

¹³⁶ *Id.* See also Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1210 (“The distinction between ‘municipal’ and ‘international’ or true piracy obviously tracks the constitutional distinction between felonies and piracies. It suggests that Congress can punish piracy consistent with its UJ status, but that that power should not spill over to felonies.”).

¹³⁷ See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

¹³⁸ Cardales-Luna, 632 F.3d at 741 (“Other than in the case of [piracy], there is no general authority to regulate purely foreign criminal conduct that does not have a demonstrable connection with the United States.”).

¹³⁹ *Smith*, 18 U.S. at 163 n. h.

¹⁴⁰ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1210.

¹⁴¹ *Id.* (“As Wheaton . . . put it, ‘piracy created by municipal statute [could] only be punished by that State within whose territorial jurisdiction, and ‘on board whose vessels, the offence thus created was committed.’”).

¹⁴² *Id.*

¹⁴³ *Id.* at 1211. (“This distinction exists regardless of whether the [other maritime crimes] are dubbed ‘piracies’ by statute. If Congress intended the murder provision to apply to foreigners on foreign vessels, it would be unconstitutional.”).

¹⁴⁴ *Id.* at 1212.

could punish piracy based on a UJ theory under international law, other types of maritime crimes could only be punished by that state within whose territory or aboard whose vessels the offense was committed (i.e., the penalized conduct had sufficient links to the forum state).¹⁴⁵

Two decades after this speech, the Supreme Court in *United States v. Furlong* confirmed Justice Marshall's constitutional interpretation,¹⁴⁶ distinguishing between UJ piracy and other types of non-universal maritime crimes by stating that the latter were beyond the "punishing power of the body that enacted" the law.¹⁴⁷ The Court's reasoning was based on the fundamental difference between piracy as defined under international law and other types of crimes, namely piracy's UJ status.

Given this special status, Congress cannot attach the jurisdictional consequences of piracy to any crime committed on the high seas, including maritime drug trafficking.¹⁴⁸ Furthermore, despite assertions to the contrary, the MDLEA has not purported to rely on UJ to criminalize it. For example, in *United States v. Vilches-Navarette*, the Coast Guard interdicted a drug smuggling vessel 50 nautical miles (NM) west of Grenada traveling in a north-northwesterly direction.¹⁴⁹ While the main opinion bypassed the issue,¹⁵⁰ the concurrence highlighted the consistency of the MDLEA with the protective principle of international law,¹⁵¹ not UJ. Moreover, U.S. courts have consistently operated with the understanding that maritime drug trafficking is not recognized a UJ offense.¹⁵² While they have been sympathetic to the fact that drug trafficking is a global problem and of universal concern,¹⁵³ these courts have also noted that "there are crucial differences between conduct that all nations criminalize and what is considered an international crime, particularly one subject to UJ."¹⁵⁴ UJ is reserved for particularly heinous crimes, and maritime drug trafficking does not meet that threshold.¹⁵⁵

¹⁴⁵ *Id.* at 1210–12.

¹⁴⁶ 18 U.S. (5 Wheat.) 184, 197 (1820).

¹⁴⁷ Cardales-Luna, 632 F.3d at 744.

¹⁴⁸ *Id.* at 745 ("As stated by the Court in *Furlong*, '[i]f by calling murder piracy, [the United States] might assert jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought with [its] power by the same device?").

¹⁴⁹ 523 F.3d 1, 1 (1st Cir. 2008).

¹⁵⁰ *Id.* at 19.

¹⁵¹ *Id.* at 22 (Lynch and Howard, J., concurring).

¹⁵² See Cardales-Luna, 632 F.3d at 745; Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1224–25.

¹⁵³ See, e.g., *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) ("Inasmuch as trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas."). This line of reasoning was discussed in the context of a Fifth Amendment Due Process analysis.

¹⁵⁴ Cardales-Luna, 632 F.3d at 746.

¹⁵⁵ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1226.

2. Maritime Drug Trafficking Does Not Have a Nexus with the United States

The second premise, that maritime drug trafficking lacks a nexus with the United States, is intended to deprive the MDLEA of an alternative basis for the exercise of jurisdiction and force it into a UJ paradigm. As posited by the proponents, these other potential links to the United States include the protective principle of international law,¹⁵⁶ Congress's traditional authority over admiralty and maritime matters,¹⁵⁷ the Treaty Power,¹⁵⁸ and the Foreign Commerce Clause.¹⁵⁹

By way of explaining each, the protective principle of international law recognizes that States have the right to punish a limited class of offenses committed outside its territory by persons who are not its nationals.¹⁶⁰ These include those “directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.”¹⁶¹ Next, Congress's admiralty powers are those traditionally dealing with maritime matters that allow it “to revise and supplement the maritime law within the limits of the Constitution.”¹⁶² Third, the Treaty Power doctrine is derived from *Missouri v. Holland*,¹⁶³ which allows Congress to act outside of its otherwise enumerated powers when implementing a treaty.¹⁶⁴ Finally, the Foreign Commerce Clause permits regulation of commerce between the United States and foreign nations.¹⁶⁵ The proponents dismiss each of these potential bases for the exercise of criminal jurisdiction as deficient.¹⁶⁶

Despite support in U.S. circuit courts of appeal for basing MDLEA prosecutions on the protective principle, commentators have rejected such attempts, positing that “the cases that see the MDLEA as an exercise of protective jurisdiction *fundamentally misconceive* the principle.”¹⁶⁷ To support this, the

¹⁵⁶ See Cardales-Luna, 632 F.3d at 747 (“Treating drug crimes as generally within the protective jurisdiction theory would effectively eliminate the distinction with UJ, which would be unacceptable under Article I.”).

¹⁵⁷ *Id.* at 748 (“[A]dmiralty law follows the flag, irrespective of the fact that ship in question was [in foreign internal waters].”).

¹⁵⁸ *Id.* at 749. (“Since the MDLEA does not raise any questions of federalism or separation of powers, and assuming it does not violate express individual rights . . . under *Missouri v. Holland* it could be argued that the MDLEA is a valid exercise of Congress's treaty making authority . . . The question is, what treaty is being implemented?”).

¹⁵⁹ *Id.* at 750 (“Notwithstanding the breadth of this power, it is unavailing in the present case, for it only authorizes Congress to legislate conduct with a demonstrable and direct nexus to the United States, and in the present situation, no such nexus is extant.”).

¹⁶⁰ RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 402 cmt. f.

¹⁶¹ *Id.*

¹⁶² *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361 (1959).

¹⁶³ 252 U.S. 416, 433 (1920).

¹⁶⁴ *Id.*

¹⁶⁵ U.S. CONST. art. I, § 8, cl. 3

¹⁶⁶ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1251.

¹⁶⁷ *Id.* at 1230 (emphasis added).

proponents argue that the bounds of the principle are “unclear” and that it only applies to conduct that in and of itself could potentially endanger the security of the United States.¹⁶⁸ In their view, the “security of the state” only refers to the “safety and integrity of the state apparatus itself,”¹⁶⁹ and these types of threats include, among others, only the crimes of espionage, counterfeiting currency, or falsification of official documents.¹⁷⁰ As such, they conclude that “there is no support for the principle reaching moral or victimless crimes,”¹⁷¹ a category which would presumably include drug trafficking. According to this argument, the protective principle’s use is even more tenuous when it cannot be shown that the drugs in a particular case were bound for the United States, which occurs with some frequency in federal MDLEA prosecutions given the lack of a nexus requirement in all but one of the federal circuits.¹⁷²

The other potential bases for the exercise of criminal jurisdiction are also alleged to be insufficient. Admiralty jurisdiction, the federal government’s traditional authority over maritime-related issues, is rejected because “admiralty law follows the flag,”¹⁷³ and maritime drug trafficking typically occurs aboard foreign-registered vessels or in certain locations that do not fall within Congress’s admiralty powers.¹⁷⁴ The Treaty Power, which allows Congress to act outside its otherwise enumerated powers if it is implementing a treaty,¹⁷⁵ fails because the proponents state that there is no applicable, pre-existing treaty that Congress could be implementing by enacting the MDLEA.¹⁷⁶ Lastly, the Foreign Commerce Clause,¹⁷⁷ which permits Congress to regulate commerce with foreign nations, fails because “th[at] power does not authorize legislation regarding conduct with no demonstrable and direct nexus with the United States.”¹⁷⁸ As the argument goes, because these alternate constitutional sources of congressional

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1231.

¹⁷⁰ RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 402 cmt. f.

¹⁷¹ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1231.

¹⁷² *See, e.g.*, Cardales-Luna, 632 F.3d at 740 (“There is no evidence that any of the contraband found aboard the vessel was destined for U.S. territory, or that there was any connection with persons or activities in U.S. territory, or with persons who were U.S. nationals. The only injection of the United States into this case comes about from the fact that the vessel that intercepted the *Osiris II* was a U.S. Coast Guard vessel . . .”). This also explains the preference for trying MDLEA cases in federal circuits that have not added the nexus requirement to the MDLEA (for example, the Eleventh Circuit).

¹⁷³ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1234.

¹⁷⁴ *Id.* at 1235.

¹⁷⁵ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁷⁶ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1242–1248.

¹⁷⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁸ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1249 (“This shows that it is not enough for the commerce to be between some foreign states. Rather, the United States must be on one side of the transaction.”). *Id.* at 1250. *But see* *United States v. Baston*, 818 F.3d 651, 666 (11th Cir. 2016) (“We did not hold that the Offences Clause is the *only* power that can support an extraterritorial criminal law; our decision was limited to the Offences Clause because the government failed to offer ‘any alternate ground upon which the [MDLEA] could be sustained constitutional.’ If the government had invoked the Foreign Commerce Clause in *Bellaizac-Hurtado*, we might have reached a different result.”).

authority provide no basis for the MDLEA, the provisions of the law are an unconstitutional exercise of congressional power.

3. The MDLEA Impermissibly Punishes Drug Trafficking Beyond the High Seas

A related criticism of the Felonies Power argument is concerned with the historical understanding of the term “high seas.”¹⁷⁹ Under the current law of the sea, the high seas do not begin until 200 NM from a coastal state’s baseline.¹⁸⁰

Given that the Define and Punish Clause limits Congress’s power to punishing only those felonies that occur “on the high seas,” defining the term by its modern understanding would limit the application of the MDLEA to only those maritime locations beyond this 200 NM limit.¹⁸¹

Drug traffickers have an inconvenient penchant for hugging the South and Central American coasts.¹⁸² As a result, many USCG interdictions occur within the maritime zones between the territorial seas of coastal states and the start of the high seas at 200 NM from their baselines.¹⁸³ These include the contiguous and exclusive economic zones, which are still considered “international waters” for freedom of navigation and law enforcement purposes.¹⁸⁴ Practically speaking, if the modern interpretation of the term “high seas” were adopted, the MDLEA would not apply in a 200 NM-wide band of ocean that runs straight from the Source Zone to the Arrival Zone in the United States. Whether this is a good idea depends on your view of whether drug traffickers should be stopped in the Transit Zone before they reach the United States. This issue will be discussed in greater detail in Part IV.

¹⁷⁹ This criticism has been briefly mentioned in the articles and cases. Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1232–34 (“[I]f UJ is not locked into its 1789 parameters of including only piracy, it is hard to see why the definition of high seas should not change with the times as well.”).

¹⁸⁰ UNCLOS, *supra* note 67, art. 57 (“The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”).

¹⁸¹ See Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1233.

¹⁸² *Operation Martillo*, UNITED STATES SOUTHERN COMMAND, <http://www.southcom.mil/newsroom/Pages/Operation-Martillo.aspx> (last visited Feb. 9, 2016). Operation Martillo is a U.S., European, and Western Hemisphere effort targeting illicit trafficking routes in coastal waters along the Central American isthmus. *Id.*

¹⁸³ See, e.g., Martinez-Hidalgo, 993 F.2d at 1053 (3d Cir. 1993) (“On December 12, 1991, the USS Hercules, a [U.S. Navy] vessel with four Coast Guard members on board, was on patrol at a point approximately . . . 80 miles south of Puerto Rico.”). This interdiction occurred within the U.S. EEZ.

¹⁸⁴ Kraska, *supra* note 69, at 22–23.

B. *The MDLEA Is an Unconstitutional Exercise of the Offenses Power*

The second argument, recently advanced by the Eleventh Circuit, states that the MDLEA is an unconstitutional exercise of the Offenses Power.¹⁸⁵ The court focuses exclusively on that grant of authority contained in the Define and Punish Clause, bypassing both the Piracies Clause (because maritime drug trafficking is not piracy) and the Felonies Clause (because the activity in the case occurred in Panamanian territorial seas and not on the high seas).¹⁸⁶

In *Bellaizac-Hurtado*, the defendants were detected by the USCG in “a wooden fishing vessel operating without lights and without a flag” in the territorial seas of Panama and apprehended by the Panamanian Aero-Naval Service (SENAN) once they beached their vessel and fled ashore.¹⁸⁷ After an exchange of diplomatic notes, the Foreign Ministry of the Republic of Panama waived its primary right to exercise criminal jurisdiction in favor of the United States pursuant to the U.S.-Panama counterdrug bilateral agreement.¹⁸⁸ On appeal, the Eleventh Circuit considered whether the coastal state consent provision of the MDLEA exceeded Congress’s power under the Offenses Clause.¹⁸⁹ This provision, rather than the flag state consent provision, was implicated because the conduct occurred wholly within the territorial sea of Panama.¹⁹⁰ As with the previous argument, the Eleventh Circuit used two premises to reach its conclusion that Congress lacks the power to punish maritime drug trafficking under the Offenses Clause:¹⁹¹ (1) customary international law limits the power of Congress to define and punish crimes under the Offenses Clause; and (2) drug trafficking is not a violation of customary international law.¹⁹² As with the Felonies Power argument, only the first is true.

1. Customary International Law Limits Congress’s Power to Define and Punish

At the outset, the Eleventh Circuit’s opinion focused on the term “define,” explaining that for Congress to punish certain conduct, it must first be a violation of the law of nations because the term “define” grants Congress only the power “to codify and explain offenses that had *already been understood* to be against the law of nations” rather than the power to create or declare additional offenses.¹⁹³ In

¹⁸⁵ *Bellaizac-Hurtado*, 700 F.3d at 1258 (“[W]e hold that Congress exceeded its power, under the Offences Clause, when it proscribed the defendants’ conduct in the territorial waters of Panama.”).

¹⁸⁶ *Id.* at 1248 (“The first two grants of power are not implicated here; piracy is, by definition, robbery on the high seas . . . and the Felonies Clause is textually limited to conduct on the high seas.”).

¹⁸⁷ *Id.* at 1247.

¹⁸⁸ *Id.* at 1248.

¹⁸⁹ *Id.* at 1249.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1250 (emphasis added).

other words, the Offenses Clause allows Congress to provide notice of certain types of crimes through codification, but does not authorize the creation of new offenses unrecognized by the law of nations.

Given this limitation, exactly what comprises the law of nations is the analytical lynchpin for determining Congress's authority to define and punish such crimes. In this context, the Eleventh Circuit determined that the "Law of Nations" was a term of art at the Founding that means customary international law (CIL) today,¹⁹⁴ invoking the Supreme Court's decision in *Sosa v. Alvarez-Machain* for support.¹⁹⁵ The result of this is that only CIL, as opposed to other sources of international law such as convention-based international law or *jus cogens* norms, is permitted to define what constitutes the constitutional term "Law of Nations" in U.S. counterdrug law. This has the effect of limiting those offenses which Congress may define and punish to only that conduct prohibited by CIL. The court then analyzed whether maritime drug trafficking met this standard.¹⁹⁶

2. Drug Trafficking Is Not a Violation of Customary International Law

The Eleventh Circuit analyzed maritime drug trafficking both at the time of the Founding and during the present day.¹⁹⁷ The court used this two-prong approach because it found that it was unclear "whether the power granted under the [Offenses] Clause expands and contracts with changes in customary international law."¹⁹⁸

After examining historical sources, including William Blackstone and Emer de Vattel, the Eleventh Circuit concluded that maritime drug trafficking was not an offense against the law of nations when the Constitution was ratified.¹⁹⁹ The court's analysis of drug trafficking in the modern era was more extensive, weighing both the practice of current States and the opinions of noted international criminal law scholars, before ultimately concluding that it was likewise "not a violation of contemporary [CIL]."²⁰⁰ Given that maritime drug trafficking was not a violation of CIL either at the time of the Founding or today, the Eleventh Circuit held that the coastal state provision of the MDLEA was an unconstitutional exercise of the Offenses Power.²⁰¹

C. *A Brief Summary of the Arguments*

¹⁹⁴ *Id.* at 1251.

¹⁹⁵ 542 U.S. 692 (2004).

¹⁹⁶ *Bellaizac-Hurtado*, 700 F.3d at 1254.

¹⁹⁷ *Id.* at 1253–54.

¹⁹⁸ *Id.* at 1253.

¹⁹⁹ *Id.* at 1254.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1258 ("Because drug trafficking is not a violation of customary international law, we hold that Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama.").

The aforementioned arguments have several things in common. First, they both ignore or dismiss the Felonies Power, albeit for different reasons.²⁰² The first argument maintains that maritime drug trafficking is not a UJ crime, thereby requiring certain links to the United States in order for Congress to criminalize such action. However, because some maritime drug trafficking cases lack an explicit connection to the United States, Congress may not rely on any other constitutional provision, including its admiralty powers, the Treaty Power, or the Foreign Commerce Clause, as a basis for certain provisions of the MDLEA.²⁰³ Logically, this proposition fails if it can be satisfactorily demonstrated that maritime drug trafficking has sufficient connection to the United States. In contrast, the Offenses Power argument ignores the Felonies Clause because it would apply only on the high seas and the interdiction in the case took place in Panamanian territorial waters. This reasoning fails, however, if the high seas encompass waters that also include the territorial seas of other nations.

Second, both arguments unnecessarily restrict certain concepts to limit the MDLEA's application to drug trafficking. The Felonies Power argument limits the applicability of the protective principle of jurisdiction.²⁰⁴ This does not seem warranted, however, given the effects of Western Hemisphere's drug trafficking problem on the United States and the consistently favorable jurisdictional treatment of maritime drug trafficking under this principle in U.S. federal courts. It is not enough to simply declare that a particular crime does not implicate the protective principle, or that courts in applying the principle have fundamentally misconstrued it, to make it so. Additionally, the Offenses Power argument limits the term the "Law of Nations" to CIL without regard to the other, widely-accepted components of international law, including conventional international law and *jus cogens* norms. A broader view of what constitutes the law of nations would have likely resulted in a different holding in *Bellaizac-Hurtado*.

IV. The Proposed MDLEA Limitations Are Unnecessarily Restrictive

A. *The Protective Principle Allows States to Criminalize Maritime Drug Trafficking*

The protective principle of international law should permit states to criminalize maritime drug trafficking. Again, the Felonies Power argument purports to eliminate all of the other potential sources of Article I power for the MDLEA,²⁰⁵ including the protective principle, forcing the law to rely on a UJ framework. However, this proposition is neither necessary nor convincing, especially in light of the global nature of the illicit drug trade and the detrimental

²⁰² *Id.* at 1248. See also Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1251.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1229.

²⁰⁵ *Id.* at 1251 ("Therefore, many applications of the MDLEA, especially to non-stateless vessels, exceed Congress's power under the Define and Punish Clause, and other constitutional sources of authority do not provide an alternate basis.").

impact of drug smuggling on a significant number of countries in the Western Hemisphere, including the United States.

In a chilling example from mid-2010, then-President of Mexico Felipe Calderón stated that the violence committed by DTOs was “a challenge to the state, *an attempt to replace the state*,”²⁰⁶ an indication as to the magnitude of the problem faced by his country as well as those along the primary Central America-Mexico smuggling route.²⁰⁷ The drug-related violence in Mexico has included the assassinations of government officials, car bombings, beheadings, and increased killings of innocent bystanders.²⁰⁸ Hoping that the United States and its civic institutions remain untouched by these effects is neither a realistic nor defensible counterdrug policy. Consequently, it is reasonable for regional governments, including the United States, to employ the principles of international prescriptive jurisdiction to reach beyond their borders and criminalize such conduct.

To this end, the protective principle of international law permits a forum state to exercise criminal jurisdiction over actions that occur outside the territory of that state which could “have a ‘potentially adverse effect’ upon security or governmental functions.”²⁰⁹ Moreover, there need not be any actual effect inside the country for the principle to apply.²¹⁰ Regarding the principle’s specific contours in the United States, the Second Circuit in *United States v. Pizzarusso* stated:

[A] state ‘has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.’²¹¹

Under U.S. law, then, there is a two-part test for determining whether the protective principle of jurisdiction applies to a particular activity. First, does the conduct in question threaten the security of the United States or the operation of its governmental functions and, second, is the conduct generally recognized as a crime under the law of states that have reasonably developed legal systems?

²⁰⁶ Tracy Wilkinson and Ken Ellingwood, “*Cartels Thrive Despite Calderón’s Crackdown; Drug Gangs Have Expanded Their Power and Reach in both Mexico and the United States*,” L.A. TIMES (Aug. 8, 2010), <http://articles.latimes.com/2010/aug/08/world/la-fg-mexico-cartels-20100808>.

²⁰⁷ SAVIANO, *supra* note 50, at 34.

²⁰⁸ *Id.* at 25; *see also* Greg Botelho & Annie Ramos, *Mexican Journalist’s Naked, Bound Body Found by Highway*, CNN (Feb. 10, 2016), <http://www.cnn.com/2016/02/10/americas/mexico-abducted-journalist-body/index.html>.

²⁰⁹ *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968).

²¹⁰ *Id.*

²¹¹ *Id.* In this case, an alien had made false statements to a U.S. consular officer in Canada for the purposes of a visa application.

1. Maritime Drug Trafficking Threatens the Security of the United States

The precise outlines of which criminal activities justify the protective principle's use are not clear from the cases and scholarly literature, but the Restatement (Third) of Foreign Relations Law helpfully provides a list of crimes eligible for punishment under the protective principle. This list includes espionage, counterfeiting a state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate a nation's immigration or customs laws.²¹² It is clear that each of these crimes in some way damages the sovereignty of the United States,²¹³ but the list does not include maritime drug trafficking.

In a general sense, federal courts have grappled with whether the protective principle supports the exercise of U.S. criminal jurisdiction in the past, analyzing whether the activity in question was “an affront to the very sovereignty of the United States”²¹⁴ or whether it had “a deleterious influence on valid governmental interests.”²¹⁵ One scholar stated that the “protective principle is designed to allow a state to protect itself against . . . offenses that damage or threaten to damage state security, sovereignty, treasury[,] or governmental functions.”²¹⁶ Up until this point, most courts to consider the protective principle in the United States have done so in the context of immigration-related offenses.²¹⁷

Although the list of crimes based on the protective principle does not include maritime drug trafficking aboard foreign-registered vessels,²¹⁸ the majority view in the U.S. courts of appeal, including the First, Third, Fifth, and Eleventh Circuits, is that the protective principle supports the criminalization of such conduct. For example, in the Eleventh Circuit, exercising jurisdiction under the protective principle is acceptable so long as the conduct has a potentially adverse effect on U.S. security and is generally recognized as a crime by nations with well-developed legal systems.²¹⁹ The First Circuit also addressed the

²¹² RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 402 cmt. f.

²¹³ *See, e.g.,* *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1961) (“The acts . . . were all done outside the state, but they were intended (at least at the point of time when the fraudulent document was used to gain entry) to produce, and they did so produce, a detrimental effect on the sovereignty of the United States.”).

²¹⁴ *Pizzarusso*, 388 F.2d at 10.

²¹⁵ *Id.*

²¹⁶ CHRISTOPHER L. BLAKESLEY, *INTERNATIONAL CRIMINAL LAW: PROCEDURE* 22 (M. Cherif Bassiouni ed., 1986). This list is non-exhaustive. *Id.*

²¹⁷ *See Pizzarusso*, 388 F.2d at 10; *Rocha*, 288 F.2d at 549.

²¹⁸ The distinction between foreign-registered vessels and stateless vessels for the purpose of the protective principle's application is important because U.S. courts have specifically determined that stateless vessels are “international pariahs [that] have no internationally recognized right to navigate freely on the high seas.” *United States v. Moreno-Morillo*, 334 F.3d 819, 824–25 (9th Cir. 2003).

²¹⁹ *United States v. Garcia*, 182 F. App'x 873, 876 (11th Cir. 2006) (quoting *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985)). *See also* *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006) (“The MDLEA was specifically enacted to punish drug trafficking on

protective principle in *United States v. Cardales*,²²⁰ reasoning that the congressional finding in the MDLEA about the “serious international problem” of drug trafficking and resulting specific threat to the United States meant that exercising jurisdiction over drug traffickers was consistent with the principle.²²¹

Using a slightly different rationale, the Third Circuit stated that any domestic effects requirements of prior counterdrug laws had been abrogated by the MDLEA, which “express[ed] the necessary congressional intent to override any nexus requirement that may be imposed by international law.”²²² Importantly, the court also noted that Fifth Amendment due process problems would arise if Congress attempted to criminalize conduct that was generally lawful throughout the world, which drug trafficking is not.²²³ Finally, the Fifth Circuit determined that the source of Congress’s power to enact the MDLEA—the Felonies Clause—did not have a nexus requirement.²²⁴ For all of these circuits, any additional international law concerns are satisfied because of the MDLEA’s requirement that the flag state consent to the enforcement of U.S. law prior to asserting U.S. criminal jurisdiction over the defendants aboard foreign-registered vessels.²²⁵

The Ninth Circuit, however, takes a more stringent view of the nexus requirement. That court has stated that the application of the principle should operate as a “rough guide of whether sufficient contacts, conceptually similar to the ‘minimum contacts’ analysis for personal jurisdiction outlined in *International Shoe*,²²⁶ exists between the defendant and the United States such that the application of the [MDLEA] would not violate due process.”²²⁷ In other words, whether the protective principle applies is a proxy for Fifth Amendment due

the high seas, because drug trafficking aboard vessels (1) is a serious international problem and is universally condemned, and (2) presents a specific threat to the security and societal well-being of the United States.”).

²²⁰ 168 F.3d 548 (1st Cir. 1999). See also *United States v. Vilches-Navarrete*, 523 F.3d 1, 22 (1st Cir. 2008) (“[T]his court noted that ‘the application of the MDLEA to the defendants is consistent with the protective principle of international law because Congress has determined that all drug trafficking aboard vessels threatens our nation’s security.’”).

²²¹ See James A. Tate, *Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas*, 77 U. CIN. L. REV. 267 (2008).

²²² *Id.* at 277. See also *Martinez-Hidalgo*, 993 F.2d at 1056 (3d Cir. 1993) (“We concluded that there was a domestic effects requirement for [the predecessor to the MDLEA] because of the ‘traditional requirement of international law that a state apply criminal jurisdiction to acts outside its territorial borders only where an effect occurs within those borders. But the ‘effects’ requirement . . . now has been superseded by [the MDLEA].”).

²²³ Tate, *supra* note 221, at 278.

²²⁴ *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) (“Assuming, *arguendo*, that resolution of this issue does require consulting international law, the MDLEA’s application to Suerte still passes constitutional muster because . . . international law does not require a nexus”).

²²⁵ 46 U.S.C. § 70502(c)(2) (2008).

²²⁶ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

²²⁷ *Perlaza*, 439 F.3d at 1162. *But see* *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) (“Protective jurisdiction is proper if the activity threatens the security or governmental functions of the United States. Drug trafficking presents the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction.”), *overruled by* *United States v. Perlaza*, 439 F.3d at 1162 (dismissing *Peterson* as dicta).

process concerns. This is the Ninth Circuit's so-called "Nexus Test" for the MDLEA, which requires that there be some type of factual link to the United States before exercising criminal jurisdiction over drug smugglers interdicted at sea.²²⁸ For instance, these links could include a vessel's proximity to the United States, the presence of navigational equipment on board indicating a course for a U.S. port, or markings on the load of drugs that match narcotics seized in the United States. Regardless of the specific circumstances, if there are sufficient links to invoke the protective principle, due process will likely be satisfied. In the Ninth Circuit, however, the most important analysis is always constitutional due process²²⁹ rather than compliance with international criminal law. Notwithstanding this requirement in the Ninth Circuit, the other circuits that have considered the MDLEA have explicitly declined to adopt this stricter test.²³⁰

In yet a third option, Judge Torruella, heavily citing the Felonies Power argument in his dissent in *United States v. Angulo-Hernandez*,²³¹ proposed an even narrower test, namely that it must be demonstrated that the drugs in question (those aboard the interdicted vessel) are headed for the United States to warrant application of the protective principle.²³² Professor Kontorovich agrees, stating that for the protective principle to apply, "it would have to be shown that the *particular* conduct endangered the United States,"²³³ a criterion that is only met when there is some reason to believe that the interdicted drugs were bound for the United States.²³⁴

Broad interpretations of the protective principle's application, such as the one supported by this article, have been criticized in U.S. courts of appeal.²³⁵ However, the Supreme Court has never conclusively resolved the issue, leaving in

²²⁸ *Perlaza*, 439 F.3d at 1162. *See also* *United States v. Khan*, 35 F.3d 426, 429 (9th Cir. 1994) (conspiracy included backup landing site in the United States and primary plan to transport drugs to New York); *United States v. Aikins*, 946 F.2d 608, 614 (9th Cir. 1990) (operation designed to bring off-loaded marijuana into the United States); *United States v. Davis*, 905 F.2d 245, 249 (9th Cir. 1990) (intent to smuggle contraband into United States territory).

²²⁹ *Perlaza*, 439 F.3d at 1162.

²³⁰ *See, e.g.*, *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002).

²³¹ 576 F.3d 59, 61 (1st Cir. 2009) (Torruella, J., dissenting).

²³² *Id.* at 61 (1st Cir. 2009) (Torruella, J., dissenting) ("Since the drugs at issue in this case were heading for the Dominican Republic, not the United States, there is not the kind of direct threat to the United States to trigger the protective principle."). In *Angulo-Hernandez*, the defendants were interdicted by the U.S. Coast Guard aboard a Bolivian-flagged vessel en route from Colombia to the Dominican Republic, and they challenged their convictions under the MDLEA, arguing that the drugs seized were not even bound for the United States. *Id.* at 60.

²³³ Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1230 (emphasis added).

²³⁴ *Id.*

²³⁵ *See, e.g.*, *United States v. Robinson*, 843 F.2d 1, 3 (1st Cir. 1988) ("But, they ask, how can this principle justify prohibiting foreigners on foreign ships 500 miles offshore from possessing drugs that, as far as the statute (and clear proof here) are concerned, might be bound for Canada, South America, or Zanzibar?"); *United States v. Perlaza*, 439 F.3d at 1162 ("Second, the notion that *Peterson's* 'protective principle' can be applied to prohibiting foreigners on foreign ships 500 miles offshore from possessing drugs that . . . might be bound for Canada, South America, or Zanzibar—as suggested by the Government here—has been repeatedly called into question by our Court and others." (internal quotation marks omitted)).

place a circuit split over whether the crime of maritime drug trafficking warrants the use of the protective principle.

The underlying concern seems to be that the United States will use the protective principle to place ever-increasing categories of criminal conduct under the aegis of maritime law enforcement efforts.²³⁶ Despite this concern, maritime drug trafficking remains one of the most significant law enforcement challenges in the Western Hemisphere, and the illicit drug trade stands alone in its ability to destabilize regional governments and terrorize civilians.²³⁷ This, then, is the primary limiting principle for using the protective principle to support the MDLEA: the quasi-universal status of the proscription against illicit trafficking in narcotics.²³⁸ No other maritime crime, including human trafficking, weapons trafficking, or bulk cash smuggling, has yet reached the status of a quasi-universal crime justifying the use of the protective principle. Logically, however, if these crimes were to achieve the same status as the illicit trafficking in narcotics, the use of the protective principle would be justified against them, as well. Another check on the exercise of U.S. criminal jurisdiction is the consent of the flag or coastal state.²³⁹ By requiring that the other nation consent to the exercise of U.S. criminal law aboard its vessel or within its territorial waters, the concern that the United States is expanding its jurisdictional reach to the outermost limits is significantly lessened.

One example of how drug trafficking threatens the security of the United States is the fact that even U.S. federal law enforcement agencies are susceptible to drug-related corruption. These are the agencies and institutions that are responsible for maintaining the security of the United States, the standard under U.S. law for applying the protective principle. For example, recent Government Accountability Office (GAO) reports note that, between fiscal years (FY) 2005 and 2012, 144 current or former Customs and Border Protection (CBP) agents

²³⁶ See Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1231 (“Treating drug crimes as within protective jurisdiction would eliminate any difference between protective jurisdiction and universal jurisdiction.”); Angulo-Hernandez, 576 F.3d at 61 (“Such an interpretation would result in a protective principle which swallows the principle of universal jurisdiction.”).

²³⁷ *U.S. Southern Command Posture Statement*, 113th Cong. 4 (2014) (statement of Gen. John F. Kelly, Commander, U.S. Southern Command) (“This [destabilization] challenge, however, extends far beyond a threat to public safety; some areas of Central America are under the direct influence of drug trafficking organizations. These groups use their illegally gained wealth to buy off border agents, judges, police officers, and even entire villages.”).

²³⁸ See JOHN O’BRIEN, *INTERNATIONAL LAW* 247 (2001) (“It is sometimes argued that there are a number of other crimes which should properly be regarded as subject to universal jurisdiction; the candidates include hijacking, drug trafficking, apartheid, [and] slavery Such crimes in the last half century [have] been subject to a degree of international co-operation and by various treaty regimes . . . so much so that they have been labeled . . . ‘quasi-universal crimes.’”).

²³⁹ See Robinson, 843 F.2d at 4 (“In our view, however, appellants’ arguments are beside the point, for there is another, different, but perfectly adequate basis in international law for the assertion of American jurisdiction. Panama *agreed* to permit the United States to apply its law on her ship.”).

were arrested or indicted for drug-related corruption.²⁴⁰ These activities included allowing loads of narcotics through border checkpoints, with the majority of these agents stationed along the southwest border.²⁴¹ Additionally, DHS recently stated in a report to Congress that transnational criminal organizations (TCOs) “have determined that infiltrating or undermining the stability of the CBP workforce is a worthwhile endeavor to further their criminal enterprise.”²⁴²

Another reason why maritime drug trafficking is of critical concern to the United States is because North America is the final destination for over 40 percent of the global supply of cocaine.²⁴³ It is also the world’s largest consumer of Colombian heroin and Mexican heroin and marijuana.²⁴⁴ Statistically, if a northbound smuggling vessel is interdicted in the Transit Zone, there is a high likelihood that its load of illegal narcotics is destined for the United States.²⁴⁵ While it may be easier to demonstrate factual connections to the United States in some cases (for example, when the vessel is in close proximity to U.S. territorial seas heading to a U.S. port or it is clear that the contraband was to be distributed in the United States), the very nature of the illicit drug trade as an interconnected global network designed to efficiently move contraband and illegal proceeds between suppliers, middlemen, and consumers around the world should salve concerns that U.S. criminal jurisdiction is sweeping too broadly.²⁴⁶

2. Maritime Drug Trafficking is Condemned by Virtually All Nations

Even though the majority view of scholars, jurists, and legal opinions does not support the assertion of UJ over drug crimes, the universal *condemnation* of drug trafficking helps explain why using the protective principle of jurisdiction is appropriate to deter this activity. The world community clearly treats drug trafficking as an international problem, and both its treaty obligations and other

²⁴⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-59, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT 8–9 (2012).

²⁴¹ *Id.*

²⁴² DEP’T OF HOMELAND SEC., INVESTIGATION OF DHS EMPLOYEE CORRUPTION CASES 7 (2015).

²⁴³ U.N. OFFICE OF DRUGS AND CRIME, *Drug Trafficking* (last visited Dec. 15, 2016).

²⁴⁴ *Id.*

²⁴⁵ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 32 (2012) (“Today, in addition to many minor sub-flows, there are three main arteries for northward movement of cocaine . . .”).

²⁴⁶ See *United States v. Normandin*, 378 F. Supp. 2d 4, 9 n.4 (D.P.R. 2005) (“Even if by some realignment of the stars nexus were required in a First Circuit MDLEA prosecution, this Court finds that there is more than sufficient nexus. The United States is the world’s most heavily trafficked market, and the narcotics trade being the global concern it is, any attempt to show that the 750 kilograms of cocaine found in defendants’ possession would have no effect on supply and demand in the United States is risible.”). *But see* *Angulo-Hernandez*, 576 F.3d at 61 (“The only response to [the fact that the drugs were not bound for the United States] is that drug trafficking, generally, is such a global threat that the United States is justified in protecting itself by prosecuting traffickers anywhere, regardless of the destination of the drug shipment. But this broad proposition is not consistent with international law.”).

international agreements demand that the United States actively participate in combating this problem.²⁴⁷

This international resolve is reflected in the 1988 Vienna Convention, a treaty to which 189 nations are party,²⁴⁸ as well as article 108 of UNCLOS.²⁴⁹ In fact, the preamble to the 1988 Vienna Convention sets forth the international community's "[d]eep[] concern [regarding] the magnitude of and rising trend in the illicit production of, demand for, and traffic in narcotic drugs . . . which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political *foundations of society*."²⁵⁰ These conventions and international agreements attest to the widespread and unanimous condemnation of the drug trade and illicit trafficking. To suggest that "states that have reasonably well-developed legal systems" do not recognize drug smuggling as a severe crime would be to ignore the multitude of treaties addressing the issue.²⁵¹

B. *The Term "High Seas" Geographically Overlaps Other States' Territorial Seas*

Given that the protective principle of international law is broad enough to encompass maritime drug trafficking, determining whether the MDLEA is a constitutional exercise of Congress's in a particular maritime power under the Felonies Clause requires examining the original understanding of the words chosen by the members of the Constitutional Convention. While the Eleventh Circuit conducted this type of original analysis with the term "define,"²⁵² it neglected to do so with the term "high seas." In fact, the holding in *Bellaizac-Hurtado* is partially based on the dubious premise that the high seas, as used in Article I, Section 8, Clause 10 of the Constitution, *excludes* those waters within the territorial seas of foreign nations.²⁵³ However, it was not until the early 20th century that the high seas and territorial waters began to be defined in relation to one another as separate concepts and, at the time of the Founding, were understood to be overlapping rather than mutually exclusive.²⁵⁴ As such, the Eleventh Circuit's consideration of whether maritime drug trafficking was a violation of the law of nations under the Offenses Clause was unnecessary

²⁴⁷ See Tate, *supra* note 221, at 291.

²⁴⁸ UNITED NATIONS, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en.

²⁴⁹ UNCLOS, *supra* note 67, at art. 108.

²⁵⁰ 1988 Vienna Convention, *supra* note 65, at Preamble (emphasis added).

²⁵¹ Pizzarusso, 388 F.2d at 10.

²⁵² *Bellaizac-Hurtado*, 700 F.3d at 1249–50 ("During the Founding period, the word 'define' meant '[t]o give the definition; to explain a thing by its qualities' and '[t]o circumscribe; to mark limits.' These definitions reveal that the word 'define' would not have been understood to grant Congress the power to create or declare offenses against the law of nations, but instead to codify and explain offenses that had already been understood as offenses against the law of nations.").

²⁵³ *Id.* at 1248 ("The first two grants of power are not implicated here: piracy is, by definition, robbery on the high seas, and the Felonies Clause is textually limited to conduct on the high seas.").

²⁵⁴ See *infra* Part IV.B.

because Congress already had the necessary authority to pass the MDLEA pursuant to the Felonies Clause, which, as the court stated, applies to conduct on the high seas.

At the time of the Founding and throughout the 19th century, the term “high seas” was understood to encompass or, more appropriately, overlap waters that also included the territorial waters of other nations. For instance, Chief Justice John Marshall, writing for the Court in *United States v. Wiltberger*,²⁵⁵ interpreted a criminal act of the first Congress, which defined the crime of manslaughter on the high seas. He concluded that the “‘high seas,’ if not in all instances confined to the ocean *which washes a coast*, can never extend to a river about half a mile wide, and in the interior of a country.”²⁵⁶ This explanation of the Founders’ conceptualization of the “high seas” is helpful because it demonstrates that Chief Justice Marshall did not think that the high seas abruptly stopped at some other nation’s territorial waters, as with the modern understanding of the term. Rather, Chief Justice Marshall’s conclusion indicates the conception that the high seas could, in at least some instances, “wash the coast” of another country and still be considered the high seas for the purposes of the criminal statute, which shared the same operative language as the Felonies Clause (“the high seas”).

This conclusion is supported by the Supreme Court’s decision in *Church v. Hubbard*,²⁵⁷ which considered the lawfulness of the seizure of a U.S. merchant vessel by Portuguese officials when the vessel was anchored approximately five leagues (fifteen miles) from the South American coast. The plaintiff argued that, under the law of nations, the boundary of a country’s territorial jurisdiction was set by the distance of a cannon shot, or only about four leagues, putting the merchant vessel beyond Portugal’s jurisdictional reach. While the Court accepted this definition of territorial jurisdiction, it also stated that the range at which a coastal State can lawfully take action to secure its national interests is dependent on the circumstances of geography and the threat faced, noting that the revenue cutters of the United States were authorized to visit vessels within four leagues of the U.S. coast.²⁵⁸ In other words, a State’s territorial seas extended as far from its coastline as it could assert meaningful control, and this distance may vary, unlike the modern understanding of the territorial seas.²⁵⁹

These two cases are essential to understanding the scope and intent of the term “high seas” in the Constitution. In *Wiltberger*, the Court accepts that the term includes the waters of the ocean which “wash[] a coast.” Yet in *Hubbard*, another opinion by Chief Justice Marshall, the Court accepts that a nation’s

²⁵⁵ 18 U.S. 76 (1820).

²⁵⁶ *Id.* at 94 (emphasis added).

²⁵⁷ 6 U.S. 187 (1804).

²⁵⁸ *Id.* at 31.

²⁵⁹ UNCLOS, *supra* note 67, at art. 3 (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”).

territorial waters extend at least the distance of a cannon shot from the coast, if not more, depending on certain factors. These decisions can only be reconciled by understanding that, historically, the “high seas” *overlapped* those waters considered to be within the territorial seas, even right up to the coast, of another country.

This interpretation is reinforced by subsequent Supreme Court decisions. In *Ross v. McIntyre*, the Court held that “[t]he term ‘high seas’ includes waters on the sea-coast without the boundaries of the low-water mark.”²⁶⁰ In *Ross*, the Court heard an appeal objecting to the exercise of jurisdiction by an American consular tribunal in Japan over a case involving murder committed by a British national, then a seaman aboard a U.S. merchant vessel, while the vessel was in the harbor of Yokohama, Japan. The Court accepted the petitioners’ conclusion that the crime occurred on the high seas, but also held that:

The jurisdiction to try offenses committed on the high seas . . . is *not exclusive* of the jurisdiction of the consular official to try a similar offense when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. . . . We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offenses committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offenses committed in the country of Japan . . . which includes *its ports and navigable waters* as well as its lands.²⁶¹

As in *Hubbart*, the Court considered the situs of the crime, within the port of Yokohama, Japan, to be simultaneously on the “high seas” and “within the territor[y]” of Japan for the purposes of consular jurisdiction. Again, the Supreme Court’s analysis only makes sense if the high seas can overlap another country’s territorial seas.

Two years after *Ross*, in *United States v. Rodgers*,²⁶² the Supreme Court again considered the meaning of the term “high seas,” this time in the context of Section 5346 of the Revised Statutes. In *Ross*, the Court concluded that the term encompassed the waters of the Great Lakes, including those waters on the Canadian side of the maritime boundary. The Court observed that Sir Matthew Hale, in his important treatise on the Rights of the Sea, described the high seas as “[t]hat part of the sea which lies not within the body of a county”²⁶³ The Court also relied on the holdings of English common-law courts, which declared

²⁶⁰ 140 U.S. 453, 471 (1891).

²⁶¹ *Id.* at 471–72 (emphasis added).

²⁶² 150 U.S. 249 (1893).

²⁶³ *Id.* at 253.

that the “high seas” meant “the portion of the sea which washes the open coast.”²⁶⁴

While it is indisputable that the definition of “high seas” has evolved over time, the relevant question for determining the scope of Congress’s authority under the Define and Punish Clause is dependent on the meaning of the term at the time of the Founding.²⁶⁵ The Second Circuit observed that “territorial waters” and “high seas” were defined in relation to each other only in the early part of the 20th century,²⁶⁶ and existing Supreme Court case law makes clear that, at the time of the Founding and continuing through the 19th century, the term high seas was not exclusive of another State’s territorial waters. Despite this, the Eleventh Circuit unnecessarily narrowed the term’s meaning in *Bellaizac-Hurtado*. If the court had used the original, rather than modern, understanding of the term, it would have held that the situs of the defendants’ conduct—in Panamanian territorial waters—was also on the high seas and was therefore well within Congress’s power to criminalize it pursuant to the Felonies Clause, rendering its Offenses Power argument superfluous.

C. *The “Law of Nations” Includes Other Sources of International Law*

Regardless of its rejection of the Felonies Clause as the source of congressional power for the MDLEA, the Eleventh Circuit could have also held that the MDLEA was constitutional if it had more broadly interpreted the 18th century phrase “Law of Nations.” In *Bellaizac-Hurtado*, it held that the contemporary understanding of the term means only CIL,²⁶⁷ effectively removing maritime drug trafficking from Congress’s reach under the Offenses Clause because it has never been and is not now a violation of customary international law.²⁶⁸ In so holding, the Eleventh Circuit looked to other circuits as well as the

²⁶⁴ *Id.* at 254.

²⁶⁵ *See* *In re: Air Crash Off Long Island*, 209 F.3d 200, 207 (2d Cir. 2000) (“Because defendants’ definition of high seas as ‘beyond the low-water mark’ was neither the dominant definition of ‘high seas,’ nor the definition used in those Supreme Court cases that shaped the congressional debate over DOHSA, nor . . . is it used in modern decisions concerning DOHSA, we reject it.”).

²⁶⁶ *Id.* at 210 (“For most of the century[,] there was no band of United States territorial waters between state territorial waters and the high seas similar to that created by Proclamation 5928, which in 1988 extended United States territorial waters from three to [twelve] miles.”).

²⁶⁷ *Bellaizac-Hurtado*, 700 F.3d at 1252 (11th Cir. 2012).

²⁶⁸ This article takes no position on whether the near-universal prohibition on maritime drug trafficking has risen to the level of CIL, but the Eleventh Circuit’s determination that the failure of several parties to the 1988 Vienna Convention to fulfill that convention’s obligations meant that these states “view the curtailment of drug trafficking as an aspirational goal, not a matter of legal obligation under customary international law” is exceedingly odd. *Id.* at 1255. A possible explanation for this somewhat confusing statement is that the court may have been conflating the stricter standards necessary for a particular type of conduct (such as genocide) to achieve UJ with the relatively easier standards for achieving customary international law, which include the general and consistent practice of States followed out of a sense of legal obligation. *See* *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001).

Supreme Court's decision in *Sosa v. Alvarez-Machain*.²⁶⁹ Notwithstanding the definitive nature of its determination, there is a split of authority on the whether the law of nations means only CIL among U.S. circuit courts.

In *Doe v. Exxon Mobile Corp.*, the D.C. Circuit discussed what constitutes the law of nations and concluded that “customary international law is [but] *one* of the sources for the law of nations.”²⁷⁰ The Fourth Circuit later reached the same conclusion, stating that “*several* sources comprise the [law of nations],” including, but not limited to, CIL.²⁷¹ This position is supported by the Restatement (Third) of Foreign Relations Law, which recognizes several sources of international law, including both conventions and CIL.²⁷² Also, in a statement filed by the government in the recent piracy case *United States v. Hasan*,²⁷³ State Department Legal Advisor Harold Koh expressed support for the proposition that the law of nations includes all possible sources of international law, stating that “[t]he Supreme Court has recognized international law as the modern successor to the law of nations and that courts should apply modern international law in interpreting the law of nations.”²⁷⁴ Koh’s position is in accord with Article 38 of the Statute of the International Court of Justice (ICJ) which lists the various sources of law, including conventions, CIL, and *jus cogens* norms, that will be considered when deciding cases brought before the ICJ.²⁷⁵ In contrast, the Second Circuit concluded that the law of nations meant only CIL,²⁷⁶ and the Ninth Circuit has reached the same determination.²⁷⁷

It is noteworthy that all of the discussions of the term “law of nations” in the above-referenced cases specifically applied in the context of Alien Tort Statute (ATS),²⁷⁸ which provides for federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁷⁹ Notwithstanding the fact that the ATS is a statute that

²⁶⁹ 542 U.S. 692 (2004). Simultaneously, the Eleventh Circuit also recognized that the Supreme Court “has never held that the ‘law of nations’ is synonymous with ‘customary international law’” *Bellaizac-Hurtado*, 700 F.3d at 1251.

²⁷⁰ 654 F.3d 11, 36 & n.23 (D.C. Cir. 2011) (emphasis added).

²⁷¹ *Aziz v. Alcolac*, 658 F.3d 388, 398 (4th Cir. 2011) (emphasis added).

²⁷² RESTATEMENT (THIRD) OF FOREIGN REL. L., *supra* note 12, at § 102

²⁷³ 747 F. Supp. 2d 599 (E.D. Va. 2010).

²⁷⁴ Declaration of Legal Advisor Harold Hongju Koh at 4, *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010) (citing *The Paquete Habana*, 175 U.S. 677, 708 (1900)).

²⁷⁵ Statute of the International Court of Justice art. 38, Apr. 18, 1946, 59 Stat. 1055. (“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contracting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civili[z]ed nations; (d) [J]udicial decisions and the teachings of the most highly qualified publicists of the various nations”).

²⁷⁶ *Kiobel v. Royal Dutch Shell Petrol. Co.*, 621 F.3d 111, 148 (2d Cir. 2010).

²⁷⁷ *Abagnin v. AMVAC Chemical Corp.*, 545 F.3d 733, 738 (9th Cir. 2008) (“The law of nations is synonymous with ‘customary international law.’”).

²⁷⁸ 28 U.S.C. § 1350 (2008).

²⁷⁹ *Id.*

provides federal jurisdiction over certain causes of action and the Offenses Clause is a constitutional provision that grants Congress the authority to enact statutes, the Eleventh Circuit has assumed that the “law of nations” in the two references can be used interchangeably. This equivalence is far from settled in U.S. case law, however, and even if the law of nations is synonymous with CIL, it does not necessarily follow that the term is limited to only that source.

The Supreme Court’s decision in *Sosa v. Alvarez-Machain* stands for the proposition that CIL is the appropriate reference when “there is no treaty, and no controlling executive or legislative act or judicial decision.”²⁸⁰ In the absence of such guidance, “resort . . . to the customs and usages of civilized nations”²⁸¹ is appropriate. This statement is not tantamount to saying that CIL is the only possible source of international law, which is the interpretation the Eleventh Circuit used. The Supreme Court in *Sosa* also recognized that, at the time of the Founding, the law of nations was composed of several sources.²⁸²

Furthermore, the notion that multiple sources form the body of the law of nations is clear from the works of scholars familiar to the Founders, including William Blackstone and Emer de Vattel.²⁸³ For instance, the multifaceted character of the law of nations is clearly supported by de Vattel, to whose influential treatise the Eleventh Circuit cites in *Bellaizac-Hurtado*.²⁸⁴ Careful not to combine the various types of international law, de Vattel explains that the “law of nations” includes:

[t]hese *three kinds* of Law of Nations, the voluntary, the conventional, and the customary, together constitute the positive Law of Nations. For they all proceed from the will of nations—the voluntary from their presumed consent, the conventional from an express consent, and the customary from tacit consent: and as there can be no other mode of deducing any law from the will of nations, there are only these three kinds of positive Law of Nations.²⁸⁵

In other words, according to de Vattel, at the time of the Founding, the “law of nations” was understood to mean *all* categories of the law of nations, which would today include the modern forms of international law, including CIL, conventional international law, and *jus cogens* norms.

Assuming, *arguendo*, that drug trafficking is not a violation of CIL, a dubious proposition given the widespread ratification and acceptance of the major international drug control conventions, and that it has not attained UJ status, it is nevertheless a violation of conventional international law and therefore, the law of

²⁸⁰ 542 U.S. 692, 734 (2004).

²⁸¹ *Id.*

²⁸² *Id.* at 714–15.

²⁸³ EMER DE VATTEL, THE LAW OF NATIONS 78 (Béla Kapossy et al. eds., 2008) (emphasis added).

²⁸⁴ *Bellaizac-Hurtado*, 700 F.3d at 1254.

²⁸⁵ DE VATTEL, THE LAW OF NATIONS, *supra* note 283, at 78 (emphasis added).

nations. The 1988 Vienna Convention and its 189 States Parties, as well as the Single Convention on Narcotic Drugs of 1961 and the Convention on Psychotropic Substances of 1971, demonstrates that the prohibitions on drug trafficking are an integral component of conventional international law. Moreover, the numerous bilateral and multilateral counterdrug agreements that the United States and partner nations have signed attest to how seriously these countries take their international legal obligations to cooperate in interdicting drug traffickers wherever encountered. As such, maritime drug trafficking's comprehensive treatment in conventional international law is more than sufficient to bring it within Congress's power "to define and punish . . . Offences against the Law of Nations."²⁸⁶

D. Bellaizac-Hurtado *Undermines Other U.S. Criminal Laws*

By potentially excluding other countries' territorial seas from the definition of the term "high seas," the Eleventh Circuit also undermined the authority of other U.S. criminal prohibitions that rely on the same constitutional provisions. This includes laws designed to counter violence against maritime navigation, the transport of terrorists, and the maritime transport of chemical, biological, and nuclear weapons that can apply in a coastal State's territorial seas similar to the MDLEA's coastal state consent provisions.²⁸⁷

For instance, Congress enacted 18 U.S.C. § 2280 to codify the unlawful acts against the safety of maritime navigation contained in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"),²⁸⁸ which was ratified by the United States in 1995.²⁸⁹ The SUA Convention was drafted and adopted in response to the October 1985 seizure of the vessel *Achille Lauro* during which an American passenger was murdered,²⁹⁰ while the Second Protocol to the 1988 SUA Convention, adopted in 2005, was designed to establish an international legal basis to impede and prosecute the trafficking of weapons of mass destruction on the high seas ("2005 Protocol").²⁹¹ The unlawful acts described in both the SUA Convention and 18 U.S.C. § 2280 include seizing a ship by force, performing an act of violence against a person aboard that ship if that act endangers safe navigation, and causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship.²⁹² Congress relied on the Felonies Clause when enacting 18 U.S.C. § 2280,²⁹³ and the statute specifies that U.S. jurisdiction over these unlawful acts applies even if

²⁸⁶ U.S. CONST. art. I, § 8, cl. 10.

²⁸⁷ 18 U.S.C. § 2280 (2012).

²⁸⁸ Convention from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter SUA Convention].

²⁸⁹ *United States v. Shi*, 396 F. Supp. 1132, 1134 (D. Haw. 2003).

²⁹⁰ *Id.*

²⁹¹ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF. 15/21, Nov. 1, 2005 [hereinafter 2005 Protocol].

²⁹² SUA Convention, *supra* note 288, at art. 3.

²⁹³ *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008) ("Section 2280 is an exercise of Congress's constitutional authority to define and punish "Felonies on the high Seas.").

a ship is “navigating . . . solely within the territorial sea or internal waters of a country other than the United States, if the offender is later found in the United States after such activity is committed.”²⁹⁴ However, the analysis underlying the Eleventh Circuit’s decision in *Bellaizac-Hurtado* (i.e., that the high seas does not include other countries’ territorial seas) calls into question whether the United States is capable of asserting jurisdiction over acts of violence against maritime navigation that occur wholly within the territorial sea of another country.

This is especially problematic in light of the SUA Convention’s extradite and punish provisions,²⁹⁵ which obligate a State Party to prosecute offenders in accordance with the laws of that state. If the ability of the U.S. government to prosecute such individuals is compromised by the inability to proscribe conduct that occurred in the territorial sea of another State, this calls into question whether the country is meeting its obligations under the SUA Convention and 2005 Protocol. As shown here, the Eleventh Circuit’s faulty premise that the term “high seas” excludes waters that also constitute the territorial sea of a coastal state unnecessarily hampers the ability of the United States to enforce laws protecting the safety of maritime navigation.

V. Invalidating Certain MDLEA Provisions Will Help Drug Traffickers

If the constitutional interpretations recommended by recent arguments are widely adopted in the U.S. courts of appeal, this would significantly curtail Congress’s ability to criminalize maritime drug trafficking pursuant to the extraterritorial provisions of the MDLEA and, as a consequence, its applicability to illicit activity in the Transit Zone. The resulting gaps in the law’s coverage would enable drug traffickers to evade prosecution in all but the most obvious cases of drugs bound for the United States.

For instance, if the application of the MDLEA to foreign-registered vessels in the Transit Zone exceeds Congress’s power under the Define and Punish Clause and no other source of constitutional authority provides an alternative basis for the MDLEA, drug traffickers could evade U.S. law enforcement efforts simply by using foreign-flagged vessels and minimizing those vessels’ potential connections with the United States. As the articles and opinions repeatedly emphasize,²⁹⁶ this would be the result even with the consent of the foreign state in accordance with the applicable waiver provision of the controlling bilateral agreement. This consequence should be seriously considered given the aggressiveness of South and Central American DTOs in moving contraband to the United States market. The proposals for remedying the resulting lack of jurisdiction under the MDLEA, which include entering into formal treaties with various foreign nations (as opposed to mere bilateral agreements) and building an

²⁹⁴ 18 U.S.C. § 2280(b)(2) (2012).

²⁹⁵ SUA Convention, *supra* note 288, at art. 10(1).

²⁹⁶ *See, e.g.*, Cardales-Luna, 632 F.3d at 743 (“The issue of whether Congress has the authority to enact the MDLEA cannot be waived, and Congress’ power cannot be augmented by the consent of a foreign entity or even by treaty, but only by amending the Constitution.”).

international consensus toward establishing a CIL norm universalizing jurisdiction over drug trafficking, would take a number of years to implement and likely result in a stampede of illicit trafficking through the Transit Zone in the intervening time period. Moreover, these alternate solutions are simply not necessary given the existing state of U.S. and international law.

Likewise, restricting the interpretation of “Law of Nations” to CIL such that Congress does not have the power under the Offenses Clause to apply the MDLEA to conduct in the territorial sea of another state would invalidate the ability of the U.S. Coast Guard to interdict vessels in those locations, even if permitted to do so pursuant to the applicable bilateral agreement. This would enable drug traffickers to make the entire journey from the Source Zone to Mexico by traveling through the territorial seas of South and Central American countries. With one or two exceptions, these countries do not have the ships, maritime patrol aircraft, or high-speed interceptors that United States law enforcement agencies can deploy. As a result, it is likely that most drug traffickers operating in these coastal waters would evade detection and apprehension. While it is a longer journey to hug the South and Central American coasts, it is well worth the additional price of fuel if you can evade the USCG by doing so.

These scholars have also suggested that the modern notion of high seas should control the interpretation of the Define and Punish Clause,²⁹⁷ with the end result of further restricting the applicability of the MDLEA to only those vessels more than 200 miles from the baselines of South and Central America. This is, in effect, a policy proposal for the creation of a Free Smuggling Area hundreds of miles wide in the Transit Zone within which the MDLEA does not apply. Except for the few interdiction assets that South and Central American countries can muster, there would be no counterdrug law enforcement presence in this area.

In practical terms, the USCG enforced the MDLEA’s flag and coastal state provisions in several significant interdictions in just FY 2014 alone,²⁹⁸ obtaining consent from nine states to exercise criminal jurisdiction over the interdicted vessels, crewmembers, and contraband.

These jurisdictional waivers accounted for the seizure of 8,900 kilograms of cocaine and 2,000 pounds of marijuana, the removal of an estimated \$265 million in contraband from the stream of illicit commerce,²⁹⁹ and the prosecution of 34 defendants in U.S. courts. This type of tactical success, in terms of the amount of contraband seized and the number of smugglers prosecuted, would be lost if the MDLEA were inapplicable to foreign-registered vessels and within the territorial waters of coastal States.

²⁹⁷ See Kontorovich, *Beyond the Article I Horizon*, *supra* note 7, at 1233 (“In today’s customary international law . . . the high seas can begin up to two hundred miles out from shore.”).

²⁹⁸ Telephone Interview with Lieutenant (LT) Rebecca Castaneda, U.S. Coast Guard Headquarters, Response Law Division (RLD) (Jan. 15, 2016).

²⁹⁹ Telephone Interview with Lieutenant Commander (LCDR) Devon Brennan, U.S. Coast Guard Headquarters, Office of Maritime Law Enforcement (MLE) (Oct. 14, 2016).

Strategically, the U.S. commitment to its counterdrug treaty cooperation obligations would also be legally degraded. While the jurisdictional provisions in the 1988 Vienna Convention relating to “offence[s] . . . committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to [flag State waivers of jurisdiction]”³⁰⁰ are discretionary, the treaty’s provisions requiring the adoption of criminal prohibitions against the transport of narcotics are not.³⁰¹ Certainly, U.S. counterdrug leadership in the Western Hemisphere would be questioned, and invalidating the MDLEA’s flag and coastal State provisions would reduce the ability of South and Central American countries to deliver serious criminal consequences, through the U.S. criminal system, to those smugglers apprehended aboard their vessels or interdicted in their territorial seas. As discussed, any deterrent effect gained by these U.S. MDLEA prosecutions would be lost.

The Third Circuit hinted at some of the undesirable consequences of unnecessarily tying the hands of U.S. counterdrug law enforcement efforts in *United States v. Martinez-Hidalgo*, and its warning with regard to Fifth Amendment due process concerns holds true with regard to how the Define and Punish Clause is interpreted as well:

[W]e pose the rhetorical question of who would prosecute narcotics offenders in cases such as this if the United States did not? We think that if the United States could not have arrested Martinez and his cohorts and seized the vessel and its contents that no country would have done so, given the vessel’s location in the Caribbean. The [Constitution] does not require that the high seas be turned into a sanctuary highway for drug dealers.³⁰²

Conclusion

The inherently destabilizing effects of the illicit drug trade, including via maritime means of transporting contraband, on global governments demand a coordinated, comprehensive response from the U.S. government and its regional partners. Although the list of crimes eligible for punishment pursuant to the protective principle of international law does not currently include maritime drug trafficking, this criminal behavior nevertheless threatens the security of the United States and its regional partners and is condemned by virtually all nations. These two factors are the two criteria under U.S. law for exercising the protective principle, and, as a result, it is reasonable to include maritime drug trafficking with the other types of crimes that threaten the security of the United States, such as espionage, counterfeiting a state’s seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate a nation’s immigration or customs laws.

³⁰⁰ 1988 Vienna Convention, *supra* note 65, art. 4.1(b).

³⁰¹ *Id.* at art. 3.

³⁰² 993 F.2d at 1057.

The Felonies and Offenses Power arguments discussed above do nothing to obviate the threat that maritime drug trafficking poses to the United States; rather, they unnecessarily limit the criminal enforcement options available to U.S. policymakers and law enforcement agencies. As discussed above, the Felonies Power argument attempts to sever the myriad links between the United States and maritime drug trafficking, shoehorning that criminal activity into a UJ paradigm because of the ease with which it can be shown that maritime drug trafficking is not, in fact, a UJ crime. In contrast, the Offenses Power argument attempts to restrict the applicability of the Felonies Power to the modern definition of the high seas as well as narrow the meaning of the term law of nations to *only* CIL rather than considering the other sources of international law of which the Founders were well aware. Perhaps realizing the potential negative consequences of its decision in *Bellaizac-Hurtado* with regards to maritime law enforcement operations, the Eleventh Circuit recently began to back away from its holding in that case, hinting that the MDLEA may be constitutional as applied in a foreign nation's territorial seas under the Foreign Commerce Clause.³⁰³

In light of the interconnected nature of the illicit drug trade, these arguments are neither necessary nor convincing. According to the most recent U.N. World Drug Report, over ninety percent of the cocaine grown in Colombia is destined for North America or the United States.³⁰⁴ On its way north, the organized criminal groups transporting it leave a bloody trail in their wake as they corrupt local and regional governments and fight to the death amongst themselves for smuggling territory, threatening each other and civilians alike. As discussed above, even U.S. border security agencies are not immune from drug-related corruption. When the cocaine reaches the streets of cities and towns across the United States, it detonates in the lives of millions of Americans, causing immeasurable pain and hardship. In light of this reality, relying on the Felonies Clause and the protective principle of international law to target maritime drug traffickers using the MDLEA is a more reasonable option than tying the hands of the U.S. government, its regional partners, and their assembled maritime law enforcement agencies.

³⁰³ See *Baston*, 818 F.3d at 667 (“If the government had invoked the Foreign Commerce Clause in *Bellaizac-Hurtado*, we might have reached a different result.”).

³⁰⁴ WORLD DRUG REPORT (2016), *supra* note 26.