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DRUG SMUGGLING ON THE HIGH SEAS: USING INTERNATIONAL LEGAL PRINCIPLES TO ESTABLISH JURISDICTION OVER THE ILLICIT NARCOTICS TRADE AND THE NINTH CIRCUIT'S UNNECESSARY NEXUS REQUIREMENT

I. INTRODUCTION

International drug smuggling is probably the fastest-growing industry in the world and is unquestionably the most profitable. The global drug trade produces approximately \$400 billion a year in annual revenue.¹ The U.S. market, the world's largest, produces revenues of at least \$100 billion at retail—twice what U.S. consumers spend for oil.² Drug smugglers employ every conceivable means of transportation to move their illicit cargo, but maritime conveyance continues to be the predominant method for smuggling drugs into the United States.³

To combat maritime conveyance, the United States annually spends over \$8 billion in federal resources⁴ and has enacted a series of laws that attempt to extend U.S. authority into the high seas. Prosecutions under these laws have led to a series of challenges by foreign nationals who argue that the United States does not have jurisdiction over their actions. These jurisdictional challenges have been almost universally rejected by U.S. courts, which commonly find that international legal principles are sufficient for the extraterritorial extension of U.S. jurisdiction. The Ninth Circuit Court of Appeals, however, has rejected the sufficiency of these principles and determined that, as a precursor to jurisdiction, the government must establish a nexus between the defendant's conduct and

1. U.N. Office on Drugs and Crime [UNODC], *2006 World Drug Report*, 363–67, U.N. Doc. UNIS/NAR/849 (June 25, 2006).

2. Louis Kraar, *The Drug Trade: Think of It as a Huge, Multinational Commodity Business with a Fast-moving Top Management, a Widespread Distribution Network, and Price-insensitive Customers*, *FORTUNE*, June 20, 1988, at 27.

3. U.S. GEN. ACCOUNTING OFFICE, *DRUG CONTROL: UPDATE ON U.S. INTERDICTION EFFORTS IN THE CARIBBEAN AND EASTERN PACIFIC* 3 (1997).

4. OFFICE OF NAT. DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY, FY 2008 BUDGET SUMMARY* 67 (2008). *But see* Patrick Murphy, *Keeping Score: The Frailties of the Federal Drug Budget* (Rand Drug Policy Research Ctr., IP-138 (1/94), 1994) (questioning the methodology used by the federal government in compiling its total budget, arguing that the algorithms used to calculate this figure are vulnerable to manipulation, and hypothesizing that the official figures may overstate the federal government's expenditures on antidrug activities).

the United States.⁵ The Ninth Circuit argues that this nexus requirement, which is generally interpreted as knowledge that the illicit substances being smuggled are headed for the U.S. market, is necessary because of due process and fairness concerns.⁶ The difficulties the nexus requirement creates for federal prosecutors attempting to bring cases in the Ninth Circuit are illustrated by the details of a recent decision in which the circuit overturned a conviction for failure to establish a nexus.

In the predawn hours of September 11, 2000, members of the Coast Guard Law Enforcement Detachment Team (“LEDET”) attached to the USS *De Wert*⁷ monitored via radar a suspicious rendezvous between the supposed fishing vessel *Gran Tauro*⁸ and a yet-to-be-identified vessel.⁹ The team members expected that they would soon witness an integral step in high seas drug smuggling—the resupplying of a “Go-Fast” boat from a “logistical support vessel.”¹⁰ Just before dawn, the team was alerted to a

5. See *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987) (finding that “[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction”).

6. *United States v. Perlaza*, 439 F.3d 1149, 1160 (9th Cir. 2006).

7. *Id.* at 1152. The USS *De Wert* is a United States Navy frigate that was assigned to patrol the Eastern Pacific Ocean off the coasts of Ecuador, Colombia, and Peru as part of the United States’ maritime surveillance efforts aimed at abating the traffic in illicit narcotics. *Id.* The ship was located in the Eastern Pacific because it is the least patrolled, and thus safest, method of smuggling cocaine from South America to the United States. Interview with William Gallo, Assistant United States Attorney for the Southern District of California, lead prosecutor of *United States v. Klimavicius-Viloria* and *United States v. Perlaza* (Nov. 11, 2007). There are three main transit corridors often used to transport drugs between the source (typically, Colombia) and the destination (typically, Central Mexico) countries. One is through the territorial seas of South and Central American countries. Another forms a straight line from Colombia to Mexico. The third, and least used because of cost and logistics, is through the high seas of the “middle Pacific, sufficiently west of the Central and South America coasts to make detection unlikely.” *Id.*

8. See *Perlaza*, 439 F.3d at 1152. The *Gran Tauro* was a fishing vessel that was flying the Colombian flag. It was eventually determined that the vessel’s crew was comprised exclusively of Colombian citizens. See *id.*

9. *Id.*

10. The Coast Guard based this expectation on their previous search of the *Gran Tauro*, conducted under the authority of a bilateral agreement with Colombia, which revealed that the vessel was traveling in an area unauthorized by the Colombian government, had poorly maintained fishing nets, had only one fish in its hold, and was carrying approximately 6,000 gallons of unauthorized gasoline that the vessel could not use. The agreement between the United States and Colombia referred to was the “Agreement between the Government of the United States of America and the Government Republic of Colombia to Suppress Illicit Traffic by Sea” (“the Colombian bilateral agreement”). *Id.* at 1154. This agreement allowed the United States to board Colombian ships for the purpose of suppressing the narcotics trade that originated in Colombia and was often targeted at the United States. The agreement complied with standard concepts of sovereignty and maritime law by requiring that the United States receive permission from the Colombian government before boarding any Colombian vessel. The fishing vessel’s conduct was regulated by the Colombian government pursuant to a *zarpe*, which is a “written permit—akin to a visa for marine vessels—authorizing a vessel to leave port and restricting the scope and duration of the vessel’s voyage.” *Id.* at 1154 n.4 (citing *Solano v. Gulf King*

fast-moving vessel traveling directly toward the *Gran Tauro*'s position and quickly launched the *De Wert*'s helicopter.¹¹ As the team approached the location, they observed a Go-Fast heading away from the *Gran Tauro* and began tracking it.¹² After their presence was detected, the Go-Fast's crew jettisoned its illicit cargo¹³ and circled back toward the *Gran Tauro*.¹⁴ A few minutes later, the Go-Fast smashed into the stern of the *Gran Tauro*, causing the smaller boat to capsize.¹⁵ The crew of the *Gran Tauro* never even went to the stern to survey the damage.¹⁶

Responding to the crash, the LEDET team rescued the crew of the now-capsized Go-Fast, boarded and searched the *Gran Tauro*, and arrested her crew.¹⁷ On October 11, 2000, the crews of both vessels were indicted by a federal grand jury in the Southern District of California on violations of the Maritime Drug Law Enforcement Act ("MDLEA").¹⁸ Both crews

55, Inc., 212 F.3d 902, 904 (5th Cir. 2000)). The *Gran Tauro*'s *zarpe* restricted the vessel to fishing in Buenaventura Zones 2 and 3. The *zarpe* also only allowed the *Gran Tauro*, which ran on diesel fuel and could only use gasoline to power its generators and pumps, to carry two fifty-five-gallon drums of gasoline. After this information was relayed by the LEDET team to the Colombian government, the government ordered the *Gran Tauro* to return to Buenaventura and report to the Port Captain. *Id.* at 1154–55. After leaving the *Gran Tauro*, the LEDET team continued to monitor the fishing vessel by helicopter and infrared camera and observed that the vessel neither left the area nor engaged in fishing activities. *Id.* at 1155.

"Go-Fast boat" is a term used by Coast Guard officials to describe speed boats used to transfer and land drugs. *Id.* at 1153 n.2. These vessels are referred to as Go-Fast boats "because they can travel at high rates of speed, which makes them a favored vehicle for drug . . . smuggling operations." *United States v. Rendon*, 354 F.3d 1320, 1322 n.1 (11th Cir. 2003) (quoting *United States v. Tinoco*, 304 F.3d 1088, 1092 (11th Cir. 2002)). These vessels can vary in size from twenty-five to approximately forty-five feet and have a range of up to 1500 miles. *Perlaza*, 439 F.3d at 1153 n.2.

The term logistical support vessels "was adopted following the shift in drug smuggling from the Caribbean [sic] to the Eastern Pacific and the discovery that fishing boats from Latin America were carrying extra fuel, food, and crew for smugglers aboard the Go-Fasts." *Id.* at 1153 n.3. Operation of this smuggling route "requires the use of speedboats to transfer and land drugs and larger logistical support vessels ('LSVs') to serve as roving refueling stations." *Id.* at 1153. Though circumstantial evidence strongly suggests this course of conduct, no United States vessel has ever witnessed a rendezvous between an LSV and a speedboat. *Id.* at 1154.

11. *Perlaza*, 439 F.3d at 1155. The team was alerted after the advanced radar screens aboard the destroyer showed a "merge" between the two signals, indicating that the vessels were no more than 300 yards apart. *Id.*

12. *Id.*

13. The Go-Fast ejected 1,964 kilograms of cocaine and at least a dozen fifty-five-gallon gasoline drums. This material was picked up by crew members of the *De Wert*. *Id.* at 1156.

14. *Id.* at 1155.

15. *Id.*

16. *Id.*

17. *Id.* at 1155–56.

18. The crews of both boats were charged with conspiracy to possess cocaine with the intent to distribute, aboard a vessel, in violation of parts (a), (c), and (j) of the MDLEA. *Id.* at 1157–58. The crew of the Go-Fast was also charged with possession of cocaine with intent to distribute, on a vessel, in violation of MDLEA § 1903(a), (c)(1)(A), (f). *Id.* at 1157.

were eventually tried and found guilty.¹⁹ On appeal, the convictions were overturned by the Ninth Circuit.²⁰

The trial of the crews of the *Gran Tauro* and the Go-Fast in U.S. federal court raises many issues of maritime and international law, chiefly, (1) whether the United States' claim of extraterritorial jurisdiction over a Colombian vessel and her crew traveling on the high seas is consistent with international legal principles and valid under United States law, and (2) whether due process under the U.S. Constitution requires that federal prosecutors prove that a nexus exists between the actions of a given defendant and the United States?

Part II of this Note describes the requirements for extending the jurisdiction of the MDLEA extraterritorially. This part also briefly describes the concept of jurisdiction, the expansion of modern extraterritorial jurisdiction, the inherent power of the Constitution for extending jurisdiction into the high seas, the legislative history of MDLEA, and its expression of the necessary congressional intent to extend jurisdiction extraterritorially. Part III introduces the unique nexus requirement of the Ninth Circuit Court of Appeals. This part also explains why the nexus requirement is an unnecessary burden and examines the international agreements that can be used as an alternative to international legal principles to justify extraterritorial application of the MDLEA. Lastly, Part IV describes the proper way for resolving the nexus dispute: for the Supreme Court to grant certiorari in a high seas smuggling case and find the nexus requirement superfluous because the combination of international legal principles and international treaties is sufficient to establish jurisdiction.

II. THE EXTENSION OF EXTRATERRITORIAL JURISDICTION OVER ACTS ON THE HIGH SEAS

Federal courts require the government to establish statutory and constitutional adjudicative jurisdiction over a defendant before they will find that the United States has validly exerted extraterritorial jurisdiction over drug smugglers apprehended beyond U.S. territorial waters.²¹ Part II of this Note briefly describes the basic concept of jurisdiction, the inherent power of the Constitution to extend jurisdiction into the high seas, the

19. *Perlaza*, 439 F.3d at 1157.

20. *Id.* at 1178.

21. *See Perlaza*, 439 F.3d at 1160–61. The court noted the different jurisdictional requirements, but then concentrated on the due process rights of the defendants. *See id.* at 1161–78.

legislative history of MDLEA and its expression of the necessary congressional intent for extending jurisdiction extraterritorially, and the use of international legal principles to establish prescriptive jurisdiction.

A. *Jurisdiction Generally*

Effective analysis of extraterritorial application of the MDLEA requires a precise definition of jurisdiction so that a clear distinction can be drawn between the right to make rules and the right to enforce them.²² The term “jurisdiction” is derived from the Latin roots *juris* (meaning law) and *dictio* (meaning saying), “the implication being an authoritative legal pronouncement.”²³ This pronouncement plays a crucial role in the relationship between a sovereign state and its people as it defines their legal relationship and establishes a clear statement of the state’s power over the individual.²⁴ The importance of this pronouncement cannot be overstated; “if a state has no jurisdiction over a particular individual, it has no legal authority to subject that individual to its laws and legal process.”²⁵ This concept is not limited to defining the relationship between sovereign and subject as jurisdiction also defines the legal relationship between a state and other sovereign powers.²⁶ In this context, jurisdiction is referred to as “national jurisdiction, domestic jurisdiction, or . . . ‘sovereignty.’”²⁷ This claim of authority does not have the indicia of strength associated with jurisdiction over an individual, as the sovereign is attempting to exercise control over actions that occur outside its territorial boundaries. These two forms of jurisdiction “may also overlap; in such cases there is ‘concurrent’ jurisdiction.”²⁸

To allow for greater consideration and understanding, jurisdiction is often divided into three subcategories: prescriptive,²⁹ adjudicative,³⁰ and statutory or enforcement.³¹

22. Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT’L L. REV. 1, 12 (2007).

23. *Id.* (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 38 (3d ed. 1982)).

24. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 126 (2007). See also BLACK’S LAW DICTIONARY 867 (8th ed. 2004) (defining jurisdiction as a “government’s general power to exercise authority over all persons and things within its territory; esp[ecially] a state’s power to create interests that will be recognized under common-law principles as valid in other states”).

25. Colangelo, *supra* note 24, at 126.

26. *Id.*

27. *Id.*

28. *Id.*

29. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987). Jurisdiction to prescribe is defined by the Restatement as the ability of a state “to make its law

B. Statutory Jurisdiction of the MDLEA: Constitutional Authority and Congressional Intent to Act

In order for the MDLEA to satisfy prescriptive jurisdiction, the Constitution of the United States must grant Congress the authority to enact a statute governing the proscribed behavior and Congress must express the necessary intent to regulate the conduct.³²

1. Constitutional Authority for the MDLEA

Article I of the United States Constitution grants Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”³³ An examination of an early draft³⁴ and the legislative history³⁵ of this powerful document shows that the Framers were concerned about whether they should “declare,” “designate,” or “define” laws governing the high seas, but never questioned if the clause should reach extraterritorially.³⁶ Any doubt that the Framers intended to extend jurisdiction over the high seas was quickly dispelled by the First Congress’s passage of “An Act for the Punishment of certain Crimes against the United States” (“1790 Act”),³⁷ which made

applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.” *Id.*

30. *Id.* § 401(b). Jurisdiction to adjudicate is defined by the Restatement as a state’s ability “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings.” *Id.*

31. *Id.* § 401(c). Jurisdiction to enforce is defined by the Restatement as the ability “to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.” *Id.* “Prescriptive jurisdiction is the state’s authority to apply its laws to certain persons or things.” Colangelo, *supra* note 24, at 126. This concept is used to describe both legislative action, which occurs when Congress legitimately extends its lawmaking authority, and judicial action, which occurs when courts announce that they have the authority to adjudicate a dispute. *Id.* Judicial action in the context of prescriptive jurisdiction is more commonly referred to as a court’s subject matter jurisdiction. *Id.* Adjudicative jurisdiction is a court’s authority to subject things or individuals to judicial process. Jurisdiction to enforce generally involves an exercise of executive power through police, military, or prosecutorial action. *Id.* Analysis of these distinctions generally begins with prescription, as “[a]djudicative and enforcement jurisdiction are dependent on the existence of prescriptive jurisdiction—if the legislative scope is not broad enough to cover the proscribed conduct, obviously, no adjudication or enforcement is appropriate.” Blakesley & Stigall, *supra* note 22, at 12. For the purposes of this Note, I will first address jurisdiction to adjudicate and enforce because they are less complex issues.

32. Blakesley & Stigall, *supra* note 22, at 12.

33. U.S. CONST. art. I, § 8, cl. 10.

34. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 182 (Max Farrand ed., 1966).

35. *Id.* at 315–16.

36. See *United States v. Suerte*, 291 F.3d 366, 372–73 (5th Cir. 2002).

37. Act of Apr. 30, 1790, Ch. 9, 1 Stat. 112. This Act, passed approximately seven months after

murder or robbery on the high seas by *any person or persons* an act of piracy punishable by death.³⁸

United States Supreme Court decisions interpreting the Constitution and the 1790 Act have also found congressional intent to act extraterritorially while still considering international law when extending jurisdiction into the high seas. One of the earliest and most revered cases, *Charming Betsy*,³⁹ limited the reach of congressional action, noting that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁴⁰ This theory does not mean that the United States cannot enforce laws against foreigners, only that the intent to do so must be clearly stated. This is illustrated in a subsequent case, *United States v. Palmer*,⁴¹ in which Chief Justice

the Bill of Rights was proposed to the States, provided the first substantive definition of piracy. For a more in-depth analysis of the 1790 Act, see ALFRED P. RUBIN, *THE LAW OF PIRACY* 128–44 (1988).

38. Section 8 of the 1790 Act provided:

That, if any person or persons shall commit upon the high seas . . . out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death.

1 Stat. 112, 113–14. Section 12 also stated that manslaughter on the high seas was a crime over which the United States claimed jurisdiction. *See id.* at 115.

39. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). In *Charming Betsy*, a Danish schooner owner challenged the attempt by the United States to prosecute him under the Nonintercourse Act of 1800. The act applied to “any person or persons resident within the United States, or under their protection.” Act of Feb. 27, 1800, ch. 10, § 1, 2 Stat. 7, 8. The owner of the *Charming Betsy* argued that applying the Nonintercourse Act to him would violate principles of neutrality under international law. *Charming Betsy*, 6 U.S. (2 Cranch) at 107. The Court—after concluding that he was not under the diplomatic protection of the United States—agreed with the owner and concluded that the act did not apply to him. *Id.* at 118.

40. *Id.* This holding is now referred to as either the “*Charming Betsy* Canon” or the “*Charming Betsy* Doctrine,” but there is general disagreement over the scope and justification for the doctrine. Compare Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1152–62, 1165–73, 1176–79 (1990) (arguing for a broad application of the doctrine), with Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998) (arguing for a narrow canon based on separation-of-powers grounds while largely ignoring the impact of international law). For an in-depth application of the *Charming Betsy* Canon, see Ingrid B. Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 330–57 (2005).

41. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818). In *Palmer*, the Court was asked to determine if Congress intended to apply the 1790 Act to American citizens who committed piracy against foreign vessels. *Id.* at 612–14. The Court determined that Congress did not intend to extend the act to American citizens, but noted that questions of jurisdiction over foreigners or parts of foreign empires were

generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations

Marshall stated that “there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and *may have committed no particular offence against the United States.*”⁴²

The Supreme Court has often struggled with balancing the intent to subject foreigners to American law with *Charming Betsy*’s “long heeded admonition” to avoid construing a statute as violative of international law, but has determined that international law “is not . . . any impairment of our own sovereignty.”⁴³

2. *Congressional Intent and the Enactment of the Maritime Drug Law Enforcement Act*

Though the Supreme Court has interpreted the Constitution as giving Congress the power to regulate the conduct of foreigners on the high seas, federal courts require that Congress express the necessary intent to reach the proscribed conduct before establishing statutory jurisdiction. In 1980, Congress responded to a void in U.S. drug laws⁴⁴ and expressed the necessary intent by enacting the first of what would be many attempts to control the high seas smuggling of illegal narcotics: “An Act To facilitate

Id. at 634. See also *Lauritzen v. Larsen*, 345 U.S. 571, 577–78 (1953) (noting that the *Palmer* Court “was called upon to interpret a statute of 1790,” and that the legislature did not intend to extend the Act to those charged).

42. *Palmer*, 16 U.S. (3 Wheat.) at 630 (emphasis added). This intent to apply U.S. laws extraterritorially against foreigners was also confirmed by a later interpretation of the 1790 Act by Justice William Johnson, who noted that “when embarked on a piratical cruize [sic], every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.” *United States v. Furlong*, 18 U.S. (5 Wheat) 184, 193 (1820). In *Furlong*, the Court affirmed *Palmer* and also found that the 1790 Act did not intend to extend jurisdiction to acts of piracy committed by “a foreigner upon a foreigner in a foreign ship.” *Id.* at 197. This narrow interpretation of the 1790 Act did not address the constitutional power under the Piracies and Felonies Clause. This is evident in *United States v. Madera Lopez*, 190 Fed. Appx. 832 (11th Cir. 2006), a recent unpublished opinion out of the Eleventh Circuit, which clearly rejected a claim that this interpretation of the 1790 Act somehow limited constitutional authority to claim jurisdiction over foreigners on foreign-flagged vessels. “Simply put, *Furlong* did not involve an interpretation of the Piracies and Felonies Clause, but rather an act of 1790 criminalizing piratical murder, and it certainly did not hold that Congress exceeded its authority under the Piracies [sic] and Felonies Clause by seeking to regulate drug trafficking on the high seas.” *Madera Lopez*, 190 Fed. Appx. at 836.

43. *Lauritzen*, 345 U.S. at 578. Even maritime law, which “is in a peculiar sense an international law, . . . depends upon acceptance by the United States” before application of any international principles of law in United States courts. *Id.* (quoting *Farrell v. United States*, 336 U.S. 511, 517 (1949)). *Lauritzen* dealt with a Danish seaman who brought suit against a Danish owner of a Danish vessel under the Jones Act. *Id.* at 573. The Court held that the law of the flag governed the liability because they could “find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters.” *Id.* at 593.

44. See S. REP. NO. 96-855, at 1 (1980), reprinted in 1980 U.S.C.C.A.N. 2785, 2785.

increased enforcement by the Coast Guard of laws relating to the importation of controlled substances.”⁴⁵ Though this law “significantly improved the U.S. ability to prosecute drug smugglers,”⁴⁶ Congress still found it necessary to “facilitate enforcement by the Coast Guard of laws relating to the importation of illegal drugs”⁴⁷ by enacting the MDLEA in 1986.⁴⁸

That Congress intended for the MDLEA to reach extraterritorially is evidenced by the accompanying Congressional finding: “trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific threat to the security and societal well-being of the United States.”⁴⁹ Congressional intent to frame this statute in terms of international law while still governing extraterritorial acts is also evident in the limitation that only a “foreign nation” may claim a defense of failure to comply with international law.⁵⁰ Congress also specified that “a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding.”⁵¹ The MDLEA clearly strengthened U.S. drug laws, and subsequent amendments to the MDLEA have made the expression of congressional intent even more explicit.⁵²

45. 94 Stat. 1159. This act, which was passed in response to a void in U.S. drug laws that did not proscribe possession of controlled substances on the high seas, made it “unlawful for any person on board any vessel within the customs waters of the United States . . . to possess with intent to manufacture or distribute, a controlled substance.” Pub. L. No. 96-350, 94 Stat. 1159 (1980) (codified at 21 U.S.C. § 955(a)). This act was passed because, prior to its enactment, those who were stopped on the high seas could only be prosecuted for “attempted unlawful importation of [drugs] or conspiracy to do so.” S. REP. NO. 96-855, at 1. The government had great difficulty bringing these cases because “evidence to prove importation or conspiracy beyond a reasonable doubt is impossible to obtain.” *Id.* at 1–2. This led to the difficult situation where the “Coast Guard [was] able to seize and confiscate the ship and the illegal drugs, but the Government [was] not able to prosecute the crew or others involved in the smuggling operation.” *Id.* at 2.

46. S. REP. NO. 99-530, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5986, 6000.

47. S. REP. NO. 96-855, at 1. Congress responded to a growing trend amongst “defendants in cases involving foreign or stateless vessel boardings and seizures” to rely “heavily on international jurisdictional questions as legal technicalities to escape conviction.” S. REP. NO. 99-530, at 15. Congress also noted that the Coast Guard was in compliance with international law because it did not “board a vessel claiming foreign registry until the foreign nation involved has indicated its consent or has denied the vessel’s claim of registry.” *Id.*

48. MDLEA, 46 U.S.C. app. §§ 1901–1904 (2002) (repealed 2006).

49. 46 U.S.C. app. § 1902.

50. 46 U.S.C. app. § 1903(d).

51. *Id.*

52. In 1996, the United States Congress again felt the need to amend the existing smuggling law and passed the Coast Guard Authorization Act of 1996. Pub. L. No. 104-324, § 1138(a), 110 Stat. 3901, 3988–89 (1996). This amendment made three key changes in the law. First, paragraph (c) was amended so that certification of the Secretary of State or the Secretary’s designee “conclusively” proves consent or waiver of objection by foreign nation to the enforcement of United States law and

Furthermore, the exercise of authority under the MDLEA does not violate established concepts of international law because the United States must first receive consent from the country of flag registry in order to stop and search a vessel.⁵³

C. Jurisdiction to Adjudicate: Its Basis in Domestic Law and Possible Violations of International Law

Before trying an accused, U.S. courts require jurisdiction to adjudicate, more commonly referred to as personal jurisdiction.⁵⁴ Personal jurisdiction is acquired when the defendant appears—voluntarily or involuntarily—before a trial judge.⁵⁵ U.S. courts have long held that a defendant cannot defeat personal jurisdiction by asserting that his presence was procured illegally.⁵⁶ This doctrine has been applied internationally, and is often referred to as the “*Ker-Frisbie* doctrine.”⁵⁷

Establishing personal jurisdiction in smuggling cases where the defendant is made to appear before a trial judge is not difficult. According to *United States v. Alvarez-Machain*,⁵⁸ the *Ker-Frisbie* doctrine may be applied internationally, even if doing so violates international law.⁵⁹ In

denial of a claim of registry of a claim flag. *Id.* § 1138(a)(2), 110 Stat. at 3989. Second, paragraph (d) was strengthened by adding: “Any person charged with a violation of this section shall not have standing to raise the claim of failure to comply with international law as a basis for a defense.” *Id.* § 1138(a)(4), 110 Stat. at 3989. Third, paragraph (f) was amended to state that “[j]urisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense.” *Id.* § 1138(a)(5), 110 Stat. at 3989. It is evident from President Clinton’s signing remarks that this amendment was specifically enacted to eliminate smugglers’ use of lack of jurisdiction as a defense. Clinton stated:

This act reaffirms our national resolve to maintain a strong Coast Guard . . . around the world to fight drugs The Act will strengthen drug interdiction by clarifying U.S. jurisdiction over vessels in international waters. In particular, the Act makes clear that persons arrested in international waters will not be able to challenge the arrest on the ground that the vessel was of foreign registry . . . when the vessel was targeted for boarding.

Statement on Signing the Coast Guard Authorization Act of 1996, 32 WEEKLY COMP. PRES. DOC. 2112 (Oct. 19, 1996).

53. MDLEA, 46 U.S.C. app. § 1903(e)(1)(C)–(E) (2002) (repealed 2006). Approval from the flag country is statutorily required. Once granted, this consent eliminates what could otherwise be a violation of the freedom of the high seas and of the exclusive jurisdictional rights a flag state enjoys over its own vessels. United Nations Convention on the Law of the Sea (“UNCLOS”) art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397 (“Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”).

54. Colangelo, *supra* note 24, at 126.

55. See *United States v. Darby*, 744 F.2d 1508, 1530–31 (11th Cir. 1984).

56. *Id.* at 1530.

57. *Id.*

58. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

59. *Id.* at 669–70.

Alvarez-Machain, the defendant was a Mexican doctor accused of participating in the kidnapping, torture, and murder of a DEA agent and his pilot in Mexico.⁶⁰ To gain jurisdiction, DEA agents forcibly kidnapped the defendant from his home in Mexico and flew him by private plane to Texas where he was subsequently arrested.⁶¹ After the district court dismissed the indictment on the grounds that it violated an international treaty with Mexico,⁶² the United States Supreme Court reversed.⁶³ The Court reasoned that the treaty with Mexico did not explicitly outlaw forcibly kidnapping individuals and transporting them internationally for the sole purpose of establishing personal jurisdiction.⁶⁴

The impact of *Alvarez-Machain* on personal jurisdiction is that when foreign nationals are brought before a court, it is highly unlikely that they will be able to use lack of personal jurisdiction as a defense. The only ground the defendant might have for defeating personal jurisdiction is claiming that his or her presence violates due process, an argument supported by dicta in *United States v. Russell*.⁶⁵

In *Russell*, the Court stated that “[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction,” it was not present in the instant case.⁶⁶ This holding was then cited by the Court of Appeals for the Second Circuit in *United States v. Toscanino*⁶⁷ as grounds for reversing a case that involved the kidnapping and transporting of a drug dealer from Uruguay to the United States for trial. The issue

60. *Id.* at 657.

61. *Id.*

62. *Id.* at 658.

63. *Id.* at 670.

64. *Id.* at 669. The Court addressed neither international common law nor the United Nations treaties to which the United States is a signatory that outlaw this method of establishing personal jurisdiction. See U.N. Charter art. 2, para. 4, which obligates “[a]ll Members . . . [to] ‘refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . .’” The Security Council has also explicitly ruled that international kidnappings violate the U.N. Charter. Following the illegal kidnapping in 1960 of Adolf Eichmann from Argentina by Israeli “volunteer groups,” Argentina filed a formal complaint pursuant to the U.N. Charter. The Security Council, by eight votes to none, adopted a resolution condemning the kidnapping and requesting “the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law.” S.C. Res. 4349, ¶ 138, U.N. Doc. S/RES/4349 (June 23, 1960). *But see* *United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir. 1997) (holding that, “[u]nder *Alvarez-Machain*, to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner”).

65. 411 U.S. 423, 431–32 (1973).

66. *Id.*

67. 500 F.2d 267, 272 (2d Cir. 1974).

faced by a drug smuggler abducted from the high seas attempting to invoke *Toscanino* is that the Second Circuit's opinion focused extensively on the seventeen days of abhorrent physical torture the defendant suffered.⁶⁸ Since the United States Coast Guard is responsible for the arrest and transport of drug smugglers and does not have a history of mistreating detainees after arrest, it is unlikely that this would be grounds for a successful defense. Additionally, the United States is able to establish personal jurisdiction over almost all international drug smuggling defendants because most of these individuals are citizens of countries with which the United States has entered into bilateral treaties granting the United States the right to prosecute.

D. Prescriptive Jurisdiction: International Legal Principles and Their Use by U.S. Courts in Response to Drug Smuggling

A more difficult prerequisite for U.S. prosecutors attempting to try an accused under the MDLEA is establishing prescriptive jurisdiction. Modern legal scholarship commonly recognizes five traditional bases for prescribing laws governing international crime: territorial, nationality, protective, passive personality, and universal.⁶⁹ The territorial principle includes both subjective and objective elements,⁷⁰ and allows a state to exercise jurisdiction over acts that occur outside said state's borders, but has, or is intended to have, substantial effect within its territory.⁷¹ Jurisdiction based on the principle of nationality extends jurisdiction over citizens of a state, wherever they are physically located.⁷² The protective

68. *Id.* at 270. The Second Circuit's graphic portrayal of his torture in the presence of government agents is revealing of how persuasive the facts were in its decision.

Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, [the defendant] was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to [the defendant's] earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Id.

69. See Harvard Research in Int'l Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935); Blakesley & Stigall, *supra* note 22, at 12.

70. Harvard Research in Int'l Law, *supra* note 69, at 484, 487–88.

71. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).

72. Blakesley & Stigall, *supra* note 22, at 12. This principle has also been interpreted as only affecting the perpetrators of a crime if they are nationals of the prescriptive state. *Id.*

principle is a close cousin of the territorial principle and applies when the national interest, national security, or national integrity of a state is threatened or injured by the conduct of a non-citizen.⁷³ The passive personality principle is employed to exercise jurisdiction over those who commit crimes against nationals of a state, regardless of where the crimes are committed.⁷⁴ Universal jurisdiction applies to crimes that are “so universally condemned that the perpetrators are the enemies of all people” and any civilized nation is justified in prosecuting these crimes.⁷⁵ Of these, U.S. courts are chiefly concerned with the protective, territorial, and universal principles when analyzing MDLEA cases. More than one of these traditional principles may apply to a specific act, but it is unlikely that a court will analyze each in turn. U.S. courts are currently divided over how much weight to give these principles in the jurisdiction inquiry,⁷⁶ but all still consider them necessary for prescriptive analysis.

The international law principle most analogous to the traditional domestic rule of jurisdiction is the territorial principle. The traditional rule promulgated by the Supreme Court is that “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”⁷⁷ Though the territorial principle is traditionally applied to

73. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). In *Aluminum Co.*, the United States brought an action against the Aluminum Company of America for monopolistic practices under the Sherman Act. *Id.* at 421–22. One argument made on behalf of Aluminum Co. was that the Sherman Act did not apply because most of the agreements the company entered into were made beyond U.S. territory and were not intended to affect the U.S. market. *Id.* at 443. Judge Hand rejected this argument and stated “that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.” *Id.*

74. *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998). Rezaq, a Palestinian, hijacked an Air Egypt flight in Greece and forced it to fly to Malta, where he eventually murdered two individuals, including an American citizen. *Id.* at 1126. After serving time in a Maltese jail, he was freed and subsequently arrested by the FBI, charged with air piracy under 49 U.S.C. app. § 1472(n), and convicted. *Id.* at 1126–27. On appeal, the Circuit rejected the defendant’s claim that applying U.S. law to him violated the normal jurisdictional rules of international law by stating that “[i]nternational law imposes limits on a state’s ‘jurisdiction to prescribe,’ that is, its ability to render its law applicable to persons or activities outside its borders . . .” *Id.* at 1133.

75. *Demjanuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

76. *Compare Perlaza*, 439 F.3d at 1162 (stating that these international law principles “may be useful as a rough guide” for determining if prescriptive jurisdiction is established, but cautioning that there is danger in placing too much emphasis on them (citing *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990))), *with United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (stating definitively that “[i]n determining whether due process is satisfied, we are guided by principles of international law”).

77. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

disputes wholly within the United States, it can also be applied to international cases if the United States can show that a defendant intended to harm the United States. In a case arising out of the same kidnapping, torture, and murder that gave rise to *Alvarez-Machain*, the Ninth Circuit noted that “drug smuggling by its very nature involves foreign countries, and . . . the accomplishment of the crime always requires some action in a foreign country,” and the U.S. has jurisdiction over infractions of U.S. laws internationally.⁷⁸ Though this decision did not involve application of the MDLEA, the court’s focus on congressional intent to reach “acts occurring outside the United States’ borders that have effects within the national territory” is applicable to MDLEA cases.⁷⁹ In the MDLEA, Congress expressed the requisite intent to allow extraterritorial application,⁸⁰ and a majority of circuits consider this sufficient to establish jurisdiction.

The logic of using the territorial principle to claim jurisdiction on the high seas has been approved by at least one Supreme Court justice. In *United States v. Robinson*,⁸¹ then First Circuit Court of Appeals Judge Breyer ruled that the Marijuana on the High Seas Act could be applied to a Panamanian registered vessel because “a state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state.”⁸² This decision also addressed what has become a contentious issue: whether the act violates due process by not giving fair notice to foreign nationals that they might be subject to U.S. law. The First Circuit determined that fair notice existed because it was written into the statute and it had previously been enforced.⁸³

78. *Felix-Gutierrez*, 940 F.2d at 1204 (internal quotations omitted).

79. *Id.* at 1205–06. The Ninth Circuit has refused to extend the territorial principle to MDLEA cases, noting that “[t]he fact that the Government received [the flag nation’s] consent to seize the [defendants], remove them to the United States, and prosecute them under United States law . . . does not eliminate the [need to establish jurisdiction].” *Perlaza*, 439 F.3d at 1169.

80. 46 U.S.C. app. § 1902.

81. *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988). The importance of *Robinson* as a final adjudication of the nexus argument cannot be understated, as it is the only decision by a sitting Supreme Court justice that addresses the need for a nexus before a U.S. claim of jurisdiction. Justice Breyer succinctly rejected the need for a nexus by stating that a “perfectly adequate basis in international law [existed] for the assertion of American jurisdiction. Panama *agreed* to permit the United States to apply its law on her ship. . . . [T]he Panamanian government gave its ‘authorization’ not only ‘to board, inspect, search, seize and escort the vessel to the United States,’ but also ‘to prosecute the persons aboard the vessel.’” *Id.* at 4 (emphasis in original).

82. *Id.* at 4 (internal quotations omitted).

83. *Id.* at 5–6.

A second international law principle often employed when claiming jurisdiction over drug smuggling is the protective principle. Justification for its use is based on the fact that “[d]rug trafficking presents the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction.”⁸⁴ The First Circuit expressly found that this principle allows extraterritorial application “because Congress has determined that all drug trafficking aboard vessels threatens our nation’s security.”⁸⁵ The Ninth Circuit has rejected this view, noting that the “danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?”⁸⁶ The Ninth Circuit therefore requires that prosecutors bear the additional burden of establishing a nexus to the United States as a prerequisite for establishing jurisdiction.⁸⁷

Another international law principle employed by a small minority of courts to establish jurisdiction is the universal theory. This theory is not commonly invoked, as it “is simply a weaker version of the . . . protective principle” and requires a finding that the questionable conduct is universally condemned.⁸⁸ One of the few circuits to employ this principle is the Eleventh, which has done so twice.⁸⁹

84. *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987). *Peterson*, a case involving over twelve tons of marijuana smuggled from Thailand, was the first time the Ninth Circuit incorporated language concerning the need for a nexus. The court, rejecting a constitutional challenge by the defendants, concluded “that there was more than a sufficient nexus with the United States to allow the exercise of jurisdiction. There was substantial evidence that the drugs were bound ultimately for the United States.” *Id.* at 493. Interestingly, the Court also stated that “drug trafficking may be prevented under the protective principle of jurisdiction, without any showing of an actual effect on the United States.” *Id.*

85. *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999).

86. *Perlaza*, 439 F.3d at 1162 (citing *Davis*, 905 F.2d at 249 n.2 (9th Cir. 1990)).

87. *Id.*

88. *Id.* at 1162–63 (internal quotations omitted).

89. In *United States v. Gonzalez*, 776 F.2d 931, 939 (11th Cir. 1985), the court rejected the defendants’ due process claims on grounds that the smuggling they engaged in “is generally recognized as a crime by nations that have reasonably developed legal systems.” Though this court’s reliance on the congressional determination that smuggling met this criterion is somewhat troubling given the lack of any evidence supporting it at the time, this concern has since been alleviated by the ratification of a U.N. charter. When the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed in 1988, the signatories confirmed that they were “[d]eeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society. . . .” U.N. Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs & Psychotropic Substances, Vienna, Austria, Nov. 25–Dec. 20, 1988, *Final Act*, 1. The treaty is now ratified by 184 nations, including the United States. This vast support indicates that drug trafficking is universally condemned. U.N. Convention Against Traffic in Illicit Narcotics, Status of

III. THE NINTH CIRCUIT'S NEXUS REQUIREMENT AND ITS FAILURE TO CONSIDER PRINCIPLES OF INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS WHEN CONSIDERING EXTRATERRITORIAL JURISDICTION

A. *The Ninth Circuit's Constitutional Nexus Requirement*

In addition to finding statutory, prescriptive, and adjudicatory jurisdiction prior to subjecting an MDLEA defendant to U.S. laws, the Ninth Circuit has determined that defendants are entitled to due process rights that require the United States to show a “nexus” for an extraterritorial prosecution.⁹⁰ This requirement forces the government to establish a connection between the defendant and the United States, which is generally interpreted to require establishing that the drugs were destined for the United States.⁹¹ The stated rationale for this requirement is that prosecutions within the United States, especially of foreigners, must not be arbitrary or fundamentally unfair.⁹² The Ninth Circuit has determined that this application of domestic law is required because it believes that international legal principles are insufficient for analyzing a constitutional right.⁹³

The nexus requirement has been rejected by every other circuit that has addressed the issue. In *United States v. Perez-Oviedo*,⁹⁴ the Third Circuit expressly rejected this requirement by holding that § 1903(d) “expresses the necessary congressional intent to override international law to the extent that international law might require a nexus to the United States for the prosecution of offenses” under the MDLEA.⁹⁵ The Third Circuit then

Treaty Adherence as of 9 Aug. 2008, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (follow “Chapter VI” hyperlink; then follow “Section 19” hyperlink). The United States ratified this treaty on February 20, 1990. The Ninth Circuit’s recent flat rejection of this principle is thus troubling, as it fails to consider the impact of disregarding a treaty that the United States was integral in crafting and pressured many countries into adopting. See *Perlaza*, 439 F.3d at 1162–63.

90. See, e.g., *Davis*, 905 F.2d 245; *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998); *Perlaza*, 439 F.3d at 1149. The Ninth Circuit has determined that this requirement is part of the jurisdictional inquiry and is to be decided by the court. *Klimavicius-Viloria*, 144 F.3d at 1257. This is supported by the 1996 amendment to the MDLEA, which removed jurisdiction over the vessel from the elements of the offense and made it a question of law for the trial court. 46 U.S.C. app. § 1903(f) (1996).

91. *Klimavicius-Viloria*, 144 F.3d at 1257–58.

92. *Davis*, 905 F.2d at 249.

93. *Id.* at 249 n.2 (noting that “danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?”).

94. *United States v. Perez-Oviedo*, 281 F.3d 400 (3d Cir. 2002).

95. *Id.* at 403. In *Perez-Oviedo*, the Third Circuit clarified that its earlier decision in *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1054 n.2 (3d Cir. 1993), *cert. denied*, 510 U.S. 1048,

unwittingly invoked the territorial principle of international law by stating that because the flag nation had consented to the application of U.S. law, jurisdiction was proper.⁹⁶ In *United States v. Suerte*,⁹⁷ the Fifth Circuit used a similar rationale in rejecting the nexus requirement, but also relied on Congress's express power to impose jurisdiction under the Piracies and Felonies Clause.⁹⁸ The First Circuit also rejected the nexus based on the territorial principle, but explicitly framed its rationale in terms of international legal principles.⁹⁹

The international legal principles that American courts use to justify extraterritorial jurisdiction do not require a nexus.¹⁰⁰ This requirement is not supported by the protective principle, which Congress clearly attempted to invoke in the language employed in § 1902.¹⁰¹ This additional requirement is also unrealistic because it grants defendants added due process protections that only make it more difficult for the United States to govern the universally condemned drug trade.¹⁰² In addition, the nexus requirement makes it more difficult for the United States to fulfill its treaty

(1994), was intended as an explicit rejection of the nexus requirement in all cases. The court stated: We acknowledged in our discussion that our holding in *Martinez-Hidalgo* was not joining the holding of the Court of Appeals for the Ninth Circuit in *United States v. Davis*, which read into the MDLEA a nexus requirement with respect to foreign-registered vessels.

In holding that there was no nexus requirement in the MDLEA, we refused to distinguish *Martinez-Hidalgo* from *Davis* on the basis of whether the ship involved was stateless or actually registered in another country.

Perez-Oviedo, 281 F.3d at 402 (internal citation omitted).

96. *Id.* at 403.

97. *United States v. Suerte*, 291 F.3d 366, 372–73 (5th Cir. 2002).

98. *Id.*

99. *Cardales*, 168 F.3d at 553.

100. *Davis*, 905 F.2d at 249 n.2. *Davis* was the first time the Ninth Circuit clearly enunciated its rationale for the nexus requirement. The Court stated that “[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.” *Id.* at 248–49 (internal citation omitted). *Davis* acknowledged that the Circuit’s previous case law did not have this requirement. See *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1997); *Chua Han Mow v. United States*, 730 F.2d 1308, 1312 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985); *United States v. King*, 552 F.2d 833, 851–52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). But the court noted the danger of emphasizing international law principles over determining whether application of the statute is fundamentally unfair. See *Davis*, 905 F.2d at 249 n.2.

101. See 46 U.S.C. § 1902 (2000).

102. Interview with William Gallo (Nov. 11, 2007). One of the major issues encountered by federal prosecutors in the Ninth Circuit is that it is becoming increasingly difficult to prove that shipments of drugs are headed towards the United States. *Id.* Previously, proving a nexus was not difficult because the only market that could absorb a shipment of multiple tons of cocaine was the United States. This has changed as the consumption of drugs has grown in Europe and Asia. Now, many drug smugglers will head into the Western Pacific so that they can argue that their drugs were headed for Russia, a major transshipment point for the European drug market. *Id.*

obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The difficulties raised by the nexus requirement are evident in the prosecution of the crew of the *Gran Tauro*. In October of 2001, the crew was tried in the United States District Court for the Southern District of California and found guilty of conspiracy to possess cocaine with intent to distribute aboard a vessel.¹⁰³ The district court found that the nexus requirement was satisfied because the crew had aided and abetted the crew of the Go-Fast boat, a stateless vessel that did not need a nexus to establish jurisdiction.¹⁰⁴ The court reasoned that, as aiders-and-abettors, the crew of the *Gran Tauro* “stand in the shoes of the principals, specifically the Go-Fast defendants, for jurisdiction purposes.”¹⁰⁵ The Ninth Circuit rejected

103. *Perlaza*, 439 F.3d at 1157.

104. *Id.* at 1158. The district court originally determined that the Go-Fast boat was a stateless vessel, but this was overturned by the Ninth Circuit, which claimed that this was still in dispute. *Id.* at 1165. Evidence of the lack of flag status of the Go-Fast is that crew of the *De Wert* testified that “they saw no flags of any kind, no markings of any kind, no hull numbers, no name on the boat, and no home-port inscription.” *Id.* When questioned by Coast Guard officers about the flag status of the vessel, one of the crew also responded, “‘Barco no tengo bandera,’ which literally means, ‘Boat I have no flag.’” *Id.* The Ninth Circuit found a question of fact existed because some of the crew said that both they and their boat were from Colombia. Also, one member of the crew claimed that the boat was captained by one “Freddy,” who was the only one who knew what the boat was doing and was never found. *Id.* at 1165. Stateless vessels have a unique position in international law because the relatively stringent jurisdictional requirements established to protect the sovereignty of nations over their own vessels do not apply to vessels that do not sail under the flag of a known state. *Id.* at 1161. This unique position is grounded in centuries-old international legal principles aimed at stopping piracy. In the eighteenth and early nineteenth centuries, piracy threatened travel and commerce on the high seas and all civilized nations banded together to fight the threat. The United States’ particular concern with piracy—necessary because of their reliance on maritime trade with Europe—is evident in piracy’s inclusion among the enumerated crimes in the Constitution. See U.S. CONST. art. I, § 8, cl. 10. This concern is particularly noteworthy because piracy, treason, and felonies on the high seas, are the only enumerated crimes in the entire Constitution. Congress also has the authority under this enumeration to “define and punish . . . Offences against the Law of Nations.” *Id.* The inclusion of this phrase has been interpreted as delegating to international law the right to define piracy and those crimes that are a threat to all nations. *United States v. Smith*, 18 U.S. 153, 153 (1820). See also *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) (holding stateless vessels claim no sovereign); *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982) (noting that stateless vessels enjoy little if any protection from international law). This protection also does not extend to vessels that attempt to claim the protection of multiple states. International treaties often state that vessels that do not sail under the flag of a single nation are subject to the jurisdiction of every nation. *Id.*

105. *Perlaza*, 439 F.3d at 1161. This represents another contradiction in the Ninth Circuit’s reasoning, as the nexus is meant to ensure that application of U.S. law is not arbitrary or fundamentally unfair, *Davis*, 905 F.2d at 249, which is the equivalent of notice. Those who are aboard a stateless vessel have no greater notice than those aboard a foreign flagged vessel that they may be subject to U.S. law. This distinction also exhibits how the Ninth Circuit ignores its contention that the nexus “serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction,” *United States v. Moreno-Morillo*, 334 F.3d 819, 829 n.8 (9th Cir. 2003) (internal quotations omitted), *cert. denied*, 540 U.S. 1156 (2004), because minimum contacts requires that a defendant be aware that he or she may be subject to American law; those on board stateless vessels are not thus aware.

this determination and freed the defendants.¹⁰⁶ Prosecutors found this decision especially confusing because the Ninth Circuit had previously stated that the aider-and-abettor theory could be used to establish jurisdiction.¹⁰⁷ This confusion, coupled with the lack of basis in international or national law, will most likely be the rationale upon which the Supreme Court rejects the nexus requirement when it eventually hears a case on this vital jurisdictional issue.

B. Enforcement of the MDLEA in Relation to International Agreements and Their Ability to Counteract the Need For a Nexus

The extraterritorial exercise of jurisdiction by the United States over vessels on the high seas is not supported by traditional maritime freedoms incorporated into Article 87 of the UNCLOS as “freedom of the high seas.”¹⁰⁸ This article’s broad statement of freedom of navigation, over flight, construction, and economic exploitation¹⁰⁹ ensures that a flag nation has assurances that its vessels will not be subject to the whims of a more powerful country like the United States. The treaty also incorporates the traditional concept of limited jurisdiction on the high seas by stating: “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”¹¹⁰ Though these passages express the basic intent behind UNCLOS, the extraterritorial extension of the MDLEA is supported by other language within the treaty.

The drafters of UNCLOS, responding to the known need to regulate the drug trade on the high seas, included Article 108 in the final convention. This article requires that “[a]ll States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.”¹¹¹ Of special note is the drafters’ use of the word “shall,” which creates an affirmative duty on the part of each signatory to aid in stopping the illicit trade. Though the United States is not a treaty signatory, its willingness to use its vast resources, courts, and enforcement power helps lift this burden from many South and Central American countries that may otherwise lack the

106. *Perlaza*, 439 F.3d at 1168–69.

107. *See Klimavicius-Viloria*, 114 F.3d at 1263.

108. United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 3.

109. *Id.*

110. *Id.* art. 92.

111. *Id.* art. 108.

resources necessary to fulfill this portion of the convention. The legality of U.S. policy is also enhanced by the treaty's allowance that "[a]ny State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic."¹¹² The United States complies with this portion of the treaty by providing the flag state with the reasonable grounds for believing that their ship is transporting drugs.

The enforcement of U.S. laws against foreign-flagged vessels also complies with the UNCLOS enforcement provisions, which require:

States shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States shall without delay institute such proceedings in accordance with their laws.¹¹³

The assistance provided by the U.S. Navy and Coast Guard satisfies this requirement, and any possible violations related to applying the law of the flag state are avoided because many of the bilateral treaties the United States has entered into grant it jurisdictional authority over drug crimes on the high seas. The United States also satisfies the notice requirements of UNCLOS found in article 231¹¹⁴ by always contacting the flag state of a vessel before attempting to board.

Extraterritorial jurisdiction over drug smuggling on the high seas is also legal because it fulfills obligations the United States agreed to by ratifying the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹¹⁵ Signatories to the treaty are required to provide mutual legal assistance in prosecuting criminal offenses in connection with the treaty.¹¹⁶ To fulfill this obligation, the treaty allows jurisdiction to be established whenever "[t]he offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that

112. *Id.*

113. *Id.* art. 217.

114. *Id.* art. 231. This article requires that "[s]tates shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures." *Id.*

115. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 I.L.M. 493.

116. *Id.* art. 7, para. 1.

such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article.”¹¹⁷ The treaty also allows signatories to “take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.”¹¹⁸ The explicit language of the treaty and its silence regarding a nexus leaves no doubt that signatories may allow other signatory nations to exert jurisdiction over vessels that fly their flag if the crews of such vessels are found to be participating in drug smuggling on the high seas.

IV. RECOMMENDATION

The United States’ exercise of jurisdiction over drug smugglers operating on the high seas may not further general maritime theories of openness and autonomy, but it does comply with international legal theories and treaties enacted to combat this serious threat to national stability. These theories, based on precedent that is hundreds of years old, have been adopted by the international community in order to regulate the greatest shared expanse of the common heritage of mankind and should not be altered by the Ninth Circuit’s misguided attempt to extend Constitutional protection to those engaged in a universally condemned act. The Ninth Circuit’s decision to reject the use of international legal principles and free the crew of the *Gran Tauro* is but one example of why the United States Supreme Court should take up this issue and definitively decide that international legal theory is appropriately applied when establishing jurisdiction over those who decide to violate international and domestic laws. If the Court fails to rule in this fashion, it will also place lower courts in the unenviable position of having to ignore international treaties and agreements that require the United States to aid other nations in the constant struggle against the illicit narcotics trade.

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117. *Id.* art. 4, para. 1(b)(ii).

118. *Id.* art. 4, para. 2(b).

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