# PIRATES ON THE HIGH SEAS: AN INSTITUTIONAL RESPONSE TO EXPANDING U.S. JURISDICTION IN TROUBLED WATERS

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ABSTRACT

*Collective efforts among governments and regional organizations is a vital part of the fight against piracy that represents a security threat to all nation-states with respect to freedom to navigate the high seas. This paper provides a concise overview of piracy, contemporary maritime drug laws, and cases among the circuit courts to illustrate the procedural concerns that affect fundamental constitutional principles of jurisdiction. A possible solution to existing substantive and procedural due process issues is establishment of a regional judicial institution with broad powers to preside over criminal prosecutions that include maritime crimes. The suggestion may be a viable means to resolve some concerns with respect to jurisdictional principles, regional stability, and the need for a comprehensive, coordinated response within the Western Hemisphere. Establishing a tribunal to preside over enforcement practices alleviates dependency on the existing legal framework that may not fully resolve jurisdictional issues associated with maritime drug trafficking. In addition, a regional tribunal minimizes the need for the United States to function as the only viable, sovereign nation-state in the Americas to ensure that pirates engaged in illicit trades are not roaming the high seas with impunity.*

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## INTRODUCTION

Acts of piracy capture the public's imagination of an era that is part of antiquity and revived in popular movies of fanciful tales of Captain Jack Sparrow seeking lost treasure, engaging in sea battles with other buccaneers, or outwitting the British navy.[1] Events off the coast of several African countries, however, have refocused public awareness of present-day threats because of pirates attacking cargo ships in pursuit of cash, fuel, and in some cases kidnapping crewmembers. A culmination of hostilities regarding the seriousness of piracy may have intensified with the capture of Abduwali Abdukhadir Muse, who participated in commandeering the Maersk Alabama, a U.S.-flagged merchant ship off the coast of Africa on April 8, 2009. Muse subsequently plead

[1] Capt. Jack Sparrow is the fable pirate captain appearing in the movie sequels Pirates of the Caribbean. *See generally* PIRATES OF THE CARIBBEAN: DEAD MEN TELL NO TALES (Walt Disney Pictures 2017); PIRATES OF THE CARIBBEAN: ON STRANGER TIDES (Walt Disney Pictures 2011); PIRATES OF THE CARIBBEAN: AT WORLD'S END (Walt Disney Pictures 2007); PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST (Walt Disney Pictures 2006); PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).

guilty and was sentenced to 33 years in prison for hijacking, hostage-taking, kidnapping and conspiracy in exchange for dismissing other charges of piracy to avoid a mandatory life sentence.[2] The gravity of piracy is apparent even without the use of a spyglass to view the range of punishment in the ten-count indictment against Muse described in Chart 1. Muse's prosecution is perhaps the first case of piracy within United States jurisdiction in 100 years.[3] Subsequently, other Somali nationals have been charged for attacking naval vessels and private citizens sailing in international waters, receiving life sentences for crimes that included the death of passengers.[4]

Jurisdiction over these marauders is grounded on "universal jurisdiction" that includes not only crimes of piracy, but "slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[5] Piracy on the high seas, as defined by the law of nations, incorporates acts of violence and allows any nation to exercise jurisdiction as a general duty to repress crimes on the high seas.[6] The duty to combat piracy is recognition that "[p]irates have been universally condemned as hostis humani generis — enemies of all mankind — because they attack vessels on the high seas, and thus [operate] outside of any nation's territorial jurisdiction . . . with devastating effect to global commerce

[2] Abduwali Muse was charged with several violations that criminalize piracy as indicated in Chart 1, and plead guilty to one count of hijacking a ship in violation of 18 U.S.C. § 2280; one count of conspiracy to hijack three ships, in violation of 18 U.S.C. § 2280; one count of hostage taking, in violation of 18 U.S.C. § 1203; one count of conspiracy to engage in hostage taking, in violation of 18 U.S.C. § 1203; one count of kidnapping, in violation of 18 U.S.C. § 1201; and one count of conspiracy to engage in kidnapping, in violation of 18 U.S.C. § 1201 in exchange for dismissing other charges of piracy to avoid a mandatory life sentence. Muse filed a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3) on the claim that the trial court lacked jurisdiction over him because he was a juvenile and that the magistrate judge lacked the authority to determine the question of his age. The petition was denied, Muse v. Lariva, No. 2:15-cv-00213-JMS-DKL, 2015 U.S. Dist. LEXIS 94542, at *3 (S.D. Ind. July 21, 2015), *aff'd*, Muse v. Daniels, No. 15-2646, 2016 U.S. App. LEXIS 3172, at *267 (7th Cir. Feb. 24, 2016).

[3] In United States v. Hasan, 747 F. Supp. 2d 599, 603 n.3 (E.D. Va. 2010), Judge Mark Davis refers to the case of The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885), in which Colombian rebels acting without the authority of a sovereign state were held to engage in piratical actions by their attempted blockade of Cartagena.

[4] *See, e.g.*, United States v. Said, 798 F.3d 182, 200 (4th Cir. 2015) (upholding the convictions and remands for resentencing, supportive of a life sentence of defendants attacking the USS Ashland, the court mentions the numerous attacks by armed Somali pirates in the waters off the Horn of Africa, the Gulf of Aden and the Indian Ocean); United States v. Salad, 908 F. Supp. 2d 730, 735 (E.D. Va., 2012) (upheld extraterritorial application of 18 U.S.C. §§ 924 (c), punishing use of a firearm in relation to a crime of violence, and (j) punishing a person who causes the death of a person through the use of a firearm, and § 1111 for murder within the special maritime and territorial jurisdiction of the United States).

[5] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (AM. LAW INST. 1987).

[6] United States v. Palmer, 16 U.S. (3 Wheat.) 610, 620 (1818).

and navigation."[7] Sources of law supporting universal jurisdiction are customary law, international agreements, and resolutions issued among international organizations that permit a state to apply its laws to piratical acts.[8] Moreover, U.N. Security Council efforts encourage states and regional organizations to cooperate in the fight against piracy and armed robbery at sea, with special attention to waters off the coast of Somalia, and indicate that pirates are a security threat to all states with respect to freedom to navigate the high seas.[9] A collective enforcement effort against piracy in the region is necessary "to enhance the capacity of the judicial and the corrections systems in Somalia, Kenya, Seychelles and other States in the region to prosecute suspected, and imprison convicted, pirates consistent with applicable international . . . law."[10] In fact, attacks against merchant ships using rocket-propelled grenades and assault rifles are prosecutable as general offenses of piracy under the doctrine of universal jurisdiction.[11] Consequently, prosecutions of piracy under the guise of universal jurisdiction allow nations to proscribe conduct as piracy that is widely

[7] *Hasan*, 747 F. Supp. 2d at 602.

[8] United States v. Said, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010) (citing Taveras v. Taveraz, 477 F.3d 767, 772 n.2 (6th Cir. 2007). The court identifies piracy as "robbery or forcible depredations committed on the high seas" under 18 U.S.C. § 1651, having a narrower definition than piratical that are acts of violence other than robbery. The distinction may be without merit when considering comments by Chief Judge Alex Kozinski in Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 725 F.3d 940, 942-43 (9th Cir. 2013) that "[y]ou don't need a peg leg or an eye patch[]" acknowledging acts of ramming ships, hurling containers of acid, damaging a ship's propellers and rudders as acts of violence for private ends which are illustrative of piracy in support of claims under the Alien Tort Statute, 28 U.S.C. § 1350, brought against environmental activists. *See also* United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397, 436 defining piracy as:

"(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

[9] *See generally* S.C. Res. 1918 (Apr. 27, 2010); S.C. Res. 1897 (Nov. 30, 2009); S.C. Res. 1851 (Dec. 16, 2008) (The resolutions affirm the Security Council's unanimous action to combat piracy off the Somali coast).

[10] S.C. Res. 1918, *supra* note 9, ¶ 1.

[11] *Hasan*, 747 F. Supp. 2d at 601, 608-09. The court makes clear that "when a state proscribes piracy in a manner that mirrors the international consensus definition, and prosecutes acts that fall within that definition, that the state can assert the universal jurisdiction doctrine."

condemned by international agreements although the state has no links of territory with the offense or of nationality with the offender.[12]

Defining piracy to include an expansive category of offenses requires the U.S. Congress to exercise its constitutional authority to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations".[13] Far-reaching applications of domestic laws result in extraterritorial effects applicable to nonresident aliens apprehended with narcotics on the high seas as an exercise of congressional power pursuant to U.S. Const. art. I, § 8, cl. 10 (Clause 10).[14] Expansion of offenses to include drug trafficking, taking place prior to piratical events off African coasts, draws the attention of commentators and jurists questioning the validity of U.S. laws with respect to jurisdiction and constitutional limitations.[15] Disputes regarding jurisdiction over drug traffickers operating in Drug Transit Zones present an opportunity to revisit the outer boundaries of universal criminal jurisdiction, and the discretion of Congress to enact a statute applicable to the conduct of defendants in an arbitrary or fundamentally unfair manner.[16] An obvious concern is a feckless application of maritime law enforcement patrolling the Transit Zone with no authority to pursue drug smuggling vessels.[17] Restriction of the U.S. Coast Guard to interdict vessels enables drug traffickers to set sail for coastal waters in South and Central America, and Caribbean countries to evade the only law enforcement agency that maintains a persistent presences in the Western Hemisphere capable of combating smugglers on the high seas.[18] The Coast Guard's workforce is more

[12] *Id*. at 606-10.

[13] U.S. CONST. art I, § 8, cl. 10.

[14] *See, e.g*., United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (Congress has the power under U.S. Const. art. I, § 8, cl. 10 regarding the application of the Maritime Drug Law Enforcement Act, 46 U.S.C.S. app. § 1903(c)(1)(A), to prosecute trafficking of narcotics on the high seas.).

[15] *See e.g*., Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 113 (2017) (the author reviews the primary cases and comments addressing the pitfalls of jurisdiction and apparent connection of the illicit drug trade to the United States, arguing the MDLEA is a reasonable option to assert the protective principle of international law in recognition that a state is empowered to punish a limited class of offenses committed outside its territory by persons who are not its nationals.)

[16] United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990).

[17] STAFF OF H. COMM. ON TRANSP. AND INFRASTRUCTURE, 114TH CONG., Summary on "Western Hemisphere Drug Interdiction Efforts" 1-2 (Comm. Print. 2015). The Transit Zone is a seven million square-mile area roughly twice the size of the continental United States, including the Caribbean Sea, the Gulf of Mexico, and the Eastern Pacific Ocean, where vessels transport cocaine from South America to the United States.

[18] Casavant, *supra* note 15, at 154-56. The U.S. Coast Guard is a military service and a branch of the armed forces of the United States, operating under the Department of Homeland Security, enforcing all federal laws on, empowered to make "inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the

than 87,500 personnel, whose mission includes a western hemisphere enforcement strategy.[19] Despite the Coast Guard's manpower, a tactical gamesmanship would emerge between these modern-day swashbucklers and maritime patrols that would at best become a stalemate.[20] Shackling U.S. enforcement personnel efforts to prosecute narcotics offenders may contribute to forming a sanctuary channel for drug dealers on the high seas.[21] A need for extraterritorial enforcement, however, does not justify the enforcement of the criminal laws of the United States against persons and/or activities in non-U.S. territory while running roughshod over fundamental principles of constitutional law.

This paper provides a concise overview of piracy, contemporary maritime drug laws, and cases among the circuit courts to illustrate the procedural concerns that affect fundamental constitutional principles of jurisdiction. Moreover, a possible solution is proposed for the Western Hemisphere that requires establishing a judicial institution with broad powers to preside over criminal prosecutions that include maritime crimes. The suggestion may be appealing among those who are concerned about jurisdictional principles, regional stability, and the need for a comprehensive, coordinated response within the region. Establishing a tribunal to preside over enforcement practices alleviates dependency on the existing legal framework that may not resolve jurisdictional issues associated with maritime drug trafficking.[22] In addition, a regional tribunal minimizes the need for the United States to function as the only viable, sovereign nation-state in the Americas to ensure that pirates engaged in illicit trades are not roaming the high seas with impunity.

## I. EXTRATERRITORIAL JURISDICTION AND THE HIGH SEAS

Congressional power to legislate against crimes on the high seas is firmly established in Article I, Section 8, Clause 10 of the Constitution, which often extends criminal jurisdiction outside of U.S. territory.[23] In the Act of 1790,

United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." 14 U.S.C. §§ 1, 89(a) (2010). *see also*, U.S. Coast Guard, Western Hemisphere Strategy (2014), available at https://www.hsdl.org/?abstract&did=763675 (last visited Nov. 4, 2019).

[19] U.S. Coast Guard, Our Organization (2014), available at https://www.hsdl.org/?abstract&did=763675 (last visited Nov. 4, 2019).

[20] Casavant, *supra* note 15, at 121-23. The author's description of evolving drug smuggling over the past forty years notes the difficulty in disrupting maritime drug trafficking.

[21] *Martinez-Hidalgo*, 993 F.2d at 1057.

[22] Casavant, *supra* note 15, at 124-28, 130-46.

[23] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1201, 1203, 1226-28 (2009). The author notes the United States has shown both hostility to and willingness to use universal jurisdiction more than other nation-states to pursue drug crimes outside our territory.

Congress initially elected to define and punish piracy based on the law of nations stating:

> [t]hat if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, 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; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.[24]

The Supreme Court acknowledges in *United States v. Palmer* that the "[C]onstitution having conferred on [C]ongress the power of defining and punishing piracy, [leaves] 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."[25] However, the Court makes clear that statutes are interpreted in light of the plain language used to reflect the intent of Congress when enacting legislation.[26] Thus, an act of robbery by "[non-U.S. citizens] on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not … piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States."[27] In response to *Palmer*, Congress passed the Act of 1819 to prosecute non-U.S. citizens for crimes on the high seas of a foreign vessel and defined piracy not upon the particular provisions of any municipal code, but upon "the law of nations," both for its definition and punishment.[28] Congress desired to associate robbery on the high seas as a crime that is widely considered an offense against the universal law of society, identifying a pirate as an enemy of the human race.[29] In 1820, Congress amended the statute to include that the crew or ship's company of any foreign ship or vessel engaged in the slave trade would be

[24] Act of April 30, 1790, ch. 9, § 8, 1 Stat. 112.

[25] *Palmer*, 16 U.S. (3 Wheat.) 610 at 630.

[26] *Id*. at 633-34.

[27] *Id*.

[28] *See* Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510. Congress can exercise its constitutional authority to criminalize piracy "as defined by the law of nations … [brought] before the circuit courts of the United States…."

[29] United States v. Smith, 18 U.S. (5 Wheat.) 153, 161-62 (1820).

adjudged as a pirate despite a lack of a nexus with U.S. territory.[30] Further changes to the crime of piracy abolished the death penalty, imposing life imprisonment,[31] and subsequently codified under Title 18, §§ 1651-1661 of the United States Code to include other acts of violence constituting piracy in recognition of the offense as " 'a unique offense because it permitted nations to invoke universal jurisdiction … irrespective of the existence of a jurisdictional nexus.' "[32]

## II. MARITIME DRUG TRAFFICKING

### A. *Navigating Treacherous Waters in Pursuit of Drug Pirates*

The uniqueness of piracy lends importance in understanding how Congress desires to combat drug traffickers that navigate in narcotics-trafficking vessels on the high seas. Large-scale drug smuggling began in the 1970s as cartels transported cocaine from Colombia into the United States on commercial flights or on small planes that fly undetected to Florida's Everglades.[33] The cartels used other means of transportation including small boats, fishing trawlers, cargo shipments, and motherships anchored beyond territorial waters to distribute illicit drugs to smaller boats that taxied to coastal areas, allowing traffickers to minimize risk and frustrate law enforcement efforts to seize vessels beyond United States territorial waters.[34] After encountering a number of jurisdictional issues under existing laws, Congress responded in 1980 by passing the Marijuana on the High Seas Act (MHSA) as a means to empower the U.S. Coast

[30] Act of May 15, 1820, ch. 113, §§ 4-5, 3 Stat. 600. The statute connected U.S. citizenship to transportation of any Negro or mulatto aboard any vessel engaged in the slave trade.

[31] *See* Act of January 15, 1897, ch. 29, 29 Stat. 487; Act of March 4, 1909, ch. 321, 35 Stat. 1145.

[32] 18 U.S.C. §§ 1651-61 (1948); United States v. Dire, 680 F.3d 446, 454 (4th Cir. 2012) (citing United States v. Hasan, 747 F. Supp. 2d at 605). The Fourth Circuit recognized that acts of violence, committed while attempting to commit a robbery, as piracy. *See also* Leticia M. Diaz & Barry Hart Dubner, *On The Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 BARRY L. REV. 175, 187-95 (2009). The authors, referencing international agreements, note that modern-day definitions of piracy can include an array of violent acts, detention, and depredation directed against a ship or against persons or property on board ships.

[33] *See, e.g.*, Peter S. Green, *The Ever-Changing Logistics of Drug Smuggling*, WALL ST. J.: COCAINENOMICS, http://www.wsj.com/ad/cocainenomics (last visited July 4, 2017) (explaining the rise of Pablo Escobar and the Medellín syndicate's innovation in smuggling cocaine into the United States).

[34] *Id.*; *See also* Charles Leonard-Christopher Vaccaro, Note, *Bringing in the Mother Lode: The Second Circuit Rides in the Wake of Marino-Garcia - United States v. Pinto-Mejia*, 10 TUL. MAR. L. J. 141, 145-46 (1985).

Guard to seize vessels outside the territorial jurisdiction of the United States.[35] Congress desired to extend U.S. jurisdiction over any person on the high seas that is operating a vessel in possession of a controlled substance.[36] One of the initial challenges to the MHSA application to extraterritorial waters occurs in *United States v. Angola*,[37] on a motion to dismiss asserting a lack of sufficient facts to establish a nexus between the crime and the United States. The court held that crewmembers on a stateless vessel seized near the coast of Florida west of the Bahamian island of San Salvador characterizes a pattern of conduct to facilitate distribution of drugs to other boats prosecutable under the MHSA.[38] Applying the protective principle of international law, the decision in *Angola* supports an assertion of jurisdiction when conduct of a foreigner threatens a state's security or governmental functions, despite never having entered a country's territorial waters.[39] Limitations of the MHSA, however, become apparent in *United States v. James-Robinson*[40] as prosecutors pushed the outer boundaries of the statute to prosecute foreign crewmembers that were beyond U.S. jurisdiction with no intent to distribute illicit drugs in the U.S. and with no nexus to assume subject matter jurisdiction.[41] Characterizing the ship in *James-Robinson* as a stateless vessel and § 955a as applying to any vessel on the high seas, the government claimed that the MHSA applies to anyone in possession of illicit drugs regardless of where distribution of the illicit drugs might occur and classifies citizens of foreign countries as drug pirates on stateless vessels found on the high seas anywhere in the world.[42] Referencing legislative history, the court determined that the applicable section of the statute required a nexus with the United States that, at a minimum, infers intent to distribute a controlled

[35] Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980). The MHSA was meant to remove jurisdictional problems as a result of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, but created a requirement to show that traffickers in international waters intended to bring narcotics into United States territory when Congress repealed the Narcotics Import and Export Act, Pub. L. No. 77-165, 55 Stat. 584 (1941) (repealed 1970) establishing a federal crime to knowingly import or assist in the importation of illicit drugs, or to "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such [drugs], knowing the same to have been imported contrary to law." *See also* Vaccaro, *supra* note 34 at 146-47.

[36] Marijuana on the High Seas Act, 21 U.S.C.S. § 955a (1980). The Act was transferred to 46 USCS Appx §§ 1901-1904, prior to the completion of the codification of Title 46 as positive law by Act of Oct. 6, 2006, Pub. L. No. 109-304.

[37] United States v. Angola, 514 F. Supp. 933, 934-35 (S.D. Fla. 1981).

[38] *Id*. at 935-36.

[39] *Id*. The protective principle is one of six bases to justify extraterritorial jurisdiction to legitimize the exercise of judicial powers. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmt. f (1987).

[40] *See generally* United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981).

[41] *Id*. at 1342.

[42] *Id*.

substance.[43] Prosecutors were arguing before a "friendly" court that clearly indicated that the government would have prevailed if some facts had been presented, indicating a nexus with some interest of the United States, in order to establish subject matter jurisdiction.[44] Specifically, the court in *James-Robinson* makes clear that:

> [t]here could [have been] . . . a different result if the controlled substance in question is found near U.S. territory, or if the shipment is bound for the United States, or if the foreign defendants know or intend that their illegal cargo will be distributed in this country. Subject matter jurisdiction may exist in those circumstances.[45]

Critics that may label the court as reluctant to find subject matter jurisdiction should note two other cases filed in the same District with similar motions to dismiss. The motions to dismiss were denied after the prosecutors showed some connection to establish subject matter jurisdiction[46] in order to apply § 955a(a) in conformity with due process requirements.[47] Thus, the court was clearly indicating to the government, as if engaged in semaphore signaling, a warning that navigating around jurisdictional matters could result in scuttling prosecutable cases.[48]

The First Circuit follows a similar analysis in *United States v. Smith*,[49] requiring a nexus between drug trafficking on the high seas and U.S. jurisdiction. Briefly, the defendant, a U.S. citizen arrested for transporting marijuana in international waters, asserted that "Congress in enacting 21 U.S.C. § 955a, lacked the power to extend its criminal jurisdiction to acts committed outside the territorial waters of the United States, on non-United States vessels."[50]

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[43] *Id*. at 1342-43.

[44] A month previously, prosecutors had successfully argued subject matter jurisdiction based on the protective principle to regulate activity aboard vessels on the high seas having a potentially adverse effect in Angola before the U.S. District Court for the Southern District of Florida despite the court's acknowledgement that crewmembers of a stateless ship "may not have had the specific intent to import marijuana into the United States" and the ship would not have entered United States territorial waters, except for the Cost Guards' seizure of the vessel. United States v. Angola, 514 F. Supp. at 936. Compare the subsequent application of the protective principle by the District Court for the Southern District of Florida in James-Robinson, 515 F. Supp. at 1344-46 whereby prosecutors appear to decline to argue "allegation of an effect on the national security or governmental functions of the United States."

[45] *Id*. at 1346.

[46] *Id*. at n. 9. One of the motions to dismissed involved Angola, 514 F. Supp. 933 (S.D.Fla., Order Denying Motions to Dismiss filed May 14, 1981); United States v. Pauth-Arzuza, No. 80-577-Cr-CA (S.D.Fla., Order Denying Motion to Dismiss filed Apr. 20, 1981; Order on Motion for Reconsideration filed Apr. 24, 1981).

[47] *Id*. at n. 10. Referring to U.S. CONST. amend. V.

[48] *Id*. at 1346-47.

[49] United States v. Smith, 680 F.2d 255, 258 (1st Cir. 1982).

[50] *Id*. at 257.

Identifying the objective territorial principle[51] as the most salient bases for jurisdiction in *Smith*, the court notes that the context of the facts (off-loading marijuana in close proximity to the coast of the United States) indicating eventual transportation of illicit drugs into U.S. jurisdiction establishes a nexus requirement despite the fact that "the cause of the harm is outside the territorial jurisdiction of the United States."[52] Moreover, in *United States v. Wright-Barker*,[53] the Third Circuit held that absent of an expressed purpose from Congress, a statute may afford extraterritorial jurisdiction application "so long as such jurisdiction does not abridge constitutional provisions or this nation's international agreements."[54] At issue, the defense in *Wright-Barker* alleged that, contrary to MHSA 21 U.S.C. §§ 952(a), 963, 841(a)(1), (b)(6), and 18 U.S.C. Sec. 2, Congress did not specify intent to afford extraterritorial application to conspiracy crimes.[55] Although concerned about the lack of specificity, the court held that extraterritorial application may be implied given the nature of conspiratorial maritime drug crimes taking place on the high seas.[56] These cases make clear that the language in the MHSA includes a defendant's intended but not actual effect to establish a reasonable inference of conspiracy, assuming the locus shall include the high seas and foreign countries without a direct connection to the U.S. territorial jurisdiction.[57] Specifically, the court notes that:

> [w]hen the intent of the person sought to be charged is clear and the effect to be produced by the challenged activity is substantial and foreseeable, the fact that an act or conspiracy was thwarted before its effect was felt does not deprive the target state of jurisdiction to make its law applicable to that activity.[58]

Therefore, prosecutors of conspiracy to commit maritime drug violations must show, even though the statute does not state it has extraterritorial application, a connection with the jurisdiction by asserting a foreseeable effect on the jurisdiction even if there is no proof of an overt act linked to the jurisdiction.[59]

Although some courts in the early stages of this era were requiring a jurisdictional nexus to prosecute drug traffickers in violation of maritime drug statutes, a different outcome occurred when arguments addressed a vessel's

[51] *Id*. at 257-58. In accord with the objective territorial principle, jurisdiction is established when acts done outside a geographic jurisdiction are shown to produce detrimental effects within it.

[52] *Id*. at 258.

[53] United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986).

[54] *Id*. at 166.

[55] *Id.* at 166-67.

[56] *Id*. at 167.

[57] *Id*.

[58] *Id*. at 168. Referencing the RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (Tent. Draft No. 6, 1985).

[59] *Id*.

status as stateless ("vessel without nationality"). The Eleventh Circuit held in *United States v. Marino-Garcia* that, under the MHSA § 955a(a), prosecuting crewmembers of stateless ships does not require a nexus; thus traditional jurisdictional principles that govern freedom on the open seas are not applicable to ships without nationality in order to prevent them from becoming "floating sanctuaries from authority."[60] Moreover, the Eleventh Circuit's evaluation of the legislative history of § 955a(a) indicates that Congress wanted the broadest possible application of the statute, allowing the Coast Guard to seize vessels and prosecute any person engaged in international drug trafficking as long as such seizure and prosecution is allowed under international law.[61] Subsequently, the Fifth Circuit's opinion in *United States v. Alvarez-Mena* adopted a similar approach, ruling that the legislative history of 21 U.S.C. §§ 955a-955d indicates that Congress considered the statute's application to stateless vessels and crewmembers, brushing aside any notion that a nexus to U.S. jurisdiction is fundamental; repetitively asserting that jurisdiction is predicated on the stateless status of a vessel on the high seas.[62] In addition to legislative history, the court cites the U.N. Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, art. 2 (1958), and congressional constitutional power to proscribe and punish offenses committed on the high seas reflected in Article I, section 8, clause 10. The court concluded that since § 955a(a) and its subsections have no specific nexus requirement, a person aboard a stateless vessel in mere possession of a controlled substance traversing international waters is subject to prosecution in U.S. jurisdiction.[63] Because international law does not preclude any nation from exercising jurisdiction over stateless vessels, the United States can exercise criminal jurisdiction over a person onboard a ship without nationality on the high seas. Moreover, a:

> [crewmember] of a stateless vessel on the high seas [has] no basis on which to assert any claim to the jurisdictional exemptions of international law that are available to . . . . [other] vessels, . . . . [, and] a [defendant] has no valid claim to immunity from the proper exercise of the United States' criminal jurisdiction over his actions aboard the stateless vessel . . . .[64]

The circuit court, acknowledging that Congress did not put drug trafficking in the same category as piracy (or slave trading) as a universally condemned crime,[65] engages in skullduggery by concluding that, in light of Congress' clear authority to enact § 955a(a) and "proscribe the specified conduct of 'any person' on a stateless vessel on the high seas without any United States nexus or personal citizenship requirement" with no basis for any claim of due process violation,

[60] United States v. Marino-Garcia, 679 F.2d 1373, 1382 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983).

[61] *Id*. at 1383.

[62] United States v. Alvarez-Mena, 765 F.2d 1259, 1263-67 (5th Cir. 1985).

[63] *Id* at 1264-65, n. 9.

[64] *Id*. at 1266.

[65] *Id*. at 1265 n. 10. *See also* Marino-Garcia, 679 F.2d at 1382 n. 16.

drug trafficking is transformed into an act of quasi-piracy.[66] In effect, the Fifth Circuit sought to empower the Coast Guard as the international police of the oceans, authorized under 14 U.S.C. section 89(a), needing only a "reasonable suspicion" to seize a vessel,[67] " 'subject to the jurisdiction, or to the operation of any law, of the United States,' even beyond the United States' [territorial jurisdiction], [limited] only to . . . . unreasonabl[e] interfer[ence]" with foreign vessels.[68] The response is echoed among other circuit courts acknowledging that "all nations have an equal and untrammeled right to navigate on the high seas"[69] in recognition of ships operating under a nation-state's flag in contrast to a stateless ship operating outside the laws governing international waters.

In *United States v. Howard-Aria*, the Fourth Circuit stretches the outer limits of § 955a(a) in its review of the legislative history of the statute, indicating that Congress members' concern about the danger posed to this nation by the increased incidence of modern drug trafficking, "sought to assert extraterritorial jurisdiction over stateless vessels engaged primarily in 'mother ship' smuggling activities involving controlled substances destined almost exclusively for the United States."[70] Furthermore, the Fourth Circuit's textual analysis of § 955a(a) that "proscriptions against possession of controlled substances apply to any person . . . . aboard a ship subject to the jurisdiction of the United States," coupled with "section 955b(d) declar[ing] that a stateless vessel on the high seas is subject to the jurisdiction of the United States" could be construed as Congress seeking to criminalize possession of a controlled substance with a general intent to distribute by any person aboard a stateless vessel upon the high seas destined for other parts of the world.[71] A failure of the prosecution to establish a nexus between stateless vessels and the United States was of little consequence considering that such "vessel[s] enjoy[] little, if any, protection from international law when sailing on the high seas."[72] Moreover, the court makes clear that "the United States may violate international law principles in order to effectively carry out this nation's policies"[73] in connection with enforcement of maritime drug laws. The legislative purpose of § 955a(a), intended to establish

[66] *Id*. at 1266.

[67] *Id*. at 1268. Citing United States v. Williams, 617 F.2d 1063, 1073 n. 6, 1074, 1076 (5th Cir. 1980).

[68] *Id*. The court bypasses nexus between vessels and the United States, granting criminal jurisdiction over stateless vessels on the high seas. *see also*, United States v. Pinto-Mejia, 720 F.2d 248, 260 (2d Cir. 1983) ("that § 955a reach[es] stateless vessels on the high seas whether or not the narcotics carried were intended for distribution in the United States").

[69] Marino-Garcia, 679 F.2d at 1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983). *See also* United States v. Howard-Arias, 679 F.2d 363, 370-72 (4th Cir. 1982).

[70] Howard-Arias, 679 F.2d at 371. The decision references at n. 8, 21 U.S.C. § 955a(h) clearly stating: This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

[71] *Id*. at 369.

[72] *Id*. at 371 (citations omitted).

[73] *Id*. at 371-72.

"jurisdiction over all persons aboard a stateless vessel on the high seas for possession of a controlled substance with an intent to distribute it anywhere",[74] creates a form of piracy. Thus, the Fourth Circuit, in recognition of congressional authority under Clause 10 to enact maritime drug laws with broad applications, exercised judicial fiat to calm jurisdictive currents from other courts navigating in opposite directions.

### B. *Expansion of U.S. Jurisdiction in Pursuit of Narco-Pirates on the High Seas*

While the courts deliberated jurisdictional limitations of the MHSA, Congress continued to explore the measures of extraterritorial application of maritime laws as if embarking with Jacques Cousteau on the Calypso to battle the dangers posed by seafaring drug traffickers.[75] Out of the depths of various legislative committees, the Maritime Drug Law Enforcement Act of 1986 (MDLEA)[76] was enacted to address unresolved issues encountered under the MHSA and to extend jurisdiction to any stateless vessel on the high seas, any vessel in the "contiguous zone of the United States,"[77] and ships in foreign territorial waters; providing other nations with the ability to consent or waive objections regarding enforcement of United States maritime drug laws.[78] Anti-drug trafficking agreements with over 40 partner nations consenting to the enforcement of United States law is a critical component of interdiction operations on the high seas considering the six million square mile transit zone in the Western Hemisphere that requires constant surveillance beyond randomly patrolling the open ocean.[79] In light of this enormous task, it is not surprising that Congress, acting on persuasive facts and testimony, exercised its legislative powers and authorized

[74] *Id*. at 372.

[75] Jacques Cousteau was a French explorer, scientist, and a marine conservationist who founded the French Oceanographic Campaigns. He leased and refurbished a British minesweeper from the Second World War called Calypso as a mobile laboratory for field research featuring Cousteau on documentaries exploring the oceans. His adventures inspired musician John Denver, a close friend of Cousteau, to compose the song "Calypso". JOHN DENVER, CALYPSO (RCA Records 1975), https://www.youtube.com/watch?v=-ZonmQZG0GQ.

[76] 46 U.S.C. app. §§ 1901-1904. The current version at 46 U.S.C. §§ 70501-70508 (2017).

[77] Proclamation No. 7219, 64 Fed. Reg. 48,791 (Sept. 2, 1999). The contiguous zone extends to any territory over which the United States exercises sovereignty to include all ships and aircraft within "24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation."

[78] *Id*. *See generally* 46 U.S.C. § 70502(c). Section (c) (1)(F) includes vessels entering, departing the United States, or "is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401)."

[79] *See e.g*., U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, I: Drug and Chemical Control, International Narcotics Control Strategy Report 43-44 (2017), https://www.state.gov/j/inl/rls/nrcrpt/2017/index.htm [hereinafter U.S. Dep't of State, 2017 Report].

the Coast Guard to intercept drug vessels and "remove illegal drugs close to their origins in South America and as far from U.S. shores as possible."[80]

One of the first cases to test the MDLEA extension of the Coast Guard's authority over vessels in foreign territorial waters with another nation's consent or waiver of objections is *United States v. Martinez-Hidalgo*.[81] After detection, identifying the nationality of the crewmembers, and shadowing a flagless boat for hours, Coast Guard personnel were granted a statement of no objection (SNO) by the Colombian government and sent a boarding party to the boat, discovering cocaine onboard the vessel.[82] Among the issues on appeal before the Third Circuit was extending U.S. jurisdiction to prosecute foreign nationals on flagless vessels in international waters for narcotics violations.[83] Recognizing the congressional intent to reach acts of possession, manufacturing, or distribution of illicit drugs outside the territorial jurisdiction of the United States, the circuit court held that a requirement of a domestic nexus was superseded as codified by 46 U.S.C. app. § 1903(h) of the MDLEA, reversing its previous decision in *Wright-Barker*.[84] Subsequently, *United States v. Angulo-Hernández* contributed to a consensus that prosecutors might not have to satisfy a due process requirement of "constitutional jurisdiction" regarding a nexus with the jurisdiction and a MDLEA offense.[85] In fact, challenges to the MDLEA

[80] *Id*. at 43. *See also Western Hemisphere Drug Interdiction Efforts: Hearing Before the Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 114th Cong. 30-31 (2015) (statement of Vice Admiral Charles D. Michel, Deputy Commandant of Operations, U.S. Coast Guard). Vice Admiral Charles D. Michel emphasized the importance of bilateral agreements in the western hemisphere to further the goals of the Coast Guard to interdict illicit trafficking of drugs as close to the source zone as possible.

[81] United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 699 (1994).

[82] *Id*. at 1053-54.

[83] Martinez also challenged but denied relief that the reasonable basis for the search of the vessel violated the Fourth Amendment of the U.S. Constitution, and that the jurisdictional issue should have been presented to the jury having never argued before the trial court. *Id*. at 1053-54.

[84] *Id*. at 1055-56, referencing United States v. Wright-Barker, 784 F.2d 161, 168-69 (3d Cir. 1986).

[85] United States v. Angulo-Hernández, 565 F.3d 59, 62-63 (1st Cir. 2009), *cert. denied*, 558 U.S. 1063 (2009) (smugglers prosecuted pursuant to an agreement to enforce United States drug laws against Bolivia's maritime fleet members, "Due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under MDLEA when the flag nation has consented to the application of United State law to the defendants"). *See also* United States v. Perez Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) (internal citations omitted) ("[N]o due process violation occurs in an extraterritorial prosecution under MDLEA when there is no nexus between the defendant's conduct and the United States. Since drug trafficking is condemned universally by law-abiding nations . . . there is no reason for us to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of a person apprehended with narcotics on the high seas . . .).

concerning a nexus for subject matter jurisdiction may be vitiated if the government of the flagship or the government that has territorial jurisdiction gives notice that it waives objection to Coast Guard personnel enforcing U.S. law over a vessel.[86] Bypassing due process requirements and broadly focusing on Congress' authority to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations with respect to Clause 10 as the source of congressional power to enact the MDLEA, the judiciary transforms drug trafficking on the high seas into a classification of piracy.[87] The rationale for minimizing due process concerns and deferring to Congress is objectionable to some jurists in recognition that, for purposes of enforcing U.S. maritime laws beyond our jurisdiction, circumstances may arise where Coast Guard personnel may be dependent on cooperation with other countries before a vessel can lawfully be seized.[88] Cooperation extends to extraterritorial

[86] *See e.g.*, United States v. Brant-Epigmelio, 429 F. App'x 860, 864 (11th Cir. 2011) (emphasizing that the Government of Venezuela waived objection to the enforcement of U.S. law by the United States over the Colombian crewmember of the go-fast vessel registered in Venezuela, vessels are subject to United States jurisdiction for purpose of the MDLEA if "a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States," 46 U.S.C. § 70502(c)(1)(C)(E)); United States v. Cardales-Luna, 632 F.3d 731, 736-37 (1st Cir. 2011) (a foreign nation's consent or waiver to the enforcement of United States law subjects crewmembers of a vessel registered in the foreign nation to the jurisdiction of the United States).

[87] *See e.g.*, United States v. Suarez, No. 16-cr-453, 2017 U.S. Dist. LEXIS 85026, at *14-22 (S.D.N.Y. June 1, 2017) (dismissive of due process claims, stateless vessels and those aboard lack the protections of any country's law); United States v. Aragon, No. 15 Cr. 292, 2017 U.S. Dist. LEXIS 103871, at *10-18 (S.D.N.Y. July 5, 2017) (stateless vessels and crewmembers are not protected by the due process clause, and are subject to the jurisdiction of the United States "even absent proof that the vessel's operators intended to distribute the cargo in the United States"); United States v. Portocarrero-Angulo, No. 3:16-cr-02555-BEN-01, 2017 U.S. Dist. LEXIS 120974, at *14-15 (S.D. Calif. July 28, 2017) (due process does not require the Government to demonstrate that there exists a sufficient nexus between the conduct condemned and the United States' if a vessel is deemed stateless, allowing for exercising jurisdiction over the crewmembers).

[88] United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248 (11th Cir. 2012) ("The structure of the Constitution also confirms the limited power of Congress under the Offences Clause. If Congress could define any conduct as 'piracy' or a 'felony' or an 'offence against the law of nations,' its power would be limitless and contrary to our constitutional structure."); United States v. Angulo-Hernández, 565 F.3d 59, 62-63 (1st Cir. 2009) (Torruella, J., dissenting from the denial of en banc review). *See also* Aaron J. Casavant, In Defense of the U.S. Maritime Drug Law Enforcement Act, *supra* note 15, at 218- 24. Among the author's arguments critical of the Eleventh Circuit's decision in Bellaizac-Hurtado, he suggests that while drug crimes are not subject to universal jurisdiction, the protective principle is sufficient to allow states to criminalize maritime drug trafficking. The challenges presented law enforcement, and the effect to destabilize regional governments, maritime drug trafficking has reached "the status of a quasi-universal crime justifying the use of the protective principle."

application of the MDLEA to arrest and extradite to the United States traffickers who conspire to transport drugs despite not having set foot "on board" vessels traveling on the high seas.[89] The overarching principle of conspiracy law recognizes that an overt act of one partner in crime is attributable to all in furtherance of a substance offense.[90] This principle allows Congress to criminalize the actions of a conspirator as a pirate committing felonies on the high seas who plans with co-conspirators using maps to select navigational routes that avoid detection by maritime and law enforcement authorities from the United States and other countries.[91] The dismissal of due process arguments incorporates similar reasoning to the MHSA litigation that circumvented Clause 10 of the Constitution to avoid a nexus requirement.[92] Deference to Congress' authority creates smooth sailing for prosecutorial efforts gaining acceptance

[89] United States v. Ballestas, 795 F.3d 138, 141-50 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1229, 2016 U.S. LEXIS 1105 (U.S., Feb. 29, 2016).

[90] *Id*. at 146.

[91] *Id*. at 146-48. Ballestas asserted a due process claims in enforcement of the MDLEA with respect to a failure to establish a nexus between his actions abroad and the United States. The D.C. Circuit resolved the application of the statute not on a nexus requirement, but whether the application of the statute would be an arbitrary or fundamentally unfair to the defendant, observing no such circumstances in the case. Some question the extension of the MDLEA as a matter of public policy that may result in prosecuting defendants engaged in actions which only tangentially impact drug activities aboard a vessel. *See generally* Allison N. Skopec, Note, *Seasick Yet Still Docked: The D.C. Circuit Casts a Wide Extraterritorial Net in United States v. Ballestas*, 41 TUL. MAR. L. J. 641 (2017).

[92] *See e.g*., United States v. Nueci-Peña, 711 F.3d 191, 198 (1st Cir. 2013) (rejecting the argument "that the Piracies and Felonies Clause does not authorize Congress to enact the MDLEA, which punishes conduct without a connection to the United States", coupled with an absence of Supreme Court precedent addressing the scope of congressional powers under the MDLEA, dismissed a challenge to subject matter jurisdiction); United States v. Reid-Vargas, 2015 U.S. Dist. LEXIS 146368 (D.P.R., Sept. 9, 2015) (relying on the First Circuit's decision in Nueci-Peña, as well as rulings from the Third, Fifth, Ninth, and Eleventh Circuits, denies motion to dismiss an indictment, ruling that Congress did not exceed its "power to 'define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations, U.S. Const. art. I, § 8, cl. 10' ", dismisses constitutional arguments which include to prove a nexus to the United States, the MDLEA is applicable to defendants who were transporting marijuana while operating a go-fast boat with no visible indicia of nationality in international waters about 60 nautical miles southeast of San Andrés, an island belonging to Columbia.).

among some circuit courts,[93] as if judges were writing sea shanties with a revised verse, but using a familiar chorus and lyrics sung in unison.[94]

Prosecutors arguing for a broad extraterritorial jurisdiction of the MDLEA, however, have encountered mixed results before the Ninth Circuit that has waived a constitutional nexus requirement under specific circumstances. First, in *United States v. Caicedo*,[95] the Ninth Circuit is consistent with other federal circuits with respect to stateless vessels, stating that:

> where a defendant attempts to avoid the law of all nations by travelling on a stateless vessel, he has forfeited . . . protections of international law and . . . [does] not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws.[96]

The *Caicedo* decision aligns with decisions from the First, Second, Fourth, Fifth and Eleventh Circuits "that the United States may exercise jurisdiction consistent with international law over drug offenders apprehended aboard stateless vessels on the high seas without demonstrating any nexus to the United

[93] *See, e.g*., United States v. Mitchell-Hunter, 663 F.3d 45, 49 n.3 (1st Cir. 2011) ("The MDLEA is derived from Congress's power to 'define and punish Piracies and Felonies committed on the high Seas . . . .' U.S. Const. art I, § 8, cl. 10."); United States v. Matos-Luchi, 627 F.3d 1, 4 n.4 (1st Cir. 2010) (in reference to jurisdiction, Congress' intent when amending the MDLEA "refers to the enforcement reach of the statute—not federal court subject-matter jurisdiction" to "minimize conflict with foreign nations who might also assert rights to regulate."); United States v. Ledesma-Cuesta, 347 F.3d 527, 531-32 (3d Cir. 2003) ("Congress enacted the MDLEA to . . . . remov[e] geographical barriers which had impeded efforts to combat the drug trade" pursuant to its constitutional power to define and punish Piracies and Felonies committed on the high seas); United States v. Suerte, 291 F.3d 366, 376-77 (5th Cir. 2002) (regarding the extraterritorial application of the MDLEA, Congress acted pursuant to the Piracies and Felonies Clause, a nexus between a defendant's conduct and the United States is not required to seize a vessel in international waters bound to transport and distribute cocaine in Europe, registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States, even if no formalized, written agreement exist); United States v. Martinez-Hidalgo, 993 F.2d at 1056 (3d Cir. 1993) (Congress by U.S. Const. art. 1, § 8, cl. 10, is authorized to define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations, and the fact that "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" [bypassing a nexus requirement].).

[94] Sea shanties are songs that sailors sung while on ships during the age of sail that helped maintain the work pace of crewmembers. *See* Brett McKay & Kate McKay, *The 10 Manliest Sea Shanties*, THE ART OF MANLINESS (Sept. 23, 2008), http://www.artofmanliness.com/2008/09/23/the-10-manliest-sea-shanties/; *Shanties and Sea Songs*, BRETHREN OF THE COAST, http://brethrencoast.com/Sea_Shanties.html (last visited Jan. 13, 2018).

[95] United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995).

[96] *Id*. at 372-73.

States."[97] A claim of due process violation is rejected when defendants traverse the high seas on stateless vessels with the intent to distribute illicit drugs anywhere in the world, therefore subjecting the ship's crew to the criminal jurisdiction of the United States.[98] Moreover, the Ninth Circuit agrees that the MDLEA provides for extraterritorial enforcement of United States drug laws, and there is generally no constitutional bar to such extraterritorial application of domestic penal laws.[99] The Ninth Circuit has subsequently demonstrated consistency regarding stateless vessels with the recognition that, because Congress is acting within its "authority … conferred by Article I, Section 8, Clause 10, . . . . there need be no nexus between the activities proscribed by the MDLEA and interstate or foreign commerce."[100]

However, prosecutors have encountered a tempered reception from the Ninth Circuit in the case of *United States v. Davis*,[101] involving the Myth of Ecurie ("Myth"), a sailing vessel of British registry apprehended on the high seas that was suspected of drug smuggling. The Coast Guard received permission from the United Kingdom to board the vessel in accord with a 1981 agreement between the United States and the United Kingdom, and seized bales of marijuana. The issue was whether the MDLEA applied to the facts in *Davis*, in light of Congress' authorization "to define and punish Piracies and Felonies on the high seas. . . ." U.S. Const. Art. I, sec. 8, cl. 10, together with its intent to give extraterritorial effect to the statute, which requires that federal law must comply with the due process clause of the Fifth Amendment.[102] The facts of *Davis* indicate that the vessel, on a list of boats suspected of drug smuggling, was sailing toward San Francisco when the crewmembers abruptly changed

[97] *Id*. at 372. Decisions cited by the Ninth Circuit are United States v. Victoria, 876 F.2d 1009, 1010-11 (1st Cir. 1989); United States v. Alvarez-Mena, 765 F.2d 1259, 1265 (5th Cir. 1985); United States v. Pinto-Mejia, 720 F.2d 248, 261 (2d Cir. 1983), *modified*, 728 F.2d 142 (2d Cir. 1984); United States v. Marino-Garcia, 679 F.2d 1373, 1383 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983); United States v. Howard-Arias, 679 F.2d 363, 371-72 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982).

[98] *Id*. at 373. The Ninth Circuit notes that the defendants should have been on notice that trafficking in controlled substances is universally condemned and could be prosecuted even though the act is committed outside the territorial jurisdiction under United States, citing 46 U.S.C. app. § 1902 (codified at 46 USC § 70503(b) (2017) in effect treating drug trafficking as a form of piracy subject to universal jurisdiction.

[99] United States v. Medjuck, 156 F.3d 916, 919 (9th Cir. 1998).

[100] United States v. Moreno-Morillo, 334 F.3d 819, 824 (9th Cir. 2003). The Ninth Circuit's analysis of Congress' authority is consistent with the more conservative appellate courts. *See, e.g*., United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) ("[T]o the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause".).

[101] United States v. Davis, 905 F.2d 245 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

[102] *Id*. at 248.

course for the Caribbean by way of Mexico.[103] The boat appeared to be carrying cargo, supporting a reasonable suspicion that the Myth was transporting illicit drugs, sufficient to establish a nexus between the sailing vessel and the United States.[104]

In subsequent decisions, the Ninth Circuit acknowledges that, while the MDLEA contains no specific due process assessment, "[t]he nexus requirement is a judicial gloss applied to ensure that a defendant is not improperly haled before a court for trial."[105] However, characterization of a nexus requirement as a judicial gloss is not a foregone conclusion in the application of the MDLEA. An investigation of a vessel registered in a foreign nation must satisfy the requirement, demonstrated at an evidentiary hearing and subject to rebuttal by a defendant to confront witnesses, by offering supportive evidence of a nexus between the conduct condemned and the United States.[106] Facts sufficient to establish the required nexus between the United States and a defendant's drug-smuggling activities are case specific, "analogous to 'minimum contacts' in personal jurisdiction analysis."[107] Succinctly, a trial court cannot conclude that the Government need not show a nexus, an essential part of the jurisdictional analysis in the Ninth Circuit, because a foreign nation has consented or given a waiver of objection to the enforcement of United States law with respect to a foreign-flagged vessel.[108] Failure of prosecutors to present any evidence indicating that illicit drugs onboard or connected to a vessel has any nexus to the United States is clearly erroneous and not a matter of harmless error.[109] While some legal scholars have criticized the imposition of a nexus requirement,[110] the evidentiary challenges are not insurmountable for prosecutors to show that a defendant is engaging in drug smuggling activities in international waters to

[103] *Id*. at 247

[104] *Id*. at 250. The circuit court also dismissed Davis' claim a search and seizure of nonresident aliens on the high seas violated Fourth Amendment requirements, referring to United States v. Verdugo-Urquidez, 494 U.S. 259, 264-75 (1990) that the Amendment does not apply to searches and seizures of nonresident aliens in foreign countries.

[105] United States v. Klimavicious-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998). The Ninth Circuit references United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995), the government must prove "a connection between the criminal conduct and the United States sufficient to satisfy the United States' pursuit of its interests" a nexus requirement that is determined by the court, not a jury.

[106] United States v. Medjuck, 156 F.3d 916, 918-20 (9th Cir. 1998).

[107] United States v. Zakhorov, 468 F.3d 1171, 1179 (9th Cir. 2006).

[108] United States v. Perlaza, 439 F.3d 1149, 1168-69 (9th Cir. 2006).

[109] *Id*. at 1169.

[110] *See e.g*., James A. Tate, Comment, *Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas*, 77 U. CIN. L. REV. 267, 296 (2008) (argues for eliminating the nexus requirement imposed by the Ninth Circuit when applying the MDLEA, characterizes the requirement as a barrier that hinders counter-narcotics activity of the United States and its international partners).

support a claim of U.S. jurisdiction before the Ninth Circuit.[111] Cases in which prosecutors have offered evidence to fulfill a nexus requirement and satisfy jurisdictional issues have met with success before the Ninth Circuit, an outcome that some critics have glossed over in their scrutiny of the court's concern for defendants being improperly haled before a federal court for trial.[112]

C. *Semi-submersible Vessels: New Pirates on the High Seas*

Despite ongoing litigation over the MDLEA, the Coast Guard's mission maintains various countermeasures to expand its interdiction capacity by way of intelligence operations, agreements with other Western Hemisphere countries, and strategic deployment of personnel to detect an array of vessels trafficking in illicit drugs.[113] Although fishing trawlers, sailboats, and cargo ships remain a staple among cartels, the high stakes of maritime drug trafficking requires smugglers to use advanced technology and place a greater reliance on speed boats and similarly styled vessels.[114] In the 1980s, there were indications that cartels were using unmanned submarines built for hiding contraband while being towed in deep waters behind other vessels.[115] However, the discovery of a submersible ship under construction in Colombia,[116] and the interception of a self-propelled semi-submersible (SPSS) transporting cocaine in November 2006 100 miles offshore of Costa Rica,[117] made clear that cartels introduced a "game changer" for law enforcement.[118] Interdiction of SPSS is less successful because crewmembers will scuttle the vessel with its cargo in deep waters where salvage attempts to retrieve evidence are virtually impossible.[119] A lack of contraband

[111] *See e.g.*, John O'Neil Sheehy, *False Perceptions on Limitation: Why Imposing a Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts to Prosecute Maritime Drug Trafficking*, 43 CONN. L. REV. 1677 (2011) (the Ninth Circuit nexus requirement as a standard for securing jurisdiction under the MDLEA is not likely to discourage efforts in combating maritime narcotics trafficking).

[112] United States v. Klimavicious-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

[113] U.S. Dep't of State, 2017 Report, *supra* note 79.

[114] *SELF-PROPELLED SEMI-SUBMERSIBLE (SPSS) WATERCRAFT*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/para/spss.htm.

[115] *Creative Drug Smugglers turn to Submarines*, UPI Archives, UNITED PRESS INTERNATIONAL (Nov. 11, 1988), http://www.upi.com/Archives/1988/11/11/Creative-drug-smugglers-turn-to-submarines/8252316907705/.

[116] *Drug Submarine Found in Colombia*, BBC NEWS, (Sept. 7, 2000), http://news.bbc.co.uk/1/hi/world/americas/915059.stm.

[117] Craig Collins, *Twilight of the Semi-submersible?,* DEFENSE MEDIA NETWORK, (Nov. 21, 2010), http://www.defensemedianetwork.com/stories/twilight-of-the-semi-submersible/; *Submarine with Cocaine Seized off Costa Rica: Makeshift Vessel Carrying 3 Tons of Drugs En Route from Colombia to U.S.*, NBCNEWS.COM, (Nov. 20, 2006), http://www.nbcnews.com/id/15811689/#.WXv1AVGQxhF.

[118] Matthew Harwood, *Drug War's Rough Waters*, SECURITY MGMT., (June 1, 2009), https://sm.asisonline.org/Pages/Drug-Wars-Rough-Waters.aspx.

[119] *Id.*

or a confession has resulted in crewmembers being treated as innocent seafarers, converting a smuggling investigation into a search-and-rescue operation, and returning drug-running mariners home without prosecution.[120] The inability to prosecute SPSS crewmembers, coupled the national security concerns associated with illicit drugs, prompted Congress to fire "a shot across the bow" by enacting the Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA)[121] which criminalizes the operation of any stateless semi-submersible vessel on the high seas with the intent to evade detection.[122] The DTVIA defines semi-submersible vessel as:

> any watercraft constructed or adapted to be capable of operating with most of its hull and bulk under the surface of the water, including both manned and unmanned watercraft. . . . [T]he term "submersible vessel" means a vessel that is capable of operating completely below the surface of the water, including both manned and unmanned watercraft.[123]

Proscribing the operation of a stateless SPSS empowers the Coast Guard[124] embarked on patrols in the eastern Pacific Ocean and the Caribbean to arrest

[120] *Id*.

[121] Pub. L. No. 110-407, 122 Stat. 4296 (2008) (codified at 18 U.S.C.A. § 2285 (2017)). In 46 U.S.C. § 70501 Congress declared that:

(1) trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States and (2) operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.

[122] Section 2285(a) provides that:

Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.

[123] 46 U.S.C. § 70502(f)(1)(2).

[124] Note that SPSS are also investigated by the Panama Express South Strike Force, a standing Organized Crime Drug Enforcement Task Forces (OCDETF) investigation comprised of agents and analysts from the Federal Bureau of Investigation, the Drug Enforcement Administration, Homeland Security Investigations, the United States Coast Guard Investigative Service, the Naval Criminal Investigative Service, and U.S. Southern Command's Joint Interagency Task Force South. The principal mission of the OCDETF program is to identify, disrupt, and dismantle the most serious drug trafficking and money laundering organizations and those primarily responsible for the nation's drug supply. The Panama Express (PANEX) in Tampa, Florida is the premier multi-agency interdiction operation implementing the Florida Caribbean Region's strategic initiative for targeting maritime narcotics transportation. *See e.g.*, U.S. DEPT. OF JUSTICE, FY 2012 Interagency

traffickers that are commonly navigating the coastline of South and Central America, destined to offload drugs on Mexico's southern seashores.[125]

Despite the location of detection, litigation of the DTVIA has been restricted within the Eleventh Circuit, as prosecutors have elected to limit venue on the prediction that federal courts in the jurisdiction will support congressional authority to enact a statute with extraterritorial application to crimes on the high seas.[126] The first significant case, *United States v. Ibarguen-Mosquera*,[127] involved a SPSS initially observed navigating in the Eastern Pacific Ocean, about 163 nautical miles off the coast of Columbia. While under observation, the crewmembers scuttled the vessel to evade criminal charges, abandoned ship to await a rescue by Coast Guard personnel, and were flown to Tampa, Florida where they were promptly arrested on January 14, 2009.[128] On appeal, the defendants claimed that the DTVIA exceeds congressional power, failing to conform to the due process clause with respect to satisfying a nexus requirement based in theory on the objective principle, and the requirement that the crime be universally condemned from the protective principle.[129] Recalling its analysis in *United States v. Marino-Garcia*,[130] the Eleventh Circuit held that the objective, protective, and territorial principles are not applicable to stateless vessels that

Crime and Drug Enforcement Congressional Budget Submission at 27 (2012), https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/23/fy12-ocdetf-justification.pdf.

[125] Meghann Myers, *Coast Guard Cutter Busts Fifth Cocaine Sub in Less Than a Year*, NAVY TIMES (March 28, 2016), http://www.navytimes.com/news/your-navy/2016/03/28/coast-guard-cutter-busts-fifth-cocaine-sub-in-less-than-a-year/. Officials estimate while the Coast Guard is able to get intelligence on 90 percent of drugs coming through the Pacific from South America, interdiction occurs in only 20 percent of the investigations.

[126] Prosecutors dealing with the issue of venue rely on 18 U.S.C. § 3238 (2017) which states that a "trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought . . . ." The power to select the venue is a lawful means of forum shopping, allowing prosecutors to avoid the Ninth Circuit judges that may be incline to question the outer limits of Congress' authority with respect to Clause 10. *See e.g.*, United States v. Lee, 472 F.3d 638, 644-45 (9th Cir. 2006) (plain reading of the statute, although not defining the term "district", American Samoa is not a district for the purposes of § 3238, prosecutors successfully argued that defendant's was properly tried and convicted in the Hawaii District Court for committing federal crimes in American Samoa."). *see also* Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 352-56 (2008) (commenting on American Samoa residents not afforded the opportunity to be tried by a jury of their peers as an act of rendition, violating the right to a jury of one's peers).

[127] United States v. Ibarguen-Mosquera, 634 F.3d 1370 (11th Cir. 2011).

[128] *Id*. at 1376-77.

[129] *Id*. at 1378.

[130] 679 F.2d 1373 (11th Cir. 1982).

have no international recognition to navigate freely on the high seas.[131] Because international law permits any nation to subject stateless vessels on the high seas to its jurisdiction, the DTVIA does not offend the due process clause of the Constitution.[132] Moreover, the assertion that Congress exceeded its legislative powers when enacting the DVTIA as a violation of the due process clause "because the phrases 'semi-submersible vessel' and 'intent to evade' are vague and are thus subject to arbitrary enforcement"[133] was found to be meritless. The Eleventh Circuit's assessment of the statute's plain language and facts in the case determined that the phrase 'semi-submersible vessel' is not vague as applicable to the defendants and the attributes of a SPSS, as well as actions of the crewmembers commonly recognized as smuggling tactics, may provide prima facie evidence of intent to evade Coast Guard officials.[134] Finally, the court found that Congress' power to criminalize the act of operating a stateless SPSS does not violate substantive due process rights; noting that the DTVIA is rationally related to a legitimate government interest.[135] The Eleventh Circuit observed that:

> Congress has found that operating such vessels is a 'serious international problem, facilitates transnational crime . . . and presents a specific threat to the safety of maritime navigation and the security of the United States.' 46 U.S.C. § 70501. These types of ships have no utility other than the transport of drugs or weapons. . . . They are capable of traveling long distances without refueling, are difficult to detect, and are easily disposable upon detection. . . . Clearly the government's interest in eliminating the use of these types of vessels is legitimate, and the statute is narrowly tailored to suit that interest.[136]

Therefore, the DTVIA satisfies due process challenges "to prohibit an entirely new evil" separate from the underlying reason (drug trafficking, weapons trafficking, or human smuggling), to forbid traveling on a stateless SPSS vessel.[137]

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[131] United States v. Ibarguen-Mosquera, 634 F.3d at 1379. *See also* Marino-Garcia, 679 F.2d at 1382.

[132] United States v. Ibarguen-Mosquera, 634 F.3d at 1379.

[133] *Id*. at 1380.

[134] *Id*. at 1380-81.

[135] *Id*. at 1382. Writing for the panel, Chief Judge Joel Fredrick Dubina makes clear that "Congress chose to prohibit an entirely new evil," the piloting of and/or traveling on semi-submersible vessels, commenting that a rational basis "is not a rigorous test and is generally easily met" satisfying substantive due process requirements to criminalize the use of these vessels.

[136] *Id*. (citations omitted).

[137] *Id*. at 1381. Additional due process and evidentiary claims are addressed by the panel but found to be without merit.

In *United States v. Saac*,[138] four Colombian co-defendants were observed onboard a SPSS that was stalled in the international waters of the Eastern Pacific Ocean. When Coast Guard investigators approached, crewmembers scuttled the vessel and were subsequently taken to the U.S. District Court for the Middle District of Florida.[139] The defendants were charged with conspiring to operate a semi-submersible vessel, and knowingly and intentionally, while aiding and abetting each other, operating and embarking in a semi-submersible vessel without nationality with the intent to evade detection in violation of the DTVIA.[140] The defendants asserted that Congress exceeded its power under the High Seas Clause, Article I, § 8, cl. 10 when passing the DTVIA. The circuit court in *Saac* expectedly ruled that the Constitution grants Congress the power to define and punish acts of piracy and pass laws punishing pirates regardless of nationality, even where they have committed no particular offense against the United States.[141] Citing a consensus among the circuits, the panel in *Saac* also notes that Clause 10 makes no reference to a jurisdictional nexus requirement to enforce the DTVIA.[142] In fact, the court makes a sweeping recognition of Congress's power under the High Seas Clause to punish offenses other than piracies beyond the territorial limits of the United States.[143] As a matter of deference to legislation criminalizing conduct in connection to the high seas, the court accepts Congress' findings that the DTVIA targets criminal conduct that enables drug trafficking, which is condemned universally by law-abiding nations.[144] Moreover, the Eleventh Circuit justifies its support for the law under the "protective principle" of international law that recognizes a nation may "assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions" as an equally compelling reason to uphold the statute.[145] Succinctly, "[t]he protective principle does not require that there be proof of an actual or intended effect inside the United States,"[146] and therefore allows for a glossing over extraterritorial arguments in support of a nexus requirement in light of Congress' constitutional authority under the High Seas Clause to enact the DTVIA.

[138] United States v. Saac, 632 F.3d 1203 (11th Cir. 2011), *cert. denied*, Renegifo v. United States, 2011 U.S. LEXIS 5663 (U.S., Oct. 3, 2011).

[139] Defendants were flown to Tampa, Florida, formally placed under arrest on arrival, entering unconditional guilty pleas without plea agreements to charges before the same district court that held defendants guilty in United States v. Ibarguen-Mosquera.

[140] *Id.* at 1207.

[141] *Id*. at 1209.

[142] *Id*. at 1210-11.

[143] *Id*. at 1210.

[144] *Id*. (citing United States v. Estupinan, 453 F.3d 1336, 1339 (11th Cir. 2006), citing Martinez-Hidalgo, 993 F.2d at 1056).

[145] *Id*. at 1211 (citing United States v. Gonzalez, 776 F.2d 931, 938 (11th Cir. 1985)).

[146] *Id*. (citing Gonzalez, 776 F.2d at 939).

In subsequent reviews, the Eleventh Circuit has remained steadfast in its analysis that the DTVIA does not violate substantive due process rights because it is rationally related to a legitimate government interest to criminalize the piloting of SPSS for smuggling operations in international waters.[147] Furthermore, the circuit court is dismissive of the procedural due process concern that the DTVIA unconstitutionally shifts the burden to a defendant to prove he is not involved in illegal conduct.[148] Foreclosing the possibility of constitutional challenges to its decisions in *Ibarguen-Mosquera* and *Saac*, the piloting of a semi-submersible vessel without nationality in international waters with no flag, no registration number, no homeport, and no navigational lights is prima facie evidence of evading detection.[149] Dismissing constitutional arguments is an indication that SPSS crewmembers may encounter substantial punishment for drug smuggling in accord with federal sentencing guidelines without the benefit of fundamental constitutional safeguards.[150] Thus, the Eleventh Circuit is willing to accept Congress' authority to broadly criminalize conduct associated with maritime drug trafficking, and allow the Coast Guard to exercise far-reaching enforcement powers to interdict vessels on the high seas and/or in the territorial seas of another nation-state. As a result, district courts in the Eleventh Circuit may no longer be concerned with questions regarding the DTVIA and extraterritorial jurisdiction over crewmembers, or other issues related to piloting semi-submersible vessels apprehended by U.S. Coast Guard personnel for prosecution under United States law.[151]

[147] United States v. Campaz-Guerrero, 424 F. App'x 898, 901 (11th Cir. April 22, 2011) (unpublished), *cert. denied*, Campaz-Guerrero v. United States, 2011 U.S. LEXIS 5919 (U.S. Oct. 3, 2011).

[148] *Id*. Citing United States v. Ibarguen-Mosquera, 634 F.3d at 1381-82.

[149] United States v. Valarezo-Orobio, 635 F.3d 1261, 1262-63 (11th Cir. 2012) (crewmembers on a SPSS with no flag nor markings of registry visible on the vessel in international waters satisfies the statutory term "intent to evade"); Campaz-Guerrero, 424 F. App'x at 902 (piloting a semi-submersible vessel that had no navigational lights, lacked registration numbers, and/or other markings, satisfying the statute's "intent to evade detection").

[150] *See e.g*., Estupinan-Gonzalez v. United States, No. 17-15586-J, 2018 U.S. App. LEXIS 33582, at *13-15 (11 Cir. Nov. 28, 2018) (associated with a claim of ineffective counsel, the court dismisses defendant's challenge to semi-submersible vessel that is without nationality, operating beyond the territorial sea of a single country). *See also* United States v. Valencia, 686 F. App'x 829 (11th Cir. April 28, 2017) (unpublished) (sentencing a crewmember of a semi-submersible vessel that was transporting cocaine in violation of his supervised release for a new criminal offense).

[151] In United States v. Perlaza, 363 F. Supp. 3d 1344, 1347-51 (M.D. Fla. 2019), the court rejects constitutional challenges previously reviewed in Saac and Ibarquen-Mosquera pertaining to the DTVIA. Riascos v. United States, No. 8:14-cv-2558-T-27JSS, 2017 U.S. Dist. LEXIS 169857, at *5-9 (M.D. Fla. Oct. 13, 2017), rejects a claim of jurisdiction, the vessel was seized within the territorial waters of Colombia. The district court in United States v. Garcia, No. 8:11–CR–572–T–17–MAP, 2012 WL 1890585 (M.D. Fla. 2012), unconcerned with demands that foreign naval personnel to transfer custody of crewmembers piloting semi-

## III. A REGIONAL RESPONSE TO MARITIME DRUG PIRATES

While selectively restricting prosecutions among the circuit courts may avoid conflicting opinions across jurisdictions, scholars remain troubled by the prospect that fundamental constitutional issues allowing defendants to exploit due process concerns and transform the high seas into a sanctuary highway for drug trafficking pirates exist.[152] Moreover, the lack of a nexus requirement bypassing procedural due process challenges is further complicated with multiple border crossings, as well as expansive U.S. operational involvement in a region that is dependent on collaborative initiatives among countries that periodically experience political instability.[153] Existing regional agreements with respect to U.S. operations relying on a presumptive nexus requirement would enhance diplomatic relations and avoid having federal circuit courts justify their decisions on the universal principle of international law.[154] A presumptive nexus requirement supports Congress' power to criminalize drug trafficking under the High Seas Clause in recognition of conduct that is condemned universally and legitimizes the extraterritorial reach of U.S.

submersible vessels to U.S. Coast Guard personnel for prosecution under United States law, adopted the report and recommendation of the magistrate without any further explication. According to the magistrate, existing international law governing the conduct of flagged vessels and their crew did not apply to stateless vessels operating as international pariahs with "no known rights to navigate freely on the high seas," referencing United States v. Ibarguen–Mosquera, 634 F.3d 1370, 1379 (11th Cir.2011), quoting United States v. Marino–Garcia, 679 F.2d 1373, 1382 (11th Cir.1982). United States v. Montano-Ortiz, No. 8:09-CR-5-T-17EAJ, 2009 U.S. Dist. LEXIS 137825, at *2-6 (M.D. Fla. Apr. 2, 2009), rejecting arguments that terms of the statute are vague or fail to give notice that operating a semi-submersible vessel is a crime.

[152] *See e.g.*, Casavant, *supra* note 15, at 232-34. Casavant takes issue with the Eleventh Circuit decision in United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1257 (11th Cir. 2012), that in his view undermined the authority of other U.S. criminal prohibitions because the court is of the opinion that Congress exceeds its authority under the Piracies and Felonies Clause to apply our drug trafficking laws to conduct in the territorial waters of another State. The author also cites United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056-57 (3d Cir. 1993), regarding the destabilizing effect that maritime drug traffickers present to the United States and its regional partners if Fifth Amendment due process concerns placed strict limitations on Congress' power to define and punish Piracies and Felonies committed on the high seas. However, the court recognizes that Congress does not have unlimited power to declare that conduct on the high seas is a criminal offense and thus subject to prosecution under U.S. law.

[153] Arthur J. Cook III, Note, *Drug Trafficking On The High Seas: How A Consolidation Of The Maritime Drug Law Enforcement Act And The Drug Trafficking Vessel Interdiction Act And A Statutory Nexus Requirement Will Improve The War On Maritime Drug Trafficking*, 10 LOY. MAR. L.J. 493, 508 (2012) (the author advocates for "a consolidation of both the MDLEA and DTVIA under a single, comprehensive 'umbrella' statute with a broad, presumptive nexus component based on a totality of the circumstances approach similar to that in Medjuck").

[154] *Id*. at 509.

maritime drug statutes.[155] Other concerns range from transforming the operation of a stateless vessel into a universal crime[156] to jurisdictional gaps over SPSS operating under a state's valid registration, which constitutes an affirmative defense under the DTVIA.[157]

An alternative to the jurisdictional quagmire that has existed over the past fifty years is establishing a regional tribunal with the power to preside over a range of transnational crimes, including maritime drug trafficking. Presently, there are no discussions underway within the Organization of American States (OAS) or other sub-regional organizations proposing a permanent regional tribunal to combat transnational crimes in the Western Hemisphere. However, OAS members may want to consider a dialogue to explore the possibility of empowering a court with broad jurisdiction over transnational crimes. Formation of an Inter-American Court of Criminal Justice (Inter-ACrtCJ) is a viable regional response to combat maritime drug trafficking and other transnational crimes.[158] Existing commitments require stakeholders to criminalize specific behaviors that are recognized as both transnational and domestic crimes.[159] Furthermore, criticism that beleaguers some tribunals may not be as formidable to overcome given that enforcement strategies against transnational crimes are a fundamental part of OAS policy regarding hemisphere security.[160] If OAS members consider establishing an Inter-ACrtCJ, the

[155] Saac, 632 F. 3d at 1210.

[156] Allyson Bennett, Note, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 448-50 (2012) (identifying the generally accepted categories of universal crimes limited to piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism that are recognized under customary international law or a treaty obligation).

[157] 18 U.S.C. § 2285(e)(1) (2012) states that "[i]t is an affirmative defense to a prosecution for a violation of subsection (a), which the defendant has the burden to prove by a preponderance of the evidence, the submersible vessel or semi-submersible vessel involved was, at the time of the offense" a vessel of a foreign nation or met one of the listed exceptions. 18 U.S.C. §§ 2285(e)(1)(A)-2285(e)(1)(D) (2012).

[158] *See, e.g.*, Fernando A. Iglesias, Comments, *A Regional Criminal Court against Transnational Organized Crime*, FEDERALIST DEBATE, Mar. 2014, http://www.federalist-debate.org/index.php/component/k2/item/882-a-regional-criminal-court-against-transnational-organized-crime. As Vice President of Global Democracy, an independent organization that promotes democratic institutions, Iglesias outlines the branches of a proposed regional court, advocating ratification of a treaty to establish a regional court empowered to combat criminal organizations involved in human trafficking and drug trafficking.

[159] *See, e.g.*, Erin Creegan, *Permanent Hybrid Court for Terrorism*, 26 AM. U. INT'L L. REV. 237, 265-66 (2011).

[160] *Id.* at 262-65 (discussing obstacles confronting other tribunals that impede establishing a tribunal that may intrude on a nation-state's sovereignty).

following outlines the more pertinent aspects to be addressed by a committee or OAS Working Groups.[161]

A. *Jurisdictional and Substantive Issues*

Jurisdiction of an Inter-ACrtCJ should be limited to the most serious transnational crimes defined as "offences whose inception, prevention, and/or direct or indirect effects involve more than one country,"[162] taking special consideration of an offender's involvement in an organized criminal group.[163] The following, with one exception, are broad definitions and categories of serious transnational crimes acknowledged as obligatory for OAS members[164] to take domestic enforcement action against if a nexus exists involving more than one country:

1. Illicit Drug Trafficking:[165]

The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or

[161] *Id.* The discussion reflects some of the arguments and suggestions presented by Creegan.

[162] Ninth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Action Against National and Transnational Economic and Organized Crime, and the Role of Criminal Law in the Protection of the Environment: National Experiences and International Cooperation*, U.N. Doc. A/CONF.169/5 (Mar. 30, 1995), http://www.unodc.org/congress/en/previous/previous-09.html (outlining the various threats from transnational organized crimes that undermine public administration at all levels); *see also* United Nations Convention Against Transnational Organized Crime art. 2(b), Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209 [hereinafter UNCTOC] (defining serious crime as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty").

[163] Special consideration can be evidence of the offender's influence, control, or domain of a TOC group. *See* UNCTOC, *supra* note 162 at art. 2(a). The article defines organized criminal group as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

[164] Reference to international, regional agreements and others in this section form the consensus regarding legal commitments listed in Organization of American States Hemispheric Plan of Action on Drugs, 2011-2015, June 8, 2011, O.A.S.G.S. Res. 2621 (Sept. 30, 2019, 8:30 PM), http://www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-action_eng.asp [https://perma.cc/DKL5-QH9M] [hereinafter Hemispheric Plan of Action on Drugs 2011-2015].

[165] "Illicit [drug trafficking]" means cultivation or trafficking in drugs contrary to the provisions, including terms and substances, under control as identified in the United Nations Single Convention on Narcotic Drugs of 1961 art. 1(1), as amended by the 1972 Protocol, Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter Single Convention on Narcotic Drugs of 1961].

any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961Convention and the 1961 Convention as amended;

The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in [category1] above;

The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

The organization, management or financing of any of the offences enumerated in [categories 1, 2, 3, or 4] above.[166]

2. Operation of Submersible Vessel or Semi-submersible Vessel without Nationality:

Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection.[167]

[166] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990) [hereinafter U.N. Convention Against Illicit Traffic in Narcotic Drugs] (extending Inter-ACrtCJ jurisdiction over crimes committed with intent, knowledge, or purpose required as an element of an offense pertaining to illicit drug trafficking, criminalizing production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery manufacturing, possession, and distribution, for the purpose of the production of narcotic drugs).

[167] Operation of Submersible Vessel or Semi-submersible Vessel without Nationality Act, 18 U.S.C. § 2285 (2017). Operation of a submersible vessel is the exception to obligatory domestic enforcement action against serious transnational crimes. Moreover, the Inter-American Drug Abuse Control Commission approved model legislation to encourage Members to enact legislation to counter the threat posed by submersible vessels and semi-submersible vessels without nationality and consider applying extraterritorial jurisdiction that includes an attempt or conspiracy to commit such an offenses. *See* Organization of American States, Inter-American Drug Abuse Control Commission, Model Legislation on Self-Propelled Submersible and Semi-Submersible Vessels, OEA/Ser.L/XIV.2.49, CICAD/doc.1891/11 corr. 2 (June 30, 2011), http://www.cicad.oas.org/apps/Document.aspx?Id=1124 (advocating promulgation of domestic laws regarding submersible, semi-submersible vessels that is reflective of 18 U.S.C. § 2285 (2017)). Colombia enacted a statute prohibiting the construction, possession, or crewing a semisubmersible, punishable with penalties ranging from six to 12 years in prison, in response to maritime security threats as part of other preventive measures to combat terrorism, drug trafficking, piracy, and other threats. L. 1311, julio 9, 2009, DIARIO OFICIAL

3. Illicit Manufacturing of Weapons:

"Illicit manufacturing": the manufacture or assembly of firearms, ammunition, explosives, and other related materials:

from components or parts illicitly trafficked; or

without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or

without marking the firearms that require marking at the time of manufacturing.[168]

4. Illicit Trafficking of Weapons:

"Illicit trafficking": the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.[169]

5. Human Trafficking:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;[170]

[D.O.] (Colom.), https://docs.colombia.justia.com/nacionales/leyes/ley-1311-de-2009.pdf. The statute is a response to an increase in maritime drug smuggling through Colombian ports. *See* Julieta Pelcastre, *Colombian Authorities Shake up the Drug Trade*, DIGITAL MIL. MAG., June 19, 2017, https://dialogo-americas.com/colombian-authorities-shake-up-the-drug-trade/ (last visited Nov. 5, 2019).

[168] Organization of American States, Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials art. 1(1), *opened for signature* Nov. 14, 1997, 2029 U.N.T.S. 55 (entered into force July 1, 1998) [hereinafter CIFTA] (controlling trade in firearms, ammunition, explosives and related materials, requiring criminalization of illicit manufacturing and trafficking, and encouraging cooperation between state parties).

[169] *Id.* art. 1(2). CIFTA defines firearms as (a) "any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or (b) any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine." *Id.* art. 1(3).

[170] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Dec. 12, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol].

6. Money Laundering:

The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offense or offenses or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions; The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses or from an act of participation in such an offense or offenses and conversion or transfer of property derived from any offence or offences committed.[171]

7. Terrorism:

[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[172]

These categories, some lacking the specificity that is necessary in domestic penal codes, serve as a starting point for discussions to establish jurisdiction of an Inter-ACrtCJ. Limiting jurisdiction to serious transnational crimes with an emphasis on organized criminal enterprises should alleviate fears that peripheral offenders will be targeted in a dragnet by an Inter-ACrtCJ investigative body. Concerns of empowering prosecutors "so [that they] cometh as a thief in the night"[173] arresting common criminals, with States acting as a centurion protecting their nationals have not been a substantial problem for other tribunals with jurisdiction over international crimes.

[171] U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 166, art. 3.

[172] U.N. High-Level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change*, at 49, U.N. Doc. A/59/565 (Dec. 2, 2004); *see also* Organization of American States Inter-American Convention Against Terrorism, art. 2, June 3, 2002 O.A.S.T.S. No. 1840 (stating parties agree to adopt the necessary measures and to strengthen cooperation among them, in accordance with the terms of this Convention accept pre-existing international agreements to define acts of terrorism).

[173] *See 1 Thessalonians* 5:2-4 (King James) ("For yourselves know perfectly that the day of the Lord so cometh as a thief in the night. For when they shall say, Peace and safety; then sudden destruction cometh upon them, as travail upon a woman with child; and they shall not escape. But ye, brethren, are not in darkness, that that day should overtake you as a thief."); *see also Matthew* 24:42-44 (King James) ("Keeping watch because as the owner of the house had you known at what time of night the thief was coming, you would keep watch and not have let his house be broken into at an hour when you do not expect him.").

A. *Enforcement, Power, and Capacity of an Inter-ACrtCJ*

An Inter-ACrtCJ's efficacy depends on OAS members' willingness to recognize the legitimacy of the court's powers, which will be evident by financial support because an Inter-ACrtCJ might require additional funding beyond the normal program-budget.[174] Cooperation, however, extends beyond acknowledgment of the powers of the Inter-ACrtCJ or budget concerns. The independence of a prosecutor, a part of transparency in government activities essential to respect for the rule of law,[175] requires the ability to investigate and/or submit charges *proprio motu* (on their own initiative) to an Inter-ACrtCJ. Prosecutors could honor requests of individual States, or the General Assembly, in a similar manner that investigations are initiated within the jurisdiction of the International Criminal Court (ICC), absent deferral of investigations or prosecution of offenders.[176] Otherwise, prosecutors may be reluctant to pursue investigations, as members might try "gaming" the inter-American system in a myriad of circumstances that are detrimental to the enforcement of the OAS's democratic norms.[177]

Advocates for an Inter-ACrtCJ should expect the court to encounter problems of capacity, absent a centralized law enforcement authority that can compel States to collaborate with investigations. For obvious reasons, issues of sovereignty prevent the formation of a separate enforcement agency that would be acceptable to OAS members. Consequently, domestic enforcement officials must be willing to assist with investigations, arrests, and prosecution of offenders. Scholars note the United States' record of taking a lead role in coordinating regional enforcement plans in light of threats from criminal

[174] *Organization of Central American States*, arts. 54(e), 55, 2 I.L.M. 235 (1963) (Sept. 30, 2019, 8:30 PM), http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp, [https://perma.cc/S8LQ-ELXR] [hereinafter O.A.S. Charter]. The General Assembly approves the program-budget of the Organization and determines the quotas of the Member States to contribute to the maintenance of the Organization, taking into account the ability to pay of the respective countries and their determination to contribute in an equitable manner. Decisions on budgetary matters require the approval of two thirds of the Member States. The OAS has a regular fund, which supports the General Secretariat, and a special funds (voluntary country contributions), for specific programs and initiatives.

[175] Organization of American States, Inter-American Democratic Charter art. 4, Sept. 11, 2001, 40 I.L.M. 1289.

[176] Rome Statute of the International Criminal Court arts. 12-16, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[177] Dexter S. Boniface, *The OAS versus ALBA: The Clash over Democracy and the Rule of Law in the Americas*, AM. POL. SCI. ASS'N ANNUAL MEETING PAPER (Am. Pol. Sci. Ass'n, New Orleans, L.A.), Sept. 4, 2012, at 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104502## (referring to former President Hugo Chávez's and President Daniel Ortega's dismissive actions toward the IACHR's efforts to protect democratic freedoms against authoritarian regimes).

organizations that have the potential to destabilize the Western Hemisphere.[178] Furthermore, the United States is the largest contributor to the OAS,[179] which includes support for coordinated action plans against transnational organized crime (TOC). Funding an Inter-ACrtCJ as a part of budget priorities to apprehend and prosecute offenders could be used by advocates to persuade Congressional leaders to support a regional tribunal as an alternative to broadening the United States' extraterritorial jurisdiction.[180] External agencies such as the International Criminal Police Organization (INTERPOL) can function as a subsidiary role in providing intelligence and surveillance operations to assist with enforcement actions.[181] INTERPOL-led operations target illicit drugs, weapons and other crimes across the Americas.[182] Therefore, an independent Inter-ACrtCJ that complements national criminal justice systems should not raise concerns in light of the aforementioned definitions of serious transnational crimes, need for enforcement, capacity of a tribunal dependent on OAS budgetary priorities and external contributions, and limits its mission to combat TOC in the region.

[178] *See generally* Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421 (2006).

[179] *See, e.g.*, PETER J. MEYER, CONG. RESEARCH SERV., R42639, ORGANIZATION OF AMERICAN STATES: BACKGROUND AND ISSUES FOR CONGRESS 5-7 (2013), http://fas.org/sgp/crs/row/R42639.pdf.

[180] KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 8-13 (2010); *But cf*. Julian Pecquet, *Panel Votes to Cut Funding to Organization of American States*, THE HILL: GLOBAL AFFAIRS (July 24, 2013), http://thehill.com/blogs/global-affairs/americas/313157-panel-votes-to-cut-funding-to-organization-of-american-states.

[181] Background information on INTERPOL is accessible at *Overview*, INTERPOL, http://www.interpol.int/About-INTERPOL/Overview (last visited Nov. 5, 2019). INTERPOL currently has 190 member countries ("members"), and receives statutory contributions and voluntary contributions donations. Estimates of operating revenue is reported under *Our Funding*, INTERPOL, https://www.interpol.int/About-INTERPOL/Funding (last visited Nov. 5, 2019).

[182] *See, e.g.*, *Drugs worth Nearly One Billion Dollars Seized in INTERPOL-led Operation across Central America and the Caribbean*, INTERPOL (July 2, 2013), https://www.interpol.int/en/News-and-Events/News/2013/Drugs-worth-nearly-one-billion-dollars-seized-in-INTERPOL-led-operation-across-Central-America-and-the-Caribbean; *see also INTERPOL-led Operation Targets Methamphetamine Production and Trafficking across Americas*, INTERPOL (Feb. 5, 2013), https://www.interpol.int/en/News-and-Events/News/2013/INTERPOL-led-operation-targets-methamphetamine-production-and-trafficking-across-Americas.

B. *The Long-arm of an Inter-ACrtCJ: Jurisprudence, Partnerships and Due Process of Law*

While a transnational criminal tribunal is a novel concept, proponents may want to consider empowering an Inter-ACrtCJ with an established norm of law: universal jurisdiction. Bestowing universal criminal jurisdiction to a tribunal is a focal point of concern dating back to the early years of the United Nations,[183] as well as a topic of polarization among States.[184] Commonly associated with international crimes,[185] some consider the empowerment of national courts with universal jurisdiction a necessity due to practical limitations of international tribunals to prosecute crimes involving mass atrocities.[186] Although some States disfavor granting recognition of universal jurisdiction to tribunals,[187] a distinction should be apparent with an Inter-ACrtCJ exercising universal jurisdiction over transnational crimes. First, the crimes and categories previously identified are the basis for criminal prosecutions among most States in the region. The affirmation of the Hemispheric Plan of Action on Drugs 2011-2015 Plan obligates States to adopt domestic legislation criminalizing offenses listed in the 1988 Convention.[188] Second, the cost previously alluded to in association with prosecuting offenders is a powerful incentive for States challenged by TOC

[183] G.A. Res. 260 (III) B, Study by the International Law Commission of the Question of an International Criminal Jurisdiction (Dec. 9, 1948), http://legal.un.org/docs/?symbol=A/RES/260(III) (considering the possibility of charging persons with genocide and other certain crimes under international law, requested the International Law Commission to study the feasibility of creating a judicial organ with jurisdiction conferred by international conventions, as well as the possibility of establishing a Criminal Chamber of the International Court of Justice).

[184] *See generally* Bernhard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT'L L. 67 (1990).

[185] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 cmts. c-g, 404 cmts. a-b, 423 (AM. LAW INST. 1987) (the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression without territorial, personal, or national-interest link to the crime in question when committed).

[186] Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 4-5 (2011). Claims of jurisdiction exercised by national courts under customary international law to assert universal jurisdiction for genocide, crimes against humanity, and war crimes is not addressed.

[187] Article 12(2) of the Rome Statute enables the International Criminal Court (ICC to exercise jurisdiction over nationals of non-consenting, non-States Parties, but the United States asserts that only States can invoke universal jurisdiction. *See* Olympia Bekou and Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter*, 56 INT'L AND COMP. L. Q. 49, 53 (2007); *see also* David Scheffer, *Staying the Course with the International Criminal Court*, 47 CORNELL INT'L L. J. 47, 65 (2002) (arguing that universal jurisdiction is exercised by States, not by a permanent tribunal).

[188] Hemispheric Plan of Action on Drugs 2011-2015, *supra* note 164, at 15. The other major treaties and protocols previously mention are listed in the Action Plan, and have been ratified by most of the O.A.S Members.

to grant the Inter-ACrtCJ universal jurisdiction.[189] Discussions at the OAS General Assembly's Forty-Third Regular Session on the regulation and/or legalization of illicit drugs indicate that some States are overwhelmed by transnational crimes, resulting in a prioritization of domestic concerns above enforcement against transnational criminal organizations. States in the region besieged by TOC should be eager to accept an ACrtCJ exercising universal jurisdiction and demonstrate a willingness to combat transnational crimes.[190]

Legal scholars note that U.S. Congressional officials have previously shown interest in establishing a treaty-based tribunal with jurisdiction over drug trafficking and other transnational crimes[191] Officials dedicating their legislative agenda to combating transnational crimes should support universal jurisdiction for an Inter-ACrtCJ to avoid the jurisdictional complexities associated with maritime laws that raise questions about the legitimacy of the extraterritorial jurisdiction of the United States. Domestic legislative responses alone in reaction to illicit drugs transported from South America to the United States through the Transit Zone are limited to combating TOC within a seven million square-mile area about twice the size of the continental United States.[192]

The DTVIA is, at best, a response to the increase in maritime trafficking of illicit drugs through the Transit Zone that is stretching the outer limits of U.S. jurisdiction.[193] Other attempts to close loopholes to avoid safe harbors for offenders are a tailored response to the inherent global nature of drug trafficking.[194] Legislative initiatives will undoubtedly face challenges in

[189] Langer, *supra* note 186, at 6-7. The author's assessment of universal jurisdiction for international crimes is applicable to transnational crimes.

[190] M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 17-18 (1991) (indicating the acceptance among Latin American nations of a regional court to prosecute international trafficking in drugs and terrorism).

[191] *Id*. at 14-17.

[192] *Transit Zone Operations*, WHITE HOUSE OFFICE OF NATIONAL DRUG CONTROL POLICY, https://obamawhitehouse.archives.gov/ondcp/transit-zone-operations (last visited Nov. 5, 2019). The Transit Zone includes the Caribbean Sea, the Gulf of Mexico, and the Eastern Pacific Ocean.

[193] The Findings and Declarations of the Act of Oct. 13, 2008, Pub. L. No. 110-407, § 101, 122 Stat. 4296 (2008), provides: "Congress finds and declares that operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States."

[194] *See, e.g*., The Drug Trafficking Safe Harbor Elimination Act, H.R. 313, 112th Cong. (2011). The Safe Harbor Elimination Act proposed to amend Section 846 of the CSA to clarify that persons who enter into a conspiracy within the United States to traffic illegal controlled substances outside the United States, or engage in conduct within the United States to aid or abet drug trafficking outside the United States, may be criminally prosecuted in the United States. The legislation was referred to the Senate Committee on the Judiciary, S. 1672, 112th Cong. (2011), which took no action.

applying the extraterritorial jurisdiction of the United States with respect to rule of law issues,[195] or from the ongoing dynamics of criminal enterprises. The power of an Inter-ACrtCJ with universal jurisdiction prevents parts of the Americas from becoming a safe haven for traffickers whose crimes take place within the region as well as outside of it. States wishing to prosecute cases involving transient actors engaged in serious transnational crimes can avoid navigating domestic jurisdictional pitfalls by transferring cases to the Inter-ACrtCJ.[196]

Subjecting nationals to Inter-ACrtCJ jurisdiction, however, raises questions of fundamental rights of due process of law.[197] For example, Article 3 of the 1988 Convention establishes subject matter jurisdiction over international drug trafficking and related offenses.[198] A treaty-based tribunal will require OAS members to adopt domestic legislation recognizing the Inter-ACrtCJ's jurisdiction over these offenses occurring in their respective territory.[199] In compliance with fundamental rights of due process, a review in national courts is necessary to ensure that prosecution of crimes before the Inter-ACrtCJ establishes a nexus with serious international organized criminal activities. Some OAS members may object to an absence of a right to a jury trial that to date is not part of international criminal adjudication.[200] Appeals could be

[195] *See, e.g.*, John O'Neil Sheehy, Note, *False Perceptions on Limitation: Why Imposing A Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts To Prosecute Maritime Drug Trafficking*, 43 CONN. L. REV. 1677, 1694-1700 (2011) (illustrating the practical considerations of satisfying the statutory jurisdiction requirements and extradition agreements in relation to the MDLEA).

[196] *See, e.g.*, United States v. Lopez-Vanegas, 493 F.3d 1305, 1313 (11th Cir. 2007). Drug conspiracy convictions were vacated, holding that "the object of the conspiracy was to possess controlled substances outside the United States with the intent to distribute outside the United States, there is no violation of § 841(a)(1) or § 846" find no nexus to apply extraterritorial jurisdiction. Failed prosecutions led to proposal of the Safe Harbor Elimination Act to amend existing law, but may not satisfy fundamental constitutional requirements to establish a nexus to apply extraterritorial jurisdiction.

[197] *See, e.g.*, Patricia M. Wald, *International Criminal Courts: A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (2006) (explaining the development of international criminal courts and her experience as a judge on one of three courts - the Yugoslav Tribunal in the Hague, she acknowledges that while some fundamental due process guarantees are not included in the procedures of the ICC such as "rights of jury trial, protection against double jeopardy, and the rejection of hearsay evidence" these same rights are not "granted to defendants in the rules for U.S. military tribunals authorized for non-citizen perpetrators of war crimes since 9/11").

[198] U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 166, arts. 5(a)-(e).

[199] *Id*. art. 3(1).

[200] Amy Powell, Note, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. REV. 2341, 2378-79 (2004) (extolling the virtues of jury trials, suggests that inclusion of a jury ought to be considered "where the State of the accused and/or the State where the crime was committed have a tradition of juries."); William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15

limited, a practice already established for some domestic actions, to avoid litigious efforts that delay prosecution without violating due process rights of defendants.[201] In addition, empowering the Inter-ACrtCJ with universal jurisdiction would give the tribunal the authority to compel States to cooperate, including in the arrest and surrender of offenders.[202] States choosing not to recognize the Inter-ACrtCJ jurisdiction, however, would be prohibited from undermining enforcement efforts by creating bilateral agreements to avoid having their nationals surrendered by other States to the court.[203]

Finally, the issue of where to confine defendants during pretrial and post-trial stages of litigation presents security problems for OAS members. A possible solution is to use existing facilities at Guantánamo Bay Naval Base (Gitmo). Controversies surrounding the facilities at Gitmo have focused on fundamental rights of detainees.[204] Conditions under which detainees were held have

EUR. J. INT'L L. 701, 712 (2004) (noting that not among the "feeble" arguments cited as part of official policy, the absence of a jury trial is of concern among legal commentators); Chenyu Wang, Note, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 402 (2012) (in arguing for unanimity jury verdicts, the author notes that most foreign jurisdictions do not conduct jury trials, and where utilized a less that unanimous verdict is the norm).

[201] *See, e.g.*, Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008) (waiver by Michael Chertoff, Secretary of Homeland Security, of numerous federal environmental laws, to construct fences and roads along the U.S.-Mexico Border within a conservation area, under the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (codified at 8 U.S.C. § 1103 note (2012)). Section 102 of the REAL ID Act amended section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, 3009-554 (codified at 8 U.S.C. § 1103(c)(2)(A)(C) (2012)) gives district courts of the United States exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to waiver of environmental laws limiting appellate review only upon petition for a writ of certiorari to the Supreme Court of the United States. *See also* Rome Statute, *supra* note 176, arts. 88-92.

[202] Rome Statute, *supra* note 176, arts. 86, 89.

[203] *See generally* David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033 (2004) (On August 3, 2002, President Bush signed the American Servicemembers' Protection Act of 2002 (ASPA), prompting the United States to create a blanket exempt from the ICC jurisdiction by entering into Article 98 agreements in conformity with the Rome Statute. The ASPA authorizes the withdrawal of military aid to countries that have not entered into an Article 98 agreement, some of these countries are Latin American nations whose military assistance is critical to combating drug trafficking).

[204] Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006) ("Exigency of war will not alone justify the establishment and use of penal tribunals not contemplated by the Federal Constitution's Article I, § 8 and Article III, § 1 of the Constitution unless some other part of the Constitution authorizes a response to the felt need." Such authority derives only from powers granted jointly to the President and Congress in time of war as enumerated in the Constitution); Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (while no bar exists to holding citizens as an enemy

improved, and are not likely to be the subject of future domestic litigation.[205] More importantly, leasing Gitmo facilities to the OAS would not lead to further litigation among member states with respect to judicial and enforcement personnel, as well as detainees under the jurisdiction of the Inter-ACrtCJ.[206] The remoteness, fortification of detention units, and the absence of external jurisdiction over inmate-nationals makes Gitmo or similar facilities a viable means to incapacitate detainees that have committed offense across a range of transnational crimes.

## CONCLUSION: STRENGTHENING THE INSTITUTIONAL RESPONSE TO COMBAT PIRATES ON THE HIGH SEAS

Existing institutional structures within the OAS largely play a supportive role, reaffirming the aspirational principle that the solidarity of the American States and the high aims sought through the OAS are reflective of representative democracy.[207] Mindful of its mission, the OAS gives homage to sovereignty acknowledging that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[208] Avoidance of intervention is broadly applied to include coercive measures of an economic or political character, use of force, or threats against the personality of the State or against its political, economic, and cultural elements.[209] As a form of government, representative democracy best expresses the "legitimate and free manifestation of the will of the people."[210] A sudden or irregular interruption of the legitimate exercise of power by democratically elected governments of OAS members requires the Secretary General to call an immediate ad hoc meeting of Ministers of Foreign Affairs or the special session of the General Assembly to make decisions deemed appropriate, in accordance

combatant, "the writ of habeas corpus remains available to every individual detained within the United States.") (citation omitted).

[205] *See, e.g.*, Ben Fox, *Guantanamo Bay Chief Moves to Ease Conditions for Detainees; Movie Night for Good Behavior*, ASSOCIATED PRESS, July 4, 2007, https://www.chron.com/news/nation-world/article/Guantanamo-Bay-chief-moves-to-ease-conditions-for-1837301.php.

[206] Privileges, Exemptions, and Immunities of International Organizations, 22 U.S.C. § 288a (2012); O.A.S Charter, *supra* note 174, arts. 133-35 (expressing the legal capacity, privileges, and immunities of the OAS, representatives, and juridical status of the Specialized Organizations and their personnel while in the territory of each Member); *see also* William M. Berenson, *Squaring the Concept of Immunity with The Fundamental Right to a Fair Trial: The Case of the OAS*, 3 WORLD BANK LEGAL REV.: INT'L FIN. INSTS. & GLOBAL LEGAL GOVERNANCE 133-45 (2012).

[207] O.A.S. Charter, *supra* note 174, art. 3(d).

[208] *Id.* art. 19.

[209] *Id.* arts. 19, 20.

[210] *See* Organization of American States, The Santiago Commitment to Democracy and the Renewal of the Inter-American System, June 4, 1991, 1 AG/Res. 1080 (XXI-O/91), at 2.

with the Charter and international law.[211] An obvious concern is strengthening democracy to protect the peoples of the Western Hemisphere from criminal organizations that can interfere with domestic governing.[212] OAS organs fulfill this task in collaboration with states responding to serious transnational crimes that affect their national interests. The conventions previously cited are testaments to the international community's desire that States implement legislation targeting a continuum of transnational crimes, including the transportation of drugs on the high seas. States are free to establish extraterritorial criminal jurisdiction to combat international crimes within their own territory and outside their borders in other countries with consent of another State.[213] When acting alone or using coercive measures to pressure others in the region to capitulate to an OAS member's jurisdiction, a statute meant to extend substantive criminal jurisdiction extraterritorially does not automatically give rise to extra-territorial enforcement.[214] Law enforcement officers do not have unlimited authority to violate the territorial sovereignty of another foreign nation or to breach international law to suppress transnational crimes.[215] Coordination of enforcement of criminal statutes across jurisdictions is an enormous task that can strain the need for consensus with respect to multi-jurisdictional issues.[216]

Furthermore, despite relenting to the extraterritorial enforcement powers of dominant countries, there are States in the region susceptible to attacks by TOC groups that can directly challenge the capacity of public institutions with billions

[211] *Id*. at 4.

[212] *See generally Transnational Organized Crime: The Globalized Illegal Economy*, U.N. OFFICE ON DRUGS & CRIME (2013), http://www.unodc.org/toc/en/crimes/organized-crime.html (describing in part the global threat of TOC that can destabilize countries and entire regions) (last visited Nov. 5, 2019) [hereinafter Transnational Organized Crime: The Globalized Illegal Economy].

[213] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(1)-(2).

[214] Alvarez-Machain v. United States, 331 F.3d 604, 625 (9th Cir. 2003) (en banc) ("Extraterritorial application [of a criminal statute], in other words, does not automatically give rise to extraterritorial enforcement authority."), *rev'd on other grounds, sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[215] The Ninth Circuit suggests that the extraterritorial reach of substantive criminal laws and the reach of law enforcement is best achieved by cooperation is the form of "extradition pursuant to a treaty or local statute, formal deportation, and revocation of passports—to purely diplomatic tactics, such as informal deportation and negotiation." *Id.* n. 26.

[216] Neil Boister, *Transnational Criminal Law?*, 14 EUR. J. INT'L L. 953, 958-59 (2003), http://www.ejil.org/pdfs/14/5/453.pdf ("definitional incoherence or ambiguity" and poorly developed penal systems may explain why States show little interest harmonizing domestic codes in conformity with a specific suppression convention that is "developed in relative isolation from conventions dealing with other threats").

of profits from illicit businesses.[217] TOC "threatens peace and human security, leads to human rights violations, and undermines the economic, social, cultural, political and civil development of societies around the world. The vast sums of illicit profits can compromise legitimate economies and have a direct impact on governance, such as through corruption and the 'buying' of elections."[218] Establishing an Inter-ACrtCJ is a viable response to advance a unified front against maritime drug trafficking and other forms of transnational crimes[219] A criminal tribunal as part of the OAS is compatible with its purposes of strengthening democracy, joining with restorative efforts to preserve democratic institutions, and ensuring that criminal enterprises do not operate with impunity.[220] Obviously, a myriad of legal questions will surface as OAS Working Groups consult on implementing a treaty-based tribunal. Understandably, any proposals must conform to existing international legal principles and complex domestic justice systems in the region. In comparison to the ICC, the task should be less burdensome, considering the inherent functions of representative democracy that are supportive of the rule of law.[221] Maritime drug piracy and its connection with other forms of transnational crimes lend support to beginning a dialogue regarding the need for a regional tribunal to combat TOC throughout the Americas. Those familiar with the complexities of

[217] *See Transnational Organized Crime: The Globalized Illegal Economy*, *supra* note 212. Recent estimates note that TOC generates $870 billion a year - more than six times the amount of official development assistance, about 7 per cent of the world's exports of merchandise.

[218] *Id*.

[219] Int'l Narcotics Control Bd., Report of the International Narcotics Control Board for 1996, ¶ 14, U.N. Doc. E/INCB/1996/1 (1997), http://www.incb.org/documents/Publications/AnnualReports/AR1996/AR_1996_S.pdf (suggesting that as a practical means of cooperation "[i]n some regions, a number of States could establish a court with the jurisdiction to try major cases involving drug trafficking in order to ensure ready access to the specialized facilities and expertise required to deal with large, complex cases").

[220] *Id.* (supporting the concept of a regional court to prosecute drug kingpins, pooling resources "in an arrangement ensuring the existence of at least one high-security prison in a subregion capable of holding [offenders], which could be used by all the contributing States."); *see also* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 734-43 (2003) (although hesitant in calling for "a strong form of regionalization through the creation of regional criminal courts along the lines of the ICC", the author touts a number of advantages of regional court prosecuting "international crimes" that include proximity to the site of the crimes, potentially lower costs of prosecution, judicial resources to effectively adjudicate cases, and reduction of political influence).

[221] *See, e.g*., Neil Boister, *Treaty Crimes, International Criminal Court?*, 12 NEW CRIM. L. R. 341, 359-60 (2009) (the author advocates for a regional treaty to establish a criminal court with specific jurisdiction over crimes previously discussed to remove the burden of States to suppress transnational crimes by delegating jurisdiction to a regional court).

prosecuting crimes on the high seas understand how drug trafficking destabilizes institutions among nation-states in the region.[222]

Clearly, the United States must be a part of negotiations to create an Inter-ACrtCJ in light of its institutions functioning as the primary means to combat drug trafficking and transnational crimes in all its forms connected to the high seas. Presently, the Trump Administration may not be prepared to support the formation of a criminal tribunal in light of a pattern of indifference with respect to regional agreements,[223] a passive interest in the OAS,[224] and Latin America,[225] and, in some respects, neglect of longstanding relationships in the region.[226] The current level of commitment is a lost opportunity to collaborate against maritime drug trafficking and other crimes, despite President Trump's awareness that transnational criminal organizations threaten the Western Hemisphere.[227] An apathetic posture within the Trump Administration, however, may compel other OAS members to risk a parting of the ways with the United States and move forward with new proposals to combat sea piracy and other security problems. Circumstances might arise as the threat of drug trafficking and TOC in general elicits an exchange of ideas that may well include a tribunal with criminal jurisdiction operating within the confines of the OAS mission. The challenge for the OAS members is determining whether there is a path forward in combating TOC in all its forms without the United States participating in security initiatives that contributed to the formation of the world's oldest regional organization.

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[222] Casavant, *supra* note 15, at 124.

[223] Patrick Gillespie, *As Trump Threatens NAFTA, Mexico looks to Latin America for Trade*, CNN BUSINESS, Sept. 21, 2017, http://money.cnn.com/2017/09/21/news/economy/trump-latin-america-pacific-alliance/index.html.

[224] President Donald J. Trump appointed Carlos Trujillo as U.S. Ambassador to the OAS, April 5, 2018, replacing Kevin K. Sullivan serving as Interim Permanent Representative at the U.S. Mission to the Organization of American States since July 2016. Press Release, White House, President Donald J. Trump Announces Key Additions to his Administration, (Nov. 5, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-additions-administration-18/.

[225] According to the American Foreign Service Association, the list of Ambassadors indicates that President Trump has appointed several ambassadors throughout the Americas, five ambassadorships remain vacant, and the others are appointees held over from the Obama Administration. *See Appointments – Donald J. Trump*, American Foreign Service Association, (last visited Nov. 5, 2019), https://www.afsa.org/appointments-donald-j-trump.

[226] Nathaniel Parish Flannery, *Is Trump Damaging the U.S.'s Relationship with Latin America?*, FORBES (Aug. 30, 2017, 8:00 AM), https://www.forbes.com/sites/nathanielparishflannery/2017/08/30/is-trump-damaging-the-uss-relationship-with-latin-america/#114fe88c75df.

[227] President Trump has demonstrated awareness of the threats of transnational crimes to the United States but is not proposing any innovative enforcement programs despite acknowledging that TOC presents a challenge to public safety and national security. *See e.g.*, Exec. Order No. 13,773, 82 Fed. Reg. 10,691 (Feb. 9, 2017).

**Chart 1.** Ten Counts in the Indictment against Abduwali Abdukhadir Muse

| Count | Charge | Maximum Prison Term |
|---|---|---|
| One | Piracy under the law of nations | Mandatory sentence of life in prison |
| Two | Seizing a ship by force | 20 years |
| Three | Conspiracy to seize a ship by force | 20 years |
| Four | Possession of a machinegun during and in relation to seizing a ship by force | Life |
| Five | Hostage-taking | Life |
| Six | Conspiracy to commit hostage-taking | Life |
| Seven | Possession of a machinegun during and in relation to hostage-taking | Life |
| Eight | Kidnapping | Life |
| Nine | Conspiracy to commit kidnapping | Life |
| Ten | Possession of a machinegun during and in relation to kidnapping | Life |

Abduwali Abdukhadir Muse v. Lariva, 2015 U.S. Dist. LEXIS 94542 (S.D.Ind. July 21, 2015), affirmed by Muse v. Daniels, 2016 U.S. App. LEXIS 3172 (7th Cir. 2016).