1990

United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal

Michael Tousley

Follow this and additional works at: http://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/jil/vol22/iss2/11
I. INTRODUCTION

The humidity and warmth of the Gulf sun have yet to reach their zenith in the warm waters off the Yucatan Peninsula. Though miles beyond the territorial waters of Mexico, the smell and feel of the jungle are hardly distant. A small but seaworthy vessel, a one time Carolina shrimper, sometime Peruvian tuna trawler, plods heavily across the distant horizon. A single helmsman steadies it northeasterly heading through the uneasy glow of the early morning light. A closer look indicates the boat has cast off its previous piscatorial occupation for a more lucrative trade. It flies the flag of no land, bears no nets or lines, and is studded with antennae and light radar. The old black waterline is distinct some feet beneath the line where the clear water meets the ship as it cuts its way along the watery highway. The markings are indistinct. The stern and bow bear a name but no homeport.

Several hundred miles from its South Florida home the United States Coast Guard cutter increases the revolutions on its twin screws and sets a course to intercept. With approach imminent, the cutter is battle ready. The flagless vessel is a drug freighter, heavily laden with marijuana, bound, most likely, for the North American market. The flagless vessel is boarded in international waters and its cargo is found in the search. Within days the Port of Houston will be entered by another captured vessel in the “War on Drugs” and the illicit narcotics will be destroyed. Meanwhile, the Latino crewmembers will spend time in American courts and prisons as the crew of the Coast Guard cutter proudly displays another marijuana leaf, painted on the deckhouse, in recognition of this latest victory.

The Maritime Drug Law Enforcement Act (“MDLE”)\textsuperscript{1} and its predecessor, the Marijuana on the High Seas Act (“MHSA”),\textsuperscript{2} have unquestionably served to fulfill the policy of the United States government in the protection of the American population. But what has been the cost of this victory?

The extension of United States criminal jurisdiction to foreign nationals in international waters is in conflict with the standards of custom-

\textsuperscript{1} 46 U.S.C. §§ 1901-04 (1986).

ary international law. Both the MHSA and the MDLE (together, the "Acts") permit actions outside the scope and letter of the current state of customary international law. International consensus on the law of the sea has recently been codified in the Third United Nations Convention on the Law of the Sea ("UNCLOS III").


The United States is one of the few nations of the world that has not signed the treaty. The Executive branch formally acceded to those parts of the treaty which it believed reflected the trend of customary sea law. The objection to UNCLOS III was primarily with the treaty's establishment of an international regime for the exploitation of the mineral wealth of the deep seabed. The sections that were recognized by the United States include those relevant to stateless vessels carrying cargoes of illicit drugs on the high seas. Thus, the United States has constructively made itself a party to those elements of the UNCLOS III treaties.

This Note seeks to examine the conflict between the Acts and the UNCLOS III. The policy goals of Congress are not questioned. Without a doubt, there is a drug problem in the United States. International traffic in illicit drugs is clearly a threat to the security and well-being of the people of the United States. The question examined in this Note is whether the Acts, their use by the Coast Guard, and their judicial enforcement by the courts is in conflict with international law. The underlying goal is to reconcile the American "War on Drugs" with international law by highlighting the flaws in the enforcement of the Acts and recognizing possible solutions to the conflicts with international law.

---

5 Id.
6 Id.
7 Federal lawmakers have formally recognized the problem in a series of legislative acts. The Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1986), comprehensively complied much of the legislative action to date. P.L. 99-570, section 2019 of the act, "Drugs as a National Security Problem," is descriptive of the scope of the problem and is indicative of the extent to which the Congress believes action must be taken. The section reads: "The Congress hereby declares that drugs are a national security problem and urges the President to explore the possibility of engaging such essentially security-oriented organizations as the North Atlantic Treaty Organization in cooperative drug programs.
8 Id.
II. The Marijuana on the High Seas Act and The Maritime Drug Enforcement Act

A. The MHSA

In 1981 the MHSA was enacted by Congress to close a loophole in the Comprehensive Drug Abuse Prevention and Control Act of 1970 by extending U.S. jurisdiction to persons on board vessels subject to U.S. jurisdiction. The practical effect of the MHSA was to ensure the prosecution of U.S. citizens aboard U.S. and foreign registered vessels anywhere in international waters. The MHSA was also drafted to permit the prosecution of foreign nationals aboard stateless vessels with illicit drug cargoes traveling anywhere on the high seas with a showing of intent to distribute their cargo in the United States. The language of the MHSA makes it "unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture and distribute, or to possess the intent to manufacture or distribute, a controlled substance." The section regarding the "[i]ntent or knowledge of unlawful importation into the United States" was included specifically to ensure that the appropriate scienter requirement of the MHSA was beyond question. In order to be found guilty of violating the MHSA, the violator must have been consciously aware of, and must have intended, the result of the illegal importation of controlled substances into the territory of the United States.

The MHSA was written to apply specifically both in the "customs waters of the United States" and "beyond the territorial jurisdiction of the United States." Jurisdiction was further defined as applying not only to vessels "documented under the laws of the United States" but also to "vessels without nationality."

B. The MDLE

The MDLE is an amended version of the MHSA. The MHSA has been replicated within the MDLE with four important changes. Con-
gress felt it was necessary to give more force to the earlier legislation by including, in section 1902, a declaration that "trafficking in controlled substances is a serious international problem and is universally condemned." 18

The second amendment contained in the MDLE deals with foreign consent to U.S. officials boarding foreign flagged vessels. 19 The MHSA had not explicitly provided for the consensual process and had created some jurisdictional questions in the courts. 20 Specifically, this MHSA amendment provided courts with explicit legislative direction to respect jurisdiction gained by consent. 21 Prior to the MDLE, an informal, non-treaty, arrangement had been established whereby the Coast Guard would establish radio, telephone, and electronic communications with foreign governments to gain permission to board their flag vessels. 22 The MDLE now specified that this consent was sufficient to extend U.S. jurisdiction. 23

The third amendment adds striking language to the Act's force: "a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act." 24 This provision stands in direct conflict not only with international law but also with the prevailing interpretation of international law in U.S. courts. 25

The fourth change present in the MDLE is the explicit reference to the 1958 Convention on the High Seas. 26 Congress sought to ease doubt about the international propriety of the seizure of stateless vessels by resting the action on a foundation of international law. 27 Unfortunately,
this foundation, the 1958 Convention, had already been eroded by the 
UNCLOS III agreement. Although UNCLOS III has not been ratified 
by the U.S. Senate and is technically not law in the United States, the 
convention has been signed by a vast majority of the world's states and 
in 1982 was acceded to in part by the Executive branch.

The MDLE provides clearer legislative guidance to the courts re-
garding jurisdictional questions than the MHSA had. With the legisla-
tive guidance of the MDLE, the courts were no longer compelled to 
wrestle with the difficult questions of international law every time foreign 
drug smuggler came before them. Unfortunately, the MDLE also makes 
Congress' ignorance of the current state of customary international law 
more explicit. Despite the MDLE's assertion to the contrary, there had 
been no universal condemnation of drug trafficking, and UNCLOS III 
now stands as the law of the sea replacing the Convention on the High 
Seas of 1958.

C. Legislative Purpose

Congress drafted the MHSA in order to ensure that extraterritorial 
acts were within the scope of the Comprehensive Drug Abuse Prevention 
and Control Act of 1970. Previously, a loophole had existed that inhib-
ited courts in acting against smugglers on the high seas. The 1970 Act 
had not addressed the possession of controlled substances aboard vessels 
anywhere beyond the customs waters. The MHSA corrected this error 
by including both U.S. and foreign vessels lying beyond the customs 
waters.

The hearings on the MHSA, both in the House and the Senate,
demonstrated that Congress sought to give "maximum prosecutorial authority under international law to enforcement agencies".\textsuperscript{35} The Justice Department was concerned that "international law considerations require some nexus to the United States . . . because drug trafficking is not generally accepted as an international crime."\textsuperscript{36} The knowledge and intent elements were added to satisfy this concern.\textsuperscript{37} Nonetheless, drug smugglers were seen as "modern day pirates, men and vessels without a country."\textsuperscript{38}

The MDLE was enacted in conjunction with the comprehensive Anti-Drug Abuse Act of 1986.\textsuperscript{39} The Anti-Drug Abuse Act of 1986 is an updated version of the Comprehensive Drug Abuse Prevention and Control Act of 1970.\textsuperscript{40} Congress produced the updated Act to strengthen federal efforts directed at stopping the flow of illicit drugs into the United States by strengthening federal programs and broadening existing federal statutes such as the MHSA.\textsuperscript{41} The MDLE takes the MHSA’s misplaced legislative inertia a step further by specifically stating "that trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned."\textsuperscript{42}

Jurisdiction was purposefully extended in the Acts to cover foreign nationals manning stateless vessels.\textsuperscript{43} This previous judicial extension was beyond Congressional authority.\textsuperscript{44} The Constitution grants Congress the authority to "define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations."\textsuperscript{45} Congressional power is thus limited by the Constitution to actions within the scope of international law.\textsuperscript{46} Drug smugglers have not been placed in the same category as pirates — hostes homini generis —, enemies of

\textsuperscript{34} S. REP. NO. 855, 96th Cong., 2d Sess. 2 (1980).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{40} 21 U.S.C. § 801-971.
\textsuperscript{45} U.S. CONST. art. I, § 8, cl. 10.
\textsuperscript{46} Dickinson, supra note 44.
The international community has yet to declare drug trafficking a universal crime against humanity.\textsuperscript{47} The case law relying on the Acts provides poignant examples of the tension created by Congress' failure to adequately address this state of international law when it drafted domestic law to handle drug traffickers.\textsuperscript{49}

\section*{II. Judicial Application of the Acts}

The MHSA and the MDLE have created difficulties for domestic courts due to their application to foreign nationals outside of U.S. jurisdiction. Courts must determine whether the law can be applied not only in the specific circumstances involved but also in the larger realm of international law.

\subsection*{A. Traditional Bases for Extraterritorial Jurisdiction}

Jurisdiction over criminal activity is an element of national sovereignty.\textsuperscript{50} It is an integral element of the makeup of statehood as an international phenomenon.\textsuperscript{51} A state is a state, in part, because it has the authority and ability to proscribe certain behavior within and outside of its borders.\textsuperscript{52} Though the purpose and means of a State's internal criminal law is often debated, especially by individuals in states with differing and opposing ideological underpinnings, there is seldom a question regarding a State's right to act against its own citizens within its own territory.\textsuperscript{53} Difficulties arise, however, when a State chooses to act against individuals so that effects are felt within other states. Should nations choose to extend criminal jurisdiction extraterritorially, with no consideration for the rights of other states, international chaos and conflict between sovereigns would ensue.\textsuperscript{54} Consequently, some principles for extraterritorial jurisdiction have arisen.\textsuperscript{55}


\textsuperscript{48} The UNCLOS III is historic in its universal character. Drug smugglers were directly addressed and were specifically excluded from the category of universal criminals in the UNCLOS III. Pirates and slavetraders were, however, labeled as such. This issue will be discussed with greater depth infra at notes 204-208 and accompanying text.

\textsuperscript{49} See infra notes 50-140 and accompanying text.

\textsuperscript{50} R. GILPIN, WAR AND CHANGE IN WORLD POLITICS (1981); L. HENKIN, HOW NATIONS BEHAVE (2d ed. 1979).

\textsuperscript{51} Id. at 21-23.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 22.

\textsuperscript{54} Note, High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of Title 21: Over extension of the Protective Principle of International Jurisdiction, 50 FORDHAM L. REV. 688, 691 (1982) [hereinafter High Seas Narcotics Smuggling].

\textsuperscript{55} See generally H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS (2d ed. 1975);
International law has recognized a series of principles that extend the jurisdiction of states. While different texts often give them different titles and provide different distinctions between principles, five different principles have been settled upon: nationality, territoriality, the effects principle, the protective principle, and the universality principle. In The Pacquette Habana the U.S. Supreme Court made these principles applicable in U.S. courts: "International law is a part of our law, and must be ascertained and administered by the courts of justice . . . ."

The nationality principle provides a State with jurisdiction over its own nationals, wherever such offenses might be committed. This principle is accepted by all states. In the United States there is a presumption against extraterritorial application of criminal law to nationals when the crimes are against individuals, but a presumption exists for extraterritorial application when the crime committed is against the state.

The territoriality principle confers jurisdiction upon a State over offenses committed within its territory. The ability of a sovereign to define and punish offenses within its territorial limits is absolute. The United States adheres to the "objective" view of territoriality, which was first enunciated and applied domestically within the United States by the Supreme Court in Strassheim v. Daily, the principle infers territoriality to intentional acts initiated outside a territory but intended to have their effects within a territory. Justice Holmes' opinion in Strassheim has been extended to cover not only interstate but also international jurisdic-

56 Restatement, supra note 4, §§ 402, 403.  
57 Id.  
58 Id.  
59 175 U.S. 677. Justice Gray relied upon ancient principles of international law to determine that Cuban coastal fishing vessels were not subject to U.S. military capture during the Spanish-American War.  
60 Id. at 700.  
62 Restatement, supra note 4, § 402 comment f.  
63 United States v. Bowman, 260 U.S. 94, 98 (1922). The defendant in Bowman was a U.S. national who had defrauded a corporation in which the United States was a stockholder. Despite the fact that the fraudulent activities took place on the high seas and in Brazil, the Court held that the government's right to protect itself from fraud or obstruction justified an inference of extraterritoriality. The Court felt that to limit the relevant statutes to a territorial application provide a loophole of sorts for nationals living abroad or acting on the high seas. Id. at 98.  
64 Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804).  
65 221 U.S. 280 (1911). Daily fraudulently sold machinery in Illinois that he knew was bound for Michigan. The Court allowed Michigan jurisdiction. Id. at 281.  
66 Id.
A State can thus punish the offense of a foreign actor which is felt within its territory.

The effects principle is an offshoot of the territoriality principle. As long as the criminal act is intended to have a substantial, direct, and foreseeable effect within the United States and there is some reasonable jurisdictional nexus, criminal jurisdiction over it may exist regardless of where the act took place. There is a strong presumption against the use of the effects principle to extend criminal jurisdiction into other states when the acts are predominately those of nationals of those other states. U.S. government law enforcement agencies have been directed to extend jurisdiction "sparingly" and only upon "strong justification." Consent of the foreign state is generally required to permit U.S. criminal law enforcement agents to act outside a U.S. territory. This includes consent to board foreign flag vessels in the search for illicit drugs outside of U.S. customs waters.

The protective principle allows the extension of jurisdiction over foreign nationals whose acts threaten the security of the State or affect a State's interests. This is a broad category and has been used to reach foreign nationals who have violated MHSA, despite the fact that crimes against State interests are generally limited under international law to offenses such as espionage, counterfeiting a State's official seal, falsification of official documents, violation of immigration laws, and perjury before consular officials. This category of crimes concerns the State's interest in effective interstate administrative processes. Drug smuggling does not fit into this category of crimes against State interests.

The universality principle provides jurisdiction over criminals of any nationality who are held in their custody for committing crimes against humanity. Such criminals are hostes homini generis. Their crimes include, and are limited to, those that are of a universal concern and have an effect on the whole community of nations. Specifically, slave trade, piracy, attacks on, or hijacking of aircraft, and genocide are universal

\[67\] \textit{Restatement, supra} note 4, § 402(1)(c).
\[68\] \textit{Id.} § 403.
\[69\] \textit{Id.}
\[70\] \textit{Id.}
\[71\] \textit{Id.} § 403 and § 403 reporters' note 8.
\[72\] \textit{Id.} § 432.
\[73\] \textit{Id.} § 433 reporters' note 4.
\[74\] \textit{Id.} § 402 comment f.
\[75\] See \textit{High Seas Narcotics Smuggling, supra} note 54.
\[76\] \textit{Restatement, supra} note 4, § 402 comment f.
\[77\] \textit{Id.} § 404.
\[78\] \textit{Id.} Drug smuggling is specifically excluded from the list of universal crimes. A state must use some other justification for extraterritorial extension of criminal laws to pertain to foreign nationals.
crimes\textsuperscript{79} for which any state can extend jurisdiction. Despite a common belief in the United States that "there is a growing consensus among nations to include drug trafficking as a universally prohibited crime,"\textsuperscript{80} there is not a formal international declaration to that effect. In fact, most recent multilateral discussions of controls on drug trafficking specifically avoid alluding to drug offenses as universal crimes.\textsuperscript{81}

The seizing of foreign nationals aboard stateless vessels on the high seas does not fall neatly into any of the above listed traditional justifications for extraterritorial extension of criminal jurisdiction. Yet, without some degree of multilateral cooperation sanctioning U.S. activity, the Acts and the reliance on them by the Coast Guard and the courts are questionable under international law. Most U.S. courts rely on a broad reading of international law in their extension of authority in such cases.\textsuperscript{82} Admittedly, however, when faced with evidence, suspects, and a Congressional mandate it is difficult for any U.S. court not to act, despite the lack of neatness in decision making. As a result, there is no strict adherence to, and even a lack of respect for, the tenets of international customary and conventional law.\textsuperscript{83}

In summary, while the MHSA and MDLE provide a quick, clean method for dealing with foreign nationals picked up on the high seas, the Acts also place U.S. courts outside the regime of international order. However justified it may be, unilateral efforts to create some order out of the chaos\textsuperscript{84} on the seas by the United States upsets the traditional international order.\textsuperscript{85} The United States' desire to correct a heinous international phenomenon through domestic legal action is contrary to, and does harm to, the development of both international customary and treaty law.

B. Customary International Law in United States Courts

International law is, and must be, a part of U.S. law. From the earliest developments of the United States as a nation, the law of nations

\textsuperscript{79} Id.
\textsuperscript{80} 679 F.2d at 1378.
\textsuperscript{81} International Conference on Drug Abuse and Illicit Drug Trafficking, June 26, 1987. 26 I.L.M. 1637. The language of the final document specifically called for cooperation amongst states as realized in bilateral and multilateral agreements. Id. at 1645 and 1706. There was an express concern that the actions of individual states not conflict with other states' constitutional, legal, and administrative systems. Id. at 1692. In spite of the claims that a consensus on drug trafficking's criminal universality exists, it clearly does not. Too many states have a dependency upon the revenue from the production of drugs and subsequently have developed alternative cultural and moral approaches to illicit narcotics production and distribution.
\textsuperscript{82} See High Seas Narcotics Smuggling, supra note 54.
\textsuperscript{83} See infra notes 87-140 accompanying text.
\textsuperscript{84} Anderson, supra note 31, at 342.
\textsuperscript{85} See High Seas Narcotics Smuggling, supra note 54, at 719.
was an integral part of American jurisprudence.\(^{86}\) There is a tension in the constitutional system between the judicial and legislative branches.\(^{87}\) Courts do not have the prerogative to act as foreign policy bodies by interpreting international law contrary to executive and legislative foreign policy.\(^{88}\) However, courts do have the ability and the responsibility to interpret both customary and treaty-based international law.\(^{89}\)

International law, as a body of law, is not superior to Congress, but customary international law is equal in authority to an Act of Congress.\(^{90}\) Customary law is “self-executing” and does not require specific congressional ratification to become a part of U.S. law.\(^{91}\) The United States participates daily in the creation of customary international norms.

In *The Decay of International Law*,\(^{92}\) Professor A. Carty provides the following definition of customary international law as follows:

> Law is a matter of concrete practice and not simply an expression of national will – that is to say, law is customary. Custom has two essential stages, legal consciousness, as the inner ground, and then external conduct and practice. National legal consciousness has to be set in a universal perspective because the idea of law as such exists at a world level.\(^{93}\)

Domestic laws need not stand in the way of courts’ adherence to new international customary norms. Professor Henkin writes that “courts should continue to give effect to developments in international law to which the United States is part, unless Congress is moved to reject them as domestic law in the United States.”\(^{94}\) U.S. courts must be ever vigilant to their role as interpreters of law and not simply become the mouthpieces of transient national policy decisions.

If there is a conflict between domestic law and developing customary law, courts must examine whether the United States has formally disassociated itself from the process of development.\(^{95}\) In the case of UNCLOS III, for example, the United States has specifically stated a disavowal of the new deep seabed regime, but has accepted the other provisions as customary law that simply modify previously existing

---


\(^{87}\) U.S. Const. art. III, § 1 & 2, and art. I, § 8, cl. 10.

\(^{88}\) *Id.*

\(^{89}\) *Id.*

\(^{90}\) Henkin, *supra* note 86, at 1566.

\(^{91}\) *Id.*


\(^{93}\) *Id.* at 32.

\(^{94}\) Henkin, *supra* note 86.

\(^{95}\) *Restatement*, *supra* note 4, § 115 comment b.
treaty and custom. Further, domestic statutes are to be construed, as much as possible, so as to avoid conflict with international law. Even if an international norm has been superseded by domestic law, it does not relieve the United States of its international obligation or from the potential consequences of a violation. Clearly, courts have a duty to examine and understand international norms and their effect upon domestic legal action.

United States courts have been inconsistent in their interpretation of customary international norms. This, in turn, has hindered the development of international law and raised questions about the role of the United States as a law-abiding nation in the international community. This judicial inconsistency is occurring in conjunction with a reevaluation of the term "custom" to more closely reflect U.S. political values. As multilateral fora, such as the United Nations, produce norms contrary to U.S. policy, the U.S. foreign policy establishment has come to place greater value in customary international law and less emphasis on legislated doctrine. Inconsistency in courts can perhaps be attributed to a lack of consistency on the part of U.S. policy makers in taking positions on specific aspects of international law.

Judicial interpretations and use of the Acts illustrate this confusion and inconsistency. Customary international law is generally adhered to by the United States. But the degree to which customary international law supersedes domestic legislation, and the degree to which it supersedes the Acts, has varied from courtroom to courtroom.

C. Illustrative Cases

Two tracks exist in the cases dealing with the application of the Acts

96 See id. § 115, comment d; See also id. introductory note preceding § 501.
97 Id. § 114.
98 Id. § 115.
99 See Henkin, supra note 86.
101 There is a long history of U.S. involvement in the development of international treaty and customary law. The U.S. has been a vital player in the development of many of the contemporary regimes for order and commerce in the international community. See e.g. T. Franck, Nation Against Nation (1985); R. Jackson, The Non-Aligned, The UN, and The Superpowers (1983); P. Kennedy, The Rise and Fall of the Great Powers (1987); Keohane, After Hegemony (1984); R.O. Keohane & J. Nye, Power and Interdependence: World Politics In Transition (1977); S. Krasner, Structural Conflict: The Third World Against Global Liberalism (1985). In many instances, the United States has been a leader in such endeavors, much to its credit and to the benefit of world peace and harmony. As a world leader, the U.S. must establish a consistency as regards its approach to global legal regimes. The world community must be able to anticipate the legal and policy decisions of the great powers.
DRUG SMUGGLING VESSELS

1990]

to stateless vessels on the high seas. The first track, termed the "reasonable nexus" track, requires some evidence of intent to smuggle the illicit drugs on board the vessel into the United States. The second track, termed the "international pariah" track, requires only that the vessel be stateless and carrying contraband in order to extend jurisdiction and apply the Act to its crewmembers.

Prior to the enactment of the MHSA, the two tracks were found in judicial decisions. Two district court cases exemplify the "reasonable nexus" track. In United States v. May 103 the court determined that, since charts found in the deckhouse projected a track leading to the United States, there was enough evidence to extend jurisdiction over a vessel found 135 miles off the Texas coast. 104 In United States v. Egan the court invoked the protective principle to convict foreign crewmembers of a stateless drug smuggling vessel picked up thirty miles off the Long Island coast. 106 In both of these decisions the court required some degree of reasonable evidence of a nexus to the United States to convict foreign nationals.

The "international pariah" track is illustrated through United States v. Ricardo. 107 Despite a lack of evidence of intent to distribute, the Fifth Circuit found that five Colombian crewmen could be prosecuted for having been on board a stateless vessel bearing illicit drugs that had been seized 150 miles from the U.S. coast. 108 The Fifth Circuit did not require any overt or alleged act or effect in the United States to allow conviction. 109

Of the cases heard after the enactment of the MHSA most, but not all, belong in the second track. These decisions seem to rely on the MHSA as a green light in convicting foreign nationals seized aboard stateless drug smuggling vessels. In United States v. Angola, 110 the Court convicted crewmen from a stateless vessel found 350 miles from U.S. waters without any showing of intent to enter the United States. 111 The protective principle was invoked by Judge Spellman: "These are real threats to this country, not merely hypothecated [sic], but supported by dozens of cases of detected drug smuggling." 112 To this court, the state-

104 Id. at 392, 396.
106 Id. at 1252, 1256.
107 619 F.2d 1124 (5th Cir. 1980).
108 Id. at 1127, 1131.
109 Id. at 1129.
111 Id. at 936.
112 Id.
less vessel was an international pariah and its crewmen were clearly prosecutable under the Act.

Nonetheless, a month later, Judge Davis of the same district court wrote what now stands as the exemplar "reasonable nexus" decision. In *United States v. James-Robinson* \(^{113}\) the crewmen of a stateless vessel seized 400 miles from the U.S. coast were found to be not prosecutable since there was an insufficient nexus to the United States to warrant an extension of extraterritorial jurisdiction. \(^{114}\) Judge Spellman examined the MHSA and its legislative history, and determined that Congress had not sought to supersede existing international law, but to act within it. \(^{115}\) Thus, the court felt compelled to examine the situation from the perspective of international law without regard to the policy decision embodied in the Act. \(^{116}\) Judge Davis determined that the protective principle simply did not extend so far as to allow an extension of jurisdiction in this situation:

> [The situation] boils down to whether, as a matter of law the presence of foreign crewmen on a stateless ship carrying marijuana on the high seas 400 miles from the United States *by definition* represents a threat to our national security or to our government’s functions. It does not. More than that must be alleged and proven. \(^{117}\)

The "reasonable nexus" track quickly fell out of favor, however, as courts sought to take advantage of the prosecutorial effect provided by Congress in the MHSA.

In a "nontraditional analytic approach" \(^{118}\) the Eleventh Circuit concluded that, since drug trafficking was "universally prohibited crime," \(^{119}\) international law permitted the extension of jurisdiction over stateless vessels on the high seas. \(^{120}\) In *United States v. Marino-Garcia*, \(^{121}\) the Eleventh Circuit faced a fact situation similar to those considered by Judges Davis and Spellman in the Southern District of Florida. The Coast Guard cutter *Dependable*, establishing its acclaimed reputation as "the scourge of drug traffickers plying the Caribbean", \(^{122}\) seized the small freighter, *Four Roses*, and its cargo of 57,000 pounds of marijuana 65 miles off the coast of Cuba and 300 miles from Florida. \(^{123}\) There was

---


\(^{114}\) Id. at 1347.

\(^{115}\) Id. at 1343.

\(^{116}\) Id.

\(^{117}\) Id. at 1346.

\(^{118}\) Note, Recent Cases, 52 U. CIN. L. REV. 292, 309 (1983) [hereinafter, Recent Cases].

\(^{119}\) 679 F.2d at 1381.

\(^{120}\) Id.

\(^{121}\) 679 F.2d at 1373.

\(^{122}\) Id. at 1378 n.2.

\(^{123}\) Id.
no evidence to indicate that the cargo was intended for the United States. The vessel was registered in Honduras under a different name and displayed the homeport "Miami, Florida" on its bow. The court determined that the vessel, having asserted a false registration, was to be considered stateless under international law and the MHSA. None of the crewmen were aware of the Honduran registry, and the boat did not fly Honduran colors. All of the crewmen were foreign nationals and jurisdiction was extended.

Judge Johnson's opinion in Marino-Garcia was nontraditional because it read the MHSA literally and gave little credence to either domestic or international legal precedent. The opinion held that Congress had been correct in judging that the MHSA did not conflict with international law. In fact, Judge Johnson opined that the attempts by other courts to apply the traditional principles was irrelevant since stateless vessels are "international pariahs," open to inspection and seizing by any state, and persons aboard are subject to prosecution by the seizing state.

Judge Johnson's opinion contrasts with Judge Davis's holding in James-Robinson, which was concerned with the lack of danger posed by the stateless vessel to the United States. In Marino-Garcia, Judge Johnson found that concern to be irrelevant; no nexus to the United States need be required. As a matter of law, the MHSA allowed the United States to stop and seize any vessel anywhere on the high seas from Cuba to the Indian Ocean. For those like Judge Johnson who consider such vessels to be international pariahs, anything less would permit chaos and deny order on the high seas.

Having determined that international law in no way restricts the right of the United States to assert jurisdiction over stateless vessels on the high seas, we hold that Section 955a properly extends the criminal jurisdiction of this country to any stateless vessel in international waters engaged in the distribution of controlled substances.

Relying on Marino-Garcia other circuits have also followed the "international pariah" test.
tional pariah” track and established it as the dominant precedent for examining facts in light of either the MHSA or the MDLE.\(^{136}\)

There is, however, a distinct flaw in the reading of the relevant international law in these courts. All these decisions are based on treaty law established in the 1958 Convention of the High Seas.\(^{137}\) Discussions or acknowledgements of UNCLOS III in any of the decisions do not exist. Though the United States has failed to ratify the later treaty, it has acquiesced to the majority of its substantive elements.\(^{138}\) UNCLOS III is a new, more universal, phenomenon than the 1958 Convention. The substance of the customary law codified in UNCLOS III existed before the MHSA was drafted,\(^{139}\) and UNCLOS III was signed by a large majority of the world’s states well before the MDLE was even considered.\(^{140}\) Both the precedent settled upon in judicial decisions and the legislative direction relevant to the prosecution of foreign nationals seized aboard stateless vessels on the high seas by the United States Coast Guard and

---


Alvarez-Mena filled a gap in the doctrine of stateless vessel jurisdiction as developed by the Second, Fourth, and Eleventh Circuits. Each of those courts had assumed that jurisdiction over a stateless vessel carried with it jurisdiction over the ship’s non-resident alien crew. The Alvarez-Mena court became the first to confront the question of whether such an assumption was warranted. Id. at 175-76.

It is readily seen that the rights denied the vessel are just as surely denied to the crew of the ship. In reality, it is the crewmembers of a stateless ship who are deprived of the right to participate in legitimate trade as long as they are aboard such a ship. Similarly, the vessel’s statelessness subjects both the ship and its crew to any nation’s jurisdiction. Id. at 177; Note, The Navy’s Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on Constitution, 75 GEO. L.J. 1947 (1987); Keig, A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad, 23 TEX. INT’L L.J. 291 (1988). In United States v. Gonzales, 810 F.2d 1538 (11th Cir. 1987), the Eleventh Circuit has indicated a continuing concern for a reasonable territorial nexus indicating that a jury could find that a stateless drug smuggling vessel in the Caribbean heading north was on its way to the United States, 810 F.2d at 1542.

\(^{137}\) See, RESTATEMENT, supra note 4, Pt.V introductory note preceding § 501 at 5-6.

\(^{138}\) Id.

\(^{139}\) UNCLOS III was drafted between 1972-79. The MHSA was drafted in 1979-80.

\(^{140}\) UNCLOS III was signed in December 1982. The MDLE was written in 1985.
naval vessels stands in conflict with the spirit and letter of UNCLOS III. In order to better appreciate the questionable legality of the Acts, it is necessary to examine the current state of customary international law as embodied in UNCLOS III.

III. THE THIRD UNITED NATIONS CONVENTION ON THE LAW OF THE SEA.

The Third United Nations Convention on the Law of the Sea ("UNCLOS III") is a unique historical phenomenon. It is both a legal treaty upon which affairs between states are peacefully conducted and a highly charged political manifesto. This dual nature has both charmed and harmed the acceptance and utility of UNCLOS III. For much of the world's community of nations, the final UNCLOS III document represents a massive codification of customary and prior treaty sea law. For a few other states, most notably the United States, UNCLOS III is fatally flawed because of its failure to reflect real power in the world scene.

Despite the failure of the United States to sign the UNCLOS III, the Convention is international law applicable to all the world's states. Though the treaty has not been presented by the President to the Congress for ratification, the United States has acquiesced to those portions of the treaty not concerned with the international exploitation of the deep seabed. The United States, as a law-abiding member of the com-

144 RESTATEMENT, supra note 4, Pt. V introductory note preceding § 501 at 5 states in pertinent part:
As of 1987 the Convention was not yet in force, and, after it's entry into force, it will apply to the United States only if the United States becomes a party to it.

For purposes of this Restatement, therefore, the Convention as such is not law of the United States. However, many of the provisions of the Convention follow closely provisions in the 1958 Conventions to which the United States is a party and which largely restated customary law as of that time. Other provisions of the LOS Convention set forth rules that, if not law in 1958, became customary law since that time, as they were accepted at the Conference by consensus and have influenced, and came to reflect, the practice of states. (cites omitted) In particular, in March 1983 President Reagan proclaimed a 200-nautical-mile exclusive economic zone for the United States and issued a policy statement in which the United States in effect agreed to accept the substantive provisions of the Convention, other than those dealing with deep sea-bed mining, in relation to all states that do so with respect to the United States. 19 Weekly Comp. of Pres. Docs. 383 (1983), 83 Dep't State Bull., No. 2075, at 70-71 (1983), 22 I.L.M. 464 (1983). Thus, by express or tacit agreement accompanied by consistent practice, the United States, and States generally, have accepted the substantive provisions of the Conventions, other than those addressing
munity of nations, should acknowledge the existence of UNCLOS III in its conduct of foreign affairs. Nonetheless, the method by which the Congress has sought to interdict the traffic in illicit drugs on the high seas by stateless vessels, the Coast Guard armed with the MHSA and the MDLE, has failed to acknowledge UNCLOS III.

International trafficking in illicit drugs on the high seas is specifically addressed in UNCLOS III. Taking heed of this language and the spirit behind its drafting would serve the U.S. effort to halt the flow of drugs across its borders.

A. The Spirit of the UNCLOS III

In order to appreciate the new spirit reflected in the UNCLOS III document, some historical perspective is required. Contemporary maritime law, like much of modern international law, has its roots primarily in Western Europe. Early Roman emperors asserted that they had control over the seas in their domain and could control them at will. After the Dark Ages, the Europeans, especially the merchant traders of the Italian city-states, left their continent aboard ships to find fortune elsewhere. Trade routes and the territoriality of the seas became vigorously disputed issues.

The great mercantilist empires also claimed sovereignty over much of the world's watery space just as the Romans had. In the fifteenth century Papal Bulls and the Treaty of Tordesillas of 1494 divided the oceans between the Spanish and the Portuguese and gave the North Atlantic to the Danes.

In 1663, Hugo Grotius, a lawyer employed by the Dutch government to help break the Portuguese monopoly on the spice trade, wrote a landmark brief, Mare Liberum. Writing that "[b]y the Law of Nations navigation is free to all persons whatsoever," this brief established the tradition of the freedom of the high seas.

The freeing of the seas encouraged the merchant and naval fleets of
Western Europe to spread both the tradition and the primacy of this European sea law throughout the globe. Europe's colonies, regardless of their indigenous legal institutions, were "civilized" into the use of the metropolitan European legal systems.\textsuperscript{153} States had sovereignty over coastal waters to a distance of three miles and travel on the high seas could be restricted by no state. The high seas had become the crowded highways of international trade in raw materials and products of the industrial revolution.\textsuperscript{154} The British naval fleet helped ensure \textit{Pax Britannica} by maintaining its version of law and order on the high seas.\textsuperscript{155}

At the end of World War II the \textit{Pax Americana} replaced its elder British cousin.\textsuperscript{156} This new hegemon also held sway over the oceans.\textsuperscript{157} Ocean-going commerce continued to expand and soon came to encompass new areas of wealth in oil and fisheries.\textsuperscript{158} Unlike the British, however, the Americans deviated from the Grotian tradition.\textsuperscript{159}

In 1945, desiring to protect the oil wealth beneath its extensive continental shelf,\textsuperscript{160} the United States altered the tradition of sea law with the Truman Proclamation.\textsuperscript{161} By claiming that the continental shelf beneath the sea was national property out to a depth of 200 meters, President Truman changed the old rules of coastal territoriality and freedom of the seas.\textsuperscript{162}

Following suit in 1950 several Latin American states extended their territorial zones to distances of up to 200 miles.\textsuperscript{163} Many other States settled on a new twelve mile limit.\textsuperscript{164} Where there had been Grotian order, confusion and conflict now existed. Control of the wealth of the seas became a central policy tenet of many states.\textsuperscript{165}

In 1958 and 1960 the United Nations sponsored the first two Law of the Sea conferences in Geneva. States recognizing a three mile limit to coastal sovereignty unsuccessfully sought to translate their concept into

\textsuperscript{153}See R. GILPIN, \textit{supra} note 50, at 31.
\textsuperscript{154}Id.
\textsuperscript{155}Id.
\textsuperscript{156}See generally P. KENNEDY, \textit{supra} note 101; R.O. KEOHANE & J. NYE, \textit{supra} note 101; R. GILPIN, \textit{supra} note 50.
\textsuperscript{157}Id.
\textsuperscript{158}Id.
\textsuperscript{159}L. HENKIN, \textit{supra} note 50, at 213.
\textsuperscript{160}Id.
\textsuperscript{161}Id.; \textit{See also} Ball, \textit{supra} note 150, 471-72.
\textsuperscript{162}Id.
\textsuperscript{164}L. HENKIN, \textit{supra} note 50.
\textsuperscript{165}Id.
The later conference failed to agree on a compromise six-mile territorial limit. The 1958 conference did, however, produce the substantive document upon which Congress based the international legality of the MHSA and the MDLE.  

In 1967, the Soviet Union approached its American rival with a proposal for a new treaty conference. Seizing upon this rare concurrence of interest, Ambassador Arvid Pardo of Malta made a stirring proposal to the U.N. General Assembly. He proposed that a new and comprehensive treaty be negotiated to cover all areas of concern in the oceans, including the "futuristic" exploitation of the deep seabed. It was hoped that not only traditional ocean transit rights would be agreed upon, but also that conflicts like France and Brazil's "Lobster War" and the British-Icelandic "Cod War" could be averted by a new treaty.

Ambassador T.B. Koh, head of the Delegation of the Singapore and Chairman of the UNCLOS III Conferences, provides an insider's perspective on the many elements that combined to make Pardo's proposal a reality:

By 1970, it was clear to all that the old legal order had collapsed. Support for the convening of a Third U.N. Conference on the Law of the Sea, therefore, seemed logical and timely. First, the Conference was needed to resolve the unfinished business of the First and Second U.N. Conferences, viz., the limit of the territorial sea and the limit of the fishing zone, and to replace the exploitability criterion with a more precise criterion. Second, it was necessary to replace the chaos created by the unilateral and conflicting claims of coastal States with a new legal order. Third, the great maritime powers, especially the two superpowers, felt the need for a new internationally agreed upon regime for the passage of ships and aircraft through and over straits used for international navigation. Fourth, the newly independent countries of the Third World wanted a new conference so that they could participate in the progressive development of this branch of international law. Fifth, the international community had to agree on rules as well as institutions, for the exploitation of the mineral resources in the seabed and on the ocean floor beyond the limits of national jurisdiction. Last, the historic Stockholm Conference on the Human Environment and a series of accidents involving oil tankers had raised the world's con-

166 Id.
167 Id. at 214-15.
169 See Pardo, Before and After, 46 LAW & CONTEMP. PROBS. 95 (1983).
170 Id.
171 "Lobster War" and "Cod War" refer, respectively, to the 1960s conflicts between the United Kingdom and Iceland over cod fisheries off the Icelandic coast and between France and Brazil over lobster beds off the Brazilian coast. See R. CHURCHILL & A. LOWE, supra note 146, at 128, 310.
sciousness regarding the threat to the marine environment; consequent-ly, there was a desire to adopt new rules to protect and preserve that environment.172

A more strident, developing country vision of purpose is described by Professor Rembe, a lecturer in law at the University of Dar es Salaam, in his introduction to *Africa and the International Law of the Sea*:

International law is in a period of transition from a European law to a more universal or quasi-universal law governing diverse subjects and reflecting a wide range of fields. In this heuristic stage, international law is emerging as a discipline of considerable interest to many States, particularly to the newly independent nations. . . .

The above view does not, however, mean that the new States are satisfied with, and accept the whole body of international law. There has been a phase of reaction against traditional international law which sanctified relationships that are the sources of current problems in these countries. The origins, development and functions of traditional international law have been indissolubly linked and identified with colonialism and imperialism, responsible for the present and past oppression and exploitation of the new states. International law therefore poses an obstacle to the realization of economic and social reconstruction, as well as international development.173

Clearly, the negotiations for the UNCLOS III took on a much larger international role than simply that of a sea treaty. It was a discussion of global import in which all the nations of the world, not simply the great powers, played an integral and decisive role. In a world community only just emerging from neocolonialism, the UNCLOS III negotiations were held out as a model for the future of international relations.

The sea, next to the sun and air, is the most widely shared, uniform aspect of the physical environment. I wonder whether the conceptual systems of diverse cultures ought not to have the greatest convergence—or the least divergence—along the front of interaction with the common factor of the sea. If so, perhaps international, multicultural negotiations regarding the sea may thus enjoy some natural, cohesive predisposition to the possibility of mutual understanding. It may prove then that negotiations revolving around the sea may constitute a further, common basis for attempts at mutual understanding on other subjects. In any event, I think it well worth noting the singular shape taken by the conference.174

174 Ball, *supra* note 150, at 463.
These international political forces that shaped UNCLOS III conflicted with domestic political forces. This political and ideological conflict provides a framework for understanding the international and domestic environments within which the law embodied in both UNCLOS III and the Acts was crafted.

The forces that had been working to bring about the end of the neocolonial era in world politics saw the UNCLOS III negotiations as an opportunity to codify and further institutionalize their goal of creating a New International Economic Order ("NIEO"). The NIEO is a plan for a revolutionary alteration of the world economy based on large scale redistribution of wealth from the developed to the developing world. The redistribution of wealth in the NIEO plan was at odds with conservative ideology espoused by the Reagan Administration. The presence of NIEO-inspired language, especially the notion of the high seas as the "common heritage of mankind," and programs, especially the Authority established to coordinate deep seabed mining operations, led to the decision not to sign the Final Document by the United States.

The United States had participated in the UNCLOS III process from the very beginning. The U.S. delegation had played a leadership role in shaping both the style of negotiation and its final product. As early as 1966, President Johnson warned that the deep seabed ought not become the object of a new colonialism, but be a "legacy for all human

---


179 UNCLOS III, supra note 3, art. 37. This Article established an area beyond sovereign control the exploitation of which would benefit all the world's states and within which no one state could exert control. The text states:

[all rights in the resources in the area are vested in mankind as a whole, on whose behalf the Authority shall act . . . No State or natural of juridical person shall claim, acquire, or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part . . . .

Id. at 42. See also Ball, supra note 150, at 471; L. Henkin, supra note 50, at 200.

180 Malone, supra note 141, at 789.

181 Ratiner, supra note 143.
beings.”

In the face of this prior, long term U.S. support for UNCLOS III, the Reagan Administration’s rejection of the UNCLOS III has been labeled a short term victory of “pure conservative ideology.”

The United States had not been a loser in the bargaining process. Indeed, the U.S. was one of the big winners in the coastal undersea land-grab that the new concept of the Exclusive Economic Zone (“EEZ”) created. The United States, along with Australia, New Zealand, Canada, Japan, Norway, and the USSR, gained rights to forty-four percent of the total EEZ area for their fifteen percent of the world population. All told, twenty-eight developed coastal states get a larger EEZ than all of the approximate 130 odd developing countries together. Further, the United States, along with the Soviet Union, earned numerous concessions from the developing coastal states in the areas of traditional concern to large naval and maritime powers.

Nonetheless, the United States stood alone among the great powers in its rejection of the new treaty. For some critics, U.S. participation in the treaty failed to fill the ideological vacuum that was ultimately filled by the NIEO proponents. To counteract this previous U.S. failure, President Reagan had “asserted the values of democracy and free enterprise and rejected efforts to impose a collectivist ideology upon the multilateral negotiating process that had become evident. . . .”

Congress’ disregard for the UNCLOS III in its drafting of the MHSA and MDLE is reflective of the Executive’s failure to acknowledge the positive aspects of the final document. Considerable confusion has been created by the “soft law” that the UNCLOS III represents. Despite this confusion among policymakers, U.S. courts have a duty as interpreters of international law to ensure that the changes brought about

---

183 Ratiner, supra note 143.
184 L. Henkin, supra note 50, at 216-19; see also Restatement, supra note 4, § 511.
186 Id.
187 L. Henkin, supra note 50.
188 Id.; See also J. Sebenius, Negotiating the Law of the Sea (1984).
190 Who Needs the Sea Treaty, supra note 178; Burke & Brokaw, supra note 176, at 50.
193 U.S. CONST. art. 1, § 8, cl. 10.
by UNCLOS III are appropriately reflected in their decisions. There has been a change in the spirit of international law illustrated by the UNCLOS III: "[i]n essence, the Convention cannot force a State to play by new rules, but may be able to outlaw the old game."194

The old game was based on a notion of the high seas as res nullius, no one's property. Grotius had stated that the open ocean was an open frontier for the use and exploitation of anyone.195 The Truman proclamation and the subsequent phenomenon of "creeping jurisdiction"196 altered that order.

The old frontier spirit of freedom of the high seas was replaced by a new spirit of international cooperation and control of the high seas.197 The UNCLOS III ushered in a new order based on the concept of the open ocean as res communis, community property.198 The oceans had been divided up, placing final control either in the hands of coastal states or under the control of the international community as a whole.199 Independent action of the sort permitted by the MHSA and the MDLE harken back to freedoms allowed under the Grotian concept of the high seas as res nullius. The Acts thus violate the new spirit embodied in the UNCLOS III.

B. The Letter of UNCLOS III

The letter of UNCLOS III is the codification of existent customary international law and the creation of new international norms. The document is universal in its character, having been created by the consensus of the large majority of the world's states. UNCLOS III directly addresses the problem of the illicit traffic in narcotics.200 The language of the Final Document does not, however, go so far as to permit the type of unilateral activity permitted by the MHSA and the MDLE. The political and ideological nature of UNCLOS III appear to have branded it as a useless source of international law for U.S. lawmakers. Nonetheless, the letter of UNCLOS III is based on a universal consensus of international law and it should be acknowledged as such. For this reason the letter UNCLOS III needs to be considered when examining domestic law, such as the Acts, that is enforced at the international level.

Ships are required to have a national origin so that safety on the

194 Gamble & Frankowska, supra note 191, at 510.
195 H. GROTIUS, supra note 151.
196 See generally M. AKEHURST, supra note 146; Ball, supra note 150; C.J. COLUMBOS, supra note 146; C. SANGER, supra note 146; and Ratiner, supra note 143.
197 Id.
198 Id.
199 UNCLOS III, supra note 3, art. 89 (invalidity of claims of sovereignty over the high seas).
200 UNCLOS III, supra note 3, art. 91.
high seas can be assured by the parent state of the vessels. UNCLOS III recognizes the classic *Lotus* case which established that: "Vessels on the high seas are subject to no authority except that of the State whose flag they fly." Without some claim of territoriality, no States can exert sovereign control over a vessel not of its own nationality.

There are certain exceptions to the *Lotus* rule that are expressly addressed by UNCLOS III. Pirate vessels and vessels involved in the slave trade may be placed under the jurisdiction of any State. UNCLOS III creates a positive "[d]uty of all states to cooperate in the repression of piracy." Piracy and slave trading are universal crimes that have been specifically condemned by the international community. Furthermore, piracy has been defined in UNCLOS III to avoid vague and overbroad interpretations.

Trafficking in illicit narcotics has not been included as an exception to the *Lotus* rule because it is not a universally condemned crime.

---

201 UNCLOS III, *supra* note 3, art. 94.
203 *Id.* at 70.
204 *Id.* at 25. See also Note, *supra* note 25. Much has been made of the fact that statelessness of a vessel permits boarding by the Coast Guard. See Anderson, *supra* note 31. The MDLE specifically addresses the problem at 46 U.S.C. 1903, and the UNCLOS III does provide for the boarding of stateless vessels. The UNCLOS III intent based on the language of the rest of the document is to ensure shipping safety by enforcement of registration requirements, not seizure and incarceration of seamen as permitted by the MDLE. Another question that is open for speculation is the logical leap made by U.S. courts from a vessel's statelessness to its crew's being subject to the jurisdiction of foreign sovereigns. That is, just because a State may stop and search a stateless vessel does not necessarily mean that its crewmembers may also be apprehended. The literal wording and the spirit of both the UNCLOS III and the United Nations Charter, *infra* note 201, would seem to require more than a vessel's statelessness to permit the extension of jurisdiction over foreign nationals without active consent of their home States.
205 UNCLOS III, *supra* note 3, art. 100; and RESTATEMENT, *supra* note 4, § 522 comments c and d.
206 *Id.*
207 *Id.*
208 See J.L. BRIERLY, *supra* note 47.
UNCLOS III specifically addresses the problem of illicit traffic in drugs,212 but does not use the same compelling language used in the piracy provisions.213 The language of the Acts does not mirror that of the UNCLOS III.

A consensus of the international community is reflected in UNCLOS III. Though there is some question as to the softness of its law,214 there is no doubt that the international phenomenon of UNCLOS III exists. Despite the ideological difficulties, the phenomenon must be recognized by U.S. policymakers and judges. UNCLOS III is a potent, universal expression of law that ought to be acknowledged in congressional acts and, more importantly, considered in judicial decisions.

IV. CONCLUSIONS AND RECOMMENDATIONS

The United States Congress and courts have acted contrary to international law as embodied in UNCLOS III.215 Both the MHSA and the MDLE permit actions outside the scope of both the letter and the spirit of the UNCLOS III.216 The state of customary and codified international law calls for international cooperation in the face of the menace of illicit drug trafficking. Congress needs to consider UNCLOS III when drafting domestic legislation that might be mirrored in the international document. Before allowing jurisdiction over foreign nationals apprehended aboard stateless vessels on the high seas, courts should question whether there has been any type of cooperation between the states from which the foreign nationals originate and the United States. The absence

provisions relevant to human rights require probable cause and reasonable notice prior to incarceration or the taking of property. See also United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975) (U.S. agents kidnap drug kingpin from Bolivia for prosecution in U.S., unprotected by fourth amendment or by article 2(4) of the U.N. Charter since charter applies only to states and not individuals); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (foreign drug kingpin kidnapped in Uruguay by U.S. agents, interrogated and beaten in Brazil by U.S. agents, flown to U.S. for prosecution, protected by fourth amendment but not by U.N. Charter despite protest by Uruguay); Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 TEX. INT'L L. 1 (1988).

212 UNCLOS III, supra note 3, art. 108.

213 Id. Article 108 requires some reasonable grounds for a request for cooperation among states in the slowing of drug trafficking. Article 100 requires that states act to the fullest possible extent to halt piracy. The Restatement (Third) Foreign Relations Law of the United States also acknowledges this distinction and stresses the fact that there has been no formal international declaration that drug smugglers ought to be treated in the same way as pirates. Restatement, supra note 4, § 513, comment e; § 521 Reporter's notes; and, § 522 comment d. See also Note, "Smoke on the Water"; Coast Guard authority to Seize Foreign Vessels Beyond the Contiguous Zone, 13 N.Y.U. J. INT'L L. 249 (1980).

214 See Gamble, supra note 192; Colson, supra note 191; Gamble & Frankowska, supra note 191; Oxman, supra note 191.

215 See supra notes 86-101 and accompanying text.

216 See supra notes 143-214 and accompanying text.
of protest by the State should not be enough to indicate cooperation in the prosecutorial effort. Cooperation requires action not omission.

Drug traffickers are not pirates or slavetraders. The United States is not free to act unilaterally. If the War on Drugs is to succeed it will require a cooperative effort. Much of the drug producing world has permitted the actions of its drug kingpins for the sake of economic independence and physical survival. This is why cooperation is required by international law. The United States cannot preempt the sovereignty of producer states or their nationals on the high seas unless some bilateral or multilateral agreement allowing that preemption is in existence. Coast Guard seizures hundreds of miles from U.S. waters may be based upon a good policy decision, but the legislation permitting it is bad law in light of UNCLOS III. If the War on Drugs is to succeed it must be done on a legitimate cooperative basis, not on an illegitimate unilateral basis. Congress and courts do not help the War on Drugs by operating outside the law.

Michael Tousley*

* J.D. Candidate, Case Western Reserve School of Law (1990).