Out of Reach: The MDLEA's Impermissible Extraterritorial Reach on Maritime Drug–Traffickers

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46 U.S.C. § 70503, known as the Maritime Drug Law Enforcement Act (MDLEA), prohibits individuals on board covered vessels from manufacturing, distributing, or possessing with an intent to distribute or manufacture, a controlled substance. The statute, as enacted, permits the prosecution of individuals arrested beyond U.S. jurisdiction and even within the territorial seas of other States. This provision is argued to be an impermissible extraterritorial reach absent a nexus requirement—showing a connection between the drug smuggling activity and the U.S. Recently, the Eleventh Circuit Court of Appeals held the statute's extraterritorial reach and lack of nexus requirement as unconstitutional under the Foreign Commerce Clause and Offenses Clause of the U.S. Constitution. This note explores the background and development of the MDLEA and argues its unconstitutionality.

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I. INTRODUCTION

Exhaustion from sleep deprivation, exacerbated by a lingering concern over your health and wellbeing; nausea from the rocking of the boat coupled with the stench of human feces and body odor; hunger so intense it consumes every waking second of your day; anxiety from not knowing whether you will ever see, or let alone speak, to your spouse, sibling, child, or mother ever again. This is the reality for thousands of Latin Americans who are seized by the U.S. Coast Guard every year, and they can endure this agony for days, weeks, and even months on end.[1] Many of those who find themselves in this position are fishermen, who are lured into smuggling drugs across seas to provide for their families.[2] Often, the U.S. Coast Guard will have tracked their every move at sea, waiting for a suitable moment to jump in and seize its suspects. Such seizures will occur beyond the territory of the U.S. and within the jurisdictions of other States or in the high seas, most often in the Caribbean and Latin America.[3] Thus, the main question presented here is where should these alleged smugglers be prosecuted? In their home States? In the States of their captors? Answering these jurisdictional issues requires an examination of U.S. constitutional law and traditional notions of customary international law. Ultimately, it will be argued that if prosecutors want to try these cases domestically, they must show a sufficient nexus between drug smuggling activity and the U.S.

For guidance, this casenote will evaluate the exercise of extraterritorial jurisdiction through the lens of the Maritime Drug Law Enforcement Act (MDLEA)—a popularly used federal statute for prosecuting drug smugglers found outside of U.S. jurisdiction.[4]

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[1] *See generally*, Seth Freed Wessler, *The Coast Guard's 'Floating Guant namos'*, N.Y. TIMES (Nov. 20, 2017) https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html.

[2] *Id*.

[3] Associated Press, *Drug smugglers take to the high seas to avoid border patrol*, N.Y. POST (Feb. 24, 2014, 1:54 PM), https://nypost.com/2014/02/24/drug-smugglers-take-to-the-high-seas-to-avoid-border-patrol/.

[4] *See infra* note 6.

Particularly, this article will observe the maritime drug smuggling phenomenon as it occurs mainly in other States' territorial waters as well a brief analysis applied to the high seas.[5]

As enacted, the MDLEA prohibits individuals on board a covered vessel from manufacturing, distributing, or possessing, with an intent to distribute or manufacture, a controlled substance.[6] A "covered vessel" is one that is subject to U.S. jurisdiction.[7] Vessels subject to jurisdiction of the U.S, include, but are not limited to, vessels "without nationality," and "a vessel in the territorial water of a foreign nation if the nation consents to the enforcement of United States law by the United States."[8] Additionally, this prohibition applies to acts "committed outside the territorial jurisdiction of the United States."[9] Regarding jurisdiction, the MDLEA asserts that anyone violating the statute will be tried "in the district in which such offense was committed," or, if the offense was carried out upon *the high seas or otherwise outside U.S. jurisdiction*, they "shall be tried in *any* district."[10] This final, overarching clause is what raises the most concern because the latter proposition activates limitless reach for the United States to arrest and prosecute anyone they consider to violate the MDLEA.[11]

Recently, an Eleventh Circuit Court of Appeals case originating in the Southern District of Florida held that the MDLEA is unconstitutional, in part, under the Foreign Commerce Clause.[12] The holding in *United States v. Davila–Mendoza* will be at the crux of the analysis here, in hopes that the Supreme Court will confront this issue and give direct guidance to lower courts.[13] Thus, two main contentions will be asserted: the MDLEA's extraterritorial reach without consent (1) violates the U.S. Constitution and (2)

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[5] *High Seas*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/high-seas (last visited Mar. 5, 2020) ("High seas, in maritime law, [includes] all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a [S]tate.").

[6] Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503(a)(1) (2021).

[7] *Id.* § 70503(e).

[8] *Id.* § 70502(1).

[9] *Id.* § 70502(b).

[10] *Id.* § 70503(b) (emphases added).

[11] *Id.*

[12] United States. v. Davila–Mendoza, 972 F.3d 1264, 1277 (11th Cir. 2020).

[13] *See generally id.*

offends traditional notions of customary international law on extra-territorial jurisdiction. Mainly, it will be argued that the MDLEA needs to contain a nexus requirement for alleged smugglers found in foreign territorial waters to comply with constitutional requirements and therefore customary international law. [14] Part II of this article will walk through the background of drug abuse in the U.S. and the laws enacted to mitigate the issue. Part III will evaluate the existing law as it applies specifically to the high seas and provide an argument against the MDLEA's reach of jurisdiction for conduct committed in the high seas. Finally, Part IV will delve into Latin American Countries' sentiment, through an examination of treaties, that concern the MDLEA's extraterritorial reach on their citizens and in their territory. Additionally, Part IV will reveal how the MDLEA's extraterritorial reach in Latin American territorial waters is unconstitutional under the Foreign Commerce and Offences Clauses and offends traditional notions of customary international law.

II. BACKGROUND

A. Drug Crisis in the United States

Indeed, drug consumption in the U.S. is a problem. Since the mid–seventies, the U.S. has seen a dangerous, widespread usage of drugs.[15] Drug poisoning deaths peaked in 2017 and consistently outrank deaths by firearms, car accidents, and homicide. [16] This can be attributed largely in part to the booming international drug–

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[14] *See infra* note 79. Under the Foreign Commerce Clause, a showing of a nexus between the illegal activity and the U.S. must be demonstrated. As for customary international law, some argue that the Protective Principle ought to permit Congress to authorize the extraterritorial arrests contemplated by the MDLEA. *Id.* However, the protective principle also carries with it the burden to prove the same nexus. *Id.*

[15] *See* William H. Latham, *United States v. Davis: Extraterritorial Application of U.S. Drug Laws on the High Seas*, 16 N.C.J. INT'L L. & COM. REG. 641, 642 (1991).

[16] *See* 2019 Drug Enforcement Administration National Drug Threat Assessment, U.S. DRUG ENF'T ADMIN. (Dec. 2019). In 2017, about 192 people died every single day from drug poisoning. *Id.*

trade which produced over $400 billion in revenue in 2006 alone.[17] The drugs mainly responsible for those deaths include cocaine, heroin, and methamphetamine,[18] mostly coming from Latin America.[19] The most relevant drug, for purposes of maritime drug smuggling in Latin America, is cocaine.[20] In 2018, global seizures of cocaine reached 1,131 tons, the second highest amount that year after cannabis.[21] Colombia is the leading nation among Latin American States, and likely the world, in the cocaine–trafficking industry, accounting for ninety–percent of cocaine consumption in the U.S. and eighty percent of the global market in 2009.[22] Because of the concentration of drug–trafficking in this region—or perhaps because of the District's leniency[23]—almost all cases have been prosecuted out of the Southern District of Florida. [24]

As a result, for the past twenty years Congress has sought to address the rapidly expanding drug problem through legislation seeking to mitigate consumption.[25] In fact, before 1981, the "War on Drugs" (a term coined by the Nixon Administration) was almost an afterthought to the aggregate of federal law–enforcement ef-forts.[26] President Reagan was at the forefront of efforts to expand the reach of the drug war by endorsing laws that boost convictions for drug consumption.[27] For cocaine and marijuana specifically,

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[17] Charles R. Fritch, *Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement*, 8 WASH. U. GLOB. STUD. L. REV. 701 (2009).

[18] U.S. DRUG ENF'T ADMIN., *supra* note 16.

[19] *Id.* at 60 (90% of cocaine comes from Colombia and 6% from Peru; 100% of heroin seizures are found to be coming from Latin American States).

[20] *See id.* Cocaine is the leading drug produced in, and transported from, Latin America.

[21] *See* U.N. Office on Drugs and Crime, *World Drug Report 2020,* U.N. Doc. E/20/XI/6 (June 2020).

[22] *See* PETER CHALK, THE LATIN AMERICAN DRUG TRADE: SCOPE, DIMENSIONS, IMPACT, AND RESPONSE (2011).

[23] *See Wessler*, *supra* note 1.

[24] *Id*.

[25] *See* Latham, *supra* note 15, at 641.

[26] *War on Drugs*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com /topic/war–on-drugs (last visited Oct. 6, 2021).

[27] *Id.* (Between 1980 and 1997, incarcerations for nonviolent drug offenses rose from 50,000 convictions to 400,000).

the U.S. focused on reducing external supply from Latin America rather than internal demand from its own citizens.[28] Naturally, this caused a great deal of legislative and executive attention to be placed not only on regulating the territorial seas of the U.S., but even the high seas in the Caribbean and Latin America.[29] One of the initial pieces of legislation to reflect U.S. efforts to mitigate drug–trafficking was the Marijuana on the High Seas Act. [30]

B. The Marijuana on the High Seas Act—A Predecessor to the MDLEA

As an initial effort to cease drug flow into the U.S., Congress enacted the Marijuana on the High Seas Act (MHSA).[31] Under the MHSA, federal courts had a right to assert subject matter jurisdiction over U.S. nationals, despite location of capture.[32] Nor did this Act require prosecutors to prove that the drugs were indeed bound for distribution in the U.S., only that it was a U.S. national or vessel committing the act of transferring the narcotics.[33] So, where the drug smugglers were not aboard a U.S. vessel or were not U.S. nationals, prosecution would still be permitted so long as the smugglers were captured on the High Seas[34] and it could be shown that these foreign nationals had an intent to distribute their controlled substances in the U.S.[35] Thus, the nexus requirement makes an appearance in drug smuggling cases even before the MDLEA was officially put in place.[36] What's more, this nexus requirement

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[28] Fritch, *supra* note 17.

[29] *See infra* note 31.

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

[31] Michael Tousley, *United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is it Legal*, 22 CASE W. RES. J. INT'L L. 375, 377 (1990).

[32] *See* M. Lawrence Noyer, *High Seas Narcotics Smuggling and Section 955A of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 FORDHAM L. REV. 688, 689–90 (1982).

[33] *Id*.

[34] ENCYCLOPEDIA BRITANNICA, *supra* note 5 ("High seas, in maritime law, [includes] all parts of the mass of saltwater surrounding the globe that are not part of the territorial sea or internal waters of a [S]tate.").

[35] Tousley, *supra* note 31, at 377.

[36] *Id*.

arose where individuals are arrested on the high seas and not even within another State's territorial waters.[37] The former is often viewed by courts to afford more sovereignty to the arresting nation to handle the issue the way it deems fit.[38]

The Fifth Circuit has addressed the MHSA and extraterritorial reach for drug–trafficking cases, determining appropriate boundaries for asserting jurisdiction through a nexus requirement.[39] For example, in *United States v. Ricardo*, the court addressed a case in which two Americans and five Colombians were arrested on board a vessel in the high seas for possession of marijuana and charged under a similar statute.[40] Defendants argued that the jurisdiction cannot be asserted against them because there was no nexus to the United States.[41] In other words, the Defendants' actions did not have an intended effect in U.S. territory.[42] The Fifth Circuit agreed, stating that "[t]he United States and this Circuit have traditionally adhered to the objective principle of territorial jurisdictional, which attaches criminal consequences to extraterritorial acts that are intended to have effect in the sovereign territory, at least where overt acts within the territory can be proved."[43] And wherever overt acts are not required, jurisdiction can be had upon a showing of intended territorial effects.[44] In the Southern District of Florida, courts adopted the same perspective on extraterritorial reach in similar circumstances.[45]

In *United States. v. James–Robinson*, for example, the court held that it did not have subject matter jurisdiction to prosecute foreign nationals on board a vessel 400 miles off the coast of the

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[37] *Id*.

[38] *Id*.

[39] *See*, *e.g.*, United States v. Ricardo, 619 F.2d 1124, 1128–29 (5th Cir. 1980); United States v. Baker, 609 F.2d 134, 139 (5th Cir. 1980).

[40] *Ricardo*, 619 F.2d at 1127; 21 U.S.C. § 841(a) (1979).

[41] *Id.* at 1128.

[42] *Id*.

[43] *Id.* (The court went on to find that the U.S. did have jurisdiction but because the nexus requirement was sufficiently met in this case).

[44] *Id.* (citing United States v. Postal, 580 F.2d 862, 885 (5th Cir. 1979)).

[45] *See*, *e.g.*, *infra* note 46.

U.S. without a showing that defendants "caused, or intended to cause, some kind of effect in or to the U.S."[46]

The court in *James–Robinson* evaluated Congress' intent behind the MHSA and found that they expressed an intent to provide the government with "maximum prosecutorial authority" *allowed by international law*.[47] The court also notes that the Department of Justice objected to the MHSA, stating that the lack of any provision requiring a showing a knowledge or intent to cause an effect in or to the U.S.

> "raises questions of criminal jurisdiction over foreign nationals and foreign vessels. Under international law, a state does not have jurisdiction to proscribe the conduct in question . . . To have jurisdiction over . . . distribution of a controlled substance by a non–U.S. citizen on foreign vessels on the high seas, the United States must show an actual or potential adverse effect within its territory."[48]

The bill was later amended, but no changes addressed the requirement in question.[49] Omitting this provision was immaterial, however, because Congress' intent was for courts to exercise authority within the boundaries of international law. [50] While the Department of Justice raised its objections for potential violations of international law, there was no sign that Congress intended to reject the application of international law when implementing the MHSA.[51] After all, the MHSA permitted intervention in drug smuggling and manufacturing where (1) the person is in the territorial waters of the U.S.; (2) there is a U.S. citizen aboard any vessel on the high seas; or (3) the persons are aboard a vessel subject to

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[46] United States v. James-Robinson, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981).

[47] *Id.* at 1343.

[48] *Id*. at 1343 (citing Letter from Patricia M. Wald, Assistant Attorney General (April 11, 1979), *reprinted in* H. R. REP. NO. 323 (1979)).

[49] *Id.* at 1343.

[50] *See id.*

[51] *Id*.

the jurisdiction of the U.S.[52] Ultimately, this statute was abandoned because of the challenging burden of proving a vessel's nationality in federal court.[53] To remedy this adversity, the MDLEA was adopted to broaden the scope of prosecution, removing the requirement to prove vessel nationality.[54]

C. The MDLEA: A Hawkish Effort to Prevent the Importation of Drugs into the U.S.

By the mid–1980s, drug smuggling had hit an all–time high in the U.S. and other countries with an overwhelming majority of drugs coming from Latin America, including countries like Colombia, Peru, Bolivia, and Mexico.[55] Consequently, cartels leading the charge in drug exportation had exhausted their aerial transportation and found relief in maritime smuggling.[56] The U.S. faced effectively catching drug smugglers in the high seas, while complying with customary international law.[57] Specifically, "the high seas are open to all states, and no state may subject any part of them to its sovereignty."[58] By 1986, Congress fully adopted the MDLEA as the appropriate measures and abandoned all versions of the MHSA.[59] The purpose of the MDLEA was to "facilitate enforcement by the U.S. Coast Guard of laws relating to the importa-

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[52] 21 U.S.C. § 955(a) (1982) (superseded by 46 U.S.C. § 1903 (1988)).

[53] Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Enforcement Act: A Justification of the Law's Extraterritorial Reach*, 8 HARV. NAT'L SEC. J. 113, 200 (2017).

[54] *See generally* 46 U.S.C. § 1903 (1988).

[55] Bruce Bagley, *The Evolution of Drug Trafficking and Organized Crime in Latin America*, 71 SOCIOLOGIA, PROBLEMAS E PRÁCTICAS 99, 102 (2013), https://journals.openedition.org/spp/1010 (last visited Jan. 13, 2021). (In 1985, Peru produced around sixty-five percent of the global market's supply of coca leaf with Bolivia at twenty-five percent and Colombia at ten percent. Of course, with this concentration of drug supply coming from mostly Latin American countries, the U.S. was obligated to play a considerable role in mitigating this phenomenon. Consequently, the U.S. would need to create and define appropriate laws to address the issue.).

[56] Latham, *supra* note 15, at 642.

[57] *See generally id* at 642–43.

[58] *Id.* (quoting R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 145 (1983)).

[59] *Id*.

tion of illegal drugs and for other purposes."[60] Specifically, the MDLEA states the following:

> Congress finds and declares 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.[61]

Important here, and at the heart of much controversy surrounding this statute, is the finding that international drug–trafficking presents a "specific threat to the security of the United States," therefore assuming an automatic nexus between smuggling activities and the United States.[62] But not all international drug–trafficking threatens the safety and security of the U.S. by default. Indeed, Congress intended to pass this statute to activate maximum prosecutorial authority but while still *complying with international law*.[63] Thus, while Congress sought to take a strong initiative against drug importation, it cannot act beyond its enumerated powers under Article I of the Constitution nor did it intend to offend traditional notions of customary international law. [64]

III. A BRIEF EXAMINATION OF EXTRATERRITORIAL REACH ON THE HIGH SEAS

While the focus of this article centers on the extraterritorial reach of the MDLEA as it applies particularly to arrests in a foreign territory, it is worth examining the arguments against prosecu-

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[60] S. REP. 96-855, at 1 (1980).
[61] 46 U.S.C. § 70501 (1986).
[62] *Id*.
[63] *See* Wald *supra* note 47.
[64] As for the latter, intent is irrelevant.

tion based on acts committed in the high seas. Courts have been willing to gloss over an analysis of the jurisdiction for arrests made on the high seas.[65] Thus, it is worth analyzing the primary sources of customary international law, the types of jurisdiction States may assert under such law, and the existing treaties between the U.S. and Latin American nations. Such analysis shows that even arrests made for drug–trafficking on the high seas, rather than foreign territorial waters, without a valid nexus to the U.S. are improper to prosecute.

A. Setting the Stage with the United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) serves as a primary source for guidance in the area of admiralty law for many States.[66] Its contents outline a wide breadth of generally forbidden practices overseas, State sovereign and jurisdictional limits, rights of foreign vessels and ships, and so on.[67] The U.S. helped with the creation of the UNCLOS, which was later ratified by 162 countries and the European Union.[68] That said, while the U.S. spearheaded its creation and implementation, Congress has yet to ratify and sign into the Treaty, citing issues with seabed mining and delegating too much authority to adversarial countries.[69] Yet multiple presidents and congressional reports have asserted the U.S. intent to abide by the UNCLOS and courts have even cited its contents when determining best practices or violations of customary international law.[70] Moreover, because an overwhelming amount of nations have already signed the Treaty governing the UNCLOS into action, it ought to be considered customary international law regardless of U.S. approval or involve-

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[65] *See*, *e.g.*, *infra* notes 86–87.

[66] *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[67] *See id.*

[68] Aditya Singh Verma, *A Case for the Unites States' Ratification of UNCLOS*, (May 2, 2020, 12:00 PM), https://diplomatist.com/2020/05/02/a-case-for-the-united-states-ratification-of-unclos/.

[69] *Id*.

[70] *Id.*; *See*, *e.g.*, United States v. Aybar-Ulloa, 987 F.3d 1, 6 (relying on UNCLOS to determine customary international law).

ment.[71] Contained within the UNCLOS is the right for a vessel to travel through high seas with minimal interference from other states, while duties for such vessel include sailing under the flag of their corresponding States.[72]

Under the rules of international law, the Coast Guard may not stop or even board foreign vessels when such vessels are navigating the high seas or even in foreign waters.[73] To bypass this limitation, the U.S. has launched several bilateral agreements with nations in Latin America and the Caribbean allowing the U.S. Coast Guard to board and search other States' vessels when those vessels are suspected of drug trafficking.[74] These are not made in under any UNCLOS rules and are, instead, only agreements made between the U.S. and other countries laid out for specific scenari-os.[75] Rarely, if ever, do these arguments mention any instances of a nation's ability to prosecute extraterritorially.[76] Moreover, consent to prosecute in these cases does not provide valid grounds for jurisdiction where the activities have no connection to the prosecuting nation.[77] Jurisdiction, in such instance, would only be valid if the activities occurred within territorial waters of the prosecuting nation or if there were universal jurisdiction.[78]

B. The Five Types of Jurisdiction under Customary International Law

In general, there are five methods in which States can assert jurisdiction: (1) nationality principle; (2) passive personality principle; (3) territorial principles; (4) protective principle; and (5) uni-

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[71] S. EXEC. REP. NO. 110–9 (2007).

[72] United Nations Convention on the Law of the Sea art. 87, 89, Dec. 10, 1982, 1833 U.N.T.S. 397.

[73] *Id*. at art. 110.

[74] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINN. L. REV. 1191, 1202 (2009).

[75] *Id*.

[76] *Id*.

[77] *See*, *e.g.*, *infra* note 81.

[78] *See id*.

versal principle.[79] The first four require a nexus to the prosecution nation. [80] For purposes of this casenote, the three main principles to be discussed are territorial, protective, and universal. Under the territorial principle, "a state may exercise jurisdiction with respect to all persons or things within its territory."[81] Thus, under this principle, vessels on the high seas maintain the nationality of the flag they fly and are subject to such nation's exclusive jurisdiction—not that of the arresting nation. [82] When a State relies on protective jurisdiction or asserts the "protective principle," over an act committed outside the State's territory, the act or conduct must "threaten[] the nation's security or could potentially interfere with the operation of governmental functions."[83] Courts in the Eleventh Circuit relied on the protective principle as a justification for the MHSA and, later, the MDLEA.[84] In United States v. Gonzalez, the court reasoned that the MHSA had been adopted to rely on the protective principle because proving that a vessel was headed for the United states is "often difficult."[85] The court also relied on Congress' finding that drug–trafficking in these areas have a potential harm and are recognized as crimes by other developed nations. [86]

i. The Protective Principle Fails to Justify the MDLEA's Extraterritorial Reach on the High Seas

On the other hand, the Southern District of Texas addressed an issue under the MDLEA in which the defendant was neither a U.S. citizen nor had ever been to the U.S., and whose acts did not seem

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[79] Allyson Bennett, Note, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L. L. 433, 436 (2012).

[80] *Id*.

[81] United States v. Marcano-Godoy, 462 F. Supp. 3d 88, 95. (D.P.R. 2020) (internal citations omitted).

[82] United States v. Arra, 630 F.2d 836 (1st Cir. 1980).

[83] United States v. Gonzalez, 776 F.2d 931, 938 (11th Cir. 1985).

[84] *Id.* at 939 (addressing arrests made on the high seas specifically); *see infra* note 88.

[85] 776 F.2d at 939.

[86] *Id*.

to have an effect on the U.S. because he was destined for Europe.[87] The district court found a lack of jurisdiction under the protective principle and asserted that there was no nexus here.[88] To support its argument, they offered that the protective principle is only activated when conduct by foreign nationals are directed against the "security of the state or against a limited class of other state inter-ests."[89] Indeed, the district court's opinion was vacated by the Fifth Circuit because drug–trafficking automatically "threatens the security of the United States."[90] Even so, these assumptions are rarely, if ever, challenged even though it is warranted. For example, the court in *Suerte* relied heavily on a Congressional finding that "trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned[, and] . . . presents a specific threat to the security . . . of the United States.'"[91] As shown here, the phrase "trafficking in" assumes that the act includes bringing drugs "in" the U.S.[92]

Moreover, the logic applied in *Suerte* to the congressional finding has no boundaries.[93] Nothing in the congressional finding would prevent the U.S. from prosecuting cases that occurred twenty–five miles off an Australian coast or in any other part of the world isolated from the U.S.[94] Judge Torruella of the First Circuit phrased it well when he contended that "[r]elying on the protective principle without any nexus would be to conclude that Congress could allow for arrests and prosecutions of drug traffickers on the other side of the world, even without flag–nation consent."[95] Surely, there is no connection inherent in drug smuggling conducted in these areas and the safety and security of the U.S.[96] Thus, justify-

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[87] *See* United States v. Suerte, No. CRIM. 00-0659, 2001 WL 1877264 (S.D. Tex. June 6, 2001) (vacated by United States v. Suerte, 291 F.3d 366 (5th Cir. 2002)).

[88] *See id.* at *6.

[89] *Id.* at *5 (citing Restatement (Third) at § 402(3)).

[90] *Suerte*, 291 F.3d at 371.

[91] *Id.* at 370 (quoting 46 U.S.C. app. § 1902) (emphasis added).

[92] *Id*.

[93] *See id*.

[94] *See id*.

[95] United States v. Angulo-Hernández, 576 F.3d 59, 61 (1st Cir. 2009) (Torruela, J., dissenting from the denial of en banc review).

[96] *See generally id.*

ing jurisdiction for drug–trafficking on the high seas on the grounds of the protective principle ought to be re–evaluated.

ii. Universal Jurisdiction Does Not Apply to Arrests Made on the High Seas

Where arrests are made for drug–trafficking on the high seas, the U.S. would still not be able to prosecute under the guise of the last principle mentioned above, universal jurisdiction.[97] Examples of crime which *would* constitute a universal crime or possess characteristics found to impose "universal concern" include piracy, slavery, and genocide.[98] When a universal crime is committed, a nation may then exercise universal jurisdiction no matter where the act occurred or whether the act had any nexus to the nation. Comparing these types of crimes to drug–smuggling is futile. While drug abuse is a serious issue that warrants combative responses, it cannot be placed on the same level as mass–killings or forced labor. Simply put, drug trafficking is not a universal crime consistent with customary international law and should not be recognized as such.[99] For that reason, courts should not accept a universal jurisdiction argument for arrests made on the high seas.

IV. MURKY WATERS: EXTRA–TERRITORIAL REACH IN FOREIGN TERRITORIAL WATERS

The primary focus of the debate in lower courts has geared around extraterritorial reach in foreign territorial waters.[100] Thus, the attention of this note will now shift to arrests made in foreign territorial seas. To support the contention that extraterritorial arrests are improper, this section will focus on those Latin American countries that oppose this type of invasion on their sovereignty. Next, this section will include background on the Offences Clause and Foreign Commerce Clause, and an analysis for both as applied to the MDLEA.

Congress has exceeded its authority by exerting jurisdiction beyond the reach of the U.S. and such acts are unconstitutional

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[97] *Infra* note 98.

[98] See Restatement (Third) of Foreign Rel. L. §§ 402 cmt. F (1987).

[99] *Id*.

[100] *See generally supra* note 10.

under the Offences and Foreign Commerce. As such, two main constitutional provisions are at issue: the Foreign Commerce Clause under Article I Section 8, Clause 3, and the Offences Clause[101] under Article I Section 8, Clause 10. The Foreign Commerce Clause states that Congress has the power to "regulate Commerce with *foreign* Nations, and among the several States, and with the Indian Tribes."[102] Under the Offences Clause, Congress has the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[103] Both have been and are continuously used as a basis to assert extraterritorial reach.[104]

Many argue that the Offences Clause grants Congress sweeping authority to essentially define international law violations and impose punishments for those violations.[105] Some courts, particularly the Ninth Circuit, have taken a liking to this position and applied it to the MDLEA.[106] Under the strict lens of constitutionality, this seems to be an accurate interpretation of the clause.[107] Congress, under the Offences Clause, has the authority to determine what international law violations would be.[108] At any rate, this in-

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101 Many courts refer to this particular section as the "Piracies and Felonies" clause. While arguments have been made for and against the MDLEA's extraterritorial reach using this clause, this analysis will center around the "Offences" clause.

102 U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

103 U.S. CONST. art. I, § 8, cl. 10; for purposes of this case note, the "Offences Clause" will encompass both Congress' power to define and punish felonies on the high seas and Offences against the law of nations.

104 *See*, *e.g.*, United States v. Cifuentes-Cuero, 808 F. App'x 771, 775 (11th Cir. 2020) (relying on Felonies portion of Offences Tripartite Clause); *see also* United States v. Baston, 818 F.3d 651, 667–69 (11th Cir. 2016) (applying Foreign Commerce Clause to justify extraterritorial reach of human trafficking conduct).

105 *See*, *e.g.*, Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000) (discussing the underappreciated authority that the framers of the Constitution granted to Congress and how the courts neglect this as a topic).

106 *See, e.g.*, United States v. Perlaza, 439 F.3d 1149, 1159 (9th Cir. 2006) (reasoning that the MDLEA is constitutional under the Piracies and Felonies Clause).

107 *Cifuentes-Cureo*, 808 F. App'x at 775.

108 *Id*.

terpretation raises serious issues in application by permitting the exercising of such broad powers worldwide. On the other hand, specific portions of the MDLEA have already been narrowed by some Circuit courts, as made evident by the Eleventh Circuit.[109] Recently, the Eleventh Circuit expressly held that the broad authority granted to the Executive by the MDLEA as an improper exercise of the Offences Clause and Foreign Commerce Clause as well as a violation of the Due Process Clause.[110] The court in *Davila–Mendoza* primarily addressed the nexus argument, being that the U.S. cannot prosecute drug smugglers found in another State's territory where there is connection between their activities and the U.S.[111] And while this case once puts the Eleventh Circuit against the extraterritorial reach overseas permitted by the MDLEA, the Supreme Court has yet to address the issue, still leaving open the feasibility and authorization to enforce the statute.[112]

A. Latin American Sentiments on U.S. Exercise of Extra–Territorial Control

Before delving into a legal analysis under the Offences and Foreign Commerce Clauses, it is worth looking into foreign States' sentiments toward U.S. intervention and prosecution of conduct beyond its territory. Particularly relevant for these purposes is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance,[113] which will be examined throughout this section for its assertions, declarations, and objections by signatory States.

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109 *See, e.g.*, United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012) (finding that Congress is limited, by customary international law, in punishing crimes that are not deemed violations of the law of nations); *but see* United States v. Ruiz-Murillo, 736 F. App'x 812, 816 (11th Cir. 2018) (acknowledging the holding in *Bellaizac-Hurtado,* but contending such limitation does not apply where an arrest was made beyond the twelve-mile territorial waters of a foreign state).

110 United States. v. Davila-Mendoza, 972 F.3d 1264, 1277 (11th Cir. 2020).

111 *Id.* at 1276.

112 *Id*.

113 *Infra* note 114.

i. UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance—A Case Against Prosecuting Conduct Outside Territorial Reach

After the passing of the MDLEA, dozens of countries came together and established the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (the "Treaty").[114] The UN sets out the objective of the Treaty as "provid[ing] comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals. It provides for international cooperation through, for example, extradition of drug traffickers, controlled delivers and transfer of proceedings."[115] Additionally, the contents of the Treaty expresses concerns of illicit drug use and the rising trend of drug production, as well as the UN's desire to combat it head–on.[116] Nonetheless, the Treaty still maintains that it is " [d]etermined to improve international co–operation in the suppression of illicit traffic by sea . . . [r]ecognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international co–operation is necessary."[117] Although the United States has ratified this Treaty, it is important to note that because the MDLEA was passed before ratification, the statute cannot be interpreted in light of the Treaty.[118] As a result, it cannot be argued that the drafters of the MDLEA were putting it into law to comply with an existing treaty to overcome objections on grounds of constitutional law.

Multiple Latin American countries have ratified the Treaty, but with reservation and objection.[119] Most glaring is that of Mexico.

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

115 U.N. Office on Drugs and Crime, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html?ref=menuside (last visited Oct. 6, 2021).

116 *See* Treaty *supra,* note 114.

117 *Id.* at 1 (emphasis added).

118 *See* Maritime Drug Law Enforcement Act, 46 U.S.C. § 70503(a)(1) (2021).

119 *See*, *e.g.*, *infra* note 120.

Mexico objected to the United States third declaration. First, the United States' third declaration read as follows:

> (3) Pursuant to the rights of the United States under article 7 of this treaty to deny requests which prejudice its essential interests, the United States shall deny a request for assistance when the designated authority, after consultation with all appropriate intelligence, anti–narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.[120]

Mexico viewed this as a "unilateral claim to justification . . . which runs counter to the purposes of the [Treaty]."[121] Article 7 lays out the guidelines for mutual legal assistance and requires parties to afford one another the "widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relations to criminal offences . . ."[122] The reason the U.S. declaration is problematic is that the refusal to co–operate under Article 7 will hinder and deter other countries' efforts to prosecute drug–trafficking offenses committed within their jurisdiction, especially when the U.S. makes the initial arrest.[123] Operating under the U.S. declaration, whenever it makes the finding that a government official privy to the disclosed information is somehow in cahoots with the drug–trafficking activities, the U.S. can then refuse to aid in any investigation or proceeding. Without disclosure of where the arrest was made, what individuals were on a vessel, or what those individuals disclosed in interviews, it becomes nearly impossible to bring proceedings anywhere but the U.S. As such, the U.S. holds a monopoly over prosecutions for drug–trafficking offenses.

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120 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UNITED NATIONS TREATY COLLECTION (Dec. 20, 1988), sa.

121 *Id*.

122 *Id*.

123 *See id*.

ii. U.S. Mutual Legal Assistance Treaties with Latin American Nations

The Treaty also provides that other mutual legal assistance agreements may be entered into notwithstanding Article 7.[124] The United States has entered into Mutual Legal Assistance Treaties (MLATs) with nineteen countries, only six of which are Latin American countries—Argentina, Belize, Brazil, Mexico Panama, Uruguay, and Venezuela.[125] These treaties tend to focus on the help of identifying, capturing, and aiding in the prosecution of persons.[126] For example, in an MLAT with Brazil, assistance explicitly includes: (a) taking the testimony or states of persons; (b) providing documents, records, and items; . . . (f) executing requests for searches and seizures; . .. and (h) any other form of assistance not prohibited by the laws of the Requested State.[127] Thus, even where there may be some sort of agreement over cooperation and jurisdiction, the requested state must abide by its own laws.

B. Treatment of MDLEA by Davila–Mendoza and a Forecast for Future Decisions on the Extraterritorial Reach of the MDLEA in Foreign Territorial Waters

The Eleventh Circuit took initiative to consider the MDLEA unconstitutional in *United States v. Davila–Mendoza*.[128] The defendants in *Davila–Mendoza* consisted of three foreign nationals in a foreign vessel who were seized and boarded by U.S. Coast Guard officers in the territorial waters of Jamaica. [129] The officers discov-

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124 *Id*.

125 U.S. Dep't of State, Bureau of Int'l Narcotics and L. Enf't Aff., 2012 International Narcotics Control Strategy Report (INCSR) (Mar. 7, 2012); *see also Mutual Legal Assistance in Criminal Matters*, FINDLAW, https://2009-2017.state.gov/j/inl/rl s/nrcrpt/2012/vol2/184110.html (last visited Mar. 4, 2021) (explaining that only three Latin American countries have an MLAT currently in force).

126 *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, Braz.- U.S., Oct. 14, 1997, S. TREATY DOC NO. 105-42.

127 *Id.* at art. 1.

128 United States v. Davila-Mendoza, 972 F.3d 1264, 1277 (11th Cir. 2020).

129 *Id.* at 1267.

ered 3,500 kilograms of baled marijuana on the vessel.[130] The captain of the smuggling vessel disclosed to the officers that the vessel was Costa Rican and that he was Nicaraguan. [131] Subsequently, the defendants freely admitted to the crime and explained that the engines had stopped working on the boat from the weight of the drugs on board.[132] The defendants were charged with possessing and conspiring to possess with intent to distribute over 1,000 kilograms of marijuana under the MDLEA.[133] The defendants moved to dismiss, alleging the statute exceeded Congress' power under the Define and Punish Clause and asserted that the district court's application of extraterritorial jurisdiction violated their due process rights.[134] In response, the government contended that the extraterritorial application of the MDLEA was valid under the Foreign Commerce Clause. [135]

The court first looked to the Tripartite Clause—Congress' power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[136] The government's argument was quickly dismissed because this arrest occurred in the territorial waters of Jamaica, not on the high seas.[137] Additionally, the "Offences against the Law of Nations" component was rejected under *stare decisis* as the Eleventh Circuit has determined that the clause's application is "limited to those offenses recognized by customary international law."[138]

The court next evaluated a portion of Article I, which may have authorized the MDLEA's extraterritorial reach: the Foreign Commerce Clause.[139] As mentioned earlier, the Constitution provides that "Congress shall have the power . . . [t]o regulate Commerce

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130 *Id*.

131 *Id*.

132 *Id*.

133 *Id.* (citing 46 U.S.C. § 7503(a)(1), 70503(b)).

134 *Davila-Mendoza*, 972 F.3d at 1268.

135 *See id.* The government also argued that the application would fall under the Necessary and Proper Clause.

136 U.S. CONST. art. I, § 8, cl. 10.

137 *Davila-Mendoza*, 972 F.3d at 1268.

138 *Id.* (citing United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249–53 (11th Cir. 2012) (holding the MDLEA unconstitutional under the Offences Clause)).

139 972 F.3d at 1268.

with foreign Nations, and among the several States, and with the Indian Tribes."[140] While the court recognized the Foreign Commerce Clause's broad power afforded to the clause by the Supreme Court, it also pointed out the Supreme Court's lack of explicitly defined boundaries.[141] The court reasoned that Congress' power under the Foreign Commerce Clause "includes at least the power to regulate channels of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a substantial effect" on commerce between the United States and other countries."[142] Thus, under a Foreign Commerce Clause analysis it was treated as necessary to embark on a nexus determination through the "substantial affects" test.[143] The court found the government's logic as permitting Congress to "globally polic[e]" foreign drug trafficking commerce, invading the sovereignty of other foreign nations without the U.S. being involved in any capacity.[144] The court found that the MDLEA is unconstitutional and exceeded Congress' authority under the Foreign Commerce, Offences (a.k.a. "Define and Punish"), and Necessary and Proper Clauses. [145]

This case is groundbreaking because it breaks away from the position the Eleventh Circuit held for over a decade. [146] For example, in *United States v. Estupinan*, the court found that the lower court did not err in failing to *sua sponte* find that Congress exceeded its authority under the Piracies and Felonies Clause by enacting the MDLEA.[147] First, it reasoned that the MDLEA was put in

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140 US CONST. art. I § 8 cl. 3.

141 *Davila-Mendoza*, 972 F.3d at 1269–70.

142 *Id.* (quoting United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016)).

143 *See Davila-Mendoza*, 972 F.3d. at 1272–74 (reasoning that it needed not determine necessarily that the activities substantially affected interstate commerce, but only that a "rational basis" existed for concluding such).

144 *Id.* at 1276–77.

145 *Id.* at 1277–78.

146 *See, e.g.*, United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985) (rendering extraterritorial prosecution under the MHSA permissible under the protective principle of international law); United States v. Campbell, 743 F.3d 802, 809–10 (11th Cir. 2014) (reasoning that established precedent permitted extraterritorial prosecution on the high seas under the Offences Clause, even where the conduct lacked a nexus to the U.S.; *see generally* United States v. Estupinan, 453 F.3d 1336 (11th Cir. 2006).

147 *Estupinan*, 453 F.3d at 1338.

place specifically to punish acts committed on the high seas based on the statute acknowledging that drug trafficking is an international problem and is a "threat to the security and societal well–being of the United States."[148] Additionally, the court explained there was a lack of cases that applied the nexus requirement between acts committed and the U.S.[149] Still, this rationale becomes problematic because it lacks substantial, thorough analysis. [150] The MDLEA does not only apply to acts committed on the high seas, but just as the MDLEA makes clear, and just as it has been applied, the U.S. may punish acts committed anywhere outside its territory, not just the high seas.[151] It is also not entirely clear whether the MDLEA would be constitutionally viable even if its scope were restricted to solely arrests made for criminal conduct on the high seas, as argued earlier. [152]

i. The Offences Clause of the Constitution in Maritime Law

The U.S. Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[153] This Clause serves as a positive authority being afforded to the Legislature rather than a limitation like the Due Process Clause. [154] Even so, this should not be mistaken as unilateral authority to establish the boundaries of the Law of Nations and dictate what acts constitute a crime as a matter of international law. Before the Constitution was ratified and adopted as the supreme law of the land, admiralty and maritime cases were split between the Confederation and the States.[155] The Framers' purpose of setting forth that clause in the Constitution was to transfer the power to Congress to decide the legality of certain acts under admiralty law, of course within the proper boundaries.[156] Thus, in defining offenses against the law of nations

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148 *Id*.
149 *Id*.
150 *See id*.
151 46 U.S.C. § 70503(b) (2016).
152 *Id*.
153 U.S. CONST. art. I, § 8, cl. 10.
154 U.S. CONST. amend. V.
155 United States v. Flores, 289 U.S. 137, 147 (1933).
156 *Id*.

Congress sets out penalties and crimes that resemble already existing customary international law, it lacks the authority to single–handedly establish international standards for the rest of the world to follow. [157]

In *United States v. Flores*, the appellant was a U.S. citizen accused of murdering another U.S. citizen while in the territorial waters of the Belgian Congo, which was subject to the sovereignty of the Kingdom of Belgium. [158] The appellee was brought to the Port of Philadelphia following the crime and was tried in the Eastern District of Pennsylvania.[159] The main issue to be resolved was "whether the jurisdiction over admiralty and maritime cases . . . extends to the punishment of crimes committed on vessels of the United States while in foreign waters."[160] The Court looked to English courts in the past, as well as existing common law, to reason—and emphasize—that jurisdiction is not only restricted to vessels within territorial waters, but follows its ships on the high seas and in extraterritorial jurisdictions.[161] Thus, the Court found that the U.S. may define and punish crimes committed by *U.S. citizens* on *U.S. vessels* while within foreign waters where the sovereign has not elected to assert its jurisdiction.[162] It also noted that courts have a duty to apply their own statutes, interpreted in the light of recognized principles of international law, to offenses committed by their own citizens. [163]

That said, the Eleventh Circuit in *United States v. Flores* interpreted a limit on the congressional authority vested by the Foreign Commerce Clause.[164] In *United States v. Bellaizac–Hurtado*, the court held that the MDLEA exceeded Congress's authority under the Offences Clause, as it applied to extraterritorial drug trafficking of foreign nationals on foreign vessels.[165] The court listed two reasons: (1) customary international law limits Congress' power to

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157 *Id*.
158 *Id.* at 144–45.
159 *Id.* at 145.
160 *Id.* at 150.
161 *Flores*, 289 U.S. at 150–51.
162 *Id.* at 159.
163 *Id*.
164 *See generally id.*
165 United States v. Belliazac-Hurtado, 700 F.3d 1245, 1247 (11th Cir. 2012).

define and punish crimes pursuant to the Offences Clause; and (2) drug trafficking is not recognized as a universal crime and thus does not violate customary international law.[166] Additionally, it found that "'Offences Against the Law of Nations is Synonymous' With Violations of Customary International Law."[167] Consequently, an analysis of customary international law is part of an analysis of constitutionality under the Offences Clause.[168]

ii. The MDLEA is not Justified Under the Offences Clause of the Constitution

Because drug–trafficking is generally not recognized as a universal crime under customary international law, the U.S. cannot unilaterally prosecute this conduct under the Offences Clause.[169] One way in which customary international law would permit jurisdiction is under universal jurisdiction. [170] Generally, the doctrine of universal jurisdiction permits a nation to "prosecute certain serious international offenses even though it has no connection to the conduct or participants."[171] In any event, as mentioned earlier the universal jurisdiction doctrine would not apply because drug–smuggling does not constitute a universal crime like slavery or genocide.[172] The court in *Bellaizac–Hurtado* agreed with this notion and asserted that the international community and legal scholars alike have refused to treat drug trafficking as a violation of contemporary customary international law.[173] And while the government argued that "widespread ratification of the 1988 [UN] Convention Against Illicit Traffic in Narcotic Drug and Psychotropic Substances establishes that drug trafficking violates a norm of customary international law,"[174] their argument fails as courts must

166 *Id.* at 1253.
167 *Id.* at 1251.
168 See *id.*
169 *See generally* U.N. Office on Drug and Crime, *supra* note 115.
170 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, *supra* note 73.
171 Kontorovich, *supra* note 74.
172 *Supra* note 98.
173 *See* United States v. Balliazac-Hurtado, 700 F.3d 1245, 1254 (11th Cir. 2012).
174 *Id.* at 1255.

look beyond treaty ratification and into actual state practice.[175] Although the aforementioned convention has 188 State parties, several of those States have failed to comply with its restrictions over a sheer unwillingness; this practice suggests that drug trafficking has not reached the threshold of a customary international law violation.[176] As a result, the court held that Congress exceeded its power under the Offences clause when it prosecuted the defendants' conduct in Panama's territorial waters.[177]

Indeed, it is well settled in the Eleventh Circuit that "Congress [cannot] create an international felony of drug trafficking."[178] This makes an analysis under the Offences Clause, or really any part of the Tripartite Clause, brief and straightforward.[179] Drug– trafficking is simply not conduct which the U.S. can assert control over in foreign territory. Such acts do not violate any well–settled customary international law, and thus cannot be categorized as an Offense against the Law of Nations.[180] Some may argue that the Protective Principle would permit jurisdiction. Yet this would challenge whether the conduct has a nexus to the safety and security of the U.S. or somehow interferes with its governmental functions.[181] While drug–trafficking does not *per se* constitute a nexus to the U.S., this contention has been discussed under a high seas analysis, and will now be evaluated under the context of the Foreign Commerce Clause.[182]

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175 *See id.* (citing *North Sea Continental Shelf Cases* (Fed. Republic of Ger. V. Den.; Fed. Republic of Ger. V. Neth.), 1969 I.C.J. 3, 43 (Feb. 20)).

176 *See Bellaizac-Hurtado,* 700 F.3d at 1255; *see also* John David Michels, *Keeping Dealers Off the Docket: The Perils of Prosecuting Serious Drug-Related Offences at the International Criminal Court*, 21 FLA. J. INT'L L. 449, 450 (2009) (referring to the drafters of the Rome Statute who rejected a proposal to consider drug trafficking a crime within the jurisdiction of the International Criminal Court).

177 *Bellaizac-Hurtado*, 700 F.3d at 1258.

178 United States v. Oliveros-Estupinan, 544 F. App'x. 930, 931 (11th Cir. 2014) (citing *Bellaizac-Hurtado*, 700 F.3d at 1245).

179 *Id*.

180 *See supra* note 98.

181 *See*, *e.g.*, United States v. Ricardo, 619 F.2d 1124, 1128–29 (5th Cir. 1980); United States v. Baker, 609 F.2d 134, 139 (5th Cir. 1980).

182 *See, e.g.*, United States v. Bowman, 43 S. Ct. 39, 41 (1922); American Banana Co. v. United Fruit Co., 29 S. Ct. 511, 512 (1909).

C. The Background and Development of the Foreign Commerce Clause

The Foreign Commerce Clause can be interpreted to provide broad authority, "an unbound reading of the Foreign Commerce Clause allows the federal government to intrude on the sovereignty of other nations—just as a broad reading of the Interstate Commerce Clause allows it to intrude on the sovereignty of the States."[183] This section will explain the Foreign Commerce Clause and how its boundaries are equated with the well–known Interstate Commerce Clause by lower courts. The Foreign Commerce Clause does not permit extraterritorial prosecution of drug–trafficking in foreign territorial waters.

i. The Foreign Commerce Clause in General

Under the Foreign Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations."[184] This Clause is closely mirrored by the highly scrutinized Interstate Commerce Clause.[185] Mainly, the mutual ground between these two Clauses is their nexus requirement, or commonly known in Interstate Commerce precedent as the substantial effect rule.[186] But a key difference is that the Foreign Commerce Clause has garnered little attention and its powers have scarcely been reviewed by the federal courts.[187] Yet this is an increasingly important area to be explored, especially as it applies to the thousands of alleged smugglers that have been, and continue to be, arrested extraterritorially by the U.S.[188]

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183 United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016) (citing United States v. Al-Maliki, 787 F.3d 784, 793 (6th Cir. 2015)).

184 U.S. CONST. art. I, § 8, cl. 3.

185 *See Baston*, 818 F.3d at 668 (assuming, for purposes of analysis, that the Foreign Commerce Clause carries the same scope as the Interstate Commerce Clause).

186 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); Gibbons v. Ogden, 22 U.S. 1 (1824); United States v. Lopez, 514 U.S. 549, 560 (1995) (finding that a "substantial effect" must be an economic effect).

187 *See* United States v. Durham, 902 F.3d 1180, 1197 (10th Cir. 2018).

188 Wessler, *supra* note 1.

ii. Interstate Commerce Clause in General

The Interstate Commerce Clause derives from Article I of the Constitution, "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[189] In 1824, the Clause was explained by the Court in *Gibbons v. Ogden*, when the Court said, "[t]he power given to Congress to regulate commerce with foreign nations, and between the Several states, relates to commerce, in the proper acceptation of the term; 'the exchange of one thing for another; the interchange of commodities; trade or traffic.'"[190] Commerce describes the "commercial intercourse between nations . . . and is regulated by prescribing rules for carrying on that intercourse."[191] Regulation of commerce evolved since the 19th century and the Court has established three separate categories of regulation under the Constitution.[192] Under the Interstate Commerce Clause, Congress can do the following: (1) regulate channels of interstate commerce; (2) regulate and protect instrumentalities of interstate commerce as well as the persons or things within; and regulate (3) "activities that substantially affect interstate commerce."[193]

iii. The Extraterritorial Reach of MDLEA is Not Justified Under the Foreign Commerce Clause

"Congress has broad power under [the Foreign Commerce Clause], '[t]o regulate Commerce with Foreign Nations,' and this court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."[194] The Foreign Commerce Clause, in its few uses, has been used as a basis to excuse extraterritorial reach successfully.[195] In any event, deliberate inclusion of an effects requirement for extraterritorial reach in the late Justice Scal-

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189 U.S. CONST. art. I, § 8, cl. 3. (emphasis added).

190 *Gibbons*, 22 U.S. at 89.

191 *Id.* at 72.

192 *See generally* Gonzales v. Raich, 545 U.S. 1 (2005).

193 U.S. CONST. art. 1, § 8, cl. 3.

194 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (emphasis added).

195 *See, e.g.*, United States v. Bowman, 260 U.S. 94, 97 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347, 354 (1909).

ia's dissent in *Hartford Fire Insurance Company* speaks volumes.[196] While prosecuting criminal activities beyond territorial boundaries is acceptable under some circumstances, the clear, unambiguous line must be drawn where activities do adversely affect against the U.S. [197]

Under the Foreign Commerce Clause, the Eleventh Circuit considered an instance of extraterritorial jurisdiction over sex–trafficking acts constitutional.[198] In *United States v. Baston*, the defendant was a convicted international sex trafficker.[199] The government had filed a cross–appeal over the district court's refusal to award restitution to a victim of sex trafficking in Australia on the grounds that it would exceed the power of Congress under the Foreign Commerce Clause.[200] In its reasoning, the *Baston* court assumed that "the Foreign Commerce Clause included at least the power to regulate the 'channels' of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a 'substantial effect' on commerce between the United States and other Countries."[201] The court deemed Section 1596(a)(2)—the statute on extraterritorial jurisdiction over certain trafficking offenses—constitutional at least as a "regulation of activities that have a 'substantial effect' on foreign commerce," and that Congress had a rational basis to place those acts in "'an economic class of activities that have a substantial effect on . . . commerce.'"[202] Human trafficking is distinct from drug–trafficking. Human trafficking is a modern form of slavery and is the largest manifestation of slavery today.[203] Drug use, while no doubt problematic, cannot and should not be equated to human–trafficking, slavery, or genocide for pur-

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196 46 U.S.C. § 70503(a)(1).

197 *See id.*

198 United States v. Baston, 818 F.3d 651, 669 (11th Cir. 2016).

199 *Id.* at 656.

200 *Id.* at 657.

201 *Id.* at 668. (quoting Gonzales v. Raich, 125 S. Ct. 2195 (2005)).

202 *Id.*

203 Karen E. Bravo, *The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse*, 9 SEATTLE J. SOC. JUST. 555, 555–56 (2011).

poses of establishing a nexus.[204] Thus, when viewing drug–trafficking conduct as a whole, it does not fall squarely within a categorical net for a nexus to exist. [205]

The Supreme Court in *Baston*, had a chance to address the boundaries of the Foreign Commerce Clause and eliminate the need to operate under assumptions in its comparison to the Interstate Commerce Clause. The Court, however, rejected writ and tabled this controversy for another day.[206] Still, Justice Thomas took to a lengthy dissent arguing that the issue for setting the limits for the Foreign Commerce Clause is ripe and that the Court should have granted certiorari.[207] Justice Thomas explains the following:

> [w]ithout guidance from this Court as to the proper scope of Congress' power under [the Foreign Commerce] Clause, the court of appeals have construed it expansively, to permit Congress to regulate economic activity abroad if it has a substantial effect on this Nation's foreign commerce . . . We should grant certiorari and reaffirm that our Federal Government is one of limited and enumerated powers, not the world's lawgiver.[208]

If this is any indicator as to the outcome of an inevitable Supreme Court ruling, it seems that Congress has gone beyond its bounds in authorizing extraterritorial jurisdiction under the MDLEA.[209] Lower courts have been much too quick to find a nexus automatically where one simply does not exist based on congressional findings and a loose rationale.[210] For example, Justice Thomas looks to *United States v. Bollinger*,[211] where the Fourth Circuit held that the Foreign Commerce Clause permits Congress to regulate activities that "demonstrably" affect foreign commerce, rather than require the more rigorous test of showing a "substan-

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204 *Id.* at 556.
205 *See generally id.*
206 *See* Baston v. United States, 137 S. Ct. 850 (2017) (certiorari denied).
207 *Id.* at 851–53.
208 *Id.* at 851.
209 46 U.S.C. § 70503(a)(1) (2011).
210 *See, e.g.*, *Baston*, 137 S. Ct. at 850.
211 *Id.* at 853.

tial" effect.[212] Moreover, Justice Thomas's dissent suggests that the current nexus test is far too lenient and strays away from the legitimate purpose of the Foreign Commerce Clause; to restrict congressional power.[213] It is not even explicitly clear, from the Court's language in past precedent, whether the Foreign Commerce Clause is at least as powerful as the Interstate Commerce Clause.[214]

Thus, there are clear arguments to place the MDLEA's extraterritorial reach beyond the scope of the Foreign Commerce Clause, as appellate courts interpret it.[215] Perhaps the Court takes on this issue soon to resolve any confusion. The outcome would likely be a tightening of the Foreign Commerce Clause's reach.[216] That said, regardless of the outcome it seems that the MDLEA's demise as it pertains to the Foreign Commerce Clause is inevitable and only a matter of time.[217]

V. CONCLUSION

In sum, it is difficult to justify the MDLEA on constitutional or international law grounds. While it was understandably enacted as a tough reaction to a growing and pressing problem in the U.S., Congress has overreached in its attempts to combat drug abuse. Thus, the U.S. has mitigated Latin American States' sovereignty by prosecuting conduct which occurred in their own territory. Some Latin American States have voiced concern and hesitancy about permitting this sort of behavior. Despite those who do con-

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212 United States v. Bollinger, 798 F.3d 201, 215 (4th Cir. 2015).

213 *Baston*, 137 S. Ct. at 852 (Thomas, J., dissenting) ("I am concerned that language in some of this Court's precedents has led the courts of appeals into error. At the very least, the time has come for us to clarify the scope of Congress' power under the Foreign Commerce Clause to regulate extraterritorially.").

214 *Id.* at 852–53 ("[T]he court of appeals have taken the modern interstate commerce doctrine and assumed that the foreign commerce power is at least as broad. The result is a doctrine justified neither by our precedents nor by the original understanding.").

215 *See, e.g.*, United States. v. Davila-Mendoza, 972 F.3d 1264, 1277 (11th Cir. 2020).

216 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993).

217 *See generally Davila-Mendoza*, 972 F.3d 1264.

sent, this sort of extraterritorial reach over Latin American States must be analyzed by the Court to aid in a future decision that may stretch even beyond drug smuggling cases.

Indeed, it has taken time for courts to acknowledge the overextension, for circuits that have, but there are still some that remain unconvinced of any issues with the MDLEA's jurisdictional boundaries.[218] In light of the scattered circuit court rulings, the Supreme Court will no doubt need to address this issue. When that time comes, the Supreme Court must give lower courts guidance on both the Foreign Commerce and Offences Clause and their application to drug–smuggling and prosecution of other conduct beyond U.S. territory. Perhaps, *Davila–Mendoza* will provide the proper posture for the Court to decide on the issue explicitly, once and for all.

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218 *See, e.g.*, United States v. Moreno-Morillo, 334 F.3d 819 (9th Cir. 2003); United States v. Van Der End, 943 F.3d 98 (2d Cir. 2019).