

2-1-2014

# Commentary: Transnational Organized Crime in the Maritime Domain, and Broader Considerations for the United States' Interagency

Captain James D. Carlson

Lieutenant Timothy Cronin

Follow this and additional works at: <http://repository.law.miami.edu/umnsac>



Part of the [Military, War and Peace Commons](#), and the [National Security Commons](#)

---

## Recommended Citation

Captain James D. Carlson and Lieutenant Timothy Cronin, *Commentary: Transnational Organized Crime in the Maritime Domain, and Broader Considerations for the United States' Interagency*, 4 U. Miami Nat'l Security & Armed Conflict L. Rev. 43 (2014)  
Available at: <http://repository.law.miami.edu/umnsac/vol4/iss2/6>

This Contribution is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami National Security & Armed Conflict Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## ARTICLE

### **Commentary: *Transnational Organized Crime in the Maritime Domain, and Broader Considerations for the United States' Interagency***

*Captain James D. Carlson, U.S. Coast Guard*

*Lieutenant Timothy N. Cronin, U.S. Coast Guard\**

#### Table of Contents

---

I.	INTRODUCTION.....	44
II.	THE ABILITY TO BOARD VESSELS SUSPECTED OF ILLEGAL NARCOTICS TRAFFICKING.....	47
	A. <i>Vessels of the United States and Vessels Located within United States Waters.....</i>	47
	B. <i>Vessels of Foreign Nations.....</i>	48
	C. <i>Vessels Without Nationality, and Vessels Assimilated to Without Nationality.....</i>	50
III.	DOMESTIC LEGAL REGIME.....	51
	A. <i>Maritime Drug Law Enforcement Act.....</i>	51
IV.	OTHER CONSIDERATIONS FOR THE UNITED STATES' INTERAGENCY.....	53
	A. <i>Support the Recapitalizing of Coast Guard Assets.....</i>	53
	B. <i>Recognize Another Prominent Threat Stream.....</i>	54
	C. <i>Capture the Data.....</i>	55
	D. <i>Judge and Witness Protection.....</i>	56
	E. <i>Explore Expansion of the Joint Interagency Task Force Concept.....</i>	56

---

\* Captain Carlson and Lieutenant Cronin are Coast Guard Judge Advocates stationed at the Seventh Coast Guard District in Miami, Florida. The Seventh Coast Guard District area of operations includes the waters off the states of South Carolina, Georgia, Florida, Puerto Rico, the U.S Virgin Islands, and the waters of the Caribbean Sea. It borders 34 foreign countries and territories, and encompasses an area over 1.8 million square miles. This paper summarizes Captain Carlson's comments at the University of Miami School of Law National Security & Armed Conflict Law Review symposium, "Illicit Trafficking and National Security," on February 28, 2014. The opinions herein are the authors' alone, and do not necessarily reflect the views of the United States Coast Guard or the Commandant of the Coast Guard.

## I. INTRODUCTION

Transnational organized crime prevails in many forms. The White House prioritizes six illicit threat streams in the Strategy to Combat Transnational Organized Crime (TOC);<sup>1</sup> with little effort one can conceive twenty or so total. However, of all these illicit commerce streams, the illicit drug threat has dominated the Western Hemisphere TOC and security conversation since the late 1980s, and cocaine more than any drug. In our current capacities, we assist our clients with the Coast Guard law enforcement mission, which most visibly involves the interdiction of illicit drugs on waters seaward of other nations' territorial seas. Interdiction is a component of the supply-side equation of countering illicit drug flows. We will touch briefly on the elements of supply reduction, as opposed to demand reduction.<sup>2</sup> We will then briefly outline how the Coast Guard, on behalf of the United States, can haul foreign nationals interdicted on the high seas, and at times from within another nation's territorial sea, into United States' courts, perhaps thousands of miles distant. We then will offer some considerations for interagency improvement of the counterdrug effort.

Cocaine has been a scourge to society and the focus of multiple nations' law enforcement efforts since the 1980s. Due to its prominence in affecting United States', as well as myriad transit nations', civil society, it in effect has been a proxy for the efforts to combat transnational organized crime (TOC) throughout the Western Hemisphere. The United States has multi-faceted programs to assist partner nations with the problem of illicit drugs' direct, or second- or third-order, affects. Illustrative assistance programs include Plan Colombia, so-called section 1004 and 1033 assistance,<sup>3</sup> the Central American Regional Security Initiative (CARSI),<sup>4</sup> the Caribbean Basin Security Initiative

---

<sup>1</sup> Specifically, the crime-terror nexus (i.e. use of organized crime to fund terror and insurgent groups), drug trafficking, trafficking in persons, weapons trafficking, intellectual property theft, and cybercrime. White House, National Security Council, Strategy to Combat Transnational Organized Crime at 6-7 (Jul. 2011), *available at*

<http://www.whitehouse.gov/sites/default/files/microsites/2011-strategy-combat-transnational-organized-crime.pdf>. The strategy also addresses enabling paths to fighting TOC.

<sup>2</sup> We do not say this to advocate one approach over another: both elements are required for a balanced policy to counter the scourge of illegal drugs.

<sup>3</sup> See National Defense Authorization Act (NDAA) of 2001, Pub. L. No. 101-510, § 1004, 115 Stat. 1012 (2001) (as amended through the year 2011); See also NDAA of 1998, L. No. 105-85, § 1033, 111 Stat. 1629 (1997) (as amended through the year 2011).

<sup>4</sup> See Consolidated Appropriations Act of 2010, H.R. 3288, 11th Cong. § 7045 (2010) (as codified in Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2010). Formerly part of the Merida Initiative, CARSI was split from Merida in 2010, *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3288enr/pdf/BILLS-111hr3288enr.pdf>. The act

(CBSI),<sup>5</sup> the Merida Initiative,<sup>6</sup> and Beyond Merida Initiative.<sup>7</sup> These are administered alternately by the Department of State, Department of Defense, and the United States Agency for International Development (USAID).<sup>8</sup>

The cocaine business model changed in response to the United States' and Colombia's efforts. Gone are the days when cartels managed vertical cocaine monopolies, controlling production to distribution. Ownership of a cocaine load commonly changes at the water's edge of South America, with smaller dispersed transporter-contractors operating at various Mexican organizations' orders, as opposed to a single master.<sup>9</sup> Additionally, small-scale producers are firmly ensconced throughout Central America, Brazil, and Paraguay,<sup>10</sup> expanding beyond the source countries of Colombia, Peru, and Bolivia. In effect, when the United States and Colombia began gaining momentum against major cocaine producers in the 1990s and early 2000s, the organized crime shifted to Mexico. When the Mexican government increased the pressure in the mid-2000s, with assistance from the Merida Initiative,<sup>11</sup> Mexican groups expanded into Central America, primarily Honduras and Guatemala. With increasing Mexican Government pressure, organized crime is shifting further into Central America.<sup>12</sup> Shipping their illicit cargo northward,

---

placed assistance to Central America into a new Central America Regional Security Initiative (CARSI), splitting Central America from the Mérida Initiative.

<sup>5</sup> *Id.* at § 7045(c).

<sup>6</sup> U.S. DEP'T OF STATE, BUREAU OF INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, MERIDA INITIATIVE (2009), available at <http://www.state.gov/j/inl/rls/fs/122397.htm>.

<sup>7</sup> U.S. DEP'T OF STATE, JOINT STATEMENT OF THE MERIDA INITIATIVE HIGH-LEVEL CONSULTATIVE GROUP ON BILATERAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME (2010), available at <http://www.state.gov/secretary/20092013clinton/rm/2010/03/139196.htm>.

<sup>8</sup> CLARE R. SEELKE, LIANA S. WYLER, JUNE S. BEITTLE, MARK P. SULLIVAN, CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN, ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 9 (2011), available at <http://justf.org/files/primarydocs/R41215.pdf>.

<sup>9</sup> See generally JUAN CARLOS GARZON ET AL., THE CRIMINAL DIASPORA: THE SPREAD OF TRANSNATIONAL ORGANIZED CRIME AND HOW TO CONTAIN ITS EXPANSION (2013), available at <http://www.wilsoncenter.org/publication/CriminalDiaspora>; See also U.S. Department of the Treasury, *Treasury Designates Honduran Drug Traffickers: Action Targets Link to Colombian and Mexican Narcotics Operations*, DEP'T OF TREASURY, Apr. 9, 2013, available at <http://www.treasury.gov/press-center/press-releases/Pages/jl1888.aspx>.

<sup>10</sup> See, e.g., Michael Lohmuller, *Honduras Cocaine Lab Points to Production Migration*, INSIGHT CRIME, Feb. 11, 2014, <http://www.insightcrime.org/news-briefs/honduras-cocaine-lab-points-to-production-migration>, Charles Parkinson, *Paraguay Cocaine Lab Bust Latest Example of Criminal Migration*, INSIGHT CRIME, Feb. 12, 2014, <http://www.insightcrime.org/news-briefs/paraguay-cocaine-lab-bust-latest-example-of-criminal-migration>.

<sup>11</sup> William R. Brownfield, Asst. Sect'y of State, Testimony before the Subcommittee on Western Hemisphere, Peace Corps, and Global Narcotics Affairs, Senate Foreign Relations Committee, (Dec. 15, 2011), available at <http://www.state.gov/j/inl/rls/rm/178886.htm>.

<sup>12</sup> *Id.*

transportation specialists operating at the orders of Mexican cartels ship the illicit cargo to the Central American Isthmus, where they make their way by land to the United States. Middle men are paid not with cash, but with cocaine, creating a supply and competition for local markets, which leaves an exhaust of instability,<sup>13</sup> corruption,<sup>14</sup> and violence<sup>15</sup> through Central America and Mexico. While the northbound smuggling vectors are populated by cocaine and methamphetamines, they are populated southbound by bulk cash and weapons.

One of the few weak links in the TOC model is the necessity for the large majority of cocaine to transit the maritime domain during at least part of the supply chain northward.<sup>16</sup> Fortunately the United States has implemented a sound legal regime to address the threat in the maritime domain, leveraging international and domestic law, as well as partnerships with allied and partner nations.

The 2013 National Drug Control Strategy highlights continuing focus on dismantling international drug trafficking organizations, disrupting the maritime transport of drugs from source countries, and “[constructing] criminal cases, [capturing] major kingpins, and [seizing] drugs and the illicit proceeds of crime.”<sup>17</sup> In the maritime domain, the task of finding narcotics traffickers and then bringing them to the district courts of the United States for prosecution requires two capabilities: (1) the authority to board vessels

---

<sup>13</sup> This assertion may admittedly be reversed. It may be that systemic instability provides a path of least resistance in which transnational criminal organizations can take advantage of. See Jeremy McDermott, *The Zetas Set up Shop in Honduras*, INSIGHT CRIME, Feb. 4, 2013, <http://www.insightcrime.org/news-analysis/zetas-set-up-in-honduras>.

<sup>14</sup> E.g., Associated Press, *Honduran Official: Authorities are Helping Country's Biggest Drug Cartel*, FOX NEWS, Oct. 10, 2013, <http://www.foxnews.com/world/2013/10/10/honduran-official-authorities-are-helping-country-biggest-drug-cartel>, Geoffrey Ramsey, *CICIG Names 18 'Judges of Impunity' in Guatemala*, INSIGHT CRIME, Dec. 4, 2012, <http://www.insightcrime.org/news-analysis/cicig-names-18-judges-of-impunity-in-guatemala>.

<sup>15</sup> See Patrick Radden Keefe, *Cocaine Incorporated: How a Mexican Drug Cartel Makes its Billions*, N.Y. TIMES, June 15, 2012, <http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html>. Some quantify the impact of efforts against illicit drugs in Mexico as more than 50,000 persons killed since 2006. For a micro-view of the violence see also Stephen S. Dudley, *The Zetas in Guatemala, Part I: The Incursion*, INSIGHT CRIME, Sep. 7, 2011, <http://www.insightcrime.org/the-zetas-in-guatemala/part-1-the-incursion>, Óscar F. Herrera, *Matan a Obdulio Solórzano y a un guardaespaldas*, ELPERIODICO, Jul. 9, 2010, available at <http://www.elperiodico.com.gt/es/20100709/pais/163103>.

<sup>16</sup> See *Border Sec. Threats to the Homeland: DHS' Response to Innovative Tactics and Techniques*, 112th Cong. (2012) (statement of Charles D. Michel, Dir. Joint Interagency Task Force-South), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg79505/html/CHRG-112hhrg79505.htm>.

<sup>17</sup> Office of National Drug Control Policy, *2013 National Drug Control Strategy*, [http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs\\_2013.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs_2013.pdf).

suspected of illegal narcotics trafficking and (2) a domestic legal regime that criminalizes confirmed instances of that conduct.

## II. THE ABILITY TO BOARD VESSELS SUSPECTED OF ILLEGAL NARCOTICS TRAFFICKING

Assets of the United States Coast Guard are constantly patrolling the Western Hemisphere's major narcotics trafficking vectors with the intent of locating and then boarding those vessels suspected of illicit drug trafficking.<sup>18</sup> To that end, the Coast Guard relies upon a robust interagency infrastructure, to include the Joint Interagency Task Force South and Department of Defense and Homeland Security assets assigned to detection and monitoring duties.<sup>19</sup> The Coast Guard also relies on a range of international and domestic authorities that permit these assets to patrol the waters of the United States, the high seas, and those of foreign nations, with the capacity to board U.S. flagged vessels as well as those of foreign nations.

### A. *Vessels of the United States and Vessels Located within United States Waters*

The Coast Guard's principal law enforcement authority derives from section 89(a) of Title 14 of the United States Code, which authorizes the Coast Guard to stop and board any vessel subject to United States jurisdiction. Section 89(a) reads:

"The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operations of any law, of the United States..."<sup>20</sup>

Pursuant to customary international law, vessels of the United States, which are comprised for the most part by those documented pursuant to United States law<sup>21</sup> or certificated in accordance with the laws of one of the 50

---

<sup>18</sup> *Id.*

<sup>19</sup> See 10 U.S.C.A. § 124 (2014). The Department of Defense is lead agency for detection and monitoring of maritime and aerial transit of illicit drugs "*in support of the counter-drug activities of Federal, State, local, and foreign law enforcement agencies*" (emphasis added).

<sup>20</sup> 14 U.S.C.A. § 89(a) (2013).

<sup>21</sup> See 46 U.S.C.A. §§ 12101-06 (2013) (providing U.S. documentation requirements).

states,<sup>22</sup> are subject to the “exclusive jurisdiction” of the United States.<sup>23</sup> Thus, through section 89(a)’s authority to board “any vessel subject to the jurisdiction... of the United States,” vessels of the United States are subject to boarding by any Coast Guard asset, wherever located.

Based on the well-established principles of customary international law, vessels of foreign nations located within the territorial seas of the United States, i.e. the water stretching from the baseline<sup>24</sup> out to twelve nautical miles<sup>25</sup>, are subject to United States jurisdiction and thus, to boarding by the Coast Guard, unless engaged in a recognized high seas freedom, such as innocent passage.<sup>26</sup> Additionally, those located within the contiguous zone of the United States, i.e. the water stretching from the 12 nautical mile mark out to the 24 nautical mile mark<sup>27</sup>, are subject to the jurisdiction of the United States, when infringing on the customs, fiscal, immigration or sanitary laws of the United States.<sup>28</sup>

### B. *Vessels of Foreign Nations*

Just as U.S. flagged vessels fall within the exclusive jurisdiction of the United States, vessels of foreign nations fall within the exclusive jurisdiction of the nations in which they are registered.<sup>29</sup> Accordingly, the Coast Guard may not board, and the United States may not exercise jurisdiction, over foreign flagged vessels, except in instances in which the foreign nation in question has consented. In the context of illicit maritime drug trafficking, the international community has long recognized the need to effectuate this consent through cooperation and formal international agreement. The United States, and 86 other nations, ratified the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“1988 Convention”), thereby formally acknowledging their collective responsibility in stemming the flow of

---

<sup>22</sup> See 46 U.S.C.A s.12302 (2013); See also *United States v. Behety*, 32 F.3d 503, 511-12 (11th Cir. 1994).

<sup>23</sup> See United Nations Convention on the Law of the Sea (hereinafter LOS), art. 92, Sep. 12, 1982 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”), available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>24</sup> *Id.* at art. 6-13.

<sup>25</sup> *Id.* at art. 3.

<sup>26</sup> *Id.* at art. 7; See also *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982).

<sup>27</sup> LOS, *supra* note 23, at art. 33.

<sup>28</sup> *Id.*; See also *United States v. Best*, 304 F.3d 308, 311-16 (3rd Cir. 2002)

<sup>29</sup> LOS, *supra* note 23, at art. 92

international drugs, and pledging “to co-operate to the fullest extent possible to suppress illicit traffic by sea.”<sup>30</sup> Under the 1988 Convention, each party may “...notify [other parties], request confirmation of registry and, if confirmed, request authorization from [those parties] to take appropriate measures...” whenever a vessel of another party is encountered and suspected of illicit trafficking; “...[authorize a requesting party] to, inter alia: (a) Board the vessel; (b) Search the vessel; (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.”; and finally to “...consider entering into bilateral or regional agreements or arrangements to carry out...” the provisions of the agreement.<sup>31</sup>

To partially effectuate the 1988 Convention, Congress authorized the President to “to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics, including opium and its derivatives, other narcotic and psychotropic drugs, and other controlled substances.”<sup>32</sup> The State Department, through and with the Coast Guard, has in turn negotiated and concluded bilateral agreements with many of the 1988 Convention’s signatories. These bilateral agreements contain, among other things, the frameworks by which the United States may and does: board foreign flagged vessels suspected of illicit trafficking; enter the territorial seas of foreign nations in order to board vessels suspected of illicit trafficking; and request waivers of jurisdiction to try suspected drug smugglers in the United States courts.<sup>33</sup> With respect to vessels suspected of illegal drug trafficking, these agreements and the provisions of the 1988 Convention have facilitated an international regime in which partner nations may routinely overcome the strong customary international legal presumption of exclusive flag state jurisdiction.

---

<sup>30</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter U.N. Drug Convention), U.N. Doc. E/Conf. 82/16, *reprinted in* 28 I.L.M. 493 (1988), art. 17.

<sup>31</sup> *Id.*

<sup>32</sup> 22 U.S.C.A. § 2291 (2012).

<sup>33</sup> See *United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006) (explaining jurisdiction through MDLEA via a bilateral agreement).



### C. *Vessels Without Nationality, and Vessels Assimilated to Without Nationality*

In addition to U.S. and foreign flagged vessels, there is an additional category of vessels that is of critical importance to understanding the Coast Guard's overall ability to board, and ultimately stop maritime narcotics trafficking. As previously noted, vessels "shall sail under the flag of one State only," under international law.<sup>34</sup> Vessels that choose not to claim the flag of any nation, and thus, sail under the flag of no nation, however, are considered "stateless" vessels, or vessels "without nationality."<sup>35</sup> Such stateless vessels subject themselves to the jurisdiction of every nation "solely as a consequence of the vessel's status as stateless."<sup>36</sup> Vessels are also considered to be "without nationality" when they claim the nationality of a nation and that nation subsequently denies that claim.<sup>37</sup>

Because stateless vessels are subject to the law of any nation, they are subject to United States law, and may be boarded by the Coast Guard, wherever located, provided they are seaward of any nation's territorial sea. The Coast Guard derives the right to physically board stateless vessels using the customary principle of "right of visit."<sup>38</sup> Under Article 110 of the Law of the Sea Convention, a warship which encounters on the high seas a foreign ship... is not justified in boarding it unless there is reasonable ground for suspecting that, "the ship is without nationality; or ...though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."<sup>39</sup> When a Coast Guard vessel encounters a vessel on the high seas and develops such suspicions, it "...may proceed to verify the ship's right to fly its flag. To this end, it may send a boat... to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship."<sup>40</sup> These "right of visit" boardings are frequently done on "go-fasts," small, open hulled and high-powered vessels that are oft used for illicit drug smuggling.<sup>41</sup> Because their primary purpose is drug smuggling, their owners typically do not register them in any nation. As a result, they become subject to the jurisdiction of the United States, or to any nation for that matter, and may be boarded by the Coast Guard.

---

<sup>34</sup> LOS, *supra* note 23, at art. 92.

<sup>35</sup> *United States v. Marino-Garcia*, 679 F.2d 1373, 1382-83 (11th Cir. 1982).

<sup>36</sup> *Id.*

<sup>37</sup> LOS, *supra* note 23, at art. 92; *See, e.g.* *United States v. Bravo*, 489 F.3d 1, 6 (1st Cir. 2007).

<sup>38</sup> LOS, *supra* note 23, at art. 110.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See, e.g.* *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002).

### III. DOMESTIC LEGAL REGIME

The previous section reviewed the principle authorities by which Coast Guard assets board and search foreign and U.S. vessels alike, and also conduct boardings in the waters of the United States as well as foreign nations. Once aboard, boarding teams search for evidence of violations of the Maritime Drug Law Enforcement Act (“MDLEA”).<sup>42</sup> The MDLEA constitutes the principal tool by which the United States, frequently through the Coast Guard, brings illicit narcotics traffickers to justice in the United States’ courts. The MDLEA represents the fulfillment of the commitment made by the United States in signing the 1988 Convention to adopt both domestic legislation that criminalizes the transport of illicit traffic by sea and sufficient measures to establish jurisdiction over the vessels on which the crimes have occurred.<sup>43</sup>

#### A. *Maritime Drug Law Enforcement Act*

The Maritime Drug Law Enforcement Act (“MDLEA”) is the United States’ principal domestic statute for prosecuting at-sea narcotics trafficking.<sup>44</sup> Through the MDLEA, the United States made it unlawful to “knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance...”<sup>45</sup>. Intentionally broad, the statute explicitly applies extraterritorially and permits the prosecution of any individuals engaging in its prohibited activities aboard “(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.” The MDLEA’s jurisdiction determination is explicitly “not an element of an offense,” and “[j]urisdictional issues arising under [the MDLEA] are preliminary questions of law to be determined solely by the trial judge.”<sup>46</sup>

The MDLEA’s definitions of “vessels of the United States” and “vessels subject to the jurisdiction of the United States” are founded on the international principles described above. In using these definitions, Congress

---

<sup>42</sup> 46 U.S.C.A. § 70501 (2013). The context here matters: the authors are talking about boardings in known drug smuggling vectors far from United States’ shores, so omit the safety inspection and administrative phases of a typical boarding. *See also* 14 U.S.C.A. § 89(a) (2013).

<sup>43</sup> U.N. Drug Convention, *supra* note 30, at art. 3, 4.

<sup>44</sup> Other statutes criminalize various aspects of maritime narcotics smuggling, including the Drug Trafficking Vessel Interdiction Act, 18 U.S.C.A. § 2285 (2013). The DTVIA makes it a felony to operate or embark in a stateless self-propelled semi-submersible (SPSS) or fully submersible vessel seaward of any State’s territorial seas.

<sup>45</sup> 46 U.S.C.A. s. 70503 (2013).

<sup>46</sup> *See United States v. Mitchell-Hunter*, 663 F.3d 45, 51 (1st Cir. 2011) (citing 46 U.S.C.A. § 70504(a) (2013)).

manifested its intent to push the extraterritorial application of the MDLEA to the limits of the United States' jurisdiction with respect to vessels outside of United States waters.<sup>47</sup> Subsequently, the MDLEA's jurisdictional provisions provide the framework for the United States to prosecute virtually any trafficker found aboard any vessel engaged in illicit narcotics trafficking.<sup>48</sup> Accordingly, the Coast Guard may: board any vessel of the United States suspected of narcotics smuggling;<sup>49</sup> board any vessel suspected of narcotics smuggling that is without nationality or is a vessel assimilated to without nationality under international law;<sup>50</sup> enter the waters of a foreign nation and board any foreign flagged vessel suspected of narcotics smuggling, with the permission of the coastal or flag state in question;<sup>51</sup> and finally, board any vessel that is suspected of drug smuggling located in the customs waters, territorial sea, or contiguous zone of the United States. The MDLEA applies to all of these vessels in all of these situations.<sup>52</sup>

As interpreted, however, the MDLEA's reach may not be so broad. Despite the MDLEA's explicit extraterritorial application and its recognition of the serious threat narcotics trafficking poses to the United States, there is a circuit split on whether the United States must show a nexus between the defendants and the United States for the MDLEA to reach their conduct.<sup>53</sup> Additionally, in a recent opinion, the 11th Circuit held that, because drug-trafficking is not a violation of customary international law, Congress does not have power to proscribe illicit narcotics trafficking in foreign territorial waters,

---

<sup>47</sup> See *United States v. Marino-Garcia*, 679 F.2d 1373, 1379 (11th Cir. 1982) (stating "The legislative history of Section 955a indicates, however, that Congress intended to extend jurisdiction only to the 'maximum ... permitted under international law.'")(internal citations omitted)

<sup>48</sup> *Id.* (citing 125 CONG. REC. H. 6380 (daily ed. July 23, 1979)) (statement by Congressman McCloskey) (Section 955a "provides a sound basis for the prosecution of every person and vessel ... engaged in international traffic in drugs and to the broadest extent possible under international law). See, e.g. *United States v. Del Sol*, 679 F.2d 216 (11th Cir.) (former section 955a of Title 21 reaches prohibited acts aboard American ships on the high seas under "law of the flag" theory); *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985) (Section 955a reaches prohibited acts aboard foreign ships on the high seas with consent of the ship's flag state); *United States v. Garate-Vergara*, 942 F.2d 1543 (11th Cir. 1991) (section 955a reaches prohibited acts aboard vessels assimilated to without nationality status on the high seas); *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982) (Section 955a reaches prohibited acts aboard stateless vessels).

<sup>49</sup> 14 U.S.C.A. § 89(a) (2013).

<sup>50</sup> LOS, art 92, 110.

<sup>51</sup> See, e.g., *United States v. Carvajal*, 924 F. Supp. 2d 219, 248 (D.D.C. 2013).

<sup>52</sup> 46 U.S.C.A. § 70502(c)(1)(A) – (F) (2013).

<sup>53</sup> *United States v. Estrada-Obregon*, 270 Fed.Appx. 978 (11th Cir. 2008) (analyzing split of authority on nexus requirement). See also *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990).

where there is no evidence the vessel was ever in international waters, under the Offences Clause of the United States Constitution.<sup>54</sup> This holding, currently limited to the 11th Circuit, limits the extraterritorial reach of the MDLEA by extending United States jurisdiction only to the territorial sea line of foreign nations. Thus, in instances where there is no evidence the suspect vessel was ever in international waters, Coast Guard assets would still be able to enter the territorial seas of foreign nations through bilateral agreements, as previously described, but a nation other than the United States would ultimately have to assert jurisdiction over any resulting narcotics interdictions.

#### IV. OTHER CONSIDERATIONS FOR THE UNITED STATES' INTERAGENCY

While the legal regime to deal with the cocaine threat in the maritime domain is sound, there are some things policy makers might consider to improve supply reduction efforts. We touch briefly on a few.

##### A. *Support the Recapitalizing of Coast Guard Assets*

There continues an obvious and well-documented need for the Coast Guard to continue its recapitalization efforts.<sup>55</sup> Without the hardware to do the interdictions, the legal regime is only as good as the paper on which it is written. The interdiction aspect of supply reduction requires assets: ships, helicopters, law enforcement teams, and persistent surveillance. The DHS layered strategy<sup>56</sup> requires long range patrols into the deep Caribbean Sea and eastern Pacific Ocean. Coast Guard seizures of cocaine being transported via maritime conveyance yields more gross tonnage in these patrol areas than the cocaine seizures of all other Federal agencies combined.<sup>57</sup> In 2012 for example, the Coast Guard seized more cocaine than all that seized by all

---

<sup>54</sup> *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249-58 (11th Cir.2012).

<sup>55</sup> See, e.g., Antony Kimery, *Without Adequate Recapitalization, USCG Faces Bleak Future*, Panel Hears, HS TODAY, Dec. 12, 2013, <http://www.hstoday.us/industry-news/general/single-article/without-adequate-recapitalization-uscg-faces-bleak-future-panel-hears/99849ffb002290b2a82c404330f5fc50.html>.

<sup>56</sup> See Phil Leggiere, *Admiral Papp Outlines Layered Approach to Security*, HS TODAY, June 20, 2011, <http://www.hstoday.us/briefings/daily-news-briefings/single-article/admiral-papp-outlines-layered-approach-to-security/ae69beb10ff8f66cdbb6b4635bb9160b.html>.

<sup>57</sup> S. REP. NO. 113-77 at 76 (2014), available at <http://beta.congress.gov/113/crpt/srpt77/CRPT-113srpt77.pdf>. Cf. Dep't of Homeland Sec., *Coast Guard Removal Statistics*, (2014), available at <http://www.uscg.mil/hq/cg5/cg531/Drugs/stats.asp>; Dep't of Justice, *National Drug Threat Assessment Summary*, 8 (2013), available at <http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf>; Dep't of Justice, *DEA Domestic Seizure Data*, available at <http://www.justice.gov/dea/resource-center/statistics.shtml#seizures>.

agencies in the continental United States combined.<sup>58</sup> Seizures closer to the source countries of Colombia and Ecuador also yield higher purity cocaine<sup>59</sup> and larger load sizes.<sup>60</sup> Failure to replace Coast Guard ships one for one will surrender patrol areas previously patrolled by Coast Guard and Navy ships, the latter carrying Coast Guard law enforcement detachments (LEDETs) trained and ready to conduct law enforcement boardings. Indeed, due to the ships' aging and increasing mechanical challenges, the United States has already surrendered some of those areas.<sup>61</sup> Collapsing to the continental United States amounts to a goal line defense, and forgoes the efficiencies of patrolling close to the South American landmass.

### B. *Recognize Another Prominent Threat Stream*

Cocaine is one threat stream in crowded field. Precursor chemicals used to produce methamphetamines are gaining increasing prominence in nations with only a fraction of the legitimate commercial need, spreading corruption in its wake.<sup>62</sup> Massive shipments flow into Central and South America to facilitate

---

<sup>58</sup> See Admiral Robert J. Papp Jr., Commandant, U.S. Coast Guard, Testimony before the United States Senate, Committee on Commerce, Science, and Transportation, Subcommittee on Oceans, Atmosphere, and Coast Guard (Apr. 23, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg85473/html/CHRG-113shrg85473.htm>.

<sup>59</sup> *Id.*

<sup>60</sup> See Written Statement of Rear Admiral Charles Michel, Dir. Joint Interagency Task Force-South, to the Subcommittee on Border and Maritime Security, House Committee on Homeland Security (Jun. 19, 2012), *available at*

<http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-Michel.pdf>. Cocaine is shipped from the South American landmass in larger loads before being broken down for further transit north. This assertion further highlights the difficult problem set in interdicting cocaine. Colombia produces 95% of the cocaine seized in the United States. Yet Peru has surpassed Colombia in potential of pure cocaine production, 350 metric tons to 270 metric tons, respectively. See also Rodney G. Benson, Assistant Admin'r, Chief of Intelligence, Drug Enforcement Administration, Testimony before the Senate Caucus on International Drug Control Statement for the Record (Oct. 19, 2011), *available at* [http://www.justice.gov/dea/pr/speeches-testimony/2012-2009/111019\\_testimony.pdf](http://www.justice.gov/dea/pr/speeches-testimony/2012-2009/111019_testimony.pdf). Bolivia too is a noted cocaine producing nation, capable of producing about 195 metric tons of pure cocaine. *Id.*

<sup>61</sup> See General John F. Kelly, Commander, U.S. Southern Command, Testimony to U.S. Senate, Armed Services Committee, (Mar. 13, 2014), *available at* <http://www.southcom.mil/newsroom/Pages/Budget-shortfalls-reversing-SOUTHCOM-gains,-commander-says.aspx>.

<sup>62</sup> See e.g., Edward Fox, *Guatemala Seized \$6Mn of Meth Precursor Chemicals*, INSIGHT CRIME, Apr. 2, 2012 (chemicals were being shipped to Honduras), [http://www.insightcrime.org/news-briefs/guatemala-seizes-\\$6mn-shipment-of-meth-precursor-chemicals](http://www.insightcrime.org/news-briefs/guatemala-seizes-$6mn-shipment-of-meth-precursor-chemicals); Veronica Prates, *Mexico Grabs Growing Role in Meth Market*, INSIGHT CRIME, Aug. 17, 2011, <http://www.insightcrime.org/news-briefs/mexico-grabs-growing-role-in-meth-market>; Elyssa

the production of amphetamine type substances (ATS), with precursor chemical shipments flowing into countries that produce United States- (and transit nations) bound methamphetamine, and a still-prominent cocaine flow. The White House should convene a gathering of disparate law enforcement stakeholders to establish a hemispheric strategy to holistically approach United States *supply reduction* efforts. The current milieu of strategies is piecemeal and congressionally mandated. Additionally, though a National Drug Control Strategy exists, we submit the pendulum has swung too far towards demand and treatment efforts, necessitating the need for increased supply reduction focus.

### C. Capture the Data

Nations must collaborate to quantify the cocaine & precursor chemical threat. In order to assess the validity of policy decisions, rigor must be established in measuring the international flow of precursor chemicals and cocaine. The United States has a method of quantifying illicit threat flows through management of the Consolidated Counterdrug Database (CCDB).<sup>63</sup> Yet, the information therein is only as good as the data fed into it. Systematic input from foreign nations similarly allied in reducing the illicit drug threat is essential to understand the illicit drug flows as well. The rigorous inclusion of worldwide seizure data coupled with local monitoring of prices and purity as proxies for local supply and demand will provide decision-makers with better data upon which to make policies and assess progress—or the lack thereof. This can only be done by engaging other nations for their information on

---

Pachico, *Investigations in El Salvador, Guatemala Reveal Thriving Trade in Precursor Chemicals*, INSIGHT CRIME June 27, 2012, <http://www.insightcrime.org/news-analysis/investigations-in-el-salvador-guatemala-reveal-thriving-trade-in-precursor-chemicals>; Natalie Southwick, *What Role do Mexico Cartels Play in Argentina Drug Violence?*, INSIGHT CRIME, Nov. 6, 2013, <http://www.insightcrime.org/news-analysis/rosarios-rising-violence-and-its-roots-in-mexican-cartels>; *But see* U.S. Dep't of State Bureau of Int'l Narcotics and Law Enforcement Matters, *International Narcotics Control Strategy Report* [hereafter INCSR], DEP'T OF STATE, Mar. 1, 2014 at 1, available at <http://photos.state.gov/libraries/argentina/8513/reports/INCSR2014.pdf> "The Argentine government neither encourages nor facilitates illicit production or distribution of narcotics or laundering of proceeds. An independent judiciary and press pursue allegations of corrupt practices involving government authorities. During 2013, Argentine officials accused several members of the security forces of involvement in trafficking." *Id.*

<sup>63</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-0200, AGENCIES NEED TO PLAN FOR LIKELY DECLINES IN DRUG INTERDICTION ASSETS, AND DEVELOP BETTER PERFORMANCE MEASURES FOR TRANSIT ZONE OPERATIONS, (2005), available at <http://www.gao.gov/new.items/d06200.pdf>. The CCDB is the data storage that houses and "records drug trafficking events, including detections, seizures, and disruptions. The database is vetted quarterly by members of the interagency counterdrug community to minimize duplicate or questionable reported drug movements."

seizures to add to United States' data and corroborated reports of successful illicit drug movements. This would necessarily require allowing access to the data to foreign participating partners and information sharing agreements.

#### *D. Judge and Witness Protection*

The extent to which nations in Central America can ensure accountability for criminal activity depends on the law enforcement and legal infrastructure touched on already. Part of that legal infrastructure has to be security for the judiciary, prosecutors, and witnesses. The smaller nations of Central America have a formidable challenge to ensure the safety of its judges, lawyers, and witnesses in criminal cases. Consideration should be given to empanelling anonymous juries,<sup>64</sup> and United States assistance for robust witness and victim protection programs.

#### *E. Explore Expansion of the Joint Interagency Task Force Concept*

Given the success of the Joint Interagency Task Force South (JIATF-S), a conversation must continue on those aspects that make JIATF-S successful, and a conscious discussion of application of those relevant elements to the southwest border (SWB).<sup>65</sup> The SWB is a complex application of an analogous set of variables. Mainly, JIATF-S is successful because of the extra-territorial environment in which it performs its mission.<sup>66</sup> On the other hand the southwest border is a complex amalgam of differing levels of domestic government, overlaid with various law enforcement agencies' authorities, and varying levels of border control, through which all sorts of threats present themselves to our nation. That said, there are important extant capabilities within the interagency, to include the International Organized Crime Intelligence and Operations Center, the databases of the Organized Crime Drug Enforcement Task Force (OCDETF) Fusion Center, and the Drug Enforcement Administration Special Operations Division.

These organizations do admirable work sharing information, deconflicting law enforcement operations, and producing leads for

---

<sup>64</sup> See, e.g., *United States v. Dinkens et al.*, \_\_\_ F.3d \_\_\_, (4<sup>th</sup> Cir. 2012); *United States v. Ross*, 33 F.3d 1507, 1519 (11<sup>th</sup> Cir. 1994) (citing five factors to use in determining whether to empanel an anonymous jury).

<sup>65</sup> One of the co-authors has first-hand knowledge due to heavy involvement in the effort to examine the SWB for broader interagency collaboration.

<sup>66</sup> See, e.g., CHRISTOPHER J. LAMB & EVAN MUSING, *JOINT INTERAGENCY TASK FORCE-SOUTH: THE BEST KNOWN, LEAST UNDERSTOOD INTERAGENCY SUCCESS (Strategic Perspectives 5)* (2011).

investigators and prosecutors working nationwide. However, there are a number of lessons that may be brought to bear along the SWB to improve interdictor and investigative successes, to include development and manning of interagency entities focusing on the unique threats each SWB subregion presents. Each prospective entity would need to identify an agency lead, gain parent agency buy-in, and time to mature organizationally, to realize their full potential. This is a daunting challenge, but one worth addressing.

