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Confronting the “International Pariahs” of the Oceans

*The United States’ Drug Enforcement on the High Seas and Evolving
Legal Views on the Phenomenon of Stateless Vessels*

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I. INTRODUCTION

Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas.

(from the judgement in *U.S. v. Marino-Garcia*, 1982)¹

This thesis will investigate statelessness as a legal basis for jurisdiction over vessels on the high seas, and discuss the evolving treatment of stateless vessels under international law with a particular view on the U.S. legal practice on drug enforcement toward stateless vessels and their crews.

The thesis is structured as follows: Methodology and terminology are described in Parts II and III, respectively. Part IV identifies the prerequisites for defining a vessel as stateless under international law, and Part V outlines the international legal consequences of statelessness. Part VI outlines the history of U.S. jurisdiction over stateless vessels on the high seas through the development of domestic drug enforcement legislation, and Part VII asks whether the current U.S. approach is in accordance with international law. Answering this in the negative, the thesis goes on to outline, in Part VIII, three possible legal strategies for dealing with the jurisdictional challenges faced by the U.S. in its struggle against drugs trafficking. The first is to make statelessness a universal crime under international law, and the second is to make drugs trafficking a universal crime under international law. The third option is to expand bilateral and multilateral treaties granting U.S. jurisdiction over the crews on stateless vessels caught trafficking drugs on the high seas. This author argues in favour of the third option for developing an internationally accepted jurisdictional regime which allows for the effective combatting of drugs trafficking on the high seas. Lastly, Part IV will offer some concluding remarks.

The aim of this thesis is to shed light on an important and interesting development in the international law of the sea, which could significantly impact how states deal with international security threats involving stateless vessels on the high seas. Although this thesis focuses on legal enforcement in relation to drug smuggling on the high seas, the status of stateless vessels under international law is important also with regard to dealing with other

¹ *United States v. Marino-Garcia*, 679 F.2d, 11th Cir. Judgement of July 9th, 1982, Pt. 12.
<<http://openjurist.org/679/f2d/1373/united-states-v-marino-garcia-g>>

criminal and security issues, including illegal, unreported and unregulated fishing, arms smuggling, terrorism and the illegal trafficking of migrants.

The aim of this thesis is not to give a detailed analysis of the legal content of statelessness as such, nor to provide an in-depth analysis of the US legal history when it comes to maritime drug enforcement in general. Rather, the thesis sets out specifically to examine statelessness as a basis for jurisdiction on the high seas, including how statelessness is viewed by recent U.S. law as an element of the crime itself. This novel and creative interpretation of statelessness indicates that stateless vessels, including semi-submersible vessels, used for the trafficking of drugs, are posing a significant threat and that previous legal frameworks for tackling the issue have not proved sufficient. Still, as this thesis concludes, the U.S. move toward making statelessness akin to a universal crime under international law is not an appropriate answer to the challenges at hand. Rather, a furthering of international legal cooperation to combat drugs trafficking at sea, including an expansion of the use of bilateral and multilateral treaties, would best contribute to combatting drug trafficking on the high seas.

II. METHODOLOGY

The sources of law applied in this thesis are in accordance with Article 38 of the Statute for the International Court of Justice, and include international conventions, custom, judicial decisions and scholarly opinions.

This thesis will apply the 1982 United Nations Convention on the Law of the Sea (hereinafter “LOSC”) as the basis for interpreting the nature and implications of statelessness as a legal status. For the purpose of the U.S. references to international law on the status and nationality of ships, the 1958 Convention on the High Seas (hereinafter “CHS”) will at times be cited together with LOSC, as the U.S. is a Party to the CHS, but not to LOSC. For the purpose of the specific articles on the status and nationality of ships, it should here be noted that Article 5 and 6 of the CHS are replicated in LOSC as Articles 91 and 92.

Crucially, despite not being a Party to LOSC, the U.S. has on many occasions stated that it views most of LOSC as an expression of customary international law, and thus recognizes it as binding law. In addition, the U.S. has drafted numerous policy statements and

laws in accordance with LOSC, which must be seen as further support of this instrument.² Because the sections of LOSC which are disputed by the U.S.³ are not touched upon by this thesis, this analysis will assume U.S. compliance with LOSC on all issues concerning the high seas.

International customary law on the treatment of stateless vessels will figure as a source of law in this thesis, and both historical and current state practice will be examined and discussed with the aim of uncovering what constitutes customary international law on the treatment of stateless vessels. In particular, the possibility of creating new customary law through state practice will be discussed. Because many of the legal questions surrounding stateless vessel do not have clear answers provided by codified law, custom becomes an crucial source when looking at how states have interpreted the law. As pointed out by Rothwell and Stephens, in areas of the law where state practice may have extended the application of certain treaty provisions, customary law becomes especially important.⁴ The U.S. legal strategies on tackling stateless vessels is certainly an example of this, and the possibility of the U.S. approach being adopted by other states should not be ignored. As such, this paper uses state practice not only to shed light on what constitutes the international customary law of today, but also to illustrate what that law might look like in the future.

In portraying the current legal debates over the issue of stateless vessels in general, and the criminal element of statelessness in particular, a wide range of legal scholarship will inform the thesis. In addition, case law will play an important part in depicting the legal practice of both states and international courts and tribunals on the issues of statelessness.

This thesis is concerned with legal questions surrounding enforcement jurisdiction and criminal jurisdiction asserted over stateless vessels carrying drugs in areas beyond national jurisdiction, i.e. on the high seas. Hence, the thesis will not be considering scenarios of stateless vessels which are caught smuggling drugs in other maritime zones than the high seas, as this would give rise to a very different set of jurisdictional issues.

² See collection of commentaries by John F. Turner, Sarah Ashfaw and John Norton Moore, at <<http://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy>>

³ The disputed section is LOSC Part XI, concerning the Area.

⁴ Rothwell, Donald and Stephens, Tim: *The International Law of the Sea*. Hart Publishing, Oxford, 2010, p. 22.

III. TERMINOLOGY

For the purpose of this paper, the terms “stateless” and “without nationality” will be used interchangeably, as they are considered by the author to have the same meaning. The terms “vessel” and “ship” will also be used interchangeably, although “ship” will mostly be used in relation to the legal framework of LOSC, as this is the term applied in this Convention.⁵ When referring to semi-submersible and submersible vessels, the term “vessel” will always be used. When referring to maritime areas beyond national jurisdiction, the term “high seas” will be used, as this is the term applied in international legal instruments governing the law of the sea, hereunder LOSC and CHS. The “high seas” should be interpreted to have the same meaning as the term “international waters.”

IV. WHAT IS A STATELESS VESSEL?

A fundamental principle of the law of the sea, embedded in LOSC Article 92 and 94, is that all vessels navigating on the high seas shall fly the flag of one state, and one state only, and that the flag state has the exclusive jurisdiction over that vessel on the high seas. The flag state should thus be seen as an essential component of the international legal regime governing the high seas. The crucial function of the flag state is to ensure that the high seas is not an area of legal vacuum, but one where vessels sail under the legal protection of a flag state, and remain under this state’s jurisdiction. Indeed, as stated by the International Law Commission, “the absence of any authority over ships sailing the high seas would lead to chaos.”⁶

A stateless vessel, or a vessel without nationality, is a vessel lacking a flag state. Notably, LOSC Articles 91 and 92, as their identically worded predecessors Article 6 and 7 of CHS, do not contain an explicit definition of stateless vessels, but it does outline some of the scenarios where a vessel must be considered stateless. Most clearly, if a vessel sails under more than one flag and change these according to convenience, this vessel is defined as stateless under Article 92.

⁵ “Vessel” is a somewhat wider category than “ship.” Vessels can be defined as any “nautical craft designed to navigate on water,” whereas ships are “vessels of a certain size for deep water navigation.” <<http://www.thefreedictionary.com>>

⁶ Report of the International Law Commission to the General Assembly, 11 U.N. Supp. no 9, Art. 30, Comment (1) at para 25, U.N. Doc A/3159, July 4th, 1956. <http://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf>

There are several other scenarios in which a vessel may be defined as stateless under international law, resulting from interpretations of LOSC and from general practice. For instance, a vessel may have never registered under a flag state, in which case it is stateless.⁷ A vessel may also have been deprived of the right to sail under a particular flag, or a particular flag may not be recognised as belonging to a proper state entity, in which case it can be assimilated to a stateless vessel.⁸

It is also possible that vessels which lack a “genuine link” to the flag state, as required by LOSC Article 91(1), may constitute stateless vessels.⁹ The provision itself does not explicitly state that the lack of a genuine link renders the vessel stateless, but it prescribes that there “must exist” a genuine link between the ship and its flag state. The content of this genuine link is not specified further under LOSC, and has thus been the topic of much debate, perhaps most iconically expressed in the *M/V Saiga Case* before ITLOS. In this case, Guinea did not recognize the right of *Saiga* to fly the flag of Saint Vincent and the Grenadines, as it claimed there was no genuine link between the vessel and its flag state. ITLOS discussed two issues in relation to this problematique: first, whether the lack of a genuine link allows another state to refuse to recognize the vessel’s nationality, and second, whether there was a genuine link between *Saiga* and Saint Vincent and the Grenadines.¹⁰

On the first question, ITLOS concluded that the genuine link requirement was not intended to establish a set of criteria which could give other states the possibility of challenging the validity of a ship’s nationality. Rather, ITLOS held that the purpose of the genuine link requirement was to “secure more effective implementation of the duties of the flag State.” The Court thus stressed that Guinea lacked a legal basis for refusing to recognize *Saiga*’s nationality based on the notion that no such link existed.¹¹ Interestingly, the judgement did not further elaborate on the actual content of the genuine link, and as such did not expand the understanding of this concept, except from establishing that a perceived lack of a genuine link does not provide grounds for other states to refuse to recognize a vessel’s nationality.

⁷ Bouwhuis, Stephen: *South Africa: The Samundera Pasific and the Exercise of Jurisdiction over Stateless Vessels on the High Seas*. International Journal of Marine and Coastal Law, Vol 29(2), p. 365. This statement is valid only when the vessel is of the size and type required to register, see discussion on p. 20 of this thesis.

⁸ Lowe, A.V. and Churchill, R.R.: *The Law of the Sea*. 3rd ed., Manchester University Press, Manchester, 1999, p. 213.

⁹ Bouwhuis, p. 365.

¹⁰ *The M/V Saiga (no. 2) Case*, ITLOS Judgement of July 1st, 1999, para 79.

<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf>

¹¹ *Ibid*, para 86.

On the second question, ITLOS answered that the contention of Guinea that no genuine link existed between *Saiga* and Saint Vincent and the Grenadines was not supported by sufficient evidence, and hence rejected the claim.¹² Based on the judgement of the *M/V Saiga Case*, it is safe to state that the threshold for deeming a vessel stateless on the basis of lacking a genuine link to its flag state is extremely high.

This conclusion is supported by the fact that there does not seem to be a high level of interest among states to further define and strengthen the genuine link requirement. The 1986 UN Convention on Conditions for Registration of Ships states as its objective to ensure and strengthen the genuine link between a state and ships flying its flag,¹³ but is not yet in force, as only 15 states have become parties to it. For this Convention to enter into force, it requires at least 40 state parties, whose combined tonnage must amount to 25 per cent of total world tonnage. The low level of interest for this Convention must be seen as indicative of a community of states which does not regard the vagueness of the genuine link requirement as a problem. In fact, states may even see this vagueness as convenient for conducting shipping business.

V. LEGAL CONSEQUENCES OF STATELESSNESS

Vessels which are defined as stateless fall under a particular, and highly uncertain, legal regime. This section will outline the different jurisdictional discussions which arise from the legal status of statelessness, and will thus provide the background for interpreting the extent to which U.S. law and practice on jurisdiction over stateless vessels is in accordance with international law.

A. Interpreting LOSC Article 110

According to LOSC Article 110(1), the right of warships to board a foreign vessel on the high seas is limited to cases where there is reason to suspect that the vessel has engaged in certain illegal activities, namely piracy, slave trade and unauthorized broadcasting, and, notably, where the vessel is suspected to be “without nationality.” Hence, for the purpose of boarding

¹² *Ibid*, para 87.

¹³ 1986 United Nations Convention on Conditions for Registration of Ships, Article 1.
<http://unctad.org/en/PublicationsLibrary/tdrsconf23_en.pdf>

a foreign vessel, LOSC groups statelessness in the same category as the illegal activities of piracy, slave trade and unauthorized broadcasting. Interestingly, the right of visit in cases of vessels without nationality was first introduced in LOSC, as there is no such right found in the CHS.¹⁴

The right of visit under Article 110 limits the jurisdictional scope of warships in that they may only board to “verify the ship’s right to fly its flag,” and if suspicion remains, the warship may “proceed to a further examination on board the ship.” Any further jurisdiction beyond this examination on the part of the warship is not stipulated by the article. Notably, the treatment of statelessness as being in the same category as international crimes is only found in Article 110, and is not further reflected in other provisions of LOSC. Whereas prescriptive and enforcement jurisdiction can be exercised by any state over vessels engaged in piracy and, to a lesser extent, unauthorized broadcasting,¹⁵ there are no provisions under LOSC to allow such criminal jurisdiction to be exercised over a stateless vessel. The sole provision covering the trafficking of drugs on the high seas, Article 108, only provides that states “shall cooperate on the suppression of illicit traffic in narcotic drugs” and that a flag state suspecting one of its own ships of carrying drugs “may request the co-operation of other States to suppress such traffic.”

Faced with the silence of LOSC on the criminal jurisdiction over vessels that are found to be stateless upon inspection, some authors have advanced a flexible view of Article 110. For instance, Papastavridis interprets LOSC Article 110 to include not the “full extension of the jurisdictional powers of the boarding state,” but still claims that the provision allows for the boarding state to bring the vessel to port and subject it to further investigation.¹⁶ Curiously, Papastavridis does not grant full jurisdiction because of the lack of a basis for this in the letter of LOSC Article 110, but nevertheless grants an extended right to bring the vessel to port, a right which is not included in the letter of Article 110 either.

¹⁴ Churchill and Lowe, p. 214.

¹⁵ LOSC Article 105 and 109. Under Article 109, states which may prosecute a person engaged in unauthorized broadcasting include the flag state, the state of registry of the installation, the national state of the person, any state where the transmission can be received, and any state where authorized radio is suffering interference from the illegal broadcasting. Hence, unauthorized broadcasting is subject to a much wider jurisdictional regime than exclusive flag state jurisdiction, but it is not subject to universal jurisdiction. Notably, in the case of the transport of slaves, only flag states are authorized under Article 99 to “prevent and punish” the transport of slaves. Although Article 99 expresses a general prohibition of the transport of slaves, it does not confer criminal jurisdiction over such vessels to any state but the flag state.

¹⁶ Papastavridis, Efthymios: *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*. Hart Publishing, 2013, p. 264-265.

In order to determine the extent to which extraterritorial jurisdiction may be exercised over a vessel without nationality, one must go on to interpret the very nature of statelessness in order to judge whether it gives rise to universal criminal jurisdiction, including in cases where no violation has been committed other than the possible crime of being stateless. This debate is the subject of the following section.

B. Stateless Vessels: Under the Jurisdiction of No State or of Every State?

In the debate over the extent to which international law permits a state to assert criminal jurisdiction over stateless vessels, two opposing legal rationales are expressed. The first view argues that stateless vessels do not automatically fall under the jurisdiction of all states solely because they are without nationality, whereas the opposite view argues that any state may exercise jurisdiction over a vessel which enjoys no flag state protection. These views will here be discussed in turn.

i) The Argument That Statelessness Does Not In Itself Give Rise to States' Jurisdiction Over It

The first view, maintained by Churchill and Lowe, among others,¹⁷ is that statelessness in itself is not enough to entitle each and every state to assert jurisdiction, but that there is a need for a jurisdictional nexus connecting the vessel with the enforcing state.¹⁸ In other words, there must exist a link between the act committed and the state exercising jurisdiction, and statelessness in itself does not constitute such a link, as it is not a crime.

To understand the nature and function of such a nexus, it is helpful to recall the five doctrines under which a state can exercise extraterritorial jurisdiction, i.e., where states may apply their jurisdiction to acts committed outside the state's own territory.

The first is the nationality principle, granting states jurisdiction over their own nationals. The second is the protective principle, which grants a state jurisdiction over acts which are directed against the security of that state, primarily by threatening state integrity or

¹⁷ See for example Roos, Laura L.: *Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction*. *Maritime Law*, No. 9, 1984, p. 273-295, Tousley, Michael: *United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal?* *Case Western Reserve Journal of International Law*, Vol. 22, 1990, p. 375-401, and Bennett, Allyson: *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*. *Yale Journal of International Law*, No. 37, 2012, p. 433-461.

¹⁸ Churchill and Lowe, p. 214.

government functions. This argument has been much applied by U.S. courts in cases concerning the jurisdiction over vessels on the high seas when these have been proven to carry illegal drugs destined for the U.S. The rationale for applying the protective principle to drug smuggling was stated in *United States v. Peterson*, as “the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction.”¹⁹ Supported by the recognition by Congress that drugs represent a “serious international problem” and that drug trafficking “presents a specific threat to the security and well-being of the United States,” drug smuggling has been placed in the same category as forgery, illegal entrance, and the threatening of government functions, when it comes to the application of the protective principle.²⁰ Thus, the need for protecting the vital functions of the state forms a possible jurisdictional nexus to a crime through the protective principle.

Third, the objective territorial principle establishes the right of a state to assert jurisdiction over acts which have negative effects within that state, but takes place outside its territory. This principle usually requires the negative effect to already have taken place when jurisdiction is asserted, meaning that an intended crime usually is not sufficient to activate the objective territorial principle. Nevertheless, the principle has been extended by some U.S. courts to include acts which would have an effect on U.S. territory, but where the effect has not yet been manifested. For instance, in *United States v. Baker*, the court held the objective territorial principle applicable when “the intended distribution [of the illegal drugs] would occur within the territorial United States.” Hence, intent alone has been sufficient to activate the objective territorial principle in some U.S. cases, but this is widely seen as a misguided use of the principle.²¹ The logic of the objective territorial principle rests on the premise that the effect of a crime is already being felt within a state, and that the state may therefore prosecute the perpetrators of the crime. The judgement in *United States v. Baker* did not uphold this logic, as it based itself on the possible future effect of the crime, rather than any actual effect which had already occurred. As a consequence, one may argue that it was not the objective territorial principle that was used in this case after all, as the logic for asserting criminal jurisdiction was not coherent with this principle.

¹⁹ Sorensen, Christina E.: *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction under International Law*. Emory International Law Review, Vol. 4, 1990, p. 217-218.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 216-217.

Fourth, the passive personality principle, which is not uniformly accepted by states, allows states to exercise jurisdiction over acts committed against their nationals by a non-national, thereby linking the crime by the nationality of the victim only.

Fifth, and crucial for this thesis,²² is the universality principle, which allows all states to exercise jurisdiction over a limited list of crimes, where the nature of the crime itself provides the jurisdictional basis.²³ The universality principle differs from the other principles of extraterritorial jurisdiction by the fact that it requires no link between the perpetrator, victim or committed act and the state exercising jurisdiction. Universal jurisdiction arises in cases where the act is of such a nature that it invokes the permission, and arguably even the responsibility, of all states to exercise jurisdiction, and includes crimes such as piracy, genocide and war crimes.²⁴

As pointed out by Churchill and Lowe, LOSC establishes the right of all states to exercise jurisdiction over piracy, but does not express this right with regard to stateless vessels. In their view, treating stateless vessels as under the jurisdiction of all states “ignores the possibility of diplomatic protection being exercised by the national state of the individuals on such stateless ships.”²⁵ In other words, Churchill and Lowe seem to hold that the nationality principle is the applicable nexus in cases of stateless vessels, as the individuals on board are still nationals of a state, and thus remain under the jurisdiction, and protection, of this state. In the very brief analysis by Churchill and Lowe, it is not clear whether the nationality principle is the only principle opposing the argument that any state may exercise jurisdiction over a stateless vessel. Neither do these authors specify the consequences of a potential scenario where the state of nationality of the crew found on a stateless ship is unwilling or unable to deal with the matter, which could lead to serious crimes with international ramifications going uninvestigated, and hence unpunished.

As a further critique of Churchill and Lowe’s view, it is important to point out that asserting jurisdiction over individuals on a stateless ship would only be possible if these individuals were suspected of committing a crime, unless manning a stateless vessel was in itself a crime under the laws of the state of nationality. Hence, in a scenario where no illegal activities could be identified on board a stateless ship after inspection in accordance with

²² The universality principle and the nature of the universal crime will be further discussed under Part VIII A of this thesis.

²³ Bennett, Allyson: *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*. Yale Journal of International Law, No. 37, 2012, p. 436-437.

²⁴ *Ibid.*

²⁵ Lowe, A.V. and Churchill, R.R.: *The Law of the Sea*. 3rd ed., Manchester University Press, Manchester, 1999, p. 214.

LOSC Article 110, Churchill and Lowe's view entails that the inspecting state could not take any further action toward the vessel, as statelessness is not a crime in itself. As long as no nexus can be provided, under Churchill and Lowe's rationale the stateless ship must be free to continue navigation.

Unsurprisingly, this consequence of Churchill and Lowe's view is criticised by their opponents on the matter, whose arguments will now be presented.

ii) The Argument That Statelessness Itself Constitutes a Jurisdictional Nexus

In contrast to Churchill and Lowe, authors such as Anderson and Oppenheim suggest that a vessel's lack of legal protection under a flag state entails that any state may exercise jurisdiction over it.²⁶ If this was not the case, the vessel would arguably be outside the reach of any state's jurisdiction, and statelessness would amount to a sort of immunity on the high seas in all cases where a crime could not be proven upon inspection. As pointed out by Anderson, not adopting the view that all states have jurisdiction over a vessel without nationality "would end in chaos and anarchy on the high seas."²⁷

Common to the authors advancing the view that any state may assert its jurisdiction over a vessel without nationality, is the argument that the overall legal order of the oceans depends on every vessel having a flag state, and that those vessels which are stateless must not be seen as outside the reach of the law. Illustratively, McDougal states:

*So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimal order upon the high seas (...) that extraordinary derivational measures are permitted with respect to stateless ships.*²⁸

In McDougal's view, the phenomenon of stateless ships represents a significant threat to the high seas regime because it breaks with the regime's basic prerequisite for legal order. Based on the gravity of this threat, his logic is that any state may exercise its jurisdiction over a stateless vessel. One may find support for this view in cases such as *United States v.*

²⁶ Anderson, Andrew W.: *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*. Journal of Maritime Law and Commerce, Vol. 13, No. 3, April 1982, p. 336-337, and Lauterpacht, Hersch.: *Oppenheim's International Law*. Cambridge University Press, Vol.1, 1934, p. 646.

²⁷ Anderson, p. 336.

²⁸ McDougal, Myres S.: *The Maintenance of Public Order at Sea and the Nationality of Ships*, American Journal of International Law, Vol 54, No. 1, 1960, p 76-77.

Caicedo, where it was argued that the restrictions which normally apply with regard to asserting jurisdiction over vessels on the high seas, “have no applicability in connection with stateless vessels.” The rationale behind this was that when vessels attempt to be free of any state’s authority, “they subject themselves to the jurisdiction of all nations, solely as a consequence of the vessel’s status as stateless.”²⁹

One can find this view of stateless vessels not only in American jurisprudence, but also in British case law. In *Molvan v. A.G. for Palestine*, the freedom of the high seas is described as a freedom only for those ships which are entitled to fly “the flag of a State which is within the comity of nations.” Further, the judgement stated that no “breach of international law can arise if there is no State under whose flag the vessels sails.”³⁰ Hence, the lack of protection from a flag state is the basis for the Court’s view that any state may assert jurisdiction over the stateless vessel.

The judgement in *Molvan v. A.G. for Palestine* has been quoted as the legal rationale for state practice also by other states than the United Kingdom and the U.S. For instance, the former Director General of the Norwegian Ministry of Foreign Affairs’ Department of Legal Affairs, Rolf Einar Fife, claimed that the lack of protection by a flag state entailed the right of any state to exercise its jurisdiction over a stateless vessel. On this basis, Norway applies its regulations equally to stateless vessels, and argues its right to exercise criminal jurisdiction over these vessels.³¹

As this section has demonstrated, a debate exists over the extent to which any state may exercise extraterritorial jurisdiction over a vessel without nationality, in effect taking on the role of the flag state in the absence of one. The next section will go on to investigate, from a historical perspective, the law and practice of the United States on this issue, before asking whether U.S. law-making and practice is in accordance with international legal norms on the jurisdiction over stateless vessels.

²⁹ *United States v. Caceido*, 47 F.3d, 9th Cir., 1990, 370-372, quoting *United States v. Marino-Garcia*, 679 F.2d, 11th Cir., 1982, at 1373, 1382. <<http://caselaw.findlaw.com/us-9th-circuit/1353307.html>>

³⁰ *Naim Molvan v. Attorney General for Palestine (The "Asya")*, 81 Ll L Rep 277, United Kingdom: Privy Council (Judicial Committee), 20 April 1948, p. 369-370. <<http://www.refworld.org/docid/3ae6b6544.html>>

³¹ Fife, Rolf Einar: *Elements of Nordic Practice 2006: Norwegian Measures Taken Against Stateless Vessels Conducting Unauthorized Fishing on the High Seas*. Nordic Journal of International Law, Vol. 76, 2007, p. 302.

VI. THE DEVELOPMENT OF EXTRATERRITORIAL JURISDICTION OVER STATELESS VESSELS AND THEIR CREWS UNDER U.S. DRUG ENFORCEMENT LAW

A. The US “Drug War” and the Marijuana on the High Seas Act

The international trade in drugs is one of the world’s most profitable illegal trades, generating an estimated revenue of \$400 billion annually.³² The U.S. is the world’s largest market for illegal drugs, and annually spends \$8 billion in federal resources only on combatting drug trafficking at sea.³³ Since the 1970s, the U.S. Coast Guard, the U.S. Customs Service and the U.S. Drug Enforcement Administration have directed a large effort toward curbing the illegal trafficking of drugs into U.S. territory by transport on the high seas specifically. During the 1970s, the nature of drugs smuggling into the U.S. changed from relatively small amounts of marijuana being smuggled in smaller private sailboats, to larger vessels with substantial amounts of drugs sailing from countries like Columbia or Jamaica, hovering in the high seas and using small speed boats to deliver the cargo to the U.S. coast. A significant number of these “mother ships” were stateless vessels.³⁴

The U.S. district courts had a difficult time prosecuting foreign crew members engaged in this smuggling, as many judges held the view that the U.S. Coast Guard lacked jurisdiction to board stateless vessels on the high seas, and that there was no subject matter jurisdiction when a nexus between the act and the U.S. could not be proven.³⁵ Aware of this prerequisite for jurisdiction, the smugglers often destroyed logbooks and charts before the Coast Guard boarded, to ensure it could not be proven that the illegal cargo was destined for the U.S. Destroying this evidence amounted to dismantling the jurisdictional nexus necessary for prosecution, making the objective territorial principle and the protective principle of no avail. Since the crews were usually not American nationals, there was neither a nexus

³² UN Office on Drugs and Crime (UNODC): *2006 World Drug Report*. June 25, 2006, p. 363-367. <<https://www.unodc.org/unodc/en/data-and-analysis/WDR-2006.html>>

³³ Fritch, Charles R.: *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*. Washington University Global Studies Law Review, Vol. 8, Issue 4, 2009, p. 701.

³⁴ Anderson, p. 325.

³⁵ See for example *United States v. Cortes*, No. 78-56-CR-SMA (S.D.Fla.), Judgement of April 17, 1978, and *United States v. Sarmiento-Rozo*, No. 77-8070-CR-JE (S.D.Fla.), Judgement of February 13, 1978.

connecting the crime to the U.S. though the nationality principle.³⁶ The practice by district courts therefore became to simply decline prosecution and deport the foreign crews. Between 1976 and 1979, about fifty per cent of the cases following from Coast Guard seizing of drugs resulted in no prosecution. In Anderson's words, "With little likelihood of imprisonment, the loss of an occasional cargo or vessel became just part of the cost of doing business to the drug smugglers."³⁷

In response to the apparent impunity of foreign smugglers on board stateless vessels, the U.S. Congress enacted the Marijuana on the High Seas Act (hereinafter MHSA) in 1980, which, under paragraph 955a, prohibited any person "on board a vessel subject to the jurisdiction of the United States on the high seas" to manufacture, distribute or possess illegal drugs. In the MHSA, a vessel subject to the jurisdiction of the U.S. was defined as including "a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958." Hence, the MHSA placed under U.S. jurisdiction any person on board a stateless ship carrying drugs, even when no intent could be proven that the cargo was destined for the U.S.³⁸

This was a controversial legal move, effectively making the nationality principle and the protective principle obsolete when establishing U.S. jurisdiction over stateless vessels. In this way, the MHSA arguably went so far as to create a sixth principle of extraterritorial jurisdiction, one which was based only on a vessels' status as stateless. Under paragraph 955a, the U.S. could exercise jurisdiction over foreign individuals involved in drug trafficking on the high seas without the previously required nexus proving the intent to smuggle the drugs into the United States.

As pointed out by Roos, as a matter of U.S. constitutional law Congress may legislate inconsistently with international law provided the matter is of sufficient importance and that it demonstrates the clear intention to do so. But in the process of writing the MHSA, Congress did not express such an intent to overrule international law. On the contrary, Congress emphasized the need for the MHSA to be in compliance with international law, referring to the CHS for the definition of stateless vessels, and stating the intent for the legislation to provide the "maximum prosecutorial authority permitted under international law."³⁹

³⁶ See Part V, Section B(i) of this thesis for an analysis of these jurisdictional principles.

³⁷ Anderson, p. 326.

³⁸ Brendel, Joseph R.: *Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels*, The William & Mary Law Review, No. 25, 1983, p. 314-218.

³⁹ Roos, p. 288.

In the beginning, the application of the MHSAs was shaped by the restricted interpretation of paragraph 955a, as prosecutors continued to emphasize the need to prove that the U.S. was intended as the destination of the illegal drugs, in order to satisfy the need for a jurisdictional nexus.⁴⁰ Then a new trend started to take form, under which paragraph 955a was fully endorsed by prosecutors as permitting the lack of a jurisdictional nexus. In the landmark decision of *United States v. Marino-Garcia* in 1982, and in several following judgements,⁴¹ the prosecutor explicitly stated a vessel's statelessness to be sufficient as the sole base for jurisdiction, citing the CHS to indicate that the lack of a flag state would automatically entail that stateless vessels fall under U.S. jurisdiction. The rationale from the judgement in *Molván v. A.G. for Palestine* from 1948 was also used to support the decision, reviving the notion that a vessel without nationality enjoys the protection of no state, and that this lack of protection extends to the individuals on board, not just to the vessel and its cargo.⁴²

The lack of distinction between extending jurisdiction to a stateless vessel and extending jurisdiction to the vessel's crewmembers has been criticized by authors such as Roos, Tousley and Brendel, who all point out the lack of support in international law and custom for the extension of jurisdiction to any person on board a stateless vessel.⁴³ This critique will be further discussed under Part VIII.

B. Widening the Definition of Statelessness: The 1986 Maritime Drug Law Enforcement Act

By the mid-1980s, U.S. lawmakers considered that the MHSAs had proven insufficient to tackle the increasing trafficking of drugs by sea, especially because it had been difficult for U.S. prosecutors to prove a vessel's status as stateless, and thereby authorize U.S. jurisdiction. In many cases, it would take several months to obtain proof of a vessel's statelessness which would be sufficient in court.⁴⁴ Providing watertight evidence that a vessel was without nationality, therefore, represented a hindrance to the effective prosecution of smugglers.

⁴⁰ *Ibid*, p. 291.

⁴¹ See for example *United States v. Pinto-Mejia*, 720 F.2d 248, 2nd Cir, 1983 <<https://casetext.com/case/united-states-v-pinto-mejia>> and *United States v. Howard-Arias*, 679 2.Fd 363, 4th Cir. <<http://openjurist.org/679/f2d/363/united-states-v-howard-arias>>

⁴² Roos, p. 292.

⁴³ See Roos, p. 292-294, Brendel (1983), p. 339, and Tousley (1990), p. 389-390.

⁴⁴ Bennett, p. 442.

The 1986 Maritime Drug Law Enforcement Act (hereinafter MDLEA) was passed to lessen the burden of proof upon the prosecutors in determining statelessness. Under the MDLEA, the definition of a stateless vessel was broadened to include those vessels which did not upon request show evidence of their registry under a flag state. Further, the MDLEA considered a vessel stateless if the reported flag state did not “affirmatively and unequivocally” confirm the registration of the vessel in question. Notably, this wide definition of a stateless vessel replaced that of the MHSA, which was based on the CHS. With the MDLEA, the U.S. had enacted its own definition of statelessness, and in so doing, further extended the scope of its jurisdiction.

C. The Novel Challenge of Drug Smuggling Submarines and the 2008 Drug Trafficking Vessel Interdiction Act

In response to the legal frameworks of the MHSA and MDLEA, giving U.S. law enforcement agencies and prosecutors increasing leeway to define and authorize jurisdiction over stateless vessels on the high seas, drug smuggling networks have also changed their strategies. One particularly successful scheme, beginning in the 1990s, has been the transport of cocaine in self-propelled semi-submersible vessels. These vessels, when loaded with as much as ten tons of cargo, become almost entirely submerged, with only about 30 centimetre of freeboard above the surface.⁴⁵ The vessels are crafted in remote parts of the supplying country, usually Columbia or Ecuador, and cost as little as \$300,000 to make. The vessels can be built in only 90 days, using commonly available materials, and were by 2009 estimated to carry around 30 per cent of Columbia’s total cocaine exports.⁴⁶

The use of such semi-submersible vessels to traffic cocaine into the U.S. is on the rise, and according to U.S. officials only an estimated 14 per cent of the vessels are caught.⁴⁷ The vessels are becoming increasingly difficult to detect, as new construction methods are constantly developed to avoid detection. To evade radars, the semi-submersible vessels use little or no steel. To avoid being detected by infrared sensors, they use lead pads packed around the engine. Some vessels also have piping systems which cool down engine exhaust,

⁴⁵ Kushner, David : *Drug-Sub Culture*. New York Times Magazine, April 23, 2009. <http://www.nytimes.com/2009/04/26/magazine/26drugs-t.html?_r=0>

⁴⁶ *Ibid.*

⁴⁷ Economist: *Waving, Not Drwning: Cocaine Now Moves by Submarine*. May 1st, 2008. <http://www.economist.com/node/11294435>

making the vessel even harder to detect by infrared sensors.⁴⁸ The semi-submersible vessels can travel more than 4,000 nautical miles without refuelling, and are usually crewed by four of five men. Upon detection, the common strategy of the crew has been to quickly dispose of the cargo, sink the vessel and jump overboard. Tellingly, the vessels are designed to be easy to sink, and drug cartels are known to factor in a certain loss of vessels as a cost of doing business.⁴⁹

In response to the near impossible task of proving that a sunk vessel was used for drug trafficking, the U.S. Congress passed the Drug Trafficking Vessel Interdiction Act (hereinafter DTVIA) in 2008. The DTVIA was designed to ease the prosecution of smugglers involved in this trade, and took one step further than the previous MDLEA in extending U.S. jurisdiction. Under DTVIA, paragraph 2285, any individual who “operates (...) or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating into, through or from waters beyond the outer limit of the territorial sea of a single country (...) with the intent to evade detection,” has committed a crime against the U.S.⁵⁰

There are several noteworthy elements in this paragraph. First, not only the active operating of the submersible or semisubmersible vessel is criminalized, but also the mere embarking onto one. This means that simply being on board a semi-submersible vessel is punishable under U.S. law.

The law covers vessels navigating into, through or from an EEZ or the high seas (“waters beyond the limit of the territorial sea”), and it sets as a prerequisite for the crime that the vessel has an intent to evade detection. A further specification of *prima facie* evidence of a vessel’s aim to evade detection is referenced in the DTVIA, and includes the use of certain materials to evade radar or heat sensor detection, camouflaging paint, and presenting a low hull profile.⁵¹ Violations of DTVIA prohibition on operating or embarking on a semi-submersible vessel are punishable with up to fifteen year in prison, a fine, or both.⁵²

Interestingly, the DTVIA not only uses the statelessness of a vessel as a grounds for asserting jurisdiction, it also includes the lack of nationality as an element of the crime. In Bennett’s view, the treatment of statelessness as a crime in itself under the DTVIA amounts

⁴⁸ *Supra* note 44.

⁴⁹ Brodarick, Ann Marie: *Jurisdiction over Stateless Vessels and an Excess of Congressional Power under the Drug Trafficking Vessel Interdiction Act*. University of Miami Law Review, No. 67, 2012, p. 255-258.

⁵⁰ Drug Trafficking Vessel Interdiction Act, Pub. L. No. 110-407, 18 U.S.C.A., para 2285. <<https://www.gpo.gov/fdsys/pkg/PLAW-110publ407/html/PLAW-110publ407.htm>>

⁵¹ See 46 U.S.C. para 70507 (b). <<https://www.law.cornell.edu/uscode/text/46/70507>>

⁵² *Supra* note 37.

to making statelessness akin to a universal crime. His view is persuasive: universal crimes are the only crimes which permit criminal jurisdiction where there is no connection between the crime and the prosecuting state, and where jurisdiction is based only on the nature of the offense itself.⁵³

The DTVIA not only provides grounds for statelessness to serve as the basis for jurisdiction, as the previous MHTA and MDLEA also allowed, but it makes statelessness a central element of the crime itself. In other words, where the MHTA and MDLEA allowed the U.S. to board and inspect a stateless vessel, and, upon finding drugs, prosecute the crews, the DTVIA allows for the prosecution of crews regardless of the presence of drugs. Under the DTVIA, the mere presence of a person on board a semi-submersible vessel without nationality allows the U.S. to prosecute the person, and the sentence of up to fifteen years in prison is based not on the trafficking of drugs, but on the mere act of operating or crewing this vessel. Naturally, the DTVIA has proven controversial, and the relationship between U.S. law and international law will be the topic for the following section.

VII. IS U.S. LAW IN ACCORDANCE WITH INTERNATIONAL LAW ON STATELESS VESSELS?

Several aspects of the U.S. law and legal practice with regard to stateless vessels have been accused of being in conflict with international law. The three most heavily critiqued elements of U.S. law relating to stateless vessels on the high seas will be dealt with here. First, the MDLEA's requirements for the vessel to prove its flag state will be examined in the light of international law. Second, the lack of distinction between extending jurisdiction to a stateless vessel and extending jurisdiction to the vessel's crewmembers will be analysed. Third, the definition of statelessness as a crime in itself will be explored in relation to international law.

A. Is it in Accordance With International Law to Shift the Burden of Proof From U.S. Courts to the Vessel and Flag State Regarding the Status of the Vessel?

In response to the difficult and time-consuming task of proving a vessel's lack of nationality in court, the MDLEA shifted the burden of proof to the vessel and its reported flag state.

⁵³ O'Keefe, Roger: *Universal Jurisdiction. Clarifying the Basic Concept*. Journal of International Criminal Justice No 2, 2004, p 735-760. See also Randall, Kenneth C.: *Universal Jurisdiction Under International Law*. Texas Law Review, Vol 66, 1987, p. 785-841.

When the U.S. Coast Guard boards a vessel suspected of being stateless, or suspected of crimes listed under LOSC Article 110, the vessel may be defined as stateless if it does not immediately show its registration papers, or if the flag state does not “affirmatively and unequivocally” confirm the registration.

Whether these requirements are in line with international law depends on how the law and its purpose is interpreted. On one hand, one may argue that the MDLEA does not depart from the requirements of the CHS and LOSC that every ship shall receive documents to prove its nationality.⁵⁴ Neither does it contradict the right under Article 110 to inspect and verify a vessel’s right to fly its flag when suspected of being without nationality. One may argue that the strict requirements to prove the vessel’s nationality upon inspection may be the only way to avoid the challenges faced by prosecutors if a flag state is claimed and documents produced only after proceedings have started. One may also hold that the intent of the flag state system, and indeed, of the entire high seas regime, is misused in these cases, as these vessels are likely to have obtained a flag state only after a case has been raised against them. If a vessel does not have the documents to attest to its nationality upon inspection, or the flag state is not able to confirm the nationality, one could argue that there is nothing in LOSC or in CHS to enable the inspecting state from defining the vessel as one without nationality. This argument can be further supported by the view that the law of the flag state is the only legal regime safeguarding the legal order of the high seas, recalling the arguments of authors such as Anderson and Oppenheimer.⁵⁵

Taking the opposite approach, as this author does, there are several aspects of the U.S. approach which conflict with international law. First, it is crucial to note that for a vessel to have nationality does not necessitate it being formally registered in the ship registry of that state. Article 91 of LOSC bestows on states the right to fix the conditions for the grant of its nationality to ships, and states that “ships have the nationality of the State whose flag they are entitled to fly.” As pointed out by Guilfoyle, many states allow smaller vessels, such as fishing vessels, to fly their flag if owned by a national. Many states also only require ships of a certain size to formally register.⁵⁶ If for instance a small fishing vessel enjoying the nationality of its owner under the national law of that state was boarded by the U.S. Coast Guard, it could naturally not produce papers of registration, as it would not be listed in any registry. Still, the vessel holds a nationality and is entitled to fly a flag.

⁵⁴ CHS Article 5(2) and LOSC Article 91(2).

⁵⁵ See discussion on p. 9-10 and *supra* note 18.

⁵⁶ Guilfoyle, Douglas: *Shipping Interdiction and the Law of the Sea*. Cambridge University Press, 2009, p. 16.

Even if the vessel falls within the category which should be registered under the national law of the reported flag state, deeming a vessel stateless in cases where documents can not be produced, or where a flag state fails to provide an immediate confirmation, may put a larger burden on the vessel than what was intended by the legal regime concerning the nationality of ships. For instance, stripping the vessel of protection due to what may be a registration error on the part of the flag state seems unreasonable. The argument that it is justified on the part of the inspecting state to set strict requirements for the vessel to prove its nationality in order to uphold order on the high seas may also be reversed: If the protection of a flag state is the only protection a vessel may claim on the high seas, there should be a high threshold to prove that the vessel does not enjoy any such protection. If not, the result may be that too many vessels wrongly fall into the category of lacking a nationality, with potentially very grave consequences.

The complex question of under which circumstances a vessel may lose its nationality was discussed in depth in the *M/V Saiga Case*. Here, Guinea claimed that Saint Vincent and the Grenadines did not have legal standing to bring claims on behalf of *Saiga* because the ship was not validly registered under the flag state of Saint Vincent and the Grenadines at the time of the arrest, as the ship's registration certificate was expired.⁵⁷ Saint Vincent and the Grenadines replied that the ship did not lose its nationality based on the expired certificate, as any ship registered under the flag of Saint Vincent and the Grenadines "remains so registered until deleted from the registry," citing the national Merchant Shipping Act as the relevant legal framework for determining that *Saiga* had the right to fly its flag.⁵⁸ Based on LOSC Article 91, which gives each state exclusive jurisdiction over the granting of its nationality to ships, ITLOS ruled that the expiry of the registration certificate did not entail that the nationality of *Saiga* was extinguished, as this matter is to be decided by the flag state's national law, in this case the Merchant Shipping Act of Saint Vincent and the Grenadines.⁵⁹

In addition to reaffirming that each state has the exclusive right to establish the conditions under which its nationality is granted to ships, ITLOS ruled that the behaviour of the flag state was an additional indication of the actual nationality of the ship. The fact that Saint Vincent and the Grenadines offered *Saiga* legal assistance and in other ways fulfilled the roles of a flag state thus supported the Tribunal's conclusion that *Saiga* retained the

⁵⁷ *The M/V Saiga (no. 2) Case*, ITLOS Judgement of July 1st, 1999, para 61.

<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf>
Para 58.

⁵⁸ *Ibid*, para 59.

⁵⁹ *Ibid*, paras 62-74.

nationality of Saint Vincent and the Grenadines throughout the arrest and the following dispute.⁶⁰

Coming back to the U.S. law on determining a vessel's statelessness, it becomes clear in the light of the *Saiga* judgement that the MDLEA negates an important element of the CHS and LOSC: According to Articles 5 and 91, respectively, it is up to the flag state to fix the conditions for the grant of nationality, for registration, and for the right to fly its flag. These issues are to be regulated by domestic law.⁶¹ The ITLOS judgement states that "international law recognizes several modalities for the grant of nationality to different types of ships" and that "establishing procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State."⁶² Thus, the U.S. may not, according to international law, establish its own rules as to what documentation, or lack thereof, is necessary to prove a ship's nationality, as the procedures of registration and the issuing of documents is within the domestic national legal sphere of the flag state.

Even when concluding that the MDLEA's provisions on defining a vessel as stateless is contrary to international law, it is interesting to consider whether the lack of a clear definition of a stateless vessel under the international law of the sea has prompted the U.S. to specify the concept under its own national laws. Article 5 and 6 of the CHS, which were reproduced as Articles 91 and 92 of LOSC, do not contain any clear definition of what constitutes a stateless vessel, except to provide that a vessel which is changing its flag according to convenience "may be assimilated to a ship without nationality."⁶³ Neither does Article 110, as analysed in Part V, section A, of this thesis, provide clear legal guidance on the treatment of stateless vessels. As such, it might be understandable from a political viewpoint that the U.S., when facing the difficult and time-consuming procedure of proving a vessel's lack of nationality, shifted the burden of proof of nationality from the inspectors to the vessel itself. Still, this approach is not acceptable from a legal perspective, as it clearly opposes international law on the issue. As this analysis has demonstrated, in the light of the ITLOS reasoning in the *M/V Saiga Case*, the MDLEA provisions on this issue must be seen as being in conflict with international law.

⁶⁰ *Ibid*, para 73(b).

⁶¹ *Ibid*, para 63.

⁶² *Ibid*, para 64-65.

⁶³ CHS Article 5(2) and LOSC Article 92(2).

B. Is it in Accordance With International Law to Extend Jurisdiction over Stateless Vessels to Include the Crewmembers of Such Vessels?

Already under the MHS Act did the U.S. include jurisdiction over individual crew members when asserting jurisdiction over a stateless vessel and its cargo, and this approach has remained central in subsequent U.S. law. The issue at hand is whether the U.S. may assert such jurisdiction over individuals in accordance with international law. As Guilfoyle points out, *Molvan v. Attorney General for Palestine* affirmed that if a state seizes a vessel without nationality on the high seas, then by definition no other state may claim diplomatic protection over it. But, he continues, persons on board such ships are still nationals of some state which can make claims on their behalf, an argument which, as discussed, has also been put forward by Churchill and Lowe.⁶⁴ Interestingly, Guilfoyle has sought out practitioners in order to find out whether incidents have occurred where the national state of an individual apprehended on a stateless vessel has attempted to exercise diplomatic protection, but has found no examples of this actually occurring.⁶⁵

Although states have seemed unwilling to exercise diplomatic protection over its nationals in such cases, this by no means indicates that the issue is irrelevant to analyse from an international legal perspective. As emphasized by Roos, the issue is one of jurisdictional character, where, even if the national state does not avail itself of the opportunity to exercise diplomatic protection, the U.S. may not, in her view, exercise jurisdiction over persons apprehended on board stateless vessels. According to Roos, international law allows a state to put under its jurisdiction a stateless vessel and its cargo, but not its crewmembers. If upholding the practice seen in cases such as *United States v. Marino-Garcia*, *United States v. Henriques* and *United States v. Pinto-Mejia*,⁶⁶ Roos pictures a scenario where the U.S. in effect may claim jurisdiction over any person on a stateless vessel on any part of the high seas at any given time, and finds this problematic: “This apparent unilateral extension of sovereignty over the high seas (...) constitutes a violation of customary international law and the Convention on the High Seas.”⁶⁷

Roos brings attention to the fact that both the U.S. Congress and Supreme Court have clearly expressed an intention to adhere to international law, and has not sought to operate

⁶⁴ Guilfoyle, p. 18, and Churchill and Lowe, p. 214.

⁶⁵ Guilfoyle, note 59, at p. 18.

⁶⁶ In all these cases, the judgements upheld that the U.S. had jurisdiction over crew members found on stateless vessels smuggling drugs. See Roos, p. 290-295.

⁶⁷ Roos, p. 294-295.

outside it in the drafting and passing of the MHSA. Hence, she finds the prosecution of foreign nationals to be contrary to international law, and thereby also contrary to U.S. law, since Congress has not specifically authorized the MHSA to contradict international law.⁶⁸ Furthermore, she points out that all persons are entitled to due process in the U.S. courts, but where jurisdiction is lacking, due process has not been accorded. In the cases where foreign nationals had been apprehended on board stateless vessels, jurisdiction is not granted under international treaty law nor customary law, and can therefore not be granted by U.S. courts unless specifically authorized by Congress. As such, Roos persuasively argues that the prosecution of foreign nationals found on stateless vessels is a breach of due process.⁶⁹

Writing in 1984, more than twenty years before the passing of the DTVIA, Roos already saw signs of the U.S. coming closer to criminalizing the act of merely being on board a stateless vessel, which is what occurred with the passing of the DTVIA in 2008. Drawing the same conclusions as Bennett, she foreshadowed the treatment of statelessness as akin to a universal crime under U.S. law, but underlined that the U.S. may not unilaterally assert jurisdiction over persons found on board stateless vessels: “The nations of the world may some day agree that narcotics smuggling or travelling on stateless vessels is a universal crime (...). Until such time, however, courts of the United States should refrain from an over-zealous extension of the long-arm of jurisdiction.”⁷⁰

Looking to international legal instruments for answers on the question of jurisdiction over crew members on stateless vessels found to be carrying drugs, LOSC is the natural point of departure. Whereas Article 27(1)(d) grants to coastal states the criminal jurisdiction over a foreign flagged ship suspected of carrying drugs in its territorial sea, LOSC does not specify any such jurisdiction over vessels carrying drugs on the high seas, nor over their crews. The one article concerning drug trafficking on the high seas, Article 108, only stipulates an obligation of states to cooperate in suppressing the illicit trafficking of drugs on the high seas, and is silent on the issue of criminal jurisdiction over persons on stateless vessels. It also contains a provision that any state which suspects a vessel flying its own flag of trafficking drugs, may request the assistance of another state. Thus, not only is Article 108 silent on the treatment of potential stateless vessels carrying drugs, but it is also silent on the often-occurring scenario where a foreign flagged vessel is suspected by another state of trafficking drugs. These situations are the ones which are addressed by the bilateral and multilateral

⁶⁸ Roos, p. 293.

⁶⁹ Roos, p. 294.

⁷⁰ Roos, p. 295.

treaties discussed under Section D of Chapter VIII of this thesis, but, since they are based on the law of the flag, these treaties are largely irrelevant when it comes to the jurisdiction over the crews of stateless vessels.

Faced with the silence of LOSC, human rights law may provide an additional perspective to the international law of the sea when trying to decipher jurisdictional matters over persons apprehended on stateless vessels. This field of law does contain a limited selection of case law concerning drug-related maritime law enforcement from which some interesting parallels may be drawn to the rights of persons apprehended on stateless vessels.

In 2010, the case *Medvedyev and others v. France* was brought before the European Court of Human Rights and its Grand Chamber, concerning the interception by France of the Cambodian vessel *Winner*. Cambodia and France did not have an established cooperation on the suppression of drug trafficking, but an *ad hoc* diplomatic note issued by Cambodia authorized France to intercept the vessel, although it did not specifically authorize the jurisdiction of France over Medvedyev and the other crew members. The crew members, none of whom were Cambodian nationals, claimed that their arrest, detention and case before a French court was against the European Convention of Human Rights, as the French jurisdiction over them was not clearly established or foreseeable. This was especially so, they claimed, because Cambodia was not a Party to any of the multilateral agreements facilitating such jurisdictional transfers from the flag state to the interdicting state, such as the Montego Bay Convention or the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Thus, they claimed their arrest and detention as unlawful, and held that France had violated their rights under Article 5(1) of the European Convention on Human Rights.⁷¹

The European Court of Human Rights stated that there had indeed been a violation of Article 5(1), as the French arrest had not satisfied the general principle of legal certainty.⁷² This is an interesting judgement in relation to crew members on stateless vessels placed under U.S. criminal jurisdiction, as this assertion of jurisdiction may also potentially be deemed contrary to human rights on the basis of the lack of foreseeability and legal certainty. There is no clear international legal basis for the assertion of enforcement and criminal jurisdiction over persons apprehended on stateless vessels, and these individuals may therefore assume

⁷¹ European Court of Human Rights: *Case of Medvedyev and Others v. France*, Judgement of March 29, 2010, paras 9-22.

⁷² *Ibid*, paras 82-102.

that jurisdiction over them belongs to their state of nationality, when they are on a stateless vessel on the high seas.

The question of whether U.S. jurisdiction over persons apprehended on stateless vessels is in conflict with international law is a difficult one, as there is no clear answers found neither in international legal instruments nor under customary law. Still, scholarly opinions such as that of Roos and cases such as the *Medvedyev and others v. France* are persuasive in illustrating that there seems to exist no right under international law for the U.S. to assert this sort of unanticipated jurisdiction over foreign nationals on board stateless vessel, without a nexus connecting the individual to the U.S.

C. Is it in Accordance With International Law to Define Statelessness as a Crime in Itself?

The criminal element of statelessness, and of manning and operating a stateless vessel, was indicated in the practice and spirit of the MHTA and MDLEA, and has subsequently been made explicit under the DTVA. In order to understand whether this approach is in line with international law, one must investigate the very nature of statelessness as expressed by international legal instruments as well as by international custom.

Looking to the relevant provisions of LOSC, neither Article 91 nor 92 express any criminal element to a vessel's lack of nationality. It is interesting to note, for example, that Article 92(2) does not contain a criminalization of a ship's usage of two different flags according to convenience. It does not use terminology such as "a ship shall not" but only states that in cases where ships fly more than one flag and change between these according to convenience, the ship "may be assimilated to a ship without nationality." This is interesting because it demonstrates that the international community of states chose not to formulate a prohibition of statelessness as such, but rather sought to formulate an orderly system through which states retained the right to administer its ship registries according to national law.

Article 110 pulls in the other direction, as it lists ships which are suspected of being without nationality together with those suspected of crimes which are subject to the right of visit. Still, as argued under Part V, Section A of this paper, Article 110 does not contain any further direction to states upon inspection, and it certainly does not stipulate criminal jurisdiction based on statelessness alone.

State practice on the treatment of stateless vessels does not indicate that states view the very lack of nationality as a crime in itself. For example, Norway applies the same laws to

vessels with and without a nationality, and does not subject stateless vessels and their crews to universal jurisdiction.⁷³ Similarly, Canadian law makes it an offense for an individual on a stateless ship to fish contrary to the rules established by the relevant Regional Fisheries Management Organization, but does not criminalize the act of being on the stateless ship.⁷⁴ The national legal systems which place stateless ships under their jurisdiction, such as the Norwegian and Canadian systems mentioned here, do so without criminalizing statelessness as such. Rather, these states claim jurisdiction over potential crimes being committed on stateless vessels, particularly related to fisheries and pollution.⁷⁵ This author has not succeeded in finding any other national legal systems which criminalize statelessness in the same manner as the DTVIA.

Based on this analysis, this thesis argues that the U.S. is acting contrary to international law by criminalizing the act of being on a stateless vessel, without attaching further criminal elements to the crime.

VIII. OPTIONS UNDER INTERNATIONAL LAW FOR EXTENDING U.S. JURISDICTION TO STATELESS VESSELS AND THEIR CREWS

This section will consider three theoretical options for solving the legal problem of a lacking nexus between the U.S. and stateless vessels trafficking drugs on the high seas, where the first two options involve the concept of universal crimes. The first option is to make statelessness a universal crime under international law, and the second is to do the same for the trafficking of drugs. For these two options, it should be noted that this thesis does not suggest that the U.S. may on its own transform a crime into a universal crime. Rather, the options are theoretical, but include the possibility that the U.S. can initiate and drive the process of receiving global recognition for a certain universal crime. The third option is concerned with bilateral and multilateral treaties to allow U.S. jurisdiction over foreign individuals on stateless vessels.

⁷³ *Supra* note 30.

⁷⁴ Ministry of Justice Canada: *Coastal Fisheries Protection Act*, Article 5.5.
<<http://laws-lois.justice.gc.ca/eng/acts/C-33/page-1.html>>

⁷⁵ See p. 13 of this paper, with accompanying *supra* note 30, and p. 30, with accompanying note 79.

A. Making Statelessness a Universal Crime Under International Law

Acknowledging, in line with Bennett, that the DTVIA treats the operating and manning of a stateless vessel as a universal crime by allowing it to serve as the nexus activating U.S. jurisdiction,⁷⁶ this thesis now goes on to investigate the possibility of statelessness becoming a universal crime under international law. Perhaps even more importantly, it also asks whether manning a stateless vessel *should* be regarded as a universal crime. But before diving into these issues, it is necessary to explore in detail the nature of the universality principle under international law.

i) What is a Universal Crime?

The concept of the universality principle developed as a response to a particular maritime security problem, namely piracy. Centuries back, states developed the notion of pirates as *hostis humani generis*, enemies of all people, as piracy was becoming a significant threat to all nations engaged in maritime trade and navigation. The fundament for allowing all states to prosecute pirates was the fact that the crime represented a common threat to all states.⁷⁷ It is worth noting that the special status of piracy was not based on a view of this crime as being particularly heinous, which is the rationale behind all the other crimes which have been defined as universal crimes in more recent times. Rather than representing massive atrocities, piracy was arguably deemed a universal crime because it upset order at sea, and threatened the power of states, which then often used private, state-employed robbers at sea, so called privateers.⁷⁸ Hence, in the view of authors such as Kontorovich, there exists a divide between the underlying rationale for piracy, the sole universal crime for several hundred years, and those added over the last century, such as torture and genocide. Kontorovich persuasively argues that the piracy analogy can not be used to justify those new crimes as universal.⁷⁹

The common characteristic of universal crimes is nevertheless that they are against the norms of the international community as a whole, and this remains at the core of universality principle also in current international law. The Princeton Principles of Universal Jurisdiction define the universality principle as

⁷⁶ Bennett, p. 446-447.

⁷⁷ Randall.

⁷⁸ Kontorovich, Eugene: *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*. Harvard International Law Journal, Vol. 45, No. 1, Winter 2004, p. 205-207.

⁷⁹ *Ibid*, p. 236-237.

[...] *criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising jurisdiction.*⁸⁰

Because it is the nature of the crime, when agreed by the international community to be against fundamental international norms, which gives effect to universal jurisdiction, it is clear that not all crimes may become universal crimes, and that a unified international community must agree to define a crime as universal. According to the Princeton Principles, established universal crimes are piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.⁸¹ It is worth noting that some authors also consider hijacking and apartheid as universal crimes.⁸²

Since universal crimes give effect to the jurisdiction of any state, it removes the need for a nexus between the crime and the prosecuting state. For this reason, the universality principle is interesting to explore in relation to drug trafficking by stateless vessels on the high seas and U.S. drug law enforcement. Since the traditional nexus is exactly what the U.S. is lacking to prosecute these cases, the universality principle becomes, at least at first glance, an attractive option. As has already been demonstrated, the U.S., with the DTVIA, has made a first step to criminalize the manning of stateless vessels in the manner of this being a universal crime, and this thesis now turns to investigate whether this development is coherent with international law, and whether it should be seen as a welcomed development in the effort to curb drug trafficking on the high seas.

ii) Is Statelessness Becoming a Universal Crime Under International Law, and Should it Become Such a Crime?

For the DTVIA to be in accordance with international law when it comes to making the operating and manning of stateless vessels a universal crime, one must demonstrate a strong opinion in favour of this interpretation among the world's nations. As noted in Part VII, Section C, there is no such common global opinion on the matter. Neither is there any

⁸⁰ Princeton Program in Law and Public Affairs: *Princeton Principles on Universal Jurisdiction*, 2001, Principle 1(1). <https://lapa.princeton.edu/hosteddocs/unive_jur.pdf>

⁸¹ *Ibid*, Principle 2(1).

⁸² See for example Randall.

evidence to suggest that members of the international community are moving even slightly in the direction of regarding the operating and manning of a stateless vessel as a universal crime.

Anderson, defending the U.S. practice of asserting jurisdiction over persons on stateless vessels, raises the potential for the U.S. example to develop “into international recognition that [statelessness] is inimical to world public order and should be subject to universal jurisdiction on the same basis as piracy and slavery.” Importantly, Anderson emphasizes that the claim of statelessness as a universal crime “must be tested, not in the courts of the United States, but in international diplomacy.” Since Anderson expressed this analysis in 1982, neither state practice nor international treaty law has provided further support to the notion that operating or manning a stateless vessel should be a universal crime, with the exception of the U.S. position expressed in the DTVIA. It is therefore reasonable to state that this conduct will not become a universal crime under international law, as an overwhelming support for such an interpretation is not found among the international community of states.

Another, and perhaps even more crucial question, is whether the operation and manning of a stateless vessel *should* become a universal crime. This inherently normative question must be answered with a view to what sets universal crimes apart from other crimes, namely the nature of the crime as particularly serious and as constituting a breach of universal norms. As pointed out by Jordan, the underlying basis for all nations to exercise universal jurisdiction is “the reality of the danger that universal crimes pose on all nations within the international community.”⁸³ According to Jordan, universal crimes “are considered crimes of all mankind” and, as such, are “prohibited by every nation of the world.”⁸⁴

Universal jurisdiction allows all states to prosecute crimes that are globally condemned for their atrocities, with the exception of piracy, which may be viewed in a different light. While it certainly seems unreasonable to compare an individual merely finding herself or himself on board a stateless vessel to a person committing acts of torture or genocide, it may be easier to align this act with that of piracy, since both disturb the order of the sea. Neither piracy nor stateless vessels involve grave and large-scale humanitarian consequences, and they even share the trait of taking place in an area outside national jurisdiction, activating the argument that universal crimes are those which are practically

⁸³ Jordan, Jon B.: *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*. Michigan State University-Detroit College of Law Journal of International Law, Vol. 9, 2000, p. 5.

⁸⁴ *Ibid*, p. 1.

difficult for individual states to reach.⁸⁵ So why should there not be room for statelessness in the universal crime category?

Manning and operating a stateless vessel should not become a universal crime because it is not statelessness in itself which is the main undesired behaviour targeted by the DTVIA; it is drug trafficking. Looking at statements from Congress, it is clear that the element of statelessness was included in the DTVIA not for the purpose of combatting statelessness as such, but to ease the prosecution of drug smugglers. Legislators did not discuss the criminalization of statelessness as the main threat to the U.S. and the main crime to be combatted, but emphasized it as a step forward in drug enforcement.⁸⁶ For instance, Representative Cohen, who argued in favour of the DTVIA, stated that the ships

*(...) are designed so that the crew members can readily sink them within scant minutes of being spotted, thereby making it virtually impossible for authorities to intercept illegal shipments and bring the smugglers to justice.*⁸⁷

It would clearly be a misuse of the concept of universal crimes to include statelessness in this list, when it is viewed as a mere aide to combat another type of serious crime. In addition, despite what it may have in common with piracy, it lacks the central element defining all other universal crimes, namely the grave humanitarian consequences. Piracy is the exception in the category of universal crimes, as modern legal practice and scholarship has established another set of requirements for universal crimes. Manning and operating a stateless vessel is, by nature of the conduct itself, not in the same category as committing genocide, torture or war crimes.

iii) Possible Consequences of the DTVIA for International Law

Even if there is not yet much support in the international sphere for making statelessness akin to a universal crime, the way statelessness is treated by U.S. law under the DTVIA may still have important ramifications for the development of international law and custom on the issue. It is worth analysing the possible consequences of the DTVIA, both the letter of the law and its intentions, for international law.

⁸⁵ See for example Geraghty, p. 377-378.

⁸⁶ Bennett, p. 453-454.

⁸⁷ Quoted in Bennett, p. 454.

As pointed out by Stuntz, when legislators are faced with crimes that are difficult to prove, they tend to criminalize associated behaviour in order to get at the core crime more easily.⁸⁸ This trend can be found also in the passing of the DTVIA, as the difficulty of prosecuting individuals trafficking drugs at sea sparked Congress to criminalize the use of stateless submersible and semi-submersible when these had the intent to evade detection. As pointed out by Bennett, "if the submarine requirement ever becomes too difficult to prove, Congress can drop it also."⁸⁹ His point is that when the law responds to tackle a certain conduct by criminalizing elements associated with this conduct, the law may become broader and broader in response to changes in behaviour. In this case, the DTVIA may be altered and extended in response to the change in the technology and strategy of the drug traffickers.

This manner of making law may have implications for international law in that it may make other states follow the U.S. example. In many areas of the world, stateless vessels are closely associated with illegal conduct such as IUU-fishing or trafficking of migrants. If other states see a potential in grappling with these challenges through the criminalization of statelessness, they are likely to pass similar laws. Bennett uses the example of straight baselines to illustrate how the DTVIA may set unfortunate precedence. Straight baselines were intended to be exceptional ways of establishing the basis for measuring a state's maritime zones, but have become very common, with many states using them in ways which were not intended by the law. Prescott has argued that the misuse of the concept of straight baselines has led to a situation where "it would be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as precedent."⁹⁰

If the criminalization of the manning and operating of stateless vessels makes it easier for U.S. courts to prosecute foreign drug smugglers, other states may see it as a good option to enact similar laws to deal with the particular problems that stateless vessels pose in the high seas adjacent to their maritime zones. If the challenges surrounding the use of stateless vessels continue and are seen as significant threats by enough states, there is a possibility that a custom of universal jurisdiction over stateless vessels and their crews may develop, where statelessness itself becomes a central criminal element. This development could be detrimental to the international law of the sea regime because it would be difficult to control the direction to which the practice develops, which could be contrary to the letter and intention of LOSC and other international legal instruments.

⁸⁸ Stuntz, William J: *The Pathological Politics of Criminal Law*. Michigan Law Review, Vol. 100, December 2001, p. 505-531.

⁸⁹ Bennett, p. 459.

⁹⁰ Quoted in Bennett, p. 460.

The consequences could be especially grave in light of the on-going refugee crisis, and for possible future scenarios where crossing portions of high seas in stateless vessels represents the only escape route from a zone of war. Here, one could picture that states which are unwilling to take in refugees would avail themselves of the opportunity to criminalize the act of being on board a stateless vessel, especially if this has become established practice of important maritime states like the U.S.

In relation to the smuggling of migrants by sea, there is some evidence that the international community is willing to embrace universal enforcement jurisdiction, at least for a limited period of time, over stateless vessels. In adopting Resolution 2240 in 2015, the UN Security Council authorized member states to intercept and inspect “any unflagged vessels” off the coast of Libya, if there was reasonable ground to suspect these were being used for migrant smuggling.⁹¹ If the criminalization of merely being on board such a vessel should be copied by other states, this could have grave consequences for the cooperation as called for under Resolution 2240.

B. Making the Trafficking of Drugs on the High Seas a Universal Crime Under International Law

In the same manner as making the act of manning and operating a stateless vessel a universal crime, doing the same for the trafficking of drugs would be another option to tackle the problem of a lacking jurisdictional nexus between the U.S. and the stateless vessels found to be harbouring drugs on the high seas. Naturally, this solution depends on the Coast Guard proving the presence of illegal substances on board, which, as previously discussed, can be avoided by the crew by throwing the drugs overboard.

Still, for the cases where the presence of drugs can be proven, or it can be proven by film or photography that drugs were thrown overboard, making the trafficking of drugs a universal crime would be an option to secure the jurisdiction of the U.S. to prosecute individual crew members.

Making the trafficking of drugs a universal crime has a notably higher level of support among academics than does the case of statelessness. For instance, Jordan recommends that “there should be a treaty granting universal jurisdiction over drug trafficking.” According to

⁹¹ UN Security Council Resolution 2240, October 9, 2015, para. 5.
<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2240.pdf>

him, the work to achieve such a treaty should be led by the U.S., “since they have a vast interest in curbing the flow of drugs.” Jordan calls for drug traffickers to be deemed *hostis humani generis* in the same manner as pirates, and thereby subject to the jurisdiction of all states.⁹² Sorensen points in the same direction, arguing that “international cooperation to fight drug importation has reached its highest peak” and that the next step to grapple with the challenge may be for the international community to declare drug trafficking a universal crime.⁹³

Geraghty, another strong proponent of making drug trafficking a universal crime, notes specifically that this will aid the U.S. in prosecuting stateless ships carrying drugs. She refers to the *United States v. James-Robinson* case, where the court dismissed the indictment based on the lack of a jurisdictional nexus, as it could not prove the drugs were destined for the U.S.⁹⁴ To remedy this pervasive lack of a nexus, Geraghty argues for the U.S. to work toward making drug trafficking a universal crime, and holds that such trafficking contains all the necessary elements for falling into this category of the most appalling and serious crimes.⁹⁵

Despite the support from some scholars, the international interest among states in making the trafficking of drugs a universal crime does not seem to be substantial. Looking at relevant international legal instruments, LOSC Article 108 does not contain any language which would indicate that the trafficking of drugs should be seen as a universal crime; the Article merely urges states to cooperate on the suppression of trafficking, and takes a very restrictive approach on enforcement and criminal jurisdiction on the high seas. Article 108(2) prescribes no additional jurisdiction for non-flag states over ships carrying drugs, and only outlines the option for the flag state to request assistance from others if it suspects one of its own ships is carrying drugs. In fact, the option to ask for assistance in such a situation would be present in any case, which arguably makes Article 108(2) superfluous as a legal provision. Be that as it may, the provision testifies to a community of states which did not wish to grant any special jurisdiction to non-flag states based on the suspicion of drug smuggling, and even less to frame drug trafficking as an international crime subject to universal jurisdiction.

This does not mean there has been a lack of international efforts to increase cooperation to surmount the problems created by the exclusive flag state jurisdiction over

⁹² Jordan, p. 29-30.

⁹³ Sorensen, p. 230.

⁹⁴ Geraghty, Anne H.: *Universal Jurisdiction and Drug Trafficking: A Tool For Fighting one of the World's Most Pervasive Problems*. Florida Journal of International Law, Vol. 16, 2004, p. 400.

⁹⁵ *Ibid*, p. 381-390.

vessels carrying drugs on the high seas. For instance, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “the Narcotics Convention”) stipulates that states suspecting a foreign flagged vessel of trafficking drugs may request that state to board the vessel and undertake inspections.⁹⁶ Although requiring the consent of the flag state before boarding, the Narcotics Convention does convey strong obligations on states in cooperating to suppress drugs smuggling. Still, the fact that the Narcotics Convention retains a cautious approach as not to inflict on the principles embedded in the law of the flag, testifies to a community of states which does not wish to see the trafficking of drugs as aligned with a universal crime. This view would have necessitated another type of language under Article 4, which covers jurisdiction over drug smuggling vessels and their crews. This Article only enforces the traditional bases for jurisdiction, as it prescribes jurisdiction when the offense is committed by a national, on national territory, by a vessel carrying the state party’s flag, or when jurisdiction has been granted to a third state by the flag state pursuant to Article 17.⁹⁷

Another trend among states has been to focus on strengthening law enforcement cooperation, as exemplified in the bilateral treaties between the U.S. and Caribbean and Central and Latin American states, as well as the multilateral Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (hereinafter “The Caribbean Area Agreement”).⁹⁸ These agreements, which will be further investigated in the following section, should be seen as further evidence that states do not wish to treat the trafficking of drugs as a universal crime, or even advance in that direction. Rather, the agreements show that states are intent upon using conventional means of cooperation to ensure efficient law enforcement on the high seas to combat drug trafficking.

There is arguably a strong commitment by many states to suppress drug trafficking, but there seems to be no efforts toward making this conduct a universal crime. Recalling that for a conduct to gain the status of a universal crime necessitates a truly global and sweeping level of support, and that there is so far no international efforts being made to this effect, the solution advocated by Jordan, Sorensen and Gerarghty seems both cumbersome and

⁹⁶ 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 17.

⁹⁷ *Ibid*, Article 4.

⁹⁸ The Caribbean Area Agreement is available at the US Dept. of State Website: <<http://www.state.gov/s/l/2005/87198.htm>>

unrealistic as to resolve the U.S.' legal problems when dealing with stateless vessels and their crews.

C. Extending the Use of Bilateral and Multilateral Treaties

When looking at possible legal solutions to the U.S. problems of prosecuting foreign nationals attained on stateless vessels trafficking drugs on the high seas, the use of bilateral and multilateral treaties arise as an interesting option. Such arrangements have the advantage that they may grant jurisdictional powers to the U.S. which exceed those it would have under the conventional law of the sea expressed in CHS and LOSC. In addition, these types of agreements can be concluded in a short time, involving only few negotiators, in contrast with the lengthy process required to establish statelessness or drug trafficking as international crimes subject to universal jurisdiction.

Indeed, the U.S. has been very active in establishing treaties and agreements with other states to suppress the flow of narcotics into its territory. The first bilateral agreement concerning the suppression of drug smuggling into the U.S. was concluded between the U.S. and the U.K. in 1981. This Exchange of Notes permitted the U.S. to board private British vessels on the high seas in the Gulf of Mexico, the Caribbean Sea and parts of the Atlantic Ocean to search for drugs which were destined for the U.S. market. If the suspicion was confirmed upon inspection, the vessel could be seized and taken to the U.S., where the crew would stand trial.⁹⁹ Notably, the U.K. was eager to state, upon the conclusion of the agreement, that it was indicative of a special relationship with the U.S. and that it should not be regarded as a precedent for other agreements which could “affect the freedom of passage of British ships on the high seas.”¹⁰⁰ This statement, re-affirming that the exclusive jurisdiction over British ships on the high seas belonged to the U.K, indicates that the U.K saw the Exchange of Notes as a exceptional agreement, and did not wish for it to represent a fundamental change to the international legal regime of the high seas.

Currently, the U.S. has as many as 45 bilateral treaties and other types of agreements of operational procedures with other states concerning the interdiction of vessels suspected of carrying drugs in the maritime areas of the Caribbean as well as surrounding Central and

⁹⁹ Attard, David, et.al: *The IMLI Manual on International Maritime Law: Volume III*. Oxford University Press, 2016, chapter 15, section 3.1.

¹⁰⁰ *Ibid*.

South America.¹⁰¹ Out of these agreements, 24 are bilateral treaties which authorize U.S. coast guard and military vessels to board and inspect vessels flying the flag of the other state party to the treaty when these vessels are travelling on the high seas,¹⁰² whereas the others are memoranda of understanding with other states which have territories in the region, such as the Netherlands and Belgium.¹⁰³

The bilateral treaties with 23 Caribbean, Central and South American states,¹⁰⁴ in addition to the 1981 Exchange of Notes with the U.K., represent an interesting departure from the international legal regime of the high seas, which grants exclusive jurisdiction to the flag state over a vessel which is navigating on the high seas.¹⁰⁵ Still, it is worth noting that most of the cooperating states have not been willing to grant the U.S. the right to board their vessels *ad-hoc* and without their consent.¹⁰⁶ At the same time, the U.S. has not been willing to let the lack of response to such a request be a hindrance to board the vessel. The balance which has been struck in many of these bilateral treaties is that consent must be requested by the U.S. before boarding a vessel, but a lack of response within two or three hours (depending on the agreement) will be taken to mean that the U.S. has been authorized to board the vessel “for the purpose of inspecting documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.”¹⁰⁷

Seven of the bilateral treaties on vessel interception, and one multilateral treaty, the Caribbean Area Agreement, allow for so called ship-rider arrangements, where an official of one state can travel aboard the Coast Guard ship of another state, and act as the enforcer of the flag state’s criminal law. As pointed out by Guilfoyle, ship rider arrangements are not extensively used, although Jamaican or Bahamian ship-riders on U.S. Coast Guard vessels are relatively common.¹⁰⁸ According to U.S. Secretary of State Madeleine Albright, the goal of

¹⁰¹ *Ibid*, chapter 15, section 3.2.

¹⁰² Guilfoyle, p. 89, including note 53.

¹⁰³ Attard, et. al, chapter 15, section 3.2.

¹⁰⁴ These are Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Malta, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Venezuela. For a complete list of all treaties, MoUs and other law enforcement cooperation at sea, see U.S. Dept. of State at <<http://www.state.gov/s/l/2005/87199.htm>>

¹⁰⁵ LOSC Article 92(1) states that ships shall be subject to the exclusive jurisdiction of the flag state when navigating on the high seas.

¹⁰⁶ Only the agreements with Haiti and Costa Rica automatically allow the U.S. to board upon suspicion. See Guilfoyle, p. 90.

¹⁰⁷ Citation from the 2003 Agreement between the U.S. and Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea and Air, quoted in Guilfoyle, p. 89.

¹⁰⁸ *Ibid*.

the ship-rider agreements was “ to construct a web of legal arrangements and law enforcement actions that will discourage international criminals from acting, and leaving no place to hide if they do.”¹⁰⁹

As emphasized by the International Maritime Law Institute’s handbook, there is no uniform practice when it comes to the assertion of jurisdiction over the vessel and crew which is interdicted following a bilateral treaty practice between the U.S. and partner states. Some agreements, such as the one between the U.S. and Haiti, states a preferential jurisdiction for the flag state. Under this treaty, Haiti may waive its jurisdiction and authorize U.S. jurisdiction in its place. Other agreements, such as the ones between the U.S. and Nicaragua and Columbia, take the opposite approach, where jurisdiction is automatically conferred upon the U.S.¹¹⁰ In the treaty between the U.S. and Venezuela, the flag state is required to make an expeditious decision on which Party is to exercise jurisdiction.¹¹¹

Even though the bilateral and multilateral treaties may open up possibilities for non-flag state jurisdiction over vessels on the high seas, they are still instruments which require flag state consent as the very basis for third-state interception, and as such they should be regarded as having their basis in the law of the flag. They are designed to overcome the jurisdictional problems caused by exclusive flag state jurisdiction, but do not seek to undue this basic principle of the international law of the sea.

The bilateral and multilateral treaties concluded by the U.S. are thus based on the vessel having a flag state, whose consent is needed in order to board the vessel. In the case of stateless vessels, only the persons on board hold a nationality, and it is the enforcement and criminal jurisdiction over these individuals that make up the controversial legal issue. Still, it is this author’s opinion that the well-established cooperation procedures based on the extensive array of U.S. treaties and agreements, can be modified also to include jurisdiction over foreign nationals apprehended on stateless vessels when these come from one of the U.S. partner states. Such modifications to accommodate for the problem of stateless vessels could take the form of amendments to already existing treaties, which would guarantee that individuals apprehended on stateless vessels stand trial either in the U.S. or in the individual’s national state.

With regard to the current pressing scenario of stateless submersible and semi-submersible vessels trafficking drugs out of Columbia, these are usually crewed by local

¹⁰⁹ Quoted in Barnes, Corrine: *Narcotics: Driven from Latin America, Smugglers Eye Caribbean*. Inter Press Service, January 26, 2000.

¹¹⁰ Attard, et. al, ch. 15, section 3.2.

¹¹¹ Guilfoyle, p. 91.

Columbians.¹¹² It is likely that other types of stateless vessels used for the smuggling of drugs, for example as “mother ships,” are also crewed by individuals from one of the Caribbean, Central American or Latin American states from which the vessel departs with its illicit cargo. The U.S. has maritime law enforcement agreements in place with most of these states, and should seek to extend these agreements to include a clarification of the criminal jurisdiction over the crews apprehended on board stateless vessels. Modelling the existing treaties, where jurisdiction is conferred either upon the flag state or upon the intercepting state, the U.S. should establish similar arrangement to determine the jurisdiction of persons on stateless vessels found to be smuggling drugs. Depending on the preference of each cooperating state, jurisdiction could be bestowed on the U.S. or on the national state of the crew member. Since no case have yet arisen where the national state has sought to exercise diplomatic protection over their nationals found on stateless vessels,¹¹³ it is likely that states would be content with conferring this jurisdiction to the U.S.

Notably, Ecuador is an exception to the extensive U.S. web of bilateral maritime drug enforcement cooperation treaties in the region. With this state rising to become a more frequent point of departure for large shipments of drugs,¹¹⁴ it will be crucial for the U.S. to secure law enforcement cooperation also with Ecuador.

In general, having clear legal foundation for asserting jurisdiction is crucial, lest U.S. apprehension of foreign nations be deemed contrary to human rights law. As demonstrated by the judgement in *Medvedyev and others v. France*, putting in place an *ad hoc* arrangement to allow for third-state prosecution of individuals apprehended on vessels in the high seas, may be deemed unlawful. The judgement was notable in that it put a larger weight on the right to legal certainty of Medvedyev and the other crew than it did on the effective suppressing of drug trafficking, and, for this reason, was disputed in whole or in part by seven judges.¹¹⁵ Although it is not given that a similar case in the U.S. would produce the same judgement, *Medvedyev and others v. France* still contains important arguments for why there was no legal ground to apply French law to the vessel where this had not been explicitly authorized by Cambodia, and in the light of Cambodia not being a Party to any relevant treaty. A similar

¹¹² See Kushner.

¹¹³ See *supra* note 64.

¹¹⁴ Woody, Christopher: *US agents busted \$2 million of cocaine in Florida, and it may be the last shipment from a growing drug hotspot*. Business Insider, March 5, 2016. <<http://www.businessinsider.com/cocaine-seized-in-florida-from-trafficking-hub-ecuador-2016-3?r=US&IR=T&IR=T>>

¹¹⁵ Guilfoyle, Douglas: *ECHR Rights at Sea: Medvedyev and others v. France*. Blog post at EJIL: *Talk!* April 19, 2010. <<http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/>>

situation could arise with regard to U.S. apprehension of Ecuadorian nationals on stateless vessels, as long as no formal law enforcement cooperation exists between the two states.

Extending bilateral treaties would represent a more spear-headed solution to the problem of stateless vessels and their crews than attempting to make statelessness or the trafficking of drugs become universal crimes. Support for regional or bilateral arrangements allowing the U.S. to prosecute foreign nationals apprehended on stateless vessels trafficking drugs would likely be easier to muster, as extensive agreements are already in place to suppress the common peril of drug trafficking in the Caribbean, Central American and South American maritime areas.

IV. CONCLUSION

The phenomenon of stateless vessels navigating on the high seas represents a curious international legal issue. Based on the wording of LOSC Articles 91 and 92, and its predecessor CHS Articles 5 and 6, as well as LOSC Article 94, it is clear that the entire legal regime governing the high seas is dependent on each ship flying the flag of one state, and that the flag state exercises effective jurisdiction over its vessels. International law seems clear on the point that a vessel lacking a flag state also lacks the protection of any state when navigating on the high seas. But the legal questions beyond this truism quickly become more muddled. What are the limits of LOSC Article 110? Can any state claim jurisdiction over a stateless vessel, or must there be a nexus connecting the vessel to the interdicting state? Where lies the jurisdiction over individuals apprehended on stateless vessels? To these questions, international law provides no clear answer.

This thesis has discussed some of the legal controversies embedded in the U.S. practice toward stateless vessels trafficking drugs on the high seas, and toward the crews of these vessels. By looking at the historical development of national law governing U.S. Coast Guard interception of suspected drug smuggling vessels, and the continuing difficulties posed by ever-changing tactics of drug traffickers and cartels, this thesis has demonstrated how the need for an effective and avant-garde legal framework has put U.S. law in conflict with international law on three specific points. First, with the MDLEA removing the burden of proof of U.S. prosecutors to prove a vessel's status as stateless, the U.S. has acted against the letter and spirit of LOSC.¹¹⁶ Second, by extending jurisdiction over a stateless vessel to

¹¹⁶ See the discussion under Part V, Section A.

include criminal jurisdiction over its individual crew members, and, indeed, to persons merely finding themselves on board a stateless vessel, without any other nexus connecting the person with the U.S., the U.S. has moved beyond the limits permitted by international law.¹¹⁷ Third, the U.S. criminalization of statelessness as such, with statelessness being viewed as a crime independent of whether other illegal conduct is taking place on the vessel, has no support under international law, neither through LOSC nor through customary law.¹¹⁸

The U.S. is the world's largest market for illegal narcotics, and suffers great economic and social damages from drug abuse. In addition, powerful drug cartels are crucial destabilizing factors to other states in the region, causing further security issues affecting the U.S. Based on these factors, there is a legitimate need for the U.S. to suppress the large inflow of illegal drugs into its territory by sea, and demonstrating result in this endeavour is politically important. Bearing this in mind, this thesis has considered three options for the U.S. to align its practice toward stateless vessels and their crews with international law.

The first two options, which are to engage in an international process to make statelessness or the trafficking of drugs attain the status of universal crimes, are complicated and time-consuming alternatives, demanding strong support from virtually every member of the international community of states. Given the lack of uniform condemnation of statelessness, and the generally low level of international engagement on the issue, this is the least desirable, and least realistic option. When it comes to drug trafficking, support from states may be easier to muster, illustrated by the large amount of treaties in place to suppress international drug trafficking. Over time, a gradual move toward universal jurisdiction over drug smugglers may evolve, but for the purpose of strengthening U.S. contemporary law enforcement in line with international law, it is not a practical recourse.

The third option, which this author argues in favour of, is for the U.S. to expand the use of bilateral and multilateral treaties, memoranda of understanding, procedural agreements, and other legal and semi-legal instruments which promote the effective law enforcement toward stateless vessels trafficking drugs, including the prosecution of crews. To overcome the problem of drug traffickers avoiding prosecution based on their apprehension on a stateless vessel, the U.S. should choose the recourse of regional cooperation through instruments specifically designed to deal with stateless vessels on the high seas.

In the jurisdictional patchwork that make up the law of the sea regime, supplementary international cooperation through treaties and agreements is an effective strategy to overcome

¹¹⁷ See the discussion under Part V, Section B.

¹¹⁸ See the discussion under Part V, Section C.

legal loopholes, to pool resources and to ensure maximum effectiveness in law enforcement. Rather than allowing national legislation to operate on the fringes of international law, and, in some cases, well beyond it, the U.S. should seek to engage the region in a common effort toward suppressing drug trafficking by stateless vessels. This effort would be particularly timely with regard to the novel threat of sophisticated submersible and semi-submersible vessels used for the smuggling of narcotics. Through more than 43 such agreements, the U.S. has already proven the ability and the willingness to do so; now, adding a framework suited to stateless vessels and their crews would strengthen the regional regime on vessel interception as a whole and ensure future enforcement – without compromising the U.S.’ international legal obligations.

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