Note

That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act

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I. INTRODUCTION

Congress passed the Drug Trafficking Vessel Interdiction Act (DTVIA)[1]

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1. 18 U.S.C.A. § 2285 (West 2011).

in 2008 to address a new tool employed by drug traffickers to transport illicit drugs worldwide: the self-propelled submersible vessel (SPSS). According to one congressman, at any particular moment more than one hundred of these vessels are destined for the United States, and each can carry large amounts of drugs.[2] One SPSS vessel intercepted by the Coast Guard, for example, contained seven tons of cocaine, worth $187 million.[3] SPSS vessels pose new problems for law enforcement. They are both difficult for the Coast Guard to detect and easy for crewmembers, who often prefer losing their cargo to being caught, to sink. At the first sign of the Coast Guard, drug traffickers can quickly sink the vessel and jump into the ocean, which destroys the evidence necessary to prosecute them for a drug offense and forces the Coast Guard to undertake rescue operations.

The DTVIA responds to these practical difficulties by criminalizing the operation of a submersible or semi-submersible vessel without nationality and with the intent to evade detection.[4] The U.S. Court of Appeals for the Eleventh Circuit, the only Circuit to have heard a challenge to the DTVIA as of April 1, 2012, has treated the law as an extension of its predecessors,[5] the Marijuana on the High Seas Act (MHSA)[6] and the Maritime Drug Law Enforcement Act (MDLEA).[7] The previous laws made it criminal for individuals to possess drugs with the intent to distribute while on board a "vessel subject to the jurisdiction of the United States," which was defined to include vessels without nationality.[8] Courts upheld these earlier laws on the theory that, under customary and treaty international law, all states can exercise jurisdiction over stateless vessels on the high seas solely because of their status as stateless.[9]

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2. 154 CONG. REC. H10253 (daily ed. Sept. 27, 2008) (statement of Rep. Ted Poe). Drug submarines first came into use in the late 1990s, but at that time were considered rare. *Waving, Not Drowning: Cocaine Now Moves by Submarine*, ECONOMIST (London), May 1, 2008, http://www.economist.com/node/11294435 [hereinafter *Waving, Not Drowning*]. Now, however, they are posing major challenges to law enforcement. These submarines, which can be made for as little as $500,000 each and assembled in fewer than three months, are thought to carry almost thirty percent of Colombia's cocaine exports. David Kushner, *Drug-Sub Culture*, N.Y. TIMES, April 23, 2009, at MM30, *available at* http://www.nytimes.com/2009/04/26/magazine/26drugs-t.html. They are generally made of fiberglass and wood and have four-person crews. They can carry two to five tons of cocaine at any one time, and have a range of about 2,000 miles. *Waving, Not Drowning*, *supra*. Because they can so easily evade radar systems, only an estimated fifteen percent are discovered. *Id.* Cargoes can be worth more than $100 million. William Booth & Juan Forero, *Semi-Submarines Stealthily Plying Pacific, Arrive as a Way To Smuggle Cocaine*, WASH. POST, June 6, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/05/AR2009060503718.html. For more information on drug submarines, see Douglas A. Kash & Eli White, *A New Law Counters the Semisubmersible Smuggling Threat*, FBI LAW ENFORCEMENT BULL., Mar. 2010, at 26; and Chris Kraul, *Drug Traffickers Use Submersibles to Ferry Narcotics: Some in U.S. Fear the Tactic May Inspire Terrorists*, L.A. TIMES, Nov. 6, 2007, http://www.latimes.com/news/nationworld/world/la-fg-narcosub6nov06,0,6804696.story.

3. 154 CONG. REC. H10252 (daily ed. Sept. 27, 2008) (statement of Rep. Smith).

4. A ship must have also travelled outside of any one country's territorial sea. Pub. L. No. 110-407, 122 Stat. 4296 (2008) (codified as 18 U.S.C. § 2285(a)).

5. *See* discussion *infra* Part III.

6. Marijuana on the High Seas Act, Pub. L. No. 96-350, 94 Stat. 1159 (1980).

7. 46 U.S.C. §§ 70501-07 (2006). In 2006, Congress repealed the MDLEA as codified at 46 U.S.C. app. §§ 1901-1904 (2002) and re-codified it in Title 46 itself. The new form maintains the same policies and much of the same wording as the old form. This Note will use the new form.

8. *See* discussion *infra* Part III.

9. *See* discussion *infra* Part III.

The Eleventh Circuit, however, seemed not to realize that stateless vessels played a different role under the DTVIA than they had had in the MHSA and MDLEA.[10] Unlike these laws, the DTVIA does not use a vessel's statelessness solely as a jurisdictional hook. Instead, the DTVIA makes the operation of a stateless vessel a key component of the substantive crime it proscribes.

This Note argues that the DTVIA's dual treatment of stateless vessels blurs the distinction between claiming jurisdiction over stateless vessels because they are stateless and treating the operation of a vessel without nationality as a universal crime. While customary and treaty international law may authorize the former, it does not, and should not, authorize the latter. The use of vessels without nationality does not pose the same threat to the international community as currently recognized universal crimes. Furthermore, making the operation of a stateless vessel a universal crime would affect other areas of international law, like refugee law, in significant and troubling ways.

This Note has eight Parts. Part II briefly introduces the relevant jurisdictional principles of international law. It explores both the five general jurisdictional theories that authorize the exercise of prescriptive criminal jurisdiction and the more specific jurisdictional regime, the law of the flag, which governs the law of the sea. Part III gives an overview of the evolution of U.S. maritime drug laws, paying particular attention to the MDLEA and the MHSA, and examines how U.S. courts have dealt with the MDLEA's authorization of the exercise of U.S. jurisdiction over stateless vessels. Part IV argues that the DTVIA differs from the MDLEA by making the operation of a stateless vessel a key element of the crime, in addition to using a vessel's statelessness as a jurisdictional hook. Consequently, I argue, the DTVIA has blurred the line between using a vessel's status as stateless as a jurisdictional provision and treating the conduct of operating a stateless vessel as if it were a universal crime.

In Parts V and VI, I argue that the operation of a stateless vessel is not, and should not be, a universal crime. Vessels without nationality do not cause the same level or type of harm as crimes currently recognized as subject to universal jurisdiction, and making the use of a stateless vessel a universal crime would have problematic interactions with other areas of international law, like refugee law. In Part VII, I demonstrate why scholars, courts, and legislators should be concerned that states will treat the operation of a stateless vessel as if it were a universal crime, potentially paving the way for unfortunate changes to customary international law. Part VIII offers conclusions.

II. JURISDICTION UNDER INTERNATIONAL LAW: FIVE GENERAL PRINCIPLES AND THE LAW OF THE FLAG

There are five general doctrines authorizing the exercise of jurisdiction under international law.[11] With the exception of universal jurisdiction, all of

10. *See* discussion *infra* Part III.

11. The five principles are the nationality principle, the territoriality principle, the protective

them require a nexus between a state and the conduct it seeks to proscribe. In addition to this general jurisdictional system, a more specific regime governs the law of the sea, known as the law of the flag. Under the law of the flag, states have exclusive jurisdiction, subject to some notable limitations, over their ships on the high seas.

A. *Criminal Jurisdiction Under International Law*

International law distinguishes among prescriptive jurisdiction, the authority to apply a law to particular conduct or individuals; enforcement jurisdiction, the authority to compel compliance with the law; and adjudicative jurisdiction, the authority to subject an individual to a state's judicial system.[12] This Note will focus largely on prescriptive jurisdiction.[13]

States can exercise prescriptive jurisdiction under international law if they satisfy the requirements of one of five accepted doctrines, each of which will be discussed in turn: (1) the nationality principle, (2) the territoriality (or territorial) principle, (3) the protective principle, (4) the passive personality principle, and (5) the universality principle.[14] The first four of these principles require a connection between the state and the conduct that it wishes to proscribe. The nationality principle grants states jurisdiction over their own nationals.[15] The territoriality principle gives states jurisdiction over actions committed inside of their boundaries. It also allows states to reach conduct occurring outside of their borders if that conduct has substantial effects within their territory.[16] The protective principle grants states jurisdiction over offenses directed against the "security of the state or . . . threatening the integrity of government functions . . . ."[17] The passive personality principle, which not all states have recognized, [18] authorizes states to exercise extraterritorial

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principle, the passive personality principle, and the universality principle. These principles were first discussed in *Harvard Research in Int'l Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935), and have largely been followed, in whole or in part, by subsequent scholars and commentators. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmts. a-g (1987); MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 29-30 (2007); *cf.* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 2 (1993) (noting that many states, including the United States, have historically opposed the passive personality principle). These principles will be discussed in greater depth *infra* Section II.A.

12. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 (1987).

13. Note that jurisdiction refers only to the authority to proscribe, enforce, or adjudicate a particular rule; it does not refer to the substance of the rule itself, although the substance of a rule and jurisdiction may be intertwined, such as in cases of universal jurisdiction.

14. Charles R. Fritch, *Drug Smuggling on the High Seas: Using International Legal Principles To Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement*, 8 WASH. U. GLOB. STUD. L. REV. 701, 712 (2009).

15. *See, e.g.*, Christopher L. Blakesley & Dan E. Stigall, *The Myopia of* U.S. v. Martinelli*: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 13 (2007); Fritch, *supra* note 14, at 712.

16. *See, e.g.*, Blakesley & Stigall, *supra* note 15, at 14-15. Some scholars refer to this type of jurisdiction as the "objective territorial principle" or the "objective principle." *See, e.g.*, Stephanie M. Chaissan, *"Minimum Contacts" Abroad: Using the* International Shoe *Test To Restrict the Extraterritorial Exercise of United States Jurisdiction Under the Maritime Drug Law Enforcement Act*, 38 U. MIAMI INTER-AM. L. REV. 641 (2007).

17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987).

18. *See* Watson, *supra* note 11, at 2 (noting that many states, including the United States, have

jurisdiction over acts against their nationals.[19]

Lastly, and most importantly for this Note, the universality principle gives states the power to punish "certain offenses recognized by the community of nations as of universal concern, such as piracy, . . . genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases for jurisdiction . . . is present . . . ."[20] In other words, crimes become "universal" because the international community recognizes them as such. That recognition grants states jurisdiction over the conduct recognized as a universal crime, regardless of whether the perpetrator, victim, or action has any relation to that state.[21]

The universality principle is therefore different from the other four types of prescriptive jurisdiction in two key ways. First, it does not require any connection between the state and the conduct at issue.[22] Second, the universality principle collapses the distinctions, discussed in the opening paragraph of this Section, among enforcement, adjudicatory, and prescriptive jurisdiction. While the first four principles provide only prescriptive jurisdiction, under the universality principle, the substance of the act itself both allows, and in some circumstances may even require, states to take judicial action against the perpetrator.[23] As one scholar has argued:

> [A] distinctive symbiosis exists between universal prescriptive jurisdiction (the international legal prohibition on the crime) and universal adjudicative jurisdiction (the judicial competence of all states to apply that prohibition to perpetrators of the crime). The prescriptive substance of universal jurisdiction both authorizes and circumscribes universal adjudicative jurisdiction. That is to say, the prescriptive substance defines not only the universal crimes themselves, but also the judicial competence of all courts wishing to exercise universal jurisdiction.[24]

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historically opposed the passive personality principle); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987) (stating that the passive personality principle "has not been generally accepted" for ordinary crimes).

19. *See, e.g.*, Blakesley & Stigall, *supra* note 15. For a good discussion of the evolution of the passive personality principle, see GAVOUNELI, *supra* note 11.

20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

21. *See, e.g.*, PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001) [hereinafter PRINCETON PRINCIPLES], *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

22. *See, e.g., id.*; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 88 (2001).

23. *See, e.g.*, M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 42-43 (Stephen Macedo ed., 2004). Some scholars have argued that if universal jurisdiction is established by treaty, states can still exercise universal jurisdiction over the nationals of states who are not parties to the treaty. *See, e.g.*, Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363 (2001). This view has some support under the "*Lotus* Principle," arising out of a 1927 case of the Permanent Court of International Justice, which stated that "[r]estrictions upon the independence of States cannot . . . be presumed." S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). Instead, states have "a wide measure of discretion which is only limited in certain cases by prohibitive rules." *Id.* at 19.

24. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 130-31 (2007). However, there may still be some limits on a state's ability to exercise enforcement jurisdiction under

While nearly all scholars of international law acknowledge the existence of a universality principle, some have also noted that the "content [and] scope" of that principle is unclear.[25] The universality principle is an "exceptional international jurisdictional doctrine" because it "holds that the very commission of certain 'universal crimes' engenders jurisdiction for all states irrespective of where the crime occurred or which state's nationals were involved."[26] For instance, the Princeton Principles of Universal Jurisdiction define the universality principle as "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 such jurisdiction."[27] Alternatively, one commentator defines universal jurisdiction as "the principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or the victims."[28] Although universal jurisdiction is "not widely understood," [29] these commentators make two things clear. The first is that universal jurisdiction allows a state to prosecute individuals for conduct that has no relation to that state. The second is that the nature of the offense itself grants this jurisdiction—no separate basis for prescriptive jurisdiction need be present.

B. *Law of the Flag*

In addition to this general regime, the international community depends upon a specialized jurisdictional system to maintain public order on the high seas: the law of the flag.[30] Under the law of the flag, a ship has the nationality of the country whose flag it is entitled to fly.[31] This country is often referred to as the flag state. The U.N. Convention on the Law of the Sea (UNCLOS) and customary international law provide that, with a few notable exceptions, the flag state has exclusive jurisdiction over its vessels on the high seas.[32]

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the universality principle that do not apply to prescriptive jurisdiction. For example, "when a state relies upon universal jurisdiction for its power to enforce, a state necessarily has to be subject to certain international legal obligations, such as procedural immunity for heads of state and diplomats . . . ." Bassiouni, *supra* note 22, at 87.

25. *See, e.g.*, LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 28 (2003).

26. Colangelo, *supra* note 24, at 130.

27. PRINCETON PRINCIPLES, *supra* note 21, at 28.

28. Stephen Macedo, *Introduction*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 23, at 1, 4.

29. *Id.*

30. *See* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 257 (3d ed. 1999).

31. United Nations Convention on the Law of the Sea art. 91, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Although several maritime nations, including the United States, have not ratified UNCLOS, many of its provisions are treated as customary international law. *See, e.g.*, United States v. Alaska, 503 U.S. 569, 588 n.10 (1992); Michael G. Chalos & Wayne A. Parker, *The Criminalization of Maritime Accidents and Marpol Violations in the United States*, 23 U.S.F. MAR. L.J. 206, 236 n.135 (2011); John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 10 (2006); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1836 n.64 (1998).

32. UNCLOS, *supra* note 31, art. 92(1). This provision of UNCLOS codifies customary

Furthermore, under customary and treaty international law, only the flag state can exercise diplomatic protection on a vessel's behalf.[33] Individuals have no standing to contest a vessel's treatment because the freedom of navigation, on which the law of the sea is premised, belongs to states, not individuals.[34]

In addition to these rights, the flag state has several responsibilities, including the responsibility to ensure that its ships comply with domestic and international law and regulations. Article 94 of UNCLOS lays out the basic duties of the flag state.[35] Most notably, a state must exercise "jurisdiction and control [over its fleet] in administrative, technical, and social matters."[36] Control includes ensuring that ships are seaworthy and comply with relevant labor regulations and criminal laws.[37] Furthermore, "[n]ationality also indicates which State is responsible in international law for the vessel in cases where an act or omission of the vessel is attributable to the State."[38]

Each state generally has complete discretion to determine the criteria by which ships become entitled to carry its nationality. There has been growing international pressure to require states to have a "genuine link," as codified in Article 91 of UNCLOS, with their fleet.[39] However, practically speaking, many states do not require such a link.[40] The lack of a genuine-link requirement has led to the rise of "flags of convenience," where ships register with states with which they have no real connection because the state is known to have low fees and few enforcement mechanisms.[41]

In addition to ships flying flags of convenience, some ships have no nationality at all. Ships without nationality, also called stateless, flagless, or unregistered vessels, undermine the law-of-the-flag regime. Because stateless vessels do not have a flag state, no state can exercise control over them on the

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international law. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7) ("In virtue of the principle of the freedom of the seas . . . no State may exercise any kind of jurisdiction over foreign vessels upon them."); Neil Brown, *Jurisdictional Problems Relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner's Observations*, *in* SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 69, 70 (Clive R. Symmons ed., 2011). This exclusive jurisdiction is subject to a number of limitations, including the right of visit contained in UNCLOS Article 110. A flag state's exclusive control is further limited in the exclusive economic zone and the contiguous zone of other states, and is at its most limited in another state's territorial sea. CHURCHILL & LOWE, *supra* note 30, at 263.

33. *See* CHURCHILL & LOWE, *supra* note 30, at 257; *see also* Molvan v. Attorney Gen. for Palestine (The "Asya"), [1948] A.C. 351, 369-70 (P.C.) (appeal taken from Palestine) (noting that no state can assert diplomatic protection over a stateless vessel because there is no flag state). Note that this discussion focuses solely on the law of the flag. The country whose citizens are on board the vessel may also be able to assert its rights.

34. *See, e.g.*, UNCLOS, *supra* note 31, art. 87 ("The high seas are open to all States . . . . These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas . . . .").

35. UNCLOS, *supra* note 31, art. 94.

36. *Id.*

37. *Id.*

38. CHURCHILL & LOWE, *supra* note 30, at 257.

39. UNCLOS, *supra* note 31, art. 91.

40. *See, e.g.*, H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L.J. 139, 150-57 (1996); Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime and a New Approach*, 5 OCEAN & COASTAL L.J. 227, 230 (2000).

41. *See* CHURCHILL & LOWE, *supra* note 30, at 257-62; Anderson, *supra* note 40, at 150-57.

high seas or provide diplomatic protection on their behalf.[42] Ships can become stateless in a variety of ways. They may lose their nationality if they violate their flag state's laws or do not comply with its requirements; their flag state may be unrecognized by the international community; or they may never register with any state.[43] Furthermore, ships that sail under more than one flag, using one or the other according to convenience, are "assimilated" to stateless ships under UNCLOS.[44] Because stateless ships do not enjoy the protection of any state, some countries and scholars have asserted that any state can assert jurisdiction over them.[45] But, as discussed *infra*, a ship's statelessness alone may not authorize such actions.[46]

III. EVOLUTION OF THE UNITED STATES'S MARITIME DRUG LAWS: THE MHSA AND MDLEA

The law of the flag has proven ill-suited to combating the international drug trade. The ships used to transport drugs are often unregistered, allowing them to effectively operate outside of any state's control.[47] Furthermore, drug traffickers have adopted strategies that exploit the freedom of the high seas; they remain on the high seas for as long as possible, only entering a state's territorial waters using small, fast boats that are difficult to detect and apprehend.[48] To address these gaps, the United States has passed a series of drug laws expanding U.S. jurisdiction to cover drug trafficking occurring on the high seas anywhere in the world. The first two of these laws, the Marijuana on the High Seas Act (MHSA)[49] and the Maritime Drug Law Enforcement Act (MDLEA),[50] treat a ship's statelessness as a sixth basis for prescriptive jurisdiction. This Part will first discuss the enactment of the MHSA and the MDLEA and then analyze U.S. courts' treatment of the MDLEA's jurisdictional provisions.

A. *The Enactment of the MHSA and the MDLEA*

The international drug trade is one of the most profitable industries in the

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42. *See, e.g.*, UNCLOS, *supra* note 31, art. 92 ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."); *see also supra* note 33 and accompanying text.

43. CHURCHILL & LOWE, *supra* note 30, at 213-14.

44. UNCLOS, *supra* note 31, art. 92.

45. *See* discussion *infra* Part V.

46. CHURCHILL & LOWE, *supra* note 30, at 214.

47. *See, e.g.*, United States v. Matos-Luchi, 627 F.3d 1 (1st Cir. 2010); United States v. Moreno-Morillo, 334 F.3d 819 (9th Cir. 2003); United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985); William C. Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POL'Y, 218, 228 (1989).

48. This is an example of the so-called "mothership" strategy. For a discussion of the mothership strategy, see Charles Leonard-Christopher Vaccaro, *Bringing in the Mother Lode: The Second Circuit Rides in the Wake of* Marino-Garcia—United States v. Pinto-Mejia, 10 MAR. LAW. 141, 145 (1985).

49. Marijuana on the High Seas Act, Pub. L. No. 96–350, 94 Stat. 1159 (1980).

50. Maritime Drug Law Enforcement Act, 46 U.S.C. § 705 (2006).

world, generating an estimated $400 billion annually.[51] The United States is the world's largest market for these drugs, and it spends more than $8 billion per year to combat maritime drug trafficking worldwide.[52] In 2007 alone, for example, the Coast Guard seized thirty-seven ships, which contained a combined total of 166,983 kilograms of drugs.[53]

Congress passed the MHSA in 1980 following a dramatic increase in drug trafficking in the 1970s.[54] The Act was designed to combat the then-prominent use of the "mothership" strategy of transporting drugs into the United States.[55] Under this strategy, foreign-flagged motherships wait just outside of U.S. jurisdiction and use smaller, often unregistered, vessels, to transport drugs to shore.[56] These vessels are extremely difficult to detect and capture because they are small and often fast-moving.[57] Prior to the MHSA, even when U.S. authorities apprehended the smaller vessels, law enforcement agents struggled to prove that the motherships had conspired with the smaller ships to import drugs into the United States.[58] To solve this problem, the MHSA made it illegal "for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance."[59] Under the MHSA, the government did not need to prove that any drugs the Coast Guard discovered were bound for the United States. Law enforcement agents had to demonstrate only that the vessel was subject to U.S. jurisdiction and on the high seas.

The MHSA also expanded the ambit of U.S. jurisdiction by declaring that stateless vessels are "vessels subject to the jurisdiction of the United States."[60] By its terms, therefore, the Act applied to the possession of drugs on the high seas all around the world, and if the vessel was stateless, then no connection between the ship and the United States was necessary. Stateless vessels, as defined in the Act, included vessels flying no flag and vessels bearing fraudulent or multiple registries.[61]

By the mid-1980s, the MHSA had become insufficient. Not only was the Act difficult to enforce—often because law enforcement officers found proving that a vessel was stateless under the Act's definition to be challenging and

51. Fritch, *supra* note 14, at 701.

52. *Id.*

53. John O'Neil Sheehy, Note, *False Perceptions of Limitation: Why Imposing a Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts To Prosecute Maritime Drug Trafficking*, 43 CONN. L. REV. 1677, 1690 (2011) (citing Office of Law Enforcement, *Coast Guard Drug Removal Statistics*, U.S. COAST GUARD, Oct. 19, 2011, http://www.uscg.mil/hq/cg5/cg531/Drugs/stats.asp.

54. Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1197 (2009).

55. *Id.* at 1197-98.

56. *Id.* at 1197.

57. *Id.*

58. *Id.*

59. Marijuana on the High Seas Act, Pub. L. No. 96-350, § 1, 94 Stat. 1159 (1980).

60. *Id.* § 2.

61. *Id.*

time-consuming—but the new prevalence of cocaine made the law appear too weak because possessing drugs on the high seas, in and of itself, was not a crime.[62] In 1986, Congress passed the MDLEA.[63] The MDLEA expanded the MHSA's jurisdictional provisions. While the MHSA applied only to vessels with some connection to the United States and stateless vessels,[64] the MDLEA applies also to foreign ships with foreign crews as long as the flag state consents.[65] Furthermore, the MDLEA lowers the government's burden in proving that vessels are stateless. Rather than requiring the U.S. government to obtain proof of statelessness sufficient to withstand scrutiny in court, which could take several months,[66] the Act broadens the definition of statelessness to include vessels that do not produce evidence of registry upon request and those whose asserted flag state does not "affirmatively and unequivocally" confirm their registration.[67]

B. *Challenges to the MDLEA: A Vessel's Statelessness as a New Basis for Jurisdiction*

Soon after the law went into effect, individuals facing criminal prosecution under the MDLEA began challenging its jurisdictional provisions on due process grounds. In upholding the MDLEA, some courts invoked international law, reasoning that international law is "useful as a rough guide" in determining whether application of the statute violates due process.[68] Specifically, they held that the law satisfies the protective principle, because drugs threaten the integrity of the United States,[69] the universality principle, because drug smuggling is a universal crime,[70] and the territoriality principle, because drug trafficking outside of the United States has effects within U.S. borders.[71] The Ninth Circuit cabins the MDLEA's jurisdictional provisions

62. Kontorovich, *supra* note 54, at 1198-99.

63. Pub. L. No. 109-304; 120 Stat. 1488.

64. Marijuana on the High Seas Act, Pub. L. No. 96-350, § 2, 94 Stat. 1159 (1980).

65. Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503-07 (2006).

66. S. REP. NO. 95-797, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5986, 6000-01.

67. 46 U.S.C. § 70502(d)(1)(C). This definition of stateless vessels, and the definitions contained in the Act's successors, differs from that contained in UNCLOS, which states that ships have the nationality of the country whose flag they are entitled to fly. UNCLOS, *supra* note 31, art. 92. While this may itself be contrary to customary and treaty international law, the differences between the definition of vessels without nationality under U.S. law and under UNCLOS are not the subject of this Note.

68. United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995); *cf.* United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("In determining whether due process is satisfied, we are guided by principles of international law.").

69. *See, e.g.*, United States v. Sinisterra, No. 06-15824, 2007 WL 1695698, at *3 (11th Cir. 2007) ("'Congress, under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'" (quoting United States v. Tinoco, 304 F.3d 1088, 1108 (2002))); United States v. Bravo, 489 F.3d 1, 7 (1st Cir. 2007) ("The extra-territorial jurisdiction authorized in the MDLEA is consistent with the 'protective principle' of international law . . . ."); United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) (same).

70. *See, e.g.*, United States v. Salcedo-Ibarra, 2009 WL 1953399 (M.D. Fla. July 6, 2009).

71. *See, e.g.*, *Cardales*, 168 F.3d at 553; United States v. Suerte, 291 F.3d 366, 370 (5th Cir. 2002) (citing *Cardales* with approval). Note that all three of these justifications are likely incorrect if the

somewhat by requiring a "sufficient nexus" between the drugs or the drug traffickers and the United States if the traffickers are traveling in a vessel with nationality.[72] Nonetheless, the other circuits have largely disagreed.[73]

Furthermore, U.S. courts have almost uniformly held that stateless vessels are entitled to even less protection under international law, and therefore the Due Process Clause, than foreign-flagged vessels boarded with the flag state's consent. Even the Ninth Circuit, the only circuit that normally requires a nexus between the drug traffickers being hauled into court and the United States, has found that a nexus is unnecessary to prosecute the crews of vessels without nationality. Statelessness alone is sufficient to establish U.S. jurisdiction. In *United States v. Caicedo*, for example, the Ninth Circuit, quoting the Eleventh Circuit, found that "international law 'restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels'"[74] because "by attempting to shrug the yoke of any nation's authority, they subject themselves to the jurisdiction of all nations '*solely* as a consequence of the vessel's status as stateless.'"[75] Thus, according to the Ninth Circuit, statelessness provides a sixth basis, in addition to the five general jurisdictional principles discussed *supra*, on which states can base prescriptive jurisdiction.

Treating ships' statelessness as an additional basis for prescriptive jurisdiction is controversial, but it is not wholly without support in customary and treaty international law. Several states have found that all nations can stand in for the missing flag state when dealing with vessels without nationality. In determining that stateless vessels are subject to all states' jurisdiction, for example, the Eleventh Circuit[76] cited an English case, *Molvan v. Attorney-General for Palestine*.[77] According to *Molvan*:

> [T]he freedom of the open sea, whatever those words may connote, is a freedom of ships which fly, and are entitled to fly, the flag of a State which is within the comity of nations. The Asya [a stateless ship] did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails. . . . [T]he Asya could not claim the protection of any State nor could any State claim that

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vessels at issue are not destined for the United States, particularly the assertion that drug trafficking is a universal crime. *See, e.g.*, GAVOUNELI, *supra* note 11, at 27-28 ("Interestingly enough and contrary to popular belief, neither slavery and slave related practices nor drug trafficking are covered by universal jurisdiction under the Law of the Sea Convention—or indeed other instruments. . . .").

72. *See* United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990).

73. *See, e.g.*, *Rendon*, 354 F.3d at 1325; *Suerte*, 291 F.3d at 376; United States v. Martinez-Hidalgo, 993 F.2d 1052, 1053 (3d Cir. 1993); Chaissan, *supra* note 16, at 643-44 ("While Ninth Circuit cases such as *United States v. Davis* have required a nexus in order for a federal criminal statute to apply extraterritorially consistent with the Due Process Clause, a significant number of cases have not made such a requirement." (footnotes omitted)).

74. United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) (quoting United States v. Marino-Garcia, 679 F.2d 1373, 1382 (11th Cir. 1982)).

75. *Id.* (quoting *Marino-Garcia*, 679 F.2d at 1383); *see also* United States v. Matos-Luchi, 627 F.3d 1, 6 (1st Cir. 2010) (arguing that international law treats statelessness as a basis for jurisdiction).

76. *Marino-Garcia*, 679 F.2d at 1382.

77. Molvan v. Attorney Gen. for Palestine (The "Asya"), [1948] A.C. 351 (P.C.) (appeal taken from Palestine).

any principle of international law was broken by her seizure.[78]

Under one possible interpretation of *Molvan*, stateless ships cannot benefit from the freedom of the high seas because that freedom belongs only to states, not to individual ships.[79] Because ships without nationality are not free to sail upon the high seas, according to this view, any state can assert jurisdiction over them. Another possible interpretation of *Molvan* is that all states can subject stateless vessels to their jurisdiction because only states can protest a ship's treatment, not individuals.[80] In the absence of a flag state, no state or individual has standing to assert a ship's rights. Either way, *Molvan* authorizes states to extend their jurisdiction to stateless vessels.

The United States is not alone in relying on the principles articulated in *Molvan* to authorize the exercise of jurisdiction over vessels without nationality. Rolf Einar Fife, when he was Director General of the Norwegian Ministry of Foreign Affairs' Department of Legal Affairs, stated that *Molvan*'s holding that stateless vessels enjoy the protection of no state allows all states to exercise jurisdiction over such vessels.[81] Consistent with this principle, Norway's fisheries legislation applies equally to Norwegian ships, stateless vessels, and vessels assimilated to stateless vessels.[82]

In light of these instances and others, several scholars have argued that customary international law and treaty law allow all countries to exercise jurisdiction over stateless ships. Andrew Anderson, for example, has asserted that all nations must be allowed to exercise jurisdiction over stateless ships because otherwise "an un-registered vessel would be immune from interference by anyone. This result cannot be and has never been tolerated by the nations of the world."[83] Any other outcome, he argues, "would end in chaos and anarchy on the high seas."[84] In Anderson's view, all states can therefore substitute for the flag state when there is none.[85]

Other scholars, however, such as Churchill and Lowe, disagree.[86] They argue that to assert jurisdiction over a stateless vessel because it lacks diplomatic protection would be to "ignore[] the possibility of diplomatic

78. *Id.* at 369-70.

79. *See* Rachel Canty, *Limits of Coast Guard Authority To Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123, 126 (1998).

80. *See* CHURCHILL & LOWE, *supra* note 30, at 214.

81. Rolf Einar Fife, *Elements of Nordic Practice 2006: Norwegian Measures Taken Against Stateless Vessel Conducting Unauthorized Fishing on the High Seas*, 76 NORDIC J. INT'L L. 301, 302 (2007); *see also* Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, 36 SYRACUSE J. INT'L L. & COM. 145, 160-61 (2009) (discussing an Italian case that held that Italian authorities could arrest migrants on stateless vessels on the high seas).

82. *See* Fife, *supra* note 81, at 302 (discussing the Salt Water Fisheries Act of June 3, 1983 (No. 40, § 1, ¶ 4(3))).

83. Andrew W. Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 336 (1982); *see also* Eric M. Kornblau, United States v. Marino-Garcia: *Criminal Jurisdiction over Stateless Vessels on the High Seas*, 9 BROOK. J. INT'L L. 141 (1983) (arguing that the Eleventh Circuit was correct in holding that traditional limitations on jurisdiction under international law do not apply to stateless ships).

84. Anderson, *supra* note 83, at 336.

85. *Id.*

86. CHURCHILL & LOWE, *supra* note 30, at 213-14.

protection being exercised by the national State of the individuals on such stateless ships."[87] Churchill and Lowe maintain, therefore, that there must be an independent jurisdictional nexus between the stateless ship and a state before the state can extend its laws to the vessel.[88]

IV. THE DTVIA: MIXING JURISDICTION AND SUBSTANCE

Like the MHSA before it, the MDLEA has proven inadequate to address drug traffickers' changing strategies—specifically, the increased use of submarines. Congress passed the DTVIA to address this deficiency. The Eleventh Circuit has upheld the law as a new application of the jurisdictional principles articulated in challenges to earlier drug laws, namely that a vessel's status as stateless is sufficient to authorize the exercise of U.S. jurisdiction.[89] However, this Part argues that the DTVIA differs from its predecessors because it not only uses a vessel's statelessness as a basis for jurisdiction but also includes the operation of a stateless vessel as a key component of the conduct that it proscribes. I argue that the DTVIA has thereby blurred the line between exercising jurisdiction based on a vessel's status as stateless and treating the operation of a stateless vessel as if it were a universal crime.

A. *The Passage of the DTVIA*

Although courts have generally upheld the MDLEA's constitutionality, the law has proven insufficient to combat drug traffickers' increasing use, starting in the mid-1990s, of self-propelled semi-submersible and submersible vessels (SPSS).[90] These vessels can travel up to 2,000 miles[91] at a speed of up to eight knots,[92] and are much harder to detect than the boats that smugglers had used previously.[93] Furthermore, crewmembers often sink SPSS vessels at the first sign of law enforcement. Prosecution for drug offenses, therefore, can be extremely difficult, since most of the evidence of drugs is destroyed or lost when the ship sinks.[94]

To aid prosecution, Congress passed the Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA).[95] The DTVIA states that anyone who "operates . . . or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country . . . with the intent to evade detection" has committed a crime against the United

87. *Id.* at 214.

88. *Id.*

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

90. *See* 124 CONG. REC. H7237 (daily ed. July 29, 2008).

91. *Waving, Not Drowning*, *supra* note 2.

92. Wade F. Wilkenson, *A New Underwater Threat*, PROCEEDINGS MAGAZINE, Oct. 14, 2008, *available at* http://www.usni.org/magazines/proceedings/2008-10/new-underwater-threat.

93. *Id.*

94. *See* 124 CONG. REC. H7237 (daily ed. July 29, 2008) (statement of Rep. Daniel Lungren).

95. Drug Trafficking Vessel Interdiction Act, Pub. L. No. 110-407, 18 U.S.C.A. § 2285 (West 2011).

States.[96] Violations are punishable by up to fifteen years in prison, a fine, or both.[97] Under the Act, a valid claim of nationality is limited to:

> (1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;
>
> (2) flying [a] nation's ensign or flag; or
>
> (3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.[98]

Like the MDLEA, the DTVIA was soon challenged in court. The Eleventh Circuit, the only court of appeals that has ruled on the Act's validity thus far, upheld the DTVIA under the jurisdictional principles articulated in the court's earlier cases affirming the validity of the MDLEA and its predecessors.[99] In *United States v. Ibarguen-Mosquera*,[100] the Eleventh Circuit upheld the DTVIA without noting any significant difference between the jurisdictional requirements of the DTVIA and of previous laws:

> In the past we have held that the objective, protective, and territorial principles "have no applicability in connection with stateless vessels" because such vessels are "international pariahs" that have "no internationally recognized right to navigate freely on the high seas." . . . We conclude, therefore, that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction. . . . Jurisdiction exists solely as a consequence of the vessel's status as stateless.[101]

B. *Combining Jurisdiction and Substance: Blurring the Lines*

While the Eleventh Circuit understood the role of stateless vessels in the DTVIA as continuous with that in previous statutes, the DTVIA's treatment of stateless vessels is in fact significantly different from that in earlier laws. The MDLEA and earlier statutes used a vessel's status as stateless as a basis for prescriptive jurisdiction. Under the DTVIA, however, not only is a vessel's statelessness grounds for the exercise of prescriptive jurisdiction, it is also an essential component of the conduct that the law criminalizes. This dual treatment means the DTVIA no longer uses a vessel's statelessness solely as a basis for the exercise of prescriptive jurisdiction; it also begins to make the operation of a stateless vessel look like a universal crime. As discussed below, the universality principle (1) allows states to prosecute crimes to which they

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96. *Id.* § 2285(a).

97. *Id.*

98. *Id.* § 2285(d).

99. Those earlier cases include *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (discussing the MDLEA) and *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982) (discussing a predecessor statute to the MDLEA).

100. 634 F.3d 1370 (11th Cir. 2011).

101. *Id.* at 1379 (quoting *Marino-Garcia*, 679 F.2d at 1382). The 11th Circuit also relied on an MDLEA precedent, *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006), in upholding the DTVIA against a challenge under the High Seas Clause. United States v. Saac, 632 F.3d 1203, 1210-1211 (11th Cir. 2011). *Saac*, however, was not decided on the basis of statelessness. Instead, the court stated that drug trafficking is a universal crime and that the law was justified under the protective principle. *Id.*

have no connection and (2) grants states jurisdiction over certain conduct based solely on the nature of the offense. Laws that incorporate both of these elements, and provide no additional basis for jurisdiction, treat the conduct they proscribe as a universal crime.[102] Because stateless vessels serve both as the statute's only jurisdictional provision and as an element of the conduct that the law proscribes, the DTVIA blurs the distinction between using a vessel's status as statelessness purely as a jurisdictional hook, and treating the operation of a stateless vessel as if it were a universal crime.

This stands in stark contrast to the MDLEA, which simply includes statelessness as a basis for jurisdiction over a drug offense. The MDLEA criminalizes drug possession, using statelessness as one among many possible bases for the exercise of U.S. jurisdiction; statelessness is not an element of the crime itself. In particular, the MDLEA includes stateless vessels in its definition of ships "subject to the jurisdiction of the United States" and specifies that "[j]urisdiction of the United States with respect to a vessel subject to this chapter is not an element of the offense."[103] Reinforcing the jurisdictional role of statelessness in the MDLEA are cases finding that the question of whether a vessel is subject to the jurisdiction of the United States does not need to be submitted to the jury. In *United States v. Tinoco*, for example, the Eleventh Circuit held that whether a ship is stateless is purely a legal question about jurisdiction, not a factual element that needs be proven to a jury beyond a reasonable doubt.[104]

The DTVIA also includes a vessel's statelessness as a jurisdictional term. A vessel's statelessness is the only basis for the United States to assert jurisdiction: under any of the five generally recognized jurisdictional theories or the law of the flag, Congress would lack the authority to prescribe the other elements of the offense—operating a semi-submersible or submersible vessel with the intent to evade detection outside of any nation's territorial sea—unless the conduct at issue had some other connection to the United States.[105]

Unlike the MDLEA, however, the DTVIA also makes the operation of a stateless vessel a key component of a substantive crime. Rather than placing statelessness in a separate jurisdictional section like the MDLEA, the DTVIA includes it as part of the definition of the offense.[106] Furthermore, if

102. *See* Bassiouni, *supra* note 23, at 42-43 ("When universal jurisdiction can be asserted, there is no need for a link or nexus between the enforcing power, be it national or international, and the conduct in question, or the perpetrator or victim's nationality. Universal jurisdiction is, as already noted, based solely on the nature of the crime.").

103. Maritime Drug Law Enforcement Act, 46 U.S.C. § 70504 (2006).

104. 304 F.3d 1088 (11th Cir. 2002); *see also* United States v. Bustos-Useche, 273 F.3d 622, 626 (5th Cir. 2001) (finding that whether a vessel is one subject to the jurisdiction of the United States is a jurisdictional term rather than a factual element of the offense); United States v. Guerrero, 114 F.3d 332, 340 n.9 (1st Cir. 1997) ("United States jurisdiction over vessels is no longer an element of an offense, but rather, a preliminary question of law for the trial judge."). *But see* United States v. Perlaza, 439 F.3d 1149, 1165-67 (9th Cir. 2006) (stating that whether a vessel is subject to the jurisdiction of the United States must be submitted to a jury because it turns on factual issues).

105. The Act does not require any such connection. Drug Trafficking Vessel Interdiction Act, 18 U.S.C.A. § 2285 (West 2011).

106. 18 U.S.C. § 2285(a) ("Offense.—Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without

statelessness were merely a jurisdictional requirement, one would expect the Act to apply equally to semi-submersible and submersible vessels flying the U.S. flag, just as the MHSA and the MDLEA do. The DTVIA, in contrast, applies only to stateless vessels, not to all vessels subject to the jurisdiction of the United States. Likewise, a ship's valid registration with the United States or any other state is an *affirmative defense* under the DTVIA,[107] indicating that Congress considered statelessness an essential component of the crime itself.

The Eleventh Circuit failed to recognize that a vessel's statelessness plays two roles in the DTVIA—jurisdictional and substantive—and that this distinction is significant. As long as Congress used a vessel's statelessness solely as a basis for the application of U.S. laws to the vessel, as in the MDLEA, it was clear that a vessel's statelessness was serving a purely jurisdictional role. However, once a law includes the act of using a stateless vessel as an element of the crime it proscribes, and provides no separate basis for jurisdiction, it raises the possibility that the law might satisfy the definition of a universal crime: it allows that state to claim jurisdiction over the criminal act based entirely on the nature of the act itself, with no other connection to the state.

V. OPERATING A VESSEL WITHOUT NATIONALITY IS NOT CURRENTLY RECOGNIZED AS SUBJECT TO UNIVERSAL JURISDICTION UNDER CUSTOMARY OR TREATY INTERNATIONAL LAW

Even if international law clearly authorized the use of a vessel's statelessness as a sixth basis for prescriptive jurisdiction,[108] operating a stateless vessel would not be a universal crime.[109] By definition, at least under customary international law, conduct becomes a universal crime because the community of nations recognizes it as such.[110] The international community, however, has not recognized the operation of a stateless vessel as a crime at all, let alone as a crime subject to universal jurisdiction. Nor has a treaty

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nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection, shall be fined under this title, imprisoned not more than 15 years, or both.").

107. 18 U.S.C. § 2285(e).

108. *See* discussion *supra* Section III.B.

109. A state cannot exercise universal jurisdiction absent "explicit authority" under customary or treaty international law. *See* Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems*, 16 FLA. J. INT'L L. 371, 393 (2004).

110. *See, e.g.*, Miriam Cohen, *The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction*, 16 BUFF. HUM. RTS. L. REV. 201, 219 (2010) ("The Restatement summarizes that universal jurisdiction is a result of universal condemnation of certain offenses as reflected in widely accepted international agreements and resolutions of international organizations."); Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. J. INT'L L. 1, 6 (2000) ("Universal jurisdiction can be exercised over an international crime, as a matter of customary law, only after a majority of nations have consistently followed the practice of allowing nations to exercise jurisdiction over offenders of such crimes which they have captured."); Luz E. Nagl, *Terrorism and Universal Jurisdiction: Opening a Pandora's Box?*, 27 GA. ST. U. L. REV. 339, 357 (2011) ("Indeed, crimes eliciting universal repudiation [as universal crimes] share certain elements: the crimes may be precisely defined, [and] globally accepted as such . . . .").

accomplished that result.

Universal crimes are defined as those which are "so threatening to the international community or so heinous in scope or degree that they offend the interest of all humanity, [that] any state may, as humanity's agent, punish the offender."[111] While there is no authoritative list of all universal crimes, commentators generally agree that the list includes violent human rights abuses or crimes that would be practically impossible for any state to prosecute under other, narrower jurisdictional principles.[112] The *Restatement of Foreign Relations*, for example, lists "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" as recognized universal crimes.[113]

Furthermore, UNCLOS lists several universal crimes relevant to the law of the sea, including piracy, of which statelessness is not one.[114] Although Article 110 of UNCLOS grants warships a right of visit when they suspect that a ship is without nationality, the Convention specifically authorizes the boarding state only to verify the registration of the ships.[115] Article 110 also applies to conduct that UNCLOS identifies as universal crimes, but these other crimes have their own, specific sections of the Convention authorizing states to take further action.[116] There is no such separate article for vessels without nationality. Some scholars and states have interpreted Article 110 as authorizing the exercise of jurisdiction solely on the basis of a vessel's statelessness,[117] or even as creating universal jurisdiction.[118] Others have made a strong case, however, that Article 110 allows warships to undertake only those measures necessary to substitute for the absent flag state in enforcing international law, like ensuring seaworthiness and compliance with

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111. Scharf, *supra* note 23, at 368.

112. *See, e.g.*, Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 401-02 (2001); Geraghty, *supra* note 109, at 377-78; Jordan, *supra* note 110, at 31.

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

114. UNCLOS, *supra* note 31, arts. 105, 108, 109 (listing piracy, illicit traffic in drugs, and unauthorized broadcasting).

115. UNCLOS, *supra* note 31, art. 110; *see also* Douglas Guilfoyle, *Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters*, *in* SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 83, 83-84 (Clive R. Simmons ed., 2011) ("[E]nforcement powers are not, however, expressly available in cases of slavery and statelessness . . . . The general position is that authority to visit and inspect a vessel does not automatically extend to a right of arrest and prosecution."); Patrick Sorek, Note, *Jurisdiction over Drug Smuggling on the High Seas: It's a Small World After All*—United States v. Marino-Garcia, 44 U. PITT. L. REV. 1095, 1106-07 (1983) ("[C]ustomary international law, international conventions and treatise writers agree that failure to register and identify seagoing vessels forfeits their rights to undisturbed navigation. The need for predictable orderliness and safety for commercial, military and pleasure craft of all nations in international water requires this doctrine. What a state may do *after* asserting jurisdiction over a stateless vessel on the high seas under international law is not so apparent.").

116. *See* UNCLOS, *supra* note 31, arts. 105, 109.

117. *See, e.g.*, Barry A. Feinstein, *The Interception of Civilian Vessels at Sea in the Fight Against Terrorism: Legal Aspects—An Israeli View*, 2 FINNISH Y.B. INT'L L.197, 219 (1991); *see also* Anderson, *supra* note 83, at 337 (discussing a similar provision on statelessness in the Convention on the High Seas, which preceded UNCLOS).

118. *See* Kontorovich, *supra* note 54, at 1228; *see also* Scharf, *supra* note 23, at 379 (briefly arguing that the 1958 Convention on the High Seas gives the United States universal jurisdiction over stateless vessels).

all relevant international regulations.[119]

Not only is operating a stateless vessel generally absent from lists of universal crimes, but even those who argue that all states can extend their criminal laws to stateless vessels usually do not claim that using an unregistered vessel is a universal crime.[120] Norway, for example, treats stateless ships like its own. It does not outlaw the use of stateless ships entirely and thereby subject them to universal jurisdiction.[121] Furthermore, while Anderson argues that the dangers posed by vessels without nationality may lead the international community to recognize the use of unregistered vessels as a universal crime, he does not maintain that it has done so already.[122]

VI. OPERATING A VESSEL WITHOUT NATIONALITY SHOULD NOT BE A UNIVERSAL CRIME

The question of whether operating a vessel without nationality is a universal crime—which this Note answers in the negative—is distinct from the question of whether it should be. Acts should not be universal crimes if they do not threaten the entire international community, either because they are particularly heinous or because they are the type of crime that would be impossible to prosecute under a more limited jurisdictional principle.[123] This is because the "underlying basis for all nations to exercise universal jurisdiction" is "[t]he reality of the danger that [universal] crimes pose on all nations within the international community."[124] If that danger is not present, neither is the justification for universal jurisdiction.

This Part argues that operating a stateless vessel should not be a universal crime because (1) it does not rise to the level of heinousness or pose the same practical challenges as currently recognized universal crimes (discussed in Subsections VI.A.1 and VI.A.2, respectively); and (2) treating the operation of a vessel without nationality as a universal crime would have significant ramifications for other areas of international law, including refugee law (discussed in Section VI.B).

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119. *See* Papastavridis, *supra* note 81, at 161-62.

120. *But c.f.* Kontorovich, *supra* note 54, at 1228 ("These decisions may stand for nothing more than a sort of supplemental universal jurisdiction, allowing UJ over felonies when they are part of the same 'case or controversy' or 'common nucleus of operative fact' as a piracy. But they could stand for a broader proposition, that felonies can be punished aboard stateless vessels, or even more broadly, that the Constitution allows UJ over felonies to be as broad as allowable under international law. So if international law allows UJ over stateless vessels as part of the law of the high seas, the Define and Punish Clause incorporates this power.").

121. Fife, *supra* note 81, at 302.

122. Anderson, *supra* note 83, at 342.

123. *See* Geraghty, *supra* note 109, at 377 ("[A]n examination of acts that are generally accepted as universal jurisdiction crimes suggests some coherent guidelines. As a general matter, the crime must be one of such international concern that it invokes one of the two traditional theoretical rationales for universal jurisdiction [atrocity and practicality].").

124. Jordan, *supra* note 110, at 5.

A. *Operating a Vessel Without Nationality Does Not Pose the Same Degree or Type of Harm as Currently Recognized Universal Crimes*

Universal jurisdiction rests on the premise that "every nation has an interest in exercising jurisdiction over crimes that have been universally condemned."[125] There are two main justifications for universal jurisdiction: (1) allowing all states to prosecute conduct that is universally condemned for its atrocity; and (2) "provid[ing] a basis for jurisdiction when jurisdiction is hard" [126] to demonstrate otherwise. [127] The first justification (atrocity), currently the most significant and is based on humanitarian concerns. The second justification (practicality) addresses the particular set of crimes that, because of their nature, would be impossible for any one state to reach under one of the other more limited bases of prescriptive jurisdiction. The prototypical universal crime, piracy, is largely justified under the second of these justifications. Practically speaking, it is difficult for any state to gain jurisdiction over pirates because their actions occur on the high seas[128] and outside of any state's control.[129] While the operation of a stateless vessel may seem similar to piracy in that it is practically difficult for states to address, statelessness does not satisfy either of the theoretical grounds supporting the application of universal jurisdiction.

Neither treaty nor customary international law should make something a universal crime unless at least one of these two justifications (atrocity or practicality) is present. Universal jurisdiction is an extraordinary doctrine because it allows states to prosecute individuals for acts with no connection to that state. [130] The exercise of universal jurisdiction, therefore, raises sovereignty and due process concerns that the other four traditional bases for prescriptive jurisdiction do not.[131] To retain legitimacy, universal jurisdiction

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125. *Id.* at 3.

126. *Id.* at 31.

127. Geraghty, *supra* note 109, at 377-78.

128. Christina E. Sorensen, Comment, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 228 (1990).

129. Colangelo, *supra* note 24, at 144.

130. *See id.* at 130.

131. *See, e.g.*, Bassiouni, *supra* note 22, at 90-93 (discussing sovereignty concerns); Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L L. & POL. 503, 550-55 (2004) (noting that universal jurisdiction raises serious due process concerns because someone could be subject to prosecution in any country with little warning and because of the lack of agreement on which crimes are subject to universal jurisdiction); Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 158 n.26 (2006) (noting that universal jurisdiction is contrary to the traditional sovereignty model because it allows one state to exercise jurisdiction over conduct with no relationship to it without the permission and despite the prescriptive legislation of the territorial state); Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 902 (2009) (noting potential sovereignty implications if universal jurisdiction is applied improperly); Zachary Mills, *Does the World Need Knights Errant To Combat Enemies of All Mankind?: Universal Jurisdiction, Connecting Links, and Civil Liability*, 66 WASH. & LEE L. REV. 1315 (2009) (discussing sovereignty concerns); Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 352-54 (2001) (noting the due process concerns associated with universal jurisdiction); *see also* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1103-1109 (2011) (discussing the Fifth Amendment due process concerns associated with extraterritorial application of U.S. laws).

should be used sparingly and only to prosecute crimes that are either particularly heinous or pose serious practical challenges to enforcement. As I will argue below, exercising universal jurisdiction over the operation of stateless ships satisfies neither of these two justifications. Therefore, using a vessel without nationality should not be a universal crime.

1. *First Justification: Atrocity*

Unlike many of the universal crimes recognized under customary and treaty international law, including crimes against humanity and genocide, operating a stateless vessel is not necessarily heinous. The international community may, of course, have more difficulty ensuring that stateless vessels follow relevant laws and regulations because stateless vessels lack a flag state responsible for enforcement and oversight. This could mean that passengers and crewmembers in stateless vessels are more likely to be injured or to injure others. They may also be more likely to commit crimes. However, this possibility is hardly sufficient to place the operation of a stateless vessel in the same category as genocide, war crimes, and torture.[132] The operation of a stateless vessel does not necessarily implicate humanitarian concerns, particularly not on a large scale. It does not, therefore, rise to the level of heinousness that has led the international community to subject other kinds of conduct to universal jurisdiction. If individuals are using stateless vessels for heinous ends, like slave trading, for example, it is that heinous conduct that nations should seek to ban,[133] not the use of a stateless vessel itself, which is often rightly considered a relatively minor infraction.

2. *Second Justification: Practical Challenges*

One could also make a pragmatic argument that universal jurisdiction is the only practical way to address the problem posed by stateless vessels. Although this argument may be more convincing than a justification based on heinousness, it too ultimately fails. Like pirates, stateless vessels operate outside of any nation's control.[134] Under the law of the flag, no state is competent to force unregistered vessels to comply with international regulations or other laws on the high seas. Because they are not subject to the jurisdiction of any nation, they can evade international regulations governing seaworthiness, the protection of the environment, shipping lanes, and labor,

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132. There has been some effort to determine which crimes should properly be categorized as universal. The 1996 Draft Code of Crimes Against the Peace and Security of Mankind, for example, proposed that genocide, crimes against humanity, and crimes against the United Nations should be subject to universal jurisdiction. *See* GAVOUNELI, *supra* note 11, at 24. Similarly, the International Law Association Committee on International Human Rights Law and Practice has found that genocide, crimes against humanity, war crimes, and torture are subject to universal jurisdiction. *Id.* at 24-25.

133. Some scholars believe slave trading is already a universal crime. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987); Jordan, *supra* note 110, at 12. *But see* GAVOUNELI, *supra* note 11, at 27-28 ("Interestingly enough and contrary to popular belief, neither slavery and slave related practices nor drug trafficking are covered by universal jurisdiction under the Law of the Sea Convention—or indeed under other instruments . . . .").

134. *See* discussion *supra* Section II.B.

among others. They are perhaps also more likely to be engaged in criminal behavior, like drug trafficking or human trafficking, because there is no state responsible for controlling them.

However, unlike piracy, the operation of a stateless vessel does not need to be a universal crime for the international community to combat this problem: less drastic measures are both possible and likely to be effective. For example, states could be allowed to stand in for the missing flag state in enforcing international regulations without making statelessness itself a universal crime. Although UNCLOS does not explicitly authorize nations to ensure that any vessel without nationality that they encounter complies with international standards, at least one scholar has argued that UNCLOS does allow states to do so.[135] Furthermore, if the international community is sufficiently concerned about unseaworthy or otherwise dangerous ships without nationality, states can agree to allow any nation to inspect stateless ships for seaworthiness or even to detain such ships until they validly register with a state.[136] Doing so would not criminalize the operation of a stateless ship, but it would allow states to take steps to prevent chaos on the high seas.

Furthermore, making the operation of a flagless ship a universal crime is not necessary to ensure that individuals who commit crimes aboard stateless vessels are prosecuted. In general, at least one state will be competent to prosecute such individuals under one of the currently accepted theories of criminal jurisdiction. If their actions rise to the level of piracy, for example, then they have already committed a universal crime. Furthermore, the state of any victim could prosecute them under the passive personality principle,[137] while under the territoriality principle any state could prosecute them for effects felt within the borders of that state.[138] Allowing states to prosecute individuals on board a stateless ship as long as there is some nexus to the state, as suggested by Churchill and Lowe,[139] therefore, would adequately address this concern.

Drug smuggling may be one of the main exceptions, making it unsurprising that the DTVIA grew out of the difficulties of prosecuting drug traffickers. Drug smugglers are difficult to detect, and states often struggle to prove that traffickers intended to bring the drugs to any particular country.[140] Nonetheless, if drug smuggling is really the problem, then perhaps the act of smuggling drugs, and not the operation of a stateless vessel, should be subject to universal jurisdiction. This position has already found support among some scholars and judges.[141]

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135. *See* UNCLOS, *supra* note 31, art. 110; *see also* Papastavridis, *supra* note 81, at 161 ("Notwithstanding these judicial opinions, on a stronger legal footing seems to be the contrary assertion, namely that, in general, the right to visit such vessels does not ipso facto entail the full extension of the jurisdictional powers of the boarding States.").

136. *See* Papastavridis, *supra* note 81, at 161-162.

137. *See* Blakesley & Stigall, *supra* note 15, 13-15.

138. *Id.*

139. CHURCHILL & LOWE, *supra* note 30, at 214.

140. *See* discussion *supra* Section III.A and Part IV.

141. *See, e.g.*, Geraghty, *supra* note 109 (arguing that drug trafficking should be a universal

Even the Congress that passed the DTVIA did not believe that operating a stateless vessel itself was particularly problematic. In passing the Act, Congress focused on the difficulties of prosecuting drug crimes, rather than on any particular danger posed by a vessel's statelessness. To the extent that legislators discussed statelessness, they did so to underscore the illicit nature of the vessels at issue, rather than to argue that operating a stateless vessel is inherently dangerous to U.S. interests. Representative Lungren, a sponsor of the bill in the House, for example, stated:

> [W]e're talking about stateless vessels that are built in the jungles of South America. They have no legitimate use. They . . . are designed to be rapidly scuttled. Their crews often will abandon and sink the vessels and contraband when detected by U.S. law enforcement . . . . According to the Coast Guard, when you scuttle a vessel and all of the evidence ends up at the bottom of the ocean, it makes prosecution difficult, if not, in most cases, impossible.[142]

Similarly, Representative Cohen, the floor manager during debate in the House, argued 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."[143] Congressmen argued that these vessels could be used to smuggle not only drugs, but also people and weapons of mass destruction.[144] These comments are strong evidence that it was other harms, rather than the statelessness of the vessels at issue, that the DTVIA was intended to reach.

B. *Making Statelessness a Universal Crime Would Have Troubling Ramifications For Other Areas of International Law*

Even if making the operation of a vessel without nationality a universal crime would address gaps in the law of the flag, doing so would have troubling interactions with other areas of international law. In dealing with individuals detained at sea, states must not only consider their obligations under the law of the sea, but also under various conventions and treaties that may interact with the law of the sea,[145] including the Refugee Convention, the Convention Against Torture, the European Convention on Human Rights, and the

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crime); Sorensen, *supra* note 128 (arguing that the community of nations may eventually respond to the threat presented by international drug trafficking by subjecting it to universal jurisdiction); *see also* United States v. Salcedo-Ibarra, No. 8:07-CR-49-T-27TGW, 2009 WL 1953399, at *3 (M.D. Fla. 2009) ("International drug trafficking, as proscribed by the MDLEA, is universally condemned as an offense against the "Law of Nations" and presents a specific threat to the security and societal well-being of the United States."); Jordan, *supra* note 110, at 29 n.160 (2000) (noting that some have argued that drug smuggling should be recognized as a crime subject to universal jurisdiction).

142. 124 CONG. REC. H7239 (daily ed. July 29, 2008) (statement of Rep. Lungren).

143. *Id.* at H7238 (statement of Rep. Cohen).

144. *Id.* at H7239 (statement of Rep. Lungren); *see also* Drug Trafficking Vessel Interdiction Act of 2008, § 101, 18 U.S.C.A. § 2285 (West 2011) ("Congress finds and declares that operating or embarking in a submersible vessel or semi-submersible vessel without nationality and on an international voyage is a serious international problem, facilitates transnational crime, including drug trafficking, and terrorism, and presents a specific threat to the safety of maritime navigation and the security of the United States.").

145. *See* Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1, 6 (2010).

International Covenant on Civil and Political Rights, among others.[146] One area of particular concern is refugee law.[147]

The non-refoulement principle forbids states from returning refugees to countries where they would face persecution.[148] This principle is especially relevant to the law of the sea because many refugees seek to escape by sea.[149] The relationship between the law of the sea and the law of refugees is complex. For example, some scholars argue that the Refugee Convention has no extraterritorial effect because it requires a refugee to arrive in a state.[150] A state, therefore, could turn away any potential refugees it encountered outside of its territorial sea. Others argue that a refugee need only be outside of his or her country of origin for the protections to apply, meaning that anyone "in a Protocol State Party's custody at sea may . . . not be returned to a place where they have a 'well-founded' fear of persecution."[151]

Making the operation of a stateless vessel a universal crime would only complicate matters further. Article 31 of the Refugee Convention, for example, forbids states from penalizing refugees who, "on account of their illegal entry or presence," "enter or are present in [the state's] territory without authorization."[152] Treating the use of a stateless vessel as a crime could allow states to circumvent this provision. Because many refugees are likely to arrive on stateless vessels, states could claim that they are not punishing the refugees' unauthorized presence, but rather their operation of a vehicle without nationality.

Furthermore, under the Refugee Convention, states that have "serious reasons" to believe that a would-be refugee has committed a "serious" non-political crime do not have to grant that person the Convention's protection.[153] States interpret the word "serious" differently.[154] While the European Council

146. *See* Guilfoyle, *supra* note 115, at 85.

147. This Note is not an in-depth exploration of refugee law. It seeks only to highlight one potential area in which classifying the operation of a vessel without nationality as a universal crime could intersect in troubling ways with other areas of international law.

148. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (stating that no party can "expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"); Convention Relating to the Status of Refugees, art. 3, July 28, 1951, 189 U.N.T.S. 150; Scott M. Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 7 IMMIGR. & NAT'LITY L. REV. 650, 650-51 (1983).

149. *See* Jon L. Jacobson, *At-Sea Interception of Alien Migrants: International Law Issues*, 28 WILLAMETTE L. REV. 811, 811 (1992).

150. *See, e.g.*, J.C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 301 (2005); Barbara Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, 30 FORDHAM INT'L L.J. 75, 93-94 (2006) (describing different points of view).

151. Guilfoyle, *supra* note 115, at 86; *see also* Miltner, *supra* note 150, at 93-94, 103 (discussing the scope of the non-refoulement requirement).

152. Guilfoyle, *supra* note 115, at 103.

153. Convention Relating to the Status of Refugees, *supra* note 148, art. 1(F).

154. Protection Policy and Legal Advice Section, Department of International Protection, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 INT'L J. REFUGEE L. 502, 514 (2003); *see also* European Council on Refugees and Exiles, *Position on Exclusion from Refugee Status*, 16 INT'L J. REFUGEE L. 257, 268 (2004) (stating that State practice has had "little consistency" in determining which crimes qualify as "serious").

on Refugees and Exiles, an alliance of seventy organizations founded to help refugees,[155] has recommended that serious crimes "usually involve crimes against physical integrity, life and liberty such as murder or robbery,"[156] some states instead consider formal criteria like the length of a potential sentence.[157] Universal crimes, however, could plausibly be characterized as serious by definition. As discussed above, acts become subject to universal jurisdiction because they are of universal concern, and the international community probably would not authorize the use of such an "extraordinary"[158] doctrine for minor offenses. Because many refugees who travel by sea do so in stateless vessels, making the use of a vessel without nationality a universal crime could transform a large number of refugees who have done nothing more than flee their country of origin into criminals. If the operation of a stateless vessel were to become a universal crime, then, under the Convention, states may believe that they can reject such refugees under the convention.[159]

VII. REASONS FOR CONCERN

The United States has not yet gone all the way towards treating the operation of a stateless vessel as if it were a universal crime. Because the DTVIA includes other significant elements, one could argue that it does not make the operation of a stateless vessel a crime in and of itself, let alone a universal crime, even if it does blur the line between treating the operation of a stateless vessel like a universal crime and using a vessel's statelessness as a basis for jurisdiction.[160] Nonetheless, in blurring the line between using a

155. EUROPEAN COUNCIL ON REFUGEES AND EXILES, http://www.ecre.org/about/this-is-ecre/in-a-nutshell.html (last visited May 4, 2012).

156. European Council on Refugees and Exiles, *supra* note 154, at 268.

157. *Id.*

158. Jordan, *supra* note 110, at 1.

159. It is important to note that the exclusionary provisions of Article 1(F)(b) only apply to serious crimes committed "outside the country of refuge." Convention Relating to the Status of Refugees, *supra* note 148, art. 1(F)(b). Therefore, it would be much less problematic if states criminalized the operation of a stateless vessel but could only exercise jurisdiction on one of the four other theories, since in that case the individual using the stateless vessel would either have to be the state's own citizen, in which case the individual would probably not be a refugee, or else within a state's territory, in which case the exception would not apply.

160. One could argue that the presence of other elements in the DTVIA means that it poses no danger of making the operation of a stateless vessel a universal crime. On this account, Congress is criminalizing multiple elements of a crime in combination—the operation of a stateless and submersible vessel, with the intent to evade detection, outside of any one state's territorial sea—which are unlikely to be innocent when found together. To be sure, this does not mean that Congress will ever criminalize the operation of a stateless vessel alone. An analogous scenario, for example, would be if Congress wanted to pass a law targeting people who attempted to send anthrax through the mail. Assume that Congress knows that people sending anthrax always use a particular kind of envelope and do not include a return address. Congress, therefore, decides to criminalize the act of using the mail to send that particular kind of envelope with no return address. One might argue that mailing the particular kind of envelope would be analogous to operating a submersible, and the lack of a return address would be analogous to the intent to evade detection. Although Congress might criminalize both elements together, this is not equivalent to criminalizing either element on its own.

However, the difference between the anthrax example and the DTVIA is that in the example there would be little incentive for Congress to criminalize a single element of the crime on its own—say, sending an envelope without a return address. Doing so would be a disproportional means of achieving the end of preventing the mailing of anthrax, and it would be an unnecessarily costly rule to enforce. By

vessel's statelessness as a means of obtaining prescriptive jurisdiction, and treating the operation of a stateless vessel as if it were a universal crime, the DTVIA opens the door to troubling expansion of the criminalization of the operation of stateless vessels. Other states may build on what the United States has started by passing laws that, unlike the DTVIA, do not have meaningful additional elements. If enough states do so with stateless vessels, the treatment of the operation of a stateless vessel as a universal crime could become customary international law. Conduct becomes a universal crime under customary international law because states gradually treat it as such or enter into a multilateral convention treating it as such. This prospect is particularly worrying given the rate at which states' claims of universal jurisdiction have been increasing.[161] Furthermore, if operating a stateless vessel were to become a universal crime, the potential harm would be significant.

In this Part, I demonstrate why the DTVIA should put courts, legislators, and scholars on notice that they need to pay close attention to states' laws dealing with stateless vessels to ensure that such laws do not effectively treat the operation of a stateless vessel like a universal crime. In Section VII.A, I show why stateless vessels' association with illicit conduct gives states an incentive to pass increasingly broad laws targeting stateless vessels; in Section VII.B, I explain why other states may copy the United States' actions in this area.

A. *Stateless Vessels' Association with Illicit Conduct Incentivizes States To Pass Broad Laws*

Stateless vessels are often, but not always, associated with illicit conduct, like drug trafficking and terrorism, that states view as dangerous. States therefore have an incentive to pass broad laws targeting stateless vessels to ease prosecution for the associated crimes. William Stuntz, for example, has argued that legislatures will often criminalize the indicia of criminality when the actual conduct that legislators want to target is difficult to prove:

> [A] given crime is defined by elements *ABC*; *A* and *B* are easy to prove, but *C* is much harder. Criminalizing *AB*, with the understanding that prosecutors will determine for themselves whether *C* is satisfied, raises the odds of conviction and reduces enforcement costs. The same result holds if the legislature creates new crime *DEF*, where those elements tend to follow *ABC* but are easier to establish in court. Or if the legislature creates new crimes *ABD*, *ABE*, and *ABF*,

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contrast, as will be discussed *infra*, members of the international community *do* have an incentive to isolate a single element of the DTVIA—the operation of a stateless vessel—and to treat it as a standalone universal crime. Thus, although neither the hypothetical Act banning anthrax in the mail nor the DTVIA criminalizes single elements of a multi-element crime, the DTVIA applies to a situation in which the state has an incentive to do so.

161. *See* REYDAMS, *supra* note 25, at 1 (noting that since 1994 "judicial authorities in almost a dozen countries have investigated and sometimes convicted non-nationals for crimes committed abroad against non-nationals" and that "[m]ore cases of 'universal jurisdiction' have been reported in the past decade [ending in 2003] than throughout the whole history of modern international law"). Reydams argues that the creation of *ad hoc* international tribunals in the former Yugoslavia and Rwanda to investigate human rights abuses formed the "catalyst" for increasing use of universal jurisdiction. *Id.* at 221. A few noteworthy (and controversial) cases include the Pinochet case and the Sharon case. *Id.* at 225-26.

again assuming elements *D*, *E*, and *F* correlate with *ABC*.[162]

This is exactly what happened with the passage of the DTVIA and the MDLEA before it. When prosecuting suspected drug traffickers for attempting to transport drugs into the United States became too difficult, Congress passed a law criminalizing the possession of drugs with intent to distribute by any individual on board a vessel subject to U.S. jurisdiction, regardless of where the drugs were headed.[163] Similarly, when prosecuting drug traffickers for any kind of drug trafficking became difficult, Congress criminalized the use of a submarine without nationality outside of any one state's territorial sea and with the intent to evade detection.[164] If the submarine requirement ever becomes difficult to prove, Congress could drop it also. Furthermore, Congress might also drop the submarine requirement if drug traffickers begin using many different types of stateless ships. Stateless vessels would still be associated with illicit conduct, but submarines would no longer be a good enough proxy. Congress, therefore, could target all stateless vessels, relying on prosecutors to prosecute only those individuals whom they would otherwise prosecute for drug trafficking. Similar changes in technology have already motivated some of the changes in U.S. drug laws, with the DTVIA responding to the increasing use of submarines.[165]

Legislators also broaden laws developed for a specific context when they seek to apply those laws to new contexts.[166] This possibility has two implications for the DTVIA. First, the context of drug trafficking itself is likely to change. As discussed *supra*, drug trafficking has grown greatly in scope and sophistication since the 1970s, and the United States has passed increasingly broader laws to deal with it.[167] Second, although the DTVIA was written to respond to drug trafficking, Congress may wish to target stateless vessels to combat other dangerous behaviors. When debating the DTVIA's passage, lawmakers stressed that stateless vessels could also be used by terrorists or illegal immigrants. Representative Lungren, for example, argued that "[a]lthough these new vessels are being used to evade detection and prosecution for drug trafficking, . . . [t]he potential that someone might seek to transport a weapon of mass destruction into the United States is further reason for concern and why we need an aggressive response,"[168] and Representative

162. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001).

163. *See* discussion *supra* Part III.

164. *See* discussion *supra* Section IV.A.

165. *See* discussion *supra* Parts III-IV.

166. For example, after September 11th, 2001, terrorism laws in the United States, the United Kingdom, and India "have been repurposed from one legislative context to another and broadened in application." Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 38 U. PA. J. INT'L L. 1, 2 (2011). In the United States, for example, the Patriot Act imported the definition of terrorism from the Foreign Intelligence Surveillance Act of 1978. *Id.* at 26. FISA was narrowly limited to intelligence gathering and specifically not to be used for criminal prosecution. The Patriot Act, however, adopted the definition for just that purpose. *Id.* Similarly, in the United Kingdom, a law specifically designed for fight the separatists in North Ireland was dramatically expanded to fight a new kind of terrorism after September 11th. *Id.* at 32.

167. *See* discussion *supra* Parts III-IV.

168. 124 CONG. REC. H7239 (daily ed. July 29, 2008) (statement of Rep. Lungren).

Poe stressed that this possibility was no "idle threat."[169] If there is a terrorist incident involving stateless vessels, states will likely rush to pass new laws that give law enforcement the tools they need to respond to the new threat, like states did after September 11th, 2001.[170] Because people are already concerned about the possible connection between stateless vessels and terrorism, such vessels could easily become the target of these new laws. There is therefore a risk that Congress could implement a broader version of the DTVIA targeting all stateless vessels to combat these other threats. This is particularly likely since legislators believe that stateless vessels "carry[ing] the flag of no country . . . have no legitimate use."[171]

The possibility that legislators will pass increasingly broader laws in the context of stateless vessels is particularly significant because legislators may not even realize that their actions are potentially problematic. They, like the Eleventh Circuit, could fail to recognize the dual role—both jurisdictional and substantive—that the statelessness of vessels is playing. Lawmakers, for example, could pass a law that criminalized using a stateless vessel for more than four hours, believing that the four-hour requirement removed the possibility of criminalizing short-term trips that are unlikely to pose any danger. They may believe that the law is simply using stateless vessels as a jurisdictional hook. Like the DTVIA, this law would have an additional element (the time requirement), but the combination of elements would not create a unique crime beyond merely operating a stateless vessel. In this case, a state would have implicitly treated the operation of a stateless vessel as a universal crime, without intending to do so. Moreover, the law would still apply to many innocent uses of stateless vessels, including uses by refugees.

B. *Proliferation of Laws Targeting Stateless Vessels*

In addition to states having incentives to broaden the laws they have already passed, once some states begin passing laws targeting stateless vessels, others are likely to follow suit. States often copy each other when one state's legislation seems particularly advantageous. Furthermore, once one state pushes the boundaries of international law, others are more likely to do the same. A good example of this trend is the proliferation of straight baselines for measuring the breadth of a state's territorial sea, contiguous zone, and exclusive economic zone. The extent of a coastal state's control over the adjacent waters is measured from a baseline that is normally formed by the "low-water line along the coast."[172] Under certain limited circumstances, states are permitted to draw straight baselines that increase the size of their territorial sea.[173] Treaty and customary international law theoretically constrain how and

169. *Id.* at H7240 (statement of Rep. Poe).

170. *See* Setty, *supra* note 166 (discussing how several states passed extraordinarily broad laws in the hurried atmosphere after September 11).

171. 154 CONG. REC. H10253 (daily ed. Sept. 27, 2008) (statement of Rep. Lungren).

172. UNCLOS, *supra* note 31, art. 5.

173. *Id.* art. 7(1).

when states can use straight baselines.[174] While the use of straight baselines is intended to be exceptional, however, their use has become quite common, with many states using them in unauthorized ways.[175] Thus, one scholar has concluded that the rules have been so abused that "it would now be possible to draw a straight baseline along any section of coast in the world and cite an existing straight baseline as precedent."[176] The more some states use straight baselines in impermissible ways, the more other states feel justified in doing so as well. Thus, in the case of stateless vessels, once one state passes a law criminalizing the operation of a stateless vessel that makes it easier for them to prosecute individuals whom they consider dangerous, others are likely to follow.

Furthermore, it is not unusual for states, both developing and developed, to model their own laws after those of the United States.[177] Other states, therefore, might enact their own drug laws modeled on the DTVIA, particularly if it proves effective in combatting drug smuggling or other perceived threats. Furthermore, when other countries that lack the United States' legal norms of due process and democracy enact broad laws, they can implement them in manners and contexts that the United States never imagined. Again, the United States' terrorism laws provide a good example. The USA PATRIOT Act of 2001[178] gives the U.S. government extensive powers to combat terrorism, including authorizing domestic surveillance and freezing assets. In passing these broad laws, Congress believes that it can rely on law enforcement officials not to abuse the power it gives them. This can raise problems, however, when other countries copy these laws. In adopting its own counter-terrorism law, El Salvador adopted the U.S. model.[179] El Salvador, however, has used the law not only to combat terrorists, but also as a tool to silence political dissenters.[180]

It is not difficult to see how a similar situation could occur with stateless vessels. As discussed *supra*, the United States is hardly the only state to assert jurisdiction over stateless vessels. At least England and Norway do so as well.[181] It would not be surprising, therefore, if other states followed suit.

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174. *See* Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. Rep. 116, 133 (Dec. 18); CHURCHILL & LOWE, *supra* note 30, at 35.

175. CHURCHILL & LOWE, *supra* note 30, at 38-39.

176. *Id.* at 40 (quoting J. R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 38 (1985)). For more information about the growing use of straight baselines, see generally Gayl S. Westerman & Michael Reisman, *Straight Baselines in International Law: A Call for Reconsideration*, 82 AM. SOC'Y INT'L L. PROC. 260 (1988).

177. *See, e.g.*, Stuart R. Cohn, *Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda*, 48 J. LEGAL EDUC. 101, 101 (1998); George Stephanov Georgieve, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971 (2007); Julia M. Metzger & Samuel L. Bufford, *Exporting United States Bankruptcy Law: The Hungarian Experience*, 21 CAL. BANKR. J. 153 (1993).

178. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

179. *See* Mirna Cardona, Note, *El Salvador: Repression in the Name of Anti-Terrorism*, 42 CORNELL INT'L L.J. 129, 130-31 (2009).

180. *Id.* at 131.

181. *See* discussion *supra* Section III.B. Italy does so as well. *See* Papastavridis, *supra* note 81,

Although one might argue that there is only a small probability that enough states will criminalize the operation of a stateless vessel for it to become customary international law, the magnitude of the harm that could result justifies taking steps now to ensure that it does not come about. These potential harms include the troubling interactions that such a legal development would have with refugee law, potentially removing international protections from a population that is already highly vulnerable.[182]

VIII. CONCLUSION

The DTVIA represents a potentially dangerous, although perhaps unwitting, step towards making the operation of a stateless vessel a universal crime. When hearing challenges to the DTVIA and any future law, therefore, U.S. courts should be careful to interpret Congress's ambiguous actions narrowly, in a way that does not result in the exercise of universal jurisdiction over the standalone act of operating a stateless vessel. If courts do not realize that the statelessness of the vessels is not playing merely a jurisdictional role, however, they may give ambiguous laws a dangerously broad interpretation. The Eleventh Circuit, therefore, should not have considered the DTVIA simply as a new application of the jurisdictional principles embodied in the MDLEA and earlier drug laws. Courts need to engage in careful analysis of laws that blur the line between using a vessel's statelessness as a basis for jurisdiction and making the operation of a stateless vessel a universal crime, adopting interpretations that do the former, and not the latter, whenever possible.

Moreover, in drafting laws applying to stateless vessels, legislators should be careful that they do not go too far, believing that they are simply using stateless vessels for jurisdictional purposes when they are actually acting as if they could make the operation of stateless vessels a universal crime. Lastly, international law scholars should be aware of the problem, so that they can identify instances where states have gone too far. Only by carefully imposing limits on the acceptable treatment of stateless vessels can the international community ensure that states do not act as if they can subject stateless vessels to universal jurisdiction. While vessels without nationality do threaten the public order on the high seas, making the operation of such vessels a universal crime is not the solution.

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at 160-61.

182. *See* discussion *supra* Part VI.