3-1-1992

Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War on Drugs"

D. Brian Boggess

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Criminal Law Commons, Food and Drug Law Commons, and the International Law Commons

Recommended Citation

Available at: https://digitalcommons.law.byu.edu/lawreview/vol1992/iss1/3

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
Exporting United States Drug Law: An Example of the International Legal Ramifications of the “War On Drugs”

I. INTRODUCTION

Any doubt regarding the Bush Administration’s commitment to its highly publicized “War on Drugs” disappeared on the night of December 19, 1989, as more than 20,000 American soldiers swarmed across Panama. The massive military effort was justified by a federal grand jury indictment against alleged drug trafficker and fugitive Panamanian strongman Manuel Noriega.\(^1\) The invasion, then the biggest U.S. military operation since Vietnam,\(^2\) raised a worldwide chorus of condemnation. Yet the Panamanian occupation is merely the latest drug-related step in a trend that dates back decades. One commentator has suggested that our country’s three largest exports are now “rock music, blue jeans, and United States law.”\(^3\) The extraterritorial enforcement of United States law has led to a plethora of practical and theoretical problems,\(^4\) not the least of

---

1. See George J. Church, Showing Muscle With the Invasion of Panama, a Bolder—and Riskier—Bush Foreign Policy Emerges, TIME, January 1, 1990, at 20. While there were certainly other considerations that led President Bush to take this action, one of the principle justifications voiced by the Administration was Noriega’s alleged involvement with Colombian drug lords and his outstanding indictment in the United States.
2. Id.
4. One problem facing the courts is the degree of constitutional protection afforded non-U.S. citizens concerning actions taken by the federal government outside the United States. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding the Fourth Amendment inapplicable to search and seizure by U.S. agents of property owned by a non-resident alien located in a foreign country).

One commentator has noted two practical problems being faced as a result of the extraterritorial enforcement of United States laws. He explains that:

In recent years, federal criminal prosecutions, like so much contemporary civil litigation, have become increasingly complex and frequently dependent upon evidence gathered outside the United States. . .

. . . Certainly the legacy of the Warren Court was one emphasizing, defining and, perhaps, inventing defendant’s rights. Many of those legislatively and judicially mandated protections were doubtless necessary. Their
which is the potential violation of international law by adminis-
trative agencies anxious to enforce their portion of the domestic
criminal code.\textsuperscript{5} Indeed, as one commentator explains, "the drug
war is one of great political complexity fought on many
fronts.\textsuperscript{6}

This comment examines some of the international rami-
fications of United States extraterritorial criminal law en-
forcement. Part II sets forth the international law of drug en-
forcement as codified in multinational treaties and solidified by a
United Nations convention. Part III recounts the history of the
so-called "Drug War" currently being waged by the United
States and summarizes the current focus of federal drug en-
forcement efforts. Part IV examines an example of conflict be-
tween United States drug policy and international law by dis-
cussing recent legislative efforts to expand the Coast Guard's
jurisdiction over stateless vessels on the high seas. Part V
addresses the practical, diplomatic, and philosophical problems
posed by the United States’ ever-expanding criminal law en-
forcement presence in foreign countries and at sea. This com-
ment concludes that the international drug war cannot be won
until domestic demand for drugs decreases.

II. THE INTERNATIONAL LAW OF DRUG ENFORCEMENT

Efforts to suppress non-medical narcotics usage and traf-
ficking are not confined to the United States. Several interna-
tional conventions sought to curtail illegal drug traffic through
treaties and agreements in the first half of the twentieth cen-
tury.\textsuperscript{7} Despite isolationist pressure, the United States became

\textsuperscript{5} S. Cass Weiland, Congress and the Transnational Crime Problem, 20 INT'L LAW.
1025, 1025-34 (1986).

\textsuperscript{6} This problem is not a new one. See, e.g., George Schwarzenberger, The
Problem of an International Criminal Law, 3 CURRENT LEGAL PROBS. 263 (1950)
(setting forth the problems of extraterritorial enforcement of domestic laws in the
first half of the twentieth century).

\textsuperscript{7} Neil Darbyshire, The World War on Drugs, THE DAILY TELEGRAPH, Jan. 11,
1990, at 17.

\textsuperscript{7} Some of these early treaties include the following: 1) International Opium
Convention, Jan. 23, 1912, 38 Stat. 1912, T.S. 612; 2) Agreement Concerning the
Manufacture of, Internal Trade in and Use of Prepared Opium, Feb. 11, 1925, 61
a party to three of the multinational conventions: The Hague International Opium Convention,8 the Geneva Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs,9 and the Lake Success Protocol.10 The most important issue facing these conventions seems to have been reaching an agreement on a suitable definition of "illicit narcotics" so that the worldwide control effort could be unified. However, diverse religious customs and usage traditions presented a situation where one nation's menace was another nation's pastime.11 This created problems for any concerted effort to curtail drug production and trafficking and prevented the conventions from producing an effective international drug enforcement treaty.

Due to the ineffectiveness and lack of focus of these early treaties, the United Nations held a 1961 conference "For the Adoption of a Single Convention on Narcotic Drugs" (Single Convention).12 The Single Convention, which recognized "that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,"13 is generally regarded as the present-day international law of drug enforcement.14 The United States was both a major instigator and a signatory to both the Single Convention and the Geneva Protocol of 1972, which added slight

---

11. Diversity of custom with regard to controlled substances can even be found within the United States. See Employment Div., Dep't of Human Resources v. Smith, 110 S.Ct. 1595 (1990) (case deals with the sacramental use of peyote by Native Americans in contravention of a criminal prohibition on the use of the hallucinogenic).
13. Id. at 1409.
14. There are, of course, other rules of international law that touch upon extraterritorial police activity. Some of these, such as the Law of the Sea, will be treated below.
The greatest success of the Single Convention is its widely accepted list of controlled or controllable substance definitions. Based upon this substance list, the Single Convention requires each party nation to furnish annual necessity estimates for expected medicinal, religious, and scientific use for each controlled narcotic.

The thrust of the Single Convention is individual sovereign responsibility. The substantive provisions essentially commit party nations to unilaterally stop the illegal manufacture, importation, and use of drugs within their own territories. Thus, by setting controls and by encouraging each nation to make educated estimates on its medicinal and scientific drug needs, the Single Convention attempts to fight drug smuggling on a manageable, national level.

However, because the international community assumed that party nations would accept their individual responsibilities in good faith, no provision of the Single Convention authorizes or prohibits international enforcement or extraterritorial police action by any nation or by the United Nations collectively. In light of this fact, United States anti-drug efforts have veered toward extraterritorial enforcement.

---

15. As of January 1, 1990, the following Western Hemisphere nations were parties to the 1972 Geneva Protocol amending the single convention on narcotic drugs: Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Ecuador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, St. Lucia, St. Vincent & the Grenadines, Trinidad & Tobago, United States, Uruguay and Venezuela. El Salvador is a party to the Protocol, but not the Single Convention. TREATIES IN FORCE, U.S. DEP'T OF STATE, 351-52 (1990).

16. Schedule I lists 78 drugs that are completely subject to all controlling sections of the Single Convention. Schedule II lists another 7 substances that are more readily medicinal and are therefore less controlled. Single Convention, 18 U.S.T. at 1559-61.

The listings of controlled substances set forth in the Single Convention were subsequently amended by the 1972 Geneva Protocol, supra note 12, which reaffirms the substantive provisions of the earlier agreement.

17. Among the internationally illegal drugs specified in the Single Convention’s provisions are: opium, coca and its progeny (cocaine, crack, etc.), and cannabis. Single Convention, 18 U.S.T. at 1419-21. The Convention also obliges all parties to “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of [the listed] drugs.” Id. at 1413.

18. Article 31 provides that: “The Parties shall not knowingly permit the export of drugs to any country or territory except: (a) In accordance with the laws and regulations of that country or territory; and (b) Within the limits of the total of the estimates for that country or territory as defined [by the country].” Id. at 1422.
III. THE UNITED STATES DRUG WAR

Despite the publicity and political rhetoric, the Reagan-Bush "War on Drugs" is nothing new. President Richard Nixon predated the current emotional battle by declaring a drug war of his own. In addition, Presidents Jimmy Carter and Gerald Ford both directed substantial efforts to curtail the flow of drugs into the United States.

A. History of United States Drug Enforcement Efforts

Federal government suppression of illicit narcotics in the United States actually dates back to the registration and revenue provisions of the Harrison Narcotics Act of 1914 (Harrison Act). The Harrison Act regulated the sale and use of narcotics, such as opium and cocaine, by taxing their consumption and importation. Heightened fears of the harmful effects of narcotics led to increasingly stringent amendments to the Harrison Act, as well as the passage of other, more restrictive measures. By the mid 1920s, "there was no legal source of cocaine [or other opiate narcotics] in the United States for non-surgical use."

The federal government continued to fight the consumption of drugs, but found that large quantities were being imported into the United States from other nations. Because of this troubling trend, the United States subscribed to several of the early multinational conventions. The United States was one of the major instigators of the Single Convention, and U.S. drug enforcement officials eagerly anticipated international consensus on the drug problem.

However, it soon became apparent to United States officials that the Single Convention did not provide the weaponry necessary to wage an international drug war. The ideal behind the Single Convention is that each nation wage the drug war within its own borders. This unilateral control approach fal-

22. Id. at 1313.
23. See supra note 7 and accompanying text.
24. See supra notes 11-20 and accompanying text.
tered because drug suppression was apparently a much higher priority in the U.S. than in the other Single Convention nations. Particularly discouraging to United States' efforts was the lack of enforcement in those developing countries that supply the majority of illicit narcotics. Despite the signatory promises of these "producer" nations to reduce drug trafficking, illegal narcotics smuggling continued to increase worldwide.

To combat this trend, the United States entered into a number of criminal enforcement treaties with other nations. These bilateral treaties typically include provisions for the extradition to the U.S. of accused criminals in the custody of party nations. Although these treaties had many other useful purposes besides the fight to curtail drug trafficking, the narcotics control value of such treaties was appreciated by federal government officials. Even with the extradition treaties in place, however, "the obstacles to effective suppression of [illicit drugs] at the source seem[ed] as insuperable as the barriers to enforcement within the United States."

One of the major offensives in President Nixon's drug war was the formation of a new agency to deal with the narcotics problem. The Drug Enforcement Administration (DEA), the principle drug enforcement agency of the federal government, was created in 1973. DEA's mission is principally to wage
the drug war at home and abroad through information gathering, surveillance, procuring evidence, and actual enforcement of United States drug laws.30

**B. Recent Drug Enforcement Efforts and Current Focus**

The current overseas control policy of the United States operates within a framework of foreign assistance legislation,

---

that this freedom often causes the two organizations to cross jurisdictions. For an extended history of DEA function delegation, see id.

30. DEA activities in the United States are very similar to those of the FBI. DEA extraterritorial activities, however, are markedly different from those undertaken by any previous organization. DEA has described its international assistance activities as follows:

A. Criminal drug information collection and exchange directly support intelligence production and prosecution of defendants in the United States and the host countries. These efforts include:

- Development of sources of information knowledgeable of illicit cultivation, production, and transportation activities.
- Undercover penetration of trafficking organizations in support of host country operations.
- Surveillance assistance and development of evidence against major traffickers of drugs destined for the United States.
- Provide host countries with information for effective enforcement programs.
- Participation with foreign officers in pursuing investigative leads.
- Coordination of matters regarding extraditions, expulsions, joint prosecutions and requests for judicial assistance.
- Acquisition and transmittal to the United States of drug samples supplied by foreign government officers for laboratory analyses to determine the origin of drugs destined for the United States.

B. Traditional drug intelligence activities conducted overseas concurrently with the foregoing involve the identification and dissemination of information collection requirements, collection against these requirements by special agents, initiation of Special Field Intelligence programs, analytical research processing, and the production and dissemination of tactical/operational and strategic foreign intelligence.

C. Liaison, which is central to the DEA foreign mission includes visits, briefings, exchanges and contacts with foreign law enforcement officials to encourage cooperation and development of effective host country drug enforcement capability and commitment.

D. DEA conducts a variety of international training programs which are funded by the Department of State, Bureau of International Narcotic Matters: Five-week Advanced International Drug Enforcement schools, two-week in-country training schools, two to four week executive observation programs, instructor training programs, intelligence collection and analysis schools, three-week forensic chemist seminars, and sponsor the International Drug Enforcement Officers Association Conferences.

international law, and the above-mentioned bilateral agreements with narcotic producing countries. The various organizations fighting the influx of drugs have repeatedly stated that crop control is the "first priority." This philosophy has led to "intensified programs intended to suppress the drug at its source by destroying illegal coca plants" and encouraging the development of substitute crops. Congress has appropriated billions of dollars in economic and military aid to this effort, using such aid as an incentive for the cooperation of the financially struggling Latin American countries that contribute most heavily to the production of drugs.

During recent episodes of the drug conflict, "war" has become the most appropriate designation. While only the Coast Guard participated in the enforcement of drug laws abroad throughout the 1970s, military force became a more viable and usable option to the Reagan and Bush Administrations. The military branches participated in a series of jungle strikes against Bolivian drug manufacturers in 1986. The Coast Guard's role and jurisdiction have also expanded.

The use of military force by nations to suppress the importation of narcotics is international in scope. As one newspaper recently reported:

With the Royal Navy on cocaine patrol in the Caribbean, SAS and American military advisers assisting enforcement agencies from the jungles of Peru to the mountains of the northwest frontier, and [the 20,000-plus] regular U.S. troops formerly occupying Panama, anti-drug measures have been elevated from disparate local policing actions to a series of major military actions. Even satellites and the latest Star Wars technology are used to spot illicit crops.

The drug barons have responded to this concerted attack on their power base with military offensives of their own.

---

31. Wisotsky, supra note 21, at 1335.
33. Wisotsky, supra note 21, at 1335.
34. See infra notes 87-89 and accompanying text.
36. Darbyshire, supra note 6, at 17.
37. Id. The report continues,
Somewhere in this expansion of extraterritorial police activity, United States policy was bound to confront the restraining principles of customary international law. One of the areas in which U.S. policy apparently conflicts with international law is in the exercise of jurisdiction over stateless vessels.

IV. EXPANDING UNITED STATES JURISDICTION OVER STATELESS VESSELS

A major emphasis of the Nixon Administration's drug war was to increase the Coast Guard's participation in the enforcement effort. The Coast Guard continues to be a major player in the drug crackdown today. Because this participation often involves enforcement activity on the high seas, basic principles of international jurisdiction are involved.38

The central conflict is between the long-standing notion that vessels are free to navigate the waters of the high seas, and the equally compelling duty of nations to protect citizens from evils that may lurk beyond territorial boundaries. In this sense, the struggle over the United States' drug enforcement policy on the high seas captures the essence of the tension between domestic and international law.

A. General Jurisdictional Principles

Professor Henkin has summed up the law of the sea, writing that "[f]or hundreds of years the basic principle of the law of the seas has been freedom. With it—or beneath it—has been the principle that the sea belonged to everyone, or to no one."39


In Colombia the heavily armed cocaine cartel made an audacious declaration of war on the Government. In Peru, Burma and Sri Lanka the barons have linked with guerrilla armies fighting to overthrow the governments. In Afghanistan the opium fields are protected by local warlords, once supplied with arms by the U.S. In Lebanon and other Middle Eastern countries, drug money is a major contributor to the war effort—in Laos heroin smuggling is government policy.

Id.

38. The questions presented are basic to the concept of international law, and the philosophical side of these questions is considered below. See infra notes 84-92 and accompanying text.

(“Convention”) echoes this sentiment by stating that “[t]he high seas [are] open to all nations,” and “no State may validly purport to subject any part of them to its sovereignty.” The codification of this principle by the Convention has been ratified and signed by the United States.\(^4\)

Despite this far-reaching principle, nations occasionally extend their jurisdiction beyond their borders. In *Rivard v. United States*,\(^2\) the Fifth Circuit announced the following five basic international principles upon which nations traditionally assert extraterritorial criminal jurisdiction: (1) the passive personality principle, (2) the nationality principle, (3) the universality principle, (4) the territoriality principle, and (5) the protective principle.\(^3\) Based upon one or more of these principles, nations justify extending their jurisdiction over individuals beyond national boundaries and the normal reach of domestic law enforcement.

The “passive personality principle” provides for jurisdiction when the victim of a crime is a state citizen.\(^4\) This jurisdictional basis recognizes the interest nations have in protecting

---


Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

1) Freedom of navigation;
2) Freedom of fishing;
3) Freedom to lay submarine cables and pipelines;
4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

*Id.*

41. Despite the Convention’s universal language, courts in the United States have held that its provisions do not apply to everyone. In *United States v. Monroy*, 614 F.2d 61 (5th Cir. 1980), the Fifth Circuit held that where a vessel was determined to be registered in a country which had not signed the Convention on the High Seas (in this case Panama), neither the defendants boarded and arrested by the Coast Guard nor the Republic of Panama could raise restrictions of the treaty on the exercise of jurisdiction over foreign vessels on the high seas as a bar to prosecution. See generally Andrew W. Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323 (1982).

42. 375 F.2d 882 (5th Cir. 1967).

43. *Id.* at 885.

their citizens throughout the world. While the U.S. could stretch this doctrine to justify extraterritorial police activity by classifying the victims of drug trafficking as U.S. citizens, passive personality is not currently recognized by the United States.

The "nationality principle" provides for jurisdiction when the perpetrator of the crime is a citizen of that nation. While states may not normally make arrests within the territory of another state, arrests made on the high seas based upon this principle are generally considered legal. This principle theoretically aids the prosecution of U.S. citizens overseas, but by definition does not justify the arrest of aliens outside United States territory.

The "universality principle" gives a nation jurisdiction when the criminal offender is within the custody of that nation, wherever the crime took place. Port countries generally avail themselves of this category. The theory is that the port country is in a better position to enforce its criminal laws than another entity. Universally condemned crimes, regardless of the crime locale, may be punished by any nation if that state has custody of the offender. Should the United States adopt this jurisdictional theory, an argument could be made that drug trafficking is a "universally condemned crime" under the Single Convention of 1961.

The "territoriality principle" extends jurisdiction when the criminal act either takes place within the territory of a given country, or when the effects of the act harm that country. United States courts have cited this theory as a major justification of extraterritorial jurisdiction over drug smugglers on the high seas and elsewhere. The reasoning may stem from federal criminal legislation that defines drug usage and trafficking as "a specific threat to the security and societal well-

45. Id. at 220.
46. Id. at 221.
47. Id. at 222.
48. Id.
49. See supra note 12 and accompanying text.
50. Rivard v. United States, 375 F.2d 882, 885-86 (5th Cir.); Clark, supra note 44, at 220.
51. See, e.g., United States v. Postal, 589 F.2d 862 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), overruled on other grounds, United States v. William, 617 F.2d 1063 (5th Cir. 1980) (en banc).
being of the United States." As such a threat, international enforcement is supposedly justified.

Finally, the "protective principle" gives a jurisdictional basis to laws enacted by a nation that prohibit extraterritorial acts that either threaten that nation's security or somehow interfere with a government's proper functioning. The concept is that actions which threaten sovereignty or security may be punished by the threatened state. It is possible that mere semantic shifting (for example, codification of the perceived "threat") may invoke the protective principle. By using the words "specific threat to the security" of the United States, the Maritime Drug Law Enforcement Act effectively accomplishes this.

B. The Stateless Vessel Problem

Due largely to the Nixon, Ford and Carter Administrations' increased monetary commitment to the war on drugs, the Coast Guard used its extra equipment and manpower to become more effective in apprehending traffickers during the 1970s. Unfortunately, the fruit of this heightened activity was negated by technical legal factors. One commentator summed up this period of the drug war by noting that

[as] the Coast Guard became more and more proficient at intercepting smugglers by stationing vessels at the 'choke points' in the Caribbean, the tide had turned against the Federal prosecutors in the courtroom. While the Coast Guard was beginning to win the 'Drug War' on the high seas, the lack of adequate legal weapons was turning the prosecutorial fight into a rout.

One of the thorns in the side of United States drug enforcement efforts is the use of stateless vessels by drug smugglers. Traffickers often "risk not registering their ships or flying any convenient flag to elude detection" and frustrate prosecution. Beginning in the 1970s, marijuana smugglers employed a distribution technique known affectionately as the "mother ship"

53. Clark, supra note 44, at 221-22.
55. Anderson, supra note 41, at 326.
method:

[A] large ship, typically a converted fishing vessel, meets smaller powerboats . . . at a designated point in waters off the United States coast. Even fully loaded, the powerboats can outrace the vessels in the Coast Guard fleet. The mother ship may cruise or simply float in international water until its cargo is delivered. Though often unregistered, or registered in a different country than indicated, the mother ship is made to appear properly identified to take advantage of the principle of undisturbed navigation on the high seas. Unless the Coast Guard follows internationally accepted practice, its seizure of a foreign ship in international waters violates the most fundamental rule underlying freedom of the seas, that no nation may assert sovereignty over the high seas.\(^{57}\)

This method is still used today as a major trafficking device, and drug smugglers continue to raise violations of international law as a defense when apprehended on the high seas. In particular, they argue that freedom of navigation is a fundamental right, respected by all nations and dating to antiquity; during most of the 1970s, United States courts agreed.\(^{58}\) Thus, the problem of stateless vessels escaping criminal responsibility plagued drug enforcement efforts until Congress took steps to eradicate the problem.

C. The Congressional Response

Generally, the Coast Guard defines its jurisdiction precisely as ordered by either the President, as Commander in Chief, or Congress, under the common defense and general welfare power. Several recent bills manifest congressional intent to toughen maritime drug laws and ultimately expand the reach of the Coast Guard and other drug enforcement agencies. One such bill was the Comprehensive Drug Abuse and Control Act of 1970 ("Comprehensive Act"),\(^{59}\) which repealed the prior hodgepodge of criminal drug legislation and "consolidated all Federal law in the area into one act."\(^{60}\)

This consolidation created a major problem for the Coast Guard. Due to congressional oversight, all laws regarding pos-

57. Id.
58. See Anderson, supra note 41, at 324-26.
60. Anderson, supra note 41, at 324.
session of illegal drugs aboard U.S. vessels on the high seas had been repealed by the Comprehensive Act without being subsequently replaced.61 Under federal drug enforcement statutes valid shortly after passage of the Comprehensive Act, drug smugglers apprehended on the high seas could only be charged with "consspiracy to import drugs into the United States."62 However, because this change requires proof of intent, it was difficult for federal prosecutors to prove their cases.63

An equally difficult problem was that of asserting United States jurisdiction over foreign nationals aboard foreign vessels.64 Although such arrests on the high seas were seemingly within several general principles of extraterritorial criminal jurisdiction,65 United States courts often dismissed charges against foreign smugglers. Noting a general distinction between arrests made within United States territory, and those made on the high seas, many courts typically premised the dismissals on the notion that Congress had not expressly justified the expansion of jurisdiction beyond U.S. territorial waters.66 Low conviction rates on high seas arrests had a chilling effect on drug prosecutions. For example, difficulty of conviction forced the United States Attorney's Office to decline prosecution in almost fifty percent of the seizures made by the Coast Guard during the period between September 1, 1976 and March 28, 1979.67

Congress finally remedied the situation by amending the

61. Id.
62. Id.
63. A good example of this problem is the case of the Panamanian freighter Don Emilio, which was found to be hovering just outside United States waters with 70,000 pounds of marijuana on board, but prosecution was declined for lack of proof of the intent of the 24 crew members to introduce the marijuana into the United States. Anderson, supra note 41, at 325 (citing Hearings on H.R. 2538 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Congress, 1st Sess. 64) (statement of Michael P. Sullivan, Assistant United States Attorney, Chief, Criminal Division, Southern District of Florida).
64. Id.
65. In particular, the territoriality and protective principles could be applied. See supra notes 41-53 and accompanying text (discussing principles of extraterritorial criminal jurisdiction).
66. Anderson, supra note 41, at 325.
67. See id. at 326 (citing Hearings on H.R. 2538 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess 65 (1979) (statement of Michael P. Sullivan, Assistant United States Attorney, Chief, Criminal Division, Southern District of Florida)).
Comprehensive Act in 1980. A new section explicitly prohibited "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 possess with intent to manufacture or distribute, a controlled substance." The same restrictions applied to any United States citizen on board any vessel.

Congress further expanded the Coast Guard's high seas reaching power by proclaiming that a "[v]essel subject to the jurisdiction of the United States' includes a vessel without nationality or a vessel assimilated to a vessel without nationality . . . ." This definition could be easily criticized as an unreasonable expansion of United States influence and as violative of the long-standing principle of freedom of navigation.

Congress subsequently repealed section 955a, and then in 1986 replaced it with a provision that asserts even more jurisdiction over the high seas. As mentioned above, the Maritime Drug Enforcement Act (MDEA) declared that "trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned," and that it "presents a specific threat to the security and societal well-being of the United States."

Official federal government entities realize that the present MDEA may violate international law. The State Department has cited the United Nations Convention of the High Seas and specifically noted the potential international ramifications, but nevertheless endorsed the MDEA. It advised that

under international law a country may not assert jurisdiction over a vessel of another country sailing on the high seas except in rare circumstances . . . . There is also an exception which allows us to board a vessel on the high seas which is without nationality, that is one which is not registered in a foreign state or which can be assimilated to a vessel without nationality under paragraph 2 of article 6 of the Convention on the High Seas . . . .

While ordinarily the United States does not favor a unilateral extension of jurisdiction by the United States over the

69. Id. § 955a(a) (1982).
70. Id. § 955a(b) (1982).
71. Id. § 955b(d) (1982).
72. See supra note 55 and accompanying text.
activities of non-U.S. citizens on board stateless vessels without proof of some connection to the United States, the serious nature of this problem, and the fact that persons on board these stateless vessels are engaged in narcotics trafficking aimed at the United States, warrant an extension in this particular case. . . . The Department of State strongly supports the intent of [this Act].

The United States continues to assert jurisdiction over stateless vessels on the high seas when those vessels appear to be involved in illegal activities.

D. Explaining United States Policy and Actions

Courts and official agencies have given a number of seemingly valid justifications for the expansion of jurisdiction. As noted above, two internationally recognized bases of extraterritorial jurisdiction (the territoriality and protective principles) revolve around the definition of "threat" to either sovereignty or security. The territorality principle justifies jurisdiction based upon foreign activities having potential effects within a state, while the protective principle justifies actions to eradicate definite, specific threats to the state. Governments are clearly entitled to define what they consider "a threat" and to

74. Anderson, supra note 41, at 334 (citing Hearings on H.R. 2583 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Congress, 1st Sess. 55-56 (1979) (statement of Morris D. Busby, Director, Office of Ocean Affairs, OES Bureau, Department of State). The "rare circumstances" contemplated by the State Department here are those listed in Article 22 of the Convention on the High Seas, which provides, in relevant portion, that:

1. . . . [A] warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
   (a) That the ship is engaged in piracy; or
   (b) That the ship is engaged in the slave trade; or
   (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the [above situations], the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.


75. See supra notes 48-52 and accompanying text.
protect themselves against the menace, so long as the protective actions do not violate the sovereignty of other nations.

Similarly, customary international law has adapted to protect the maritime rights of all nations. As one commentator has observed, "[t]he high seas are not res nullius, subject to the jurisdiction of no nation, but res communis, subject to the common jurisdiction of all nations." This spirit of mutual protection has spawned the custom of vessel registration.

It has long been established "that the only conclusive evidence of the nationality of a vessel is found in the documents required by international law and custom to be furnished by the flag state and carried aboard the vessel." One scholar has noted that a vessel's documentation by the issuance of appropriate papers establishing her true nationality "is older than international law itself and extends back before the era of the Romans." All maritime nations presently require some kind of vessel registration. The current adoption of this ancient principle is embodied in Article 6 of the United Nations Convention on the High Seas.

Registration of ships serves many purposes: safety control over each nation's fleet, state protection of individual vessels and sailors, identification for communication between ships, and organization for the various requirements of the general maritime law and any civil claims that may arise on the sea. Perhaps the most important reason is that the order of the seas depends upon registration. One article notes the necessity of strict adherence to this practice:

Every ship is required to have a national character and scant protection is afforded to ships which have no nationality . . . .

76. Anderson, supra note 41, at 336.
77. Id. at 339.
78. Rienow, The Test of the Nationality of a Merchant Vessel, 155 (1937).
79. Id.
1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas . . . .
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Id.
So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimal order upon the high seas . . . that extraordinary deprivational measures are permitted with respect to stateless ships. Thus, it is commonly considered that ships either having no nationality or falsely assuming a nationality are almost completely without protection. 81

Legislative actions that expand jurisdiction over stateless vessels on the high seas actually follow a principle of American jurisprudence. In United States v. Cortes, 82 the Fifth Circuit seemed to agree with the above quoted passage and said that "[s]tateless vessels are not entitled to the same protection afforded vessels registered in a foreign nation which is a signatory of the [High Seas] Convention." 83

This distinction between the rights afforded registered vessels and the rights of stateless vessels, although widely accepted, is hardly universal. Many critics argue that jurisdiction over stateless vessels on the high seas is "inimical to the exercise of freedom of the seas by United States commercial vessels and threatens the country's security and governmental functions." 84

An argument could be made that freedom of navigation is an individual rather than a national right, and that mariners who choose to sail without the protections and conveniences of a home port should be allowed to do so without harassment. While convincing from an individual right's standpoint, this argument appears to have been soundly rejected by the international community. "Although . . . it is an acknowledged violation of international law for one nation to enforce its law within the sovereign territory of another nation without permission, the wrong is one under international and not domestic law." 85 A person arrested under such circumstances cannot raise the defense when brought before U.S. courts. The action arguably violates the sovereign integrity and jurisdiction of the foreign

82. 588 F.2d 106 (5th Cir. 1979).
83. Id. at 110. The Seventh Circuit followed the same rationale and reached a similar result. See United States v. Rubies, 612 F.2d 397 (7th Cir. 1979).
84. Anderson, supra note 41, at 338.
85. Id. at 329.
nation and the defense is for that nation to raise.\textsuperscript{86} Similarly, freedom of navigation over the high seas is generally considered a right granted to all nations, which then funnel the right to individual citizens upon any condition set by the sovereign.

From a practical standpoint, rejection of the "individual freedom of navigation" argument reflects the wisdom of the ages. The principal beneficiaries of this "right," if acknowledged, would be those likely to be involved in piracy, drug trafficking or other maritime mischief. The widespread international custom of vessel registration poses quite an inconvenience to such persons.

Thus, we may conclude from the authorities and international treaty law that expanding jurisdiction over stateless vessels on the high seas is a legally acceptable leap for the United States to make. Problems with jurisdiction over stateless vessels is just one legal problem facing prosecutors of the drug war. Other problems include dual criminality and R.I.C.O. issues that the courts are still attempting to resolve. Beyond the legal questions loom other problems that must be recognized and dealt with.

V. PROBLEMS WITH THE EXTRATERRITORIAL WAR ON DRUGS

Despite seemingly spectacular successes, manifested through increased confiscation tonnage and arrest rates, the drug war in South America is not going well.\textsuperscript{87} There are practical, diplomatic, and philosophical problems that need to be addressed in any honest appraisal of the drug war.

A. Practical Problems

Critics of the drug war point at discouraging statistics and argue that we are waging an international war that cannot be won. "We are not so much fighting a war as weeding a garden," one experienced Customs officer explained in a recent newspaper article. "At least in a war," he continued, "the enemy can be killed. With drugs, it seems that no sooner have you knocked out one opponent than another one steps up to take his place."\textsuperscript{88}

\textsuperscript{86} Id.
\textsuperscript{88} Darbyshire, \textit{supra} note 6, at 17.
The war is often painted as a vast chess game with multi-billion dollar consequences. "The dramatic expansion in the size of the black market," writes one commentator, "demonstrates the inability of domestic law enforcement agencies to suppress the importation of [illicit narcotics] into the United States." For every law enforcement move there is a smuggling countermove. Smugglers often respond to Customs actions "by using counter-intelligence, decoy shipments, and such disinformation as false 'tips'."

Another problem in this age of deficit-consciousness is the price tag of the drug war. President Bush's recent campaign to stop cocaine at its source includes $2 billion in economic aid to Peru, Bolivia and Colombia over four years. In addition, the plan includes $261 million in aid mainly to the military and police in those countries. This policy of discouraging drug production may eventually produce some desired results. However, the consensus among critics is that the plan is a financial disaster. To these economic aid "incentives" we must add the price of military advisers and combat personnel used in many drug enforcement operations. Similarly, the frightening and costly increase in federal and state court docket congestion directly results from the recent escalation of drug prosecutions. The cost in time, judicial resources, and money for the courthouse machinery can be immense. Needless to say, the drug war is not without its disadvantages. Some of these costs enter into our diplomatic relations.

89. Wisotsky, supra note 21, at 1334-35.  
90. Id. at 1350.  
91. Treaster, supra note 87, at 1, col. 1.  
92. Professor Wisotsky writes that:  

In the very long term, of course, it is possible that the development of a modern socioeconomic infrastructure will transform the conditions of life in Andean Peru and Bolivia and thereby facilitate the control of coca and cocaine production. Failing such a transformation, however, neither the United States nor the source countries can achieve significant limitations on the supply of coca for cocaine without resorting to some radical or violent technical "fix" such as military occupation of the coca-growing regions. Even then, it is doubtful whether the weak governments involved have the political and economic power to sustain such repression over the long term.

Wisotsky, supra note 21, at 1347.  
B. Diplomatic Problems

The drug war is responsible for furthering the diplomatic woes of the United States in its relations with developing countries. Particularly with the nations of Central and South America, the drug war is often viewed as yet another attempt by the coloso del norte to impose its will upon the sovereignty and dignity of its neighbor nations. For example, the attack on Panama successfully felled Noriega but alienated Peru, a far more important player in the drug picture.94

Even among our South American "drug allies" there is great dissent. It is becoming increasingly clear that for the Andean nations, cutting cocaine production and exports is by no means their number one priority.95 Few analysts realistically believe that these nations have the manpower, equipment or desire to wage war on their own citizens who often depend on coca and marijuana crops as their sole economic subsistence.96 While we cannot win the drug war alone, South and Central American nations are unwilling to win it for us.

C. Philosophical Problems

Back in 1950, one commentator observed that international law is, by definition, dependent upon the whims of popular political ideologies.97 This holds true today. It has been argued that because the premises are always changing, international law is viewed as an ineffective tool to deal with the problems of nations.98

94. Citing disapproval of the United States military action, Peru pulled out of an Andean summit meeting with President Bush and briefly halted an anti-drug effort with the United States. Efforts to improve the U.S. working relationship with Peru have thus far failed to completely rectify a situation that was far more favorable in the weeks preceding the Panamanian occupation. See Treaster, supra note 87, at 1, col. 1.
95. Id.
96. See generally Wisotsky, supra note 21 (noting the economic factors which provide incentives to Latin American farmers to produce drug producing plants such as coca).
97. Schwarzenberger, supra note 5, at 263 ("International lawyers—with the exception of those immunised [sic] by the atmospheric conditions prevailing in the legal departments of Foreign Offices—are prone to suffer from a professional disease against which other members of the legal profession are remarkably immune. They appear to be highly susceptible to current fashions in the realm of political ideology").
98. See JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM 1261-
International law often poses little restraint on actions taken by the United States. Indeed, U.S. courts may (and often do) disregard international law when it conflicts with domestic law. The Fifth Circuit exemplified this attitude in United States v. Howard-Arias. The court stated that "[t]he United States may violate international law principles in order to effectively carry out this nation's policies." While this attitude is not demonstrative of all opinions, other courts have enunciated similar rules when domestic policies conflict with international law.

Legislative language is no more supportive of international legal principles. The Maritime Drug Enforcement Act mandates that "failure to comply with international law should not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under [the Act]."

This observed rejection of international law by Congress and the judiciary is by no means absolute. The Restatement (Third) of Foreign Relations notes that "Courts in the United States are bound to give effect to international law and international agreements . . . ." Generally, courts in the United States do everything possible to construe domestic law in a manner consistent with international law, and vice-versa. When such a construction is not possible, courts must bow to the constitutional will of Congress.

Perhaps the most important and far-reaching detriment to the drug war is the effect that unilateral jurisdiction expansion will have on the international legal system itself. Justice Brandeis once warned that "[i]f the Government becomes a..."
law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." While he was speaking specifically about the sovereign breaking domestic laws, the reasoning is equally apposite to an international law context.

In a system where custom is the generally accepted practice, any radical change in that custom is actually formative of the new customary law. This is true in every aspect of international jurisprudence. Every nation that violates a principle of customary law changes that law somehow. Perhaps the violation in question is so egregious that the world community resolves never again to allow such a violation, and the law changes due to that resolution. More commonly, however, a nation violates a principle of the accepted practice, only to see the violation duplicated by other nations. Soon more nations ignore the "ancient" custom and determine their own policy regarding the rapidly disintegrating legal principle. Finally, wholesale disregard for the former order quickly replaces the principle with either a different custom or "international anarchy" as to that principle.

Particularly malleable is the law of the sea. The changing, dynamic nature of the law of the high seas was noted by Professor McDougal, who observed that

the international law of the sea is not a mere static body of rules but is rather a whole decision-making process... of continuous interaction, of continuous demand and response, in which the decision-makers or particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers... weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law... 107

Because the international law is a "living, growing law," United States actions, even if technically legal, must be couched in policies that emphasize patience and restraint. Undoubtedly, other decision-makers from other nations will either

resist or follow the United States lead in this area. Whichever action the world community chooses to take, the international law of the sea will be unavoidably and forever altered.

VI. THE NEED TO REDUCE DEMAND FOR DRUGS WITHIN THE UNITED STATES

The focus of the United States drug war also raises problematic issues. Although the purpose of this comment is not to present a plan for waging the war, a few thoughts may be appropriate as an epilogue. The plague of drugs is truly frightening. Indeed, we fear losing an entire urban generation to the ravaging effects of addiction. Yet despite the crisis and our vigorous denouncement of the drugs-for-pleasure trade, we clinging doggedly to the cultural hedonism which morally underwrites our drug use. Hence, the drug war movement conspicuously smacks of "buck-passing." A culture that places a premium on "relaxing" and "getting away from it all" should not be surprised when the young, innovative minds of that society simply find more effective ways to reach the perceived goal.

The answer, however, will not be found in the siren calls for legalization. The legalization of narcotics would lead to disastrous results, fueled by the inevitable enormous increase in drug use. In turn, this would lead to similar increases in drug-related and drug-affected crimes, accidents, and untreatable addiction.\(^{108}\) In addition, legalization implicitly admits a moral defeat that would breed a general disrespect for the law.\(^{109}\) Contrary to the academic view in support of legalization, narcotics abuse is not a victimless crime. Drug use, particularly with the more powerful narcotics such as crack and heroin, often leads to dangerous results for the user, the user's family, and the community.\(^{110}\) Much drug-related crime is directly tied to the use of drugs rather than their sale or acquisition. Legalization, therefore, only encourages the tragedy.


\(^{110}\) See, e.g., Fein & Reynolds, supra note 106 (reporting that "a D.C. mother had murdered two of her children and attempted strangulation of a third after an exhilarating session with crack cocaine").
Elementary economics suggests that a supply of drugs will be available so long as there is demand. Therefore, any attempt to solve the drug problem must confront demand by enlisting both the private and public sectors, by educating existing and potential drug users, and by tirelessly enforcing the drug laws already on the books. But the plan must also address the contradiction of a society that welcomes whiskey, yet condemns cocaine. To inquisitive children and teenagers, the line between 'acceptable' and 'unacceptable' mind-altering substances is fuzzy, at best. Until our society deals with such contradictions, drug traffickers will continue, with or without the approval of the international community, to fill our communities with dangerous drugs.

VII. CONCLUSION

Extraterritorial enforcement of United States drug laws is not working. Because the United States has been unable to stop the influx of illicit narcotics at its borders, law enforcement agencies have extended the battlefield beyond those borders. The United States currently uses a variety of international legal justifications to extend U.S. jurisdiction over the high seas in order to prosecute the drug war. The Coast Guard, the D.E.A., and other federal entities have become involved in this battle that critics argue is unwinnable.

The problem is not one of manpower, ships, money or prosecutorial tools, however. The problem is one of moral inconsistency and economics. As long as the American appetite for crack, cocaine, marijuana and heroin remains ravenous, there will be a drug war to fight. When demand and hence profits from illicit drug production, manufacture and trafficking cease, the smuggling will stop. The drug war will have been won.

Until the drug war is won, unilateral expansion of extraterritorial jurisdiction in a drug effort that is unwinnable outside United States borders is foolish, costly and ultimately damaging to the international legal system. Even though the problem will never be wholly solved in Colombia, Bolivia or Peru, international cooperation is still vital to overall success and should continue to be sought. Jurisdiction over stateless vessels on the high seas would be better expanded through international dialogue and diplomacy rather than by Congress.
Such an international process would allow all nations to participate in the formation of the "living, growing" international law, and would enhance the comity of nations as well as the order of the seas.

D. Brian Boggess