

The U.S. Coast Guard Is Arresting Drug Traffickers in Ecuadorian Waters. How Does That Work

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Photograph courtesy of Mark Barney.

We have all seen movies or TV shows, such as *Miami Vice*, where a notorious drug lord races to international waters to evade arrest. By getting to international waters, he escapes the police and the Coast Guard... After all no one has jurisdiction in international waters, right?

As is often the case with law, the truth is much more complicated. In 1986, Congress passed the Maritime Drug Law Enforcement Act, or MDLEA.¹ This law was passed due to the Justice Department's lacking clear authority to detain and prosecute suspected drug smugglers in international waters.² MDLEA solved this issue by making drug smuggling on the high seas a crime against the United States and giving the Coast Guard the authority to search

for, detain, and bring suspected drug traffickers back to the United States for prosecution. But how does MDLEA enable the United States to arrest people in international waters and bring them back to the United States? A recent case, *United States v. Portocarrero-Angulo*, illustrates how the law is put into practice.

On October 4, 2016, 150 miles north of the Galapagos Islands, a military patrol aircraft spotted a Go Fast Boat ("GFB"), a sleek, high-powered speedboat designed to evade radar. As the aircraft flew closer, the patrol saw packages being thrown overboard. The Coast Guard Cutter *Waesche* seized those packages – which turned out to be 21 bales of cocaine, totaling 1,370 pounds.³ A helicopter,

dispatched by the *Waesche*, chased the GFB, the *Pez Sierra*. The *Pez Sierra* did not slow down, so the helicopter fired three warning shots. The boat refused to stop. The helicopter fired two more shots, disabling the engine and ending the chase. The Coast Guard boarded the *Pez Sierra*, collected evidence, discovered that all three men on board were Ecuadorian citizens, and arrested them.⁴ The boat was not “flagged,” meaning that it was unclear in what country the boat was registered. International law requires merchant vessels to be “flagged.” The GFB captain, Jesus Portocarrero-Angulo, claimed that the vessel was Ecuadorian. The Coast Guard contacted Ecuadorian officials, but they could neither confirm nor deny the boat’s nationality.

The ship’s pilot argued in federal court that the United States lacked jurisdiction over him because he was not on the high seas when the Coast Guard detained him. In fact, he was within Ecuador’s Economic Exclusive Zone, or the EEZ. Under the United Nations Convention on the Law of the Sea, or UNCLOS, international waters begin 200 nautical miles seaward from a coastal nation.⁵ (A nautical mile is 1.15 “land” miles.) However, the District Court for Southern California disagreed with the defendant’s interpretation. In fact, according to current case law, the “high seas” begin seaward of the territorial sea,⁶ which extends to 12 nautical miles seaward of a coastal state. Therefore, anything seaward of 12 nautical miles is “high seas” as far as American courts are concerned.

The court’s reasoning for finding another nation’s EEZ as high seas, stemmed from UNCLOS itself. Nearly all UNCLOS provisions applicable to the high seas also apply to the EEZ. For example, the court pointed to UNCLOS art. 58(2) which states that the “rights and freedoms of other states in the [EEZ]...are the same on the high seas.” Article 56 provides that the EEZ gives the coastal state the right to exploit and manage resources in that zone, engage in scientific research, and protect the marine environment. None of this explicitly prohibits a nation from enforcing drug trafficking laws in another country’s EEZ. The defendant argued that Ecuador claimed jurisdiction and sovereignty extending 200 miles seaward. However, the court held that it was unclear if Ecuador intended this to modify the UNCLOS boundaries. Even if that were Ecuador’s intent, the court noted that the United States does not recognize that claim.⁷

Flagged ships of another country raise issues of MDLEA jurisdiction because if MDLEA is enforced beyond United States waters, then both statutory and constitutional jurisdiction must be found to authorize the United States’ claim over the vessel. To find constitutional jurisdiction, a significant nexus between the conduct condemned and the United States must be found to a degree that would not be arbitrary or fundamentally unfair to the defendant.⁸ Statutory jurisdiction requires the United States to have jurisdiction over the vessel or defendants. However, the United States can gain jurisdiction over foreign flagged vessels and ships in another nation’s territorial waters. This occurs when the nation at issue consents or fails to object to the United States enforcing its own laws against that foreign-flagged vessel or within foreign waters.⁹ However, MDLEA establishes an exception to the requirement of both constitutional and statutory jurisdiction. When a vessel is “stateless,” or has no flagged nationality, then the United States has statutory jurisdiction over that vessel.¹⁰

The prosecution in the case involving the *Pez Sierra* argued that the boat was “stateless,” since Ecuadorian officials did not confirm or deny that the GFB was Ecuadorian. However, the defendant argued that it was Ecuadorian. Since this is a dispute over the facts of the case, the question of whether the boat is Ecuadorian or stateless must be answered by a jury.¹¹ If the vessel is “stateless,” then no constitutional jurisdiction needs to be found. The fact that the vessel is “stateless” is enough on its own to establish necessary jurisdiction. However, if the GFB is Ecuadorian, then the court must address the question of constitutional jurisdiction. Interestingly, MDLEA seems to answer that question. Congress found that drug trafficking “presents a specific threat to the security societal well-being and of the United States.”¹² However, in the Ninth Circuit, if a ship is flagged in a foreign country, the prosecution must prove that the trafficked drugs were bound for the United States in order to establish jurisdiction.

This brings up another issue within MDLEA. When someone is arrested in international waters, which court has jurisdiction? When someone commits a crime in the United States, they are charged where the crime occurred. However, under U.S. maritime law, drug traffickers must be tried either in Washington, D.C., or where they land at port. It appears to be simple to determine which court has jurisdiction over the defendant. However, once again, the truth is more complicated.

The Drug Enforcement Agency (“DEA”) and federal prosecutors decide where the Coast Guard takes the detainees. In the 1980s and 1990s, drug smuggling was more rampant in the Caribbean, so most suspects were brought to a port in Florida and charged there. Currently, despite trafficking becoming more active in the Pacific, many prosecutors and the DEA still prefer the detainees be brought to Florida. One reason for this is the Ninth Circuit (which covers the West Coast) requires the government to show that the drugs were bound for the United States. The same rule of proof does not apply in the Eleventh Circuit, however, where Florida is located, arguably making it easier for the government to prove its case.¹³ Thus, detainments at sea may lead to forum shopping by the U.S. government, such as when the Coast Guard catches smugglers in the Pacific but comes ashore in Florida. The efforts to forum shop also lead to longer confinement and delay of the suspect’s right to be brought before a judge “without unnecessary delay,” in potential violation of the Federal Rules of Criminal Procedure, as suspects arrested in the Pacific Ocean are sailed to the Atlantic Ocean.

In the case at hand, the defendant was arrested in the Pacific Ocean and brought to San Diego, so this case does not represent trans-oceanic forum shopping. However, he was still detained three weeks, but the court upheld his 21-day detainment as reasonable. Shortly after the court’s ruling on the detainment, Portocarrero-Angulo pled guilty to possession of narcotics with the intent to distribute and was sentenced to over eight and a half years in prison. This plea bargain cut short the court’s opportunity to determine the flag status of the vessel. The court also lost the opportunity to explore possible limitations on MDLEA, such as the number of days a defendant can be detained at sea or where a defendant could be brought to port.

In the United States, protections against lengthy pre-arraignment periods of detainment are in place. However, these protections do not seem to extend at sea. *The New York Times* reports that courts have extended the period of detainment days allowed from five days in the Caribbean in 1985 to an average detainment now of 18 days at sea. One official not named by the report claims that detainment periods have even reached as high as 90 days. Human rights and maritime law experts claim that these lengthy detainments violate human rights norms. Not only is the length of detainment a cause for concern among scholars, but the conditions on board are as well. *The New York Times*

also reported that detainees were chained to decks, slept on thin rubber mats, were cut off from any communication, including with their consulate or family, and not given adequate food. However, motions to dismiss indictments due to inhumane conditions have been largely unsuccessful, according to the article.

Not only are the detainment periods increasing, but the number of detainees is increasing as well. In the 1990s to the 2000s, the number of detainees held at sea averaged around 200 annually, according to *The New York Times*. However, Operation Martillo, under General John Kelly, in his former capacity as commander of the Southern Command, increased those numbers. In 2016, the Coast Guard detained 585 suspected drug traffickers, mostly in international waters, according to *The New York Times*. From September 2016 to 2017, nearly 700 suspects were detained and brought to the United States.¹⁴ As arrests, transport to the United States, and detainment periods increase, so will the courts’ involvement with these cases, perhaps forcing the courts to draw a line in the sand over jurisdictional issues, detainment issues, and MDLEA. Until then, these issues will continue. ↩

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Endnotes

1. 46 U.S.C. § 70503.
2. Seth Freed Wessler, *The Coast Guard’s ‘Floating Guantánamos’*, *New York Times* (Nov. 20, 2017).
3. *United States v. Portocarrero-Angulo*, 3:16-cr-02555-BEN-01, 2017 WL 3283856, *1 (S.D. Cal. Aug. 1, 2017), *Ecuador Boat Captain Gets Prison for 1,300-lb Cocaine Load*, *San Diego Union-Tribune* (Nov. 16, 2017).
4. *Portocarrero*, 2017 WL 3283856 at *1.
5. *Id.* at *2; *United Nations Convention on the Law of the Sea (UNCLOS)*, art. 3.
6. *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013)).
7. *Id.* at *4 (citing Office of the Judge Advocate Gen., U.S. Navy, *Maritime Claims Reference Manual: Ecuador* (April 2017)).
8. *Id.* at *5 (internal citations omitted).
9. 46 U.S.C. § 70502(c)(1).
10. 46 U.S.C. § 70502(d).
11. *Portocarrero*, 2017 WL 3283856 at *4.
12. 46 U.S.C. § 70501.
13. Wessler, *supra* note 2.
14. Wessler, *supra* note 2.