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NATIONAL SECURITY & ARMED CONFLICT LAW REVIEW

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Contributions

| | | | |
|------|---|---|----|
| I. | Human Trafficking is One of the Cruellest Realities in Our World..... | <i>Chairman Ileana Ros-Lehtinen</i> | 7 |
| II. | U.S. Southern Command's Role In Combatting Illicit Trafficking..... | <i>Colonel Daniel Lecce Lieutenant Commander Brendan Gavin Captain Laura Corbin</i> | 12 |
| III. | Human Trafficking: <i>An Issue of Human and National Security</i> | <i>Roza Pati</i> | 29 |
| IV. | Commentary: <i>Transnational Organized Crime in the Maritime Domain, and Broader Considerations</i> | <i>Captain James D. Carlson Lieutenant Timothy Cronin</i> | 43 |
| V. | Promoting Partnerships to Combat Illicit Trafficking..... | <i>Celina Realuyo</i> | 58 |
| VI. | Transnational Influences on Financial Crime..... | <i>Jeremy Kuester</i> | 71 |



Editor-in-Chief Comment

We are extremely grateful to our panelists that made an invaluable contribution to helping us understand the significant challenges illicit trafficking poses to both our national security and our local governments. These panelists have gone beyond merely highlighting the challenges; they have put forth solutions that will generate much needed discussion and debate on how we in the legal community can begin taking action to curb this growing threat.

Acknowledgements

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*OPENING REMARKS

Human Trafficking is One of the Cruellest Realities in Our World

United States Congresswoman Ileana Ros-Lehtinen **

According to the State Department, up to 27 million people around the world are victims of trafficking. Florida law rightly defines human trafficking as a form of modern day slavery. Though many seem to think that slavery is a thing of the past, the truth is that it's a pervasive reality in our world, and it often happens under our very nose – at the hotel, the local restaurant, and the hair salon. This crime robs victims of their basic dignity, depriving them of their fundamental liberties, and inflicts great harm on the victims, their families, and society.

This crime is also a global epidemic that demands our energetic commitment to liberate and protect those who are victimized and bring to justice those responsible. Tragically, women and girls are disproportionately affected by trafficking. The UN Office on Drugs and Crime found that on

· Ileana Ros-Lehtinen, Chairman House Comm. on Foreign Affairs, Opening Remarks at the University of Miami National Security & Armed Conflict Law Review Symposium on Illicit Trafficking and National Security: How Central, South America and the Caribbean trafficking impacts Miami as a Gateway City (Feb. 28, 2014).

· Congresswoman Ilena Ros-Lehtinen is the representative of Florida's 27th congressional district. She is Chairman of the House Committee on Foreign Affairs. Presently, she is the Chairman of the Subcommittee on the Middle East and North Africa, and a member of the House Committee on Rules. In this role, she continues to be a voice of strong support for the state of Israel, for human rights around the globe, for trade agreements with our allies, and against the spread of Islamist extremism. As a strong advocate of programs that address domestic violence against women, Congresswomen Ros-Lehtinen was a lead sponsor of the Violence Against Women's Act. She earned an Associate of Arts degree from Miami-Dade Community College in 1972, Bachelors and Master's Degrees in Education from Florida International University in 1975 and 1985 respectively, and a Doctorate in Education from the University of Miami in 2004.

· Remarks for Representative Ros-Lehtinen were delivered by Professor Dexter Lehtinen. Mr. Lehtinen is a former U.S. Attorney for the Southern District of Florida, former Organized Crime Strike Force prosecutor in Miami and former Assistant U.S. Attorney in Los Angeles. He is also a former State Senator in the Florida Senate and State Representative of the Florida House of Representatives, during which time he authored four Florida Constitutional Amendments. He earned an M.B.A. and an M.A. from Columbia University and was a Nathan Abbott Scholar at Stanford University Law School. Professor Lehtinen teaches Florida Constitutional Law at the University of Miami School of Law.

average, 55-65 percent of victims are women and 27 percent are minors. While much of the efforts to combat trafficking rightly focus on Europe, Asia, and Africa, this is also a major problem closer to home.

Latin America is a primary source region for people trafficked into the United States, and as the gateway to the Americas, Miami is a major entry point in this process. Because of this, the human trafficking epidemic particularly affects our South Florida community. Florida has one of the highest rates of human trafficking cases in the country. In 2011, the National Human Trafficking Resource Center ranked Florida third in the number of calls received by the center's hotline.

In our own community, local Miami International Airport is one of the top entry points for foreign victims of human trafficking entering into the U.S. Recognizing this problem, in March 2012 Miami International Airport became the first U.S. airport to implement anti-trafficking training. This training, provided by the local advocacy organization Kristi House, taught about 50 MIA employees how to identify suspected victims of human trafficking and respond appropriately. Hundreds more have been trained since then, and other airports throughout the U.S. have followed this model to combat trafficking in persons in their cities.

This past December, the Miami-Dade State Attorney's Office successfully prosecuted what may be the first human trafficking criminal case in Florida since a new anti-trafficking law went into effect in 2012. This law is the Safe Harbor Act, which recognizes those who are trafficked as victims and ensures that they are treated as victims and not criminals. Also, Florida Attorney General Pam Bondi has been working with businesses to expand a "zero tolerance" campaign against human trafficking throughout the state. These efforts demonstrate three important elements in the fight against human trafficking. First, they show us that to make meaningful progress in combating this issue, we must tackle the problem from the highest levels and using all the resources we can marshal. Second, these efforts, particularly the "zero tolerance" campaign, send a clear message that the exploitation of others is an abhorrent crime that cannot be tolerated. And third, such efforts demonstrate that to adequately combat and ultimately eradicate human trafficking, there must be close and effective coordination across various levels of government and law enforcement officials.

We should be encouraged by these steps, as they are critical in the fight against human trafficking and they raise awareness in our community about this epidemic which too often goes unnoticed. In addition to working at the local level, we must look at our geographic context, where our Latin American and Caribbean neighbors have a responsibility to help combat this problem. Many of these are countries of origin, transit, and destination for human

trafficking activities.

It is estimated that between 17,500 to 20,000 victims are trafficked annually into the United States, and many of these come from Mexico and Central America. Several Latin American countries, including Venezuela, Honduras and Haiti, are on the Tier 2 Watch List of the State Department's Trafficking in Persons report of 2013. This means that they will be closely watched in the coming year and if their governments don't make significant progress, they will be dropped to Tier 3, which applies to those countries that are doing little to cooperate in the fight against trafficking. The only country in the region designated Tier 3 is Cuba, where the Castro dictatorship supports and even encourages the horrific sex tourism industry by exploiting women and children. This regime-sanctioned exploitation of the most vulnerable in Cuban society is yet another example showing that the Castro regime remains as brutal and callous as ever.

It is appalling but not surprising that Cuba is the only country in the region that is not a signatory to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, which was adopted in 2000. Similarly, Cuba is the only country in the region that is not a signatory to the International Labor Organization Convention 182, on the Worst Forms of Child Labor. Such blatant disregard for universal standards of human rights and dignity are unacceptable, and placing Cuba and other countries in the Tier 3 category is one way of shaming them into action. This is why until the Cuban people enjoy a real democracy and the freedom to exercise their human rights, we must not ease U.S. policy toward Cuba.

In addition, the activities of criminal networks contribute significantly to human trafficking in the region. In Central America, drug cartels and gangs use narcotics routes to traffic individuals across borders. These criminals also coerce vulnerable young men and women into forced prostitution and trafficking, stealing their dignity, and in many cases their lives, in order to finance their illicit activities. For example, according to reports, last May, Ecuadorian police arrested six men for trafficking people from India and Sri Lanka to the port city of Guayaquil, from where they were taken through Central American into the U.S. Two of the suspects were immigration officials, who were accused of accepting money to facilitate the process. This demonstrates the appalling, but sadly not surprising, corruption that is prevalent in many of these countries and which contributes to human trafficking activities.

Too often those who are entrusted with protecting the weak and pursuing justice not only look the other way when confronted with cases of human trafficking, but are complicit in this sickening crime. This becomes a vicious cycle when rampant crime and inadequate law enforcement leads to a

general lack of security because this puts people in a vulnerable position where they are at greater risk of being trafficked. Some experts have also raised the possibility of terrorists groups, such as al-Qaeda, collaborating with criminal organizations in the region and turning to trafficking to fund their operations.

It's not all bad news, however. Many Latin American leaders have acknowledged this problem and they are taking steps to confront it. In 2012, eight countries passed anti-trafficking legislation and several others created national bodies and task forces dedicated to combating human trafficking. Also in 2012, there were more than 1,000 prosecutions of suspected traffickers and 402 convictions in Latin America, a significant increase from only five years ago. This willingness is the first step toward eradicating human trafficking, and we want to support this, not only because it's the right thing to do, but because as we have seen, this is a crime that enters our borders and affects us too.

In 2013, the State Department's Office to Monitor and Combat Trafficking in Persons provided \$19 million in funds to non-governmental organizations around the world, and of this amount, \$1.9 million went to NGOs in Dominican Republic, Honduras, and Mexico. In addition to assistance through foreign aid programs, the Department of Homeland Security is working with Mexican officials to identify, arrest, and prosecute human trafficking rings. These efforts are especially important as Mexican drug trafficking cartels become increasingly involved in the trafficking of persons.

There is also an important role for regional bodies, particularly the Organization of American States. Since 2005, the OAS has helped member states combat trafficking in persons through promoting anti-trafficking policies and providing opportunities for member states to share best practices. The OAS has also developed several training programs for various officials including parliamentarians, law enforcement personnel, migration officers, and consular and diplomatic representatives. By 2012, the OAS had trained over 1,000 judicial and law enforcement officers in Caribbean and Central American countries to help identify, prevent, and combat human trafficking.

In the U.S. Congress, I'm working to shine a light on this issue, both in Florida, our nation and around the world. Last year the Congress reauthorized the Trafficking Victims Protection Act, which is the U.S. government's most important tool in the fight against human trafficking. This bill provides resources to support law enforcement efforts against human trafficking, expand services for survivors, and help prevent this crime from happening in the first place. It also prevents U.S. foreign assistance from going to countries that use child soldiers, and through more rigorous compliance and reporting requirements, it helps ensure that our federal agencies do not support human trafficking around the globe.

In addition, this legislation also addresses this problem at the local level by authorizing the State Department to form partnerships to combat child trafficking through Child Protection Compacts. This would allow the U.S to partner with other countries to combat the exploitation of children for slave labor and commercial sex trafficking. The Trafficking Victims Protection Act represents the most significant action taken by Congress to address this appalling crime, and my colleagues and I are constantly evaluating ways to strengthen this law to make it more effective.

This is why I'm proud to co-sponsor H.R. 3344, the Fraudulent Overseas Recruitment and Trafficking Elimination Act of 2013. This bill incorporates important anti-trafficking and anti-slavery measures into our foreign assistance programs, and it also:

- Requires that prospective foreign workers be given accurate information about the terms of employment;
- Prohibits recruitment fees or hidden charges sometimes used as coercive leverage over workers;
- Requires foreign labor recruiters to register and remain in good standing with the Department of Labor; and
- Provides new incentives and enforcement mechanisms to ensure that recruiters and employers follow these disclosure and registration requirements.

While we are taking important steps toward ending this appalling crime, there remains much work to be done to eradicate this modern slavery. But the fundamental human desire for freedom is stronger still. I am committed to doing all that I can from my position as a Member of Congress to fight for human rights and dignity and to prioritize these values in our foreign policy.

Thank you.



ARTICLE

U.S. Southern Command's Role in Combatting Illicit Trafficking*

Lieutenant Commander Brendan Gavin, U. S. Coast Guard

Captain Laura Corbin, U.S. Army

*Colonel Daniel Lecce, U.S. Marine Corps**

ABSTRACT

Illicit trafficking represents a significant threat to U.S. national security and the nation's strategic interests. It is a problem that has no single solution or source, yet has numerous disparate effects on the United States and our partner nations. For purposes of this article, we will focus attention on narco-trafficking and its attendant affects. The flow of narcotics is the primary trafficking threat into the United States and also serves as a platform for all other illicit trafficking. Traditionally, illicit trafficking is divided into three zones for ease of understanding the lifecycle of illicit trafficking from source to end user. These zones are: the source zone (where the narcotics and other illicit goods are grown, manufactured, and produced), the transit zone (the paths upon which illicit goods move to the end user), and the arrival zone (where the illicit goods are distributed and consumed by the end user).

U. S. Southern Command (SOUTHCOM), as the Geographic Combatant Command assigned the area of responsibility (AOR) which includes the Caribbean, Central America and South America, plays a critical role in the fight against illicit trafficking in the source and transit zones. SOUTHCOM is assigned three essential missions in this fight: 1) Aerial and maritime detection and monitoring of narco-trafficking and other illicit trafficking into the U.S. southern approaches (transit zone); 2) Support to U.S. and foreign law enforcement in the interdiction of traffickers and their contraband within the AOR (source and transit zones); and 3) Building capacity of partner nations in the AOR to enhance their security, stability, and anti-trafficking efforts (source and transit zones).

** The views presented in this paper are those of the authors and do not necessarily represent the views of DOD or its Components.*

** LCDR Gavin currently serves as an Operational Law and Maritime Law attorney, U.S. SOUTHCOM. CPT Corbin serves as the Assistant Administrative Law and Detention Operations Law attorney, U.S. SOUTHCOM. Col Lecce is the Staff Judge Advocate, U.S. SOUTHCOM.*

SOUTHCOM and the nation at large face many ongoing challenges, which impede counter narcotics operations. Traffickers possess many advantages to include agility, vast financial resources, complex networks, ruthless methods and tactics, and strong end user demand. These advantages, combined with the decreasing availability of U.S. resources to combat them, create an environment, which requires greater coordination and commitment within the U.S. and our partner nations.

Table of Contents

| | |
|---|----|
| I. PROBLEM STATEMENT..... | 13 |
| II. SOURCE AND TRANSIT ZONES..... | 15 |
| III. VULNERABILITIES AND EXPLOITED TOC ENTERPRISES..... | 18 |
| IV. UNITED STATES LEGAL RESPONSES TO TRANSNATIONAL ORGANIZED CRIME..... | 21 |
| V. RESPONSIBILITIES AND CHALLENGES FOR SOUTHCOM..... | 23 |
| VI. LOOKING AHEAD..... | 28 |

I. PROBLEM STATEMENT

There continues to be a large demand for illicit goods, particularly narcotics, in the United States. An estimated 40 million Americans consume illicit drugs for non-medical purposes or misuse prescription medications, with roughly half of them using marijuana only.¹ The Latin American drug trade also extends to Europe and Africa.² Europe is the second largest cocaine consumer after North America.³ This amounts to massive proceeds for transnational organized criminal (TOC) enterprises, with some estimates reaching as much as \$84 billion a year from cocaine alone⁴, and between \$750 billion and \$1 trillion

¹ CLARE RIBANDO SEELKE, JUNE S. BEITTEL, LIANA SUN WYLER AND MARK P. SULLIVAN, CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 1 (2011) available at <http://www.fas.org/sgp/crs/row/R41215.pdf>.

² See LIANA SUN WYLER AND NICOLAS COOK, CONG. RESEARCH SERV., R40838, ILLEGAL DRUG TRADE IN AFRICA: TRENDS AND U.S. POLICY (2009), available at <http://www.fas.org/sgp/crs/row/R40838.pdf>, Seelke, *supra* note 1, at 1.

³ See United Nations Office of Drugs and Crime (UNODC), *World Drug Report 2010*, UNITED NATIONS, 2010, Seelke *supra* note 1.

⁴ UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crime*, UNITED NATIONS, 2011.

a year from all revenue sources.⁵ The majority of the illicit drug flow originates and moves through Central and South America to North America, Europe, and Africa.⁶

There are several reasons why Central and South America serve as the primary source and transit zones for the global cocaine market. First, the region is fertile ground for cultivating source plants. Virtually all cocaine that enters the global market originates in South America, specifically Colombia, Peru and Bolivia.⁷ The coca bush, which is found in the Andean region of South America, is the raw material used to make cocaine. Opium poppy, which is used to produce opiates, is also found Colombia, as well as Mexico and Guatemala. Marijuana is cultivated in virtually all nations in the region. Second, Central and South America's close geographic proximity to the U.S. facilitates the relatively easy transportation of illicit goods. Third, economic and social conditions in these regions create vulnerabilities and opportunities for TOC enterprises to exploit, while creating difficulties for partner nation government intervention.

The adversary in this fight is a formidable one. TOC enterprises achieve success based on a variety of factors. Foremost is the massive profit they reap from their illicit enterprises. With this cash flow, they are able to achieve influence through political corruption, bribery, recruitment, information collection, advanced technology, equipment, training and access to resources.⁸

⁵ "Estimated Annual Costs and Resources Generated by TOC." Information released by the White House in support of the *National Strategy to Combat Transnational Organized Crime*.

⁶ "More recently there has been increased awareness of the flow of South American cocaine through Venezuela to West Africa, particularly through Mali, Guinea Bissau, and other fragile states, possibly benefitting not only the traditional regional TOC structures and their Colombian and Mexican allies, but several terrorist entities including al-Qaeda in the Islamic Maghreb (AQIM), Hezbollah,⁶ and the Revolutionary Armed Forces of Columbia (*Fuerzas Armadas Revolucionarias de Colombia* [FARC])." Douglas Farah, *Transnational Organized Crime, Terrorism, and Criminalized States in Latin America: An Emerging Tier-One National Security Priority*, U.S. Army War College, Strategic Studies Institute, 7 (2012), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB1117.pdf>.

⁷ Seelke *supra* note 1 at 1; and UNODC, *The Transatlantic Cocaine Market*, United Nations, April 2011.

⁸ The White House estimates in its 2011 *Transnational Organized Crime Strategy* that money laundering accounts for \$1.3 trillion to \$3.3 trillion—or between 2 percent and 5 percent of the world's gross domestic product (GDP). Bribery from TOCs adds close to \$1 trillion to that amount, while drug trafficking generates an estimated \$750 billion to \$1 trillion, counterfeited and pirated goods adds another \$500 billion, and illicit firearms sales generate from \$170 billion to \$320 billion. Farah, *supra* note 6 at 2-3.

II. SOURCE AND TRANSIT ZONES

As outlined above, Central and South America are the primary source and transit zones for illicit trafficking, and particularly drug trafficking, into the United States. Given that the entire world's cocaine supply comes from three countries along the Andean Ridge, (Colombia, Bolivia, and Peru) identifying that area as a cocaine "source" zone is certainly apt. With an estimated \$84 billion in annual global sales,⁹ cocaine remains the most profitable activity for criminal networks operating in the region. However, as we will discuss later, TOC enterprises rarely traffic in only one commodity. The networks established to move narcotics also move other illicit goods such as guns, precursor chemicals, counterfeit pharmaceuticals, and persons. Transnational criminal networks have a ripple effect on society at large, making an area susceptible to other illicit activity. Based on this vulnerability, TOC networks create and identify ways to exploit efficiencies and maximize profits.

⁹ UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crime*, UNITED NATIONS, 2011.



Source: United Nations Office on Drugs and Crime, *World Drug Report*, 2010;

National Drug Intelligence Center, 2010 National Drug Threat Assessment, February 2010;

Barack Obama, Presidential Determination No. 2009-30, "Memorandum to the Secretary of State: Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2011," September 16, 2010, adapted by CRS graphic in CRS R41215.

For example, approximately 95% of cocaine entering the U.S. travels through Central America.¹⁰ TOC networks also use these same pathways to transport large amounts of opiates, marijuana and methamphetamine.

TOC organizations use this primary transit path in all physical domains: air, sea, and land. A brief review of the previous graphic reveals the geographic diversity and opportunities available to a TOC enterprise. From a maritime perspective, an area of ocean larger than the continental U.S. is available for traffickers to utilize. Outside of hurricane season, the Caribbean Basin, Gulf of Mexico and Straits of Florida are generally calm bodies of water upon which a small vessel can safely transit significant distances. Additionally, there are various waypoints along any given path that can serve as re-fueling points, safe havens and logistical hubs for a transit. Nearly all of these waypoints are located within the sovereign territory of other nations, which have varying degrees of resources and capabilities. From an aerial perspective, much of the same is true. Almost 80% of drug flights from South America land in Honduras.¹¹

¹⁰ OFFICE OF NAT'L DRUG CONTROL POLICY, ONDCP-01-11, COCAINE SMUGGLING IN 2010 2 (2012), available at http://www.whitehouse.gov/sites/default/files/ondcp/international-partnerships-content/20_january_cocaine_smuggling_in_2010_for_posting_on_ondcp_webpage_2.pdf.

¹¹ U.S. Dep't of State, *Internat'l Narcotics Control Strategy Report: Drug and Chemical Control*, VOL. 1 BUREAU OF INTERNAT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, 251 (2012), available at

As cooperation with the government of Venezuela has diminished since the mid-2000s, that nation has become a major transit point for drug flights ultimately destined for the U.S. and Europe.¹² In the Caribbean, both Jamaica and the Bahamas are major transit countries for the flow of illicit goods, particularly cocaine. Once ashore in Central America, there is almost no stopping the majority of this cocaine before it enters the United States and lands on street corners across America. Cocaine places a significant strain on our nation's health care and criminal justice systems and costs American taxpayers an estimated \$193 billion per year.^{13,14} The most critical point of this geographic analysis is that the full southern flank of the United States presents a very broad area of access, and is in close proximity to the global cocaine source zone with a multitude of potential waypoints.

Beyond geography, TOC networks benefit from the socio-economic conditions often found in areas of Latin America and the Caribbean. Poverty and lack of economic opportunity are critical issues that underlie the permissive conditions that facilitate illicit trafficking. These issues, coupled with a lack of governmental resources available to bolster social and economic institutions or to combat criminal activity combine to form critical enabling factors for these networks. Underfunded security forces and insufficient institutional reform efforts expose law enforcement and judicial sectors to corruption. At the same time, those law enforcement and judicial entities are vulnerable to threats of violence or even death. In addition, a lack of funding and resources in these sectors leads to insufficient manpower and political will to combat these problems. The confluence of these factors is incredibly entrenched, allowing criminal networks to operate with relative impunity.¹⁵ For example, in 2012, The United Nations Office on Drugs and Crime reported that convictions for serious criminal offenses in Central America and the

<http://www.state.gov/documents/organization/184314.pdf>.

¹² Seelke, *supra* note 1, at 2.

¹³ Note: Upon landfall in Central America, bulk cocaine is broken down into multiple smaller shipments for transit into Mexico and the United States, making large interdictions extremely difficult.

¹⁴ U.S. Dep't of Justice, *The Economic Impact of Illicit Drug Use on American Society*, U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CENTER, PRODUCT NO. 2011-Q0317-002, at ix (2011).

¹⁵ "Though the presence of a state government (as opposed to its absence) is ordinarily considered to be a positive situation, the presence of the state is beneficial or positive only if it meets the needs of its people. If the state, as it is in many parts of Latin America and many other parts of the world, is present but is viewed, with good reason, as corrupt, incompetent, and/or predatory, then its presence is not beneficial in terms of creating state strength or state capacity. In fact, where the state is strongest but least accountable for abuses, people often prefer nonstate actors to exercise authority." Farah at 18 *citing* ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990).

Caribbean have ranged from as low as 2% to 42%.¹⁶

III. VULNERABILITIES CREATED AND EXPLOITED BY TOC ENTERPRISES

Transnational criminal organizations threaten citizen security, undermine basic human rights, “erode good governance, cripple rule of law through corruption, [and] hinder economic competitiveness.”¹⁷ Generally traffickers and TOC enterprises do not seek to directly harm the U.S. or our allies. On this point they are indifferent. They simply seek profit and control of the criminal enterprise. Their actions are intended to ensure continuous operation free from government interference to minimize time and expenses and maximize profit. These enterprises create sophisticated networks, which sustain their business interests and evolve using technology and innovation to evade governmental interference.

As stated earlier, the methods used by TOC enterprises to traffic cocaine and other drugs are simply demonstrative of the greater problem of illicit trafficking. To achieve continued success in their business, TOC enterprises establish complex supply chains with broad capabilities. They create sophisticated and highly capable organizational structures. Much like any large commercial enterprise, TOC networks have logistical demands, communication needs, financial distribution requirements, and equipment procurement and maintenance concerns. They are continually evolving and refining their techniques to ensure success. Unlike legitimate business enterprises, however, TOC networks are not encumbered by governmental regulations or rules, taxes, or even social demands and expectations.

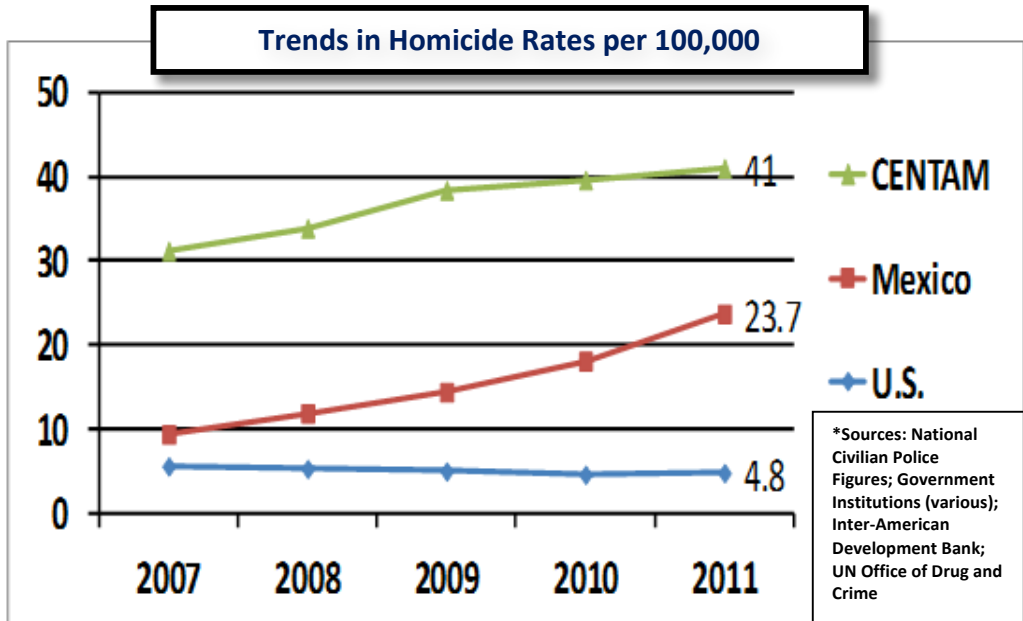
The application of widespread and often indiscriminate violence is one method by which these organizations impose their will. The rates of homicide in Latin America and the Caribbean are sharply on the rise, adding to the already extremely high rates prevalent in this part of the world. Compared to other regions, Latin America and the Caribbean have the greatest percentage of homicides both with firearms and attributed to organized crime and gangs.¹⁸ Multiple studies suggest that trafficking continues to be a major factor in this

¹⁶ See United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in Central Am. and the Caribbean, A Threat Assessment*, UNITED NATIONS, Sept. 2012, at 76, Mark Ungar, *Democracy, Law, and Order*, LATIN AM. RESEARCH REVIEW, VOL. 44, No. 3 (2009), available at https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/latin_american_research_review/v044/44.3.ungar.pdf.

¹⁷ James R. Clapper, Dir. of Nat'l Intelligence, Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community before the Senate Select Comm. on Intelligence, at 5 (March 12, 2013).

¹⁸ UNODC, *Homicide Statistics*, UNITED NATIONS, Feb. 2010, at 20, 39-40.

imbalance.¹⁹



Influence and corruption are other techniques successfully leveraged by these networks. TOC organizations use violence or the threat of violence as well as bribery to coerce, corrupt and control law enforcement and judicial sectors. These techniques create a permissive environment for trafficking. In police forces for example, as corruption and coercion increases, security, arrests and overall law enforcement decreases. This in turn creates vulnerabilities and opportunities that are often exploited by traffickers. If police are unwilling to investigate, arrest and testify against a drug trafficker because they have been co-opted, then the conditions are set for illicit trafficking and violence to thrive. The same is true when a judge is unwilling to hear a case or adjudge a conviction because of a bribe or a threat against her or a family-member. When law enforcement mechanisms fail, it becomes increasingly difficult to prevent further crime and violence.

While the United States uses tools such as the witness protection program to enhance judicial system security, these measures are very costly and rely on the large geographic area of our nation to be effective. These considerations present challenges to many Latin American and Caribbean nations.

Ineffective border security is another factor that facilitates illicit networks. Due largely to economic limitations, there is an inability to properly monitor and control borders. Other aggravating factors such as long borders,

¹⁹ *Id.* at 11.

extended coastlines, numerous littoral islands and the tropical topography only serve to further complicate the struggle. Some countries, such as Nicaragua, have passed laws that limit who may legally own property within a certain distance from their national border. This serves to limit the control a private actor may have over critical geographic areas in the fight against trafficking. To maximize available resources, many nations combine border security responsibilities among different governmental entities. This often includes enhancing police and military border protection authorities. However, without adequate resources in terms of manpower, technology, and equipment, a nation can only exert limited effective control over its borders.

Acting across loosely controlled borders and within multiple jurisdictions is a significant advantage for TOC networks. It is well documented that TOC operations seek to operate in ungoverned or under-governed space.²⁰ Countering this advantage requires sovereigns to rapidly share information and coordinate activity. Further, it requires consideration of regulation and enforcement capabilities outside of one's own sovereign territory. Criminal networks exploit these gaps in enforcement and regulation. For example, traffickers who use Central America (CENTAM) as a waypoint for the air transport of their illicit goods, as mentioned above, are taking advantage of CENTAM's inability to consistently prevent or hamper this type of activity.

The TOC-established network can also be utilized to facilitate other and potentially more dangerous threats such as terrorists and Weapons of Mass Destruction (WMD). Terrorists already exploit weaknesses created by the drug trade. In Peru, the Sendero Luminoso (Shining Path) has been involved in terrorist activities since the 1960s. Previously believed dormant, it has recently renewed small-scale attacks on the Peruvian police and military. Shining Path funds its agenda through taxing the coca growers in its area of operation in exchange for providing protection from other drug trafficking organizations.²¹ The Fuerzas Armadas Revolucionarias de Colombia (FARC), in English, the

²⁰ "Control of broad swaths of land by these nonstate groups in Latin America not only facilitates the movement of illegal products, both northward and southward, through transcontinental pipelines, but also undermines the stability of an entire region of great strategic interest to the United States. The traditional threat is broadly understood to be posed by the illicit movement of contraband (drugs, money, weapons, and stolen cars), people (human traffic, gang members, and drug cartel enforcers), and the billions of dollars these illicit activities generate in an area where states have few resources and little legal or law enforcement capacity." Farah at 19.

²¹ See Kathryn Gregory, *Background: Shining Path, Tupac Amaru*, COUNCIL ON FOREIGN RELATIONS, August 27, 2009, available at <http://www.cfr.org/peru/shining-path-tupac-amaru-peru-leftists/p9276>, *Wiretaps Reveal Peru Coca Growers' Ties to Rebels*, LATIN AM. HERALD TRIBUNE, Dec. 1, 2010, available at <http://www.laht.com/article.asp>.

Revolutionary Armed Forces of Colombia, finance their indigenous terrorist activities in a similar manner.²² Other international terrorist groups are also believed to fund their terrorist activities through connections with TOC enterprises in Latin America, particularly in the border areas between Brazil, Argentina and Paraguay.²³ Evidence identified by the U.S. Department of Treasury in February of 2011 suggests that Lebanese Hezbollah was involved in moving narcotics from South America into Europe and the Middle East.²⁴ As retired Navy Admiral James G. Stavridis cautioned, the threat of enemy convergence--the combining of the network, financial resources and infrastructure of a TOC enterprise with the ideals and objectives of a terrorist group--represents the greatest current potential threat to U.S. National Security.²⁵

IV. UNITED STATES LEGAL RESPONSES TO TRANSNATIONAL ORGANIZED CRIME

Given this difficult situation, issues of jurisdiction, law, and enforcement capability must be asked at every stage of the illicit trafficking cycle. For example, if a drug is grown in Colombia, travels through Panamanian territorial seas to land off the coast of Nicaragua where it is then transported into Honduras, ultimately to make its way through Mexico into the U.S. – where does the crime occur? Where is the best place to intervene? Who has the jurisdiction to prosecute? Who is most affected? In the end, any delays, miscommunications, or misinterpretations when answering these questions serve to benefit the TOC network.

As a general rule, nations have criminal jurisdiction over acts committed

²² "The FARC needs to move cocaine to U.S. and European markets in order to obtain the money necessary to maintain its army of some 9,000 troops. In order to do that, the FARC, with the help of traditional drug trafficking organizations, must move its product through Central America and Mexico to the United States—the same route used by those who want to move illegal aliens to the United States, and those who want to move bulk cash shipments, stolen cars, and weapons from the United States southward. All of this contraband traverses the same territory, passes through the same gatekeepers, and is often interchangeable along the way. A kilo of cocaine can be traded for roughly one ton of AK-47 assault rifles before either of the contraband items reaches what would normally be its final destination." Farah at 17.

²³ Anthony P. Placido, Assistant Adm'r for Intelligence, U.S. Drug Enforcement Admin., Report to House Oversight and Gov't Reform Sub-comm. on Nat'l Sec. and Foreign Affairs hearing on Transnational Drug Enterprises (March 3, 2010).

²⁴ U.S. Dep't of the Treasury, "Treasury Identifies Lebanese Canadian Bank Sal as a Primary Money Laundering Concern," Press Release, February 10, 2011.

²⁵ See Thom Shanker, *Globalization Creates a New Worry: Enemy Convergence*, N.Y. TIMES, (May 30, 2013, 10:26 AM), <http://atwar.blogs.nytimes.com/2013/05/30/globalization-creates-a-new-worry-enemy-convergence>.

within their own sovereign territory, airspace, and seas. Extradition agreements may be made with other nations to facilitate prosecution of cases. The majority of Latin American countries have extradition agreements with the United States.²⁶ Beyond reliance on partner nation prosecution or extradition of an individual in foreign custody, the Maritime Drug Law Enforcement Act (MDLEA)²⁷ provides a vehicle for federal criminal prosecution against crimes in the maritime domain. This Act prohibits the manufacture, distribution, and possession with the intent to distribute controlled substances onboard any vessel subject to the jurisdiction of the United States, or any vessel if the individual is a citizen or resident alien of the United States.²⁸ Further, this act explicitly applies outside the territorial jurisdiction of the United States.²⁹ The broad scope of this act, specifically in the jurisdictional context, allows the United States to prosecute crimes that occur in international waters, to include crimes aboard vessels bearing the flag and registry of another nation, assuming that coastal state consents to waive their own jurisdiction in favor of U.S. jurisdiction.

However, there are cases that test the reach of criminal statutes such as the MDLEA. In the case of *U.S. v. Bellaizac-Hurtado*,³⁰ the issue before the court was whether a U.S. law could be enforced over a vessel conducting activity in Panamanian territorial seas.³¹ Despite the acquiescence of Panama, the 11th U.S. Circuit held that the U.S. could not impose jurisdiction for a violation of the Maritime Drug Law Enforcement Act over a vessel acting in another nation's territorial seas.³² The practical challenge is that the U.S. legal system often offers the greatest chance of prosecutorial success compared to the Central and South American nations who act as our partners in combatting illicit trafficking. Moreover, the effectiveness of the U.S. judicial system often enables U.S. law enforcement to leverage traffickers for information about TOC actors, procedures, and future crimes. Cases similar to *Hurtado* will likely be tested in other judicial circuits seeking a more favorable result, which could ultimately lead to the issue making its way to the U.S. Supreme Court.

²⁶ See Extradition, 18 U.S.C. Ch. 209 (2012). The list of Latin American and Caribbean countries includes Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Colombia, Chile, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, Venezuela.

²⁷ See Mfg., Distrib., or Possession of Controlled Substances on Vessels, 46 U.S.C. Ch. 705 (2012).

²⁸ *Id.*

²⁹ 46 U.S.C. § 70503(b) (2012).

³⁰ *United States v. Bellaizac-Hurtado*, 2012 WL 5395281 (11th Cir. Nov. 6, 2012).

³¹ *Id.*

³² *Id.*

V. RESPONSIBILITIES AND CHALLENGES FOR SOUTHCOM

SOUTHCOM's geographic area of responsibility (AOR) begins at the southern Mexico border and extends south to include all of Central and South America, as well as the Caribbean. Mexico, Puerto Rico and the Bahamas fall into U.S. Northern Command's (NORTHCOM) AOR. As the Geographic Combatant Command responsible for all U.S. military personnel and activity in the Caribbean and Central & South America, SOUTHCOM holds the primary role within the Department of Defense (DoD) in the fight against illicit trafficking.

First, SOUTHCOM executes DoD's responsibility as the lead United States Government agency in the detection and monitoring of aerial and maritime drug trafficking into the United States.³³ Considering most drug traffic comes into the U.S. through Latin America and the Caribbean, SOUTHCOM orchestrates a tremendous amount of resources and assets from across multiple government agencies in a "whole of government" approach toward combating this problem. Aircraft and vessels from the U.S. Coast Guard (USCG), U.S. Navy (USN) and Customs and Border Protection (CBP) all provide on scene awareness and presence in this mission. In addition, DoD-contracted aircraft and Partner Nation vessels and aircraft are regularly relied upon to support this mission. Finally, multiple radar arrays capable of providing over-the-horizon pictures are employed to round out SOUTHCOM detection and monitoring assets.

With different U.S. agencies come different authorities. While DoD has authority under U.S. Code Title 10 to conduct detection and monitoring, it has no authority to enforce U.S. law. The U.S. Coast Guard is primarily responsible for law enforcement within the maritime domain based on their statutory authority under Title 14 of the U.S. Code. To succeed, SOUTHCOM's detection and monitoring mission must feed law enforcement action and vice versa. For example, DoD-controlled assets provide actionable intelligence to law enforcement or partner-nation assets capable of affecting an interdiction. Once the interdiction takes place, additional intelligence is collected by the Drug Enforcement Agency (DEA) or other U.S. law enforcement agencies and is fed back into the detection and monitoring cycle, informing the complex coordination and placement of assets discussed earlier.

Further along in the process, the Department of Justice represents the U.S. government in prosecuting traffickers. Successful prosecution leads to

³³ See Nat'l Def. Auth. Act for the Years 1990 and 1991 § 1202, Pub. L. 101-189, Stat. 1352 (1989), Detection and Monitoring of Aerial and Maritime Transit of Illegal Drugs: Dep't of Def. to be Lead Agency, 10 U.S.C. §124 (2012).

fewer TOC assets and increases the deterrence effect. Ultimately, the patchwork of statutory authority granted to the various U.S. agencies involved covering the source³⁴, transit³⁵ and arrival³⁶ zones requires a whole of government approach dependent on communication and teamwork. Without these, effective enforcement and ultimate prosecution is not possible.

SOUTHCOM supports U.S. and foreign law enforcement in the interdiction of traffickers and their contraband within the AOR. United States military forces (with the exception of the U.S. Coast Guard which operates under the Department of Homeland Security) are largely prohibited from enforcing state and federal law under the Posse Comitatus Act.³⁷ Unlike the U.S., many Caribbean, Central and South American nations' national militaries have counter-drug enforcement responsibilities. This is true for a variety of reasons, but the two primary reasons are 1) lack of resources to maintain an adequately staffed, trained and funded law enforcement body(s); and 2) widespread police corruption and influence from TOC networks.

Given the complexity of TOC networks and its vast resources and capabilities, the support SOUTHCOM can provide to law enforcement is critical. Both Section 1004 of the 1991 National Defense Authorization Act (NDAA), and Chapter 18 of Title 10 of the U.S. Code establish the baseline from which DoD can support both U.S. and partner nation law enforcement.³⁸ This support can come from a variety of means, ranging from providing air transportation to counter-drug training. While the DoD may not have the legal authority to take direct action against TOC networks, the military has a myriad of resources it may provide to assist. These resources come in a variety of forms, to include: tools and equipment, technology and software, manpower, training and expertise, subject matter experts and planners, and intelligence lawfully gained from the conduct of normal military operations.³⁹ Beyond physical and

³⁴ See Military Support for Civilian Law Enforcement Agencies, 10 U.S.C. Ch. 18, § 371-82 (2012), Nat'l Def. Auth. Act §§ 1004, 1021, 1033 (DoD as the lead federal agency) (1991).

³⁵ See 10 U.S.C. §124 (2012) – DoD as the lead federal agency; 46 U.S. Code Chapter 705 and 14 USC §89 – USCG as the lead federal agency.

³⁶ See Controlled Substances Act, 21 U.S.C. §801 (2012). The Drug Enforcement Administration (DEA) as the lead federal agency; Title 19 of U.S. Code, Customs Duties – CBP as the lead federal agency.

³⁷ See Use of Army and Air Force as Posse Comitatus, 18 U.S.C. §1385 (2013), Military Support for Civilian Law Enforcement Agencies, U.S.C. §375 (2013).

³⁸ See Pub. L. 101-510, § 1004, Stat. 1485 (1990), 10 U.S.C. Ch. 18 (2013).

³⁹ One specific example of this is support of certain partner nation air bridge denial programs. Through multiple international conventions on civil aviation, international law prohibits destruction of a civil aircraft in service. This is codified within U.S. law through the Aircraft Sabotage Act at 18 U.S.C. 32 (1984). However, 22 U.S.C. §§ 2291(a)(2) (2012) allows the U.S. President to determine that the U.S. can provide aircraft interdiction assistance where the use of force may be an option. Through this law, the President has made determination that air

technological resources, U.S. military personnel may provide training and limited support. Because TOC networks are diversifying not only in commodities, but also geographically, the DoD offers unique capabilities such as subject matter experts on culture, language and geography, which can greatly improve the planning and execution of a transnational law enforcement mission.

Joint Interagency Task Force (JIATF)–South, a component of SOUTHCOM, is the central entity responsible for coordination and direction of U.S. counter-narcotics operations through the Caribbean, Central and South America. Located in Key West, Florida, JIATF-South is an interagency task force that serves as the catalyst for integrated and synchronized interagency counter-drug operations and is responsible for the detection and monitoring of suspect air and maritime drug activity in the Caribbean Sea, Gulf of Mexico, and the eastern Pacific. JIATF-South also collects, processes, and disseminates counter-drug information for interagency operations.⁴⁰ Comprised of partners across the Federal agencies to include DoD, FBI, CBP, DEA, and Immigration and Customs Enforcement (ICE), JIATF-S is currently exercising its primary mission through Operation Martillo (which translates to ‘Hammer’ in English). In 2011, Operation Martillo yielded seizures of approximately \$2.35 billion worth of cocaine, and an additional \$37 million in currency and black market contraband.⁴¹ Finally, and arguably most importantly, DoD and SOUTHCOM combat TOC through building the capacity of partner nations in the AOR to enhance their security, stability, and anti-trafficking efforts. From a broad perspective, DoD and SOUTHCOM are implementers of several U.S. governmental programs to assist countries in the AOR. Within the last decade, the United States has dramatically increased the amount of money obligated to the counter-drug fight in the Caribbean, Central and South America. These efforts began with Plan Colombia, which provided broad counter-narcotics assistance authorities to support a variety of activities ranging from crop eradication, to interdiction, to institutional capacity building and support.

Also specific to Colombia is NDAA Section 1021,⁴² which enables the U.S.

track information can be supplied to Colombia, as guided by a 2007 bilateral agreement with strict protocol and limitations, to enable Colombia to interdict illicit drug traffickers and use force if necessary.

⁴⁰ U.S. Southern Command, <http://www.southcom.mil/aboutus/Pages/Our-Team.aspx>, (last visited March 13, 2014).

⁴¹ U.S. Southern Command Pub. Affairs Office, *Multinational Operation Targets Transnational Organized Crime*, USSOUTHCOM, Feb. 8, 2012, available at <http://www.southcom.mil/newsroom/Pages/Multinational-Operation-Targets-Transnational-Organized-Crime.aspx>.

⁴² See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub .L. 108-375, § 1021, Stat. 1812 (2005). Outlines the use of Funds for Unified Counterdrug and

to support Colombian forces in the fight against narco-terrorist groups such as the FARC. This narco-terrorist group is a prototype of an organization that funds its ideological and terrorist activities through the sale of narcotics. Statistics show this U.S. support has been effective in reducing Colombia's coca cultivation from about 74% of the world's supply in 2000, down to 43% in 2009.⁴³ The Central American Regional Security Initiative (CARSI), which has received almost \$600 million since 2008,⁴⁴ and the Caribbean Basin Security Initiative (CBSI), which has received over \$250 million since 2010,⁴⁵ are two Department of State (DoS)⁴⁶ run programs which rely on significant support from SOUTHCOM. These programs provide equipment, training, and technical assistance to build capacity of our Caribbean and Central American partners. Support for CARSI and CBSI comes in the form of police professionalization and anti-corruption training, equipment and training to maintain vessels used to patrol their waters, and technical support on techniques to intercept smuggled contraband.

Congress also provided specific legal authorities empowering DoD to provide capacity-building support to partner nations. As discussed above, NDAA section 1004 empowers DoD military members to provide counter-drug related training.⁴⁷ Section 1033 of the NDAA allows for the provision of non-lethal equipment for certain pre-approved partner nations.⁴⁸ As discussed above, section 1021 of the NDAA allows for DoD assistance to Colombia in a unified campaign against narcotics trafficking and terrorist organizations.⁴⁹ Traditional Combatant Commander activities, considered to be a fundamental part of executing the mission of a geographic combatant command like SOUTHCOM, also account for some partner nation engagement and benefit.

While DoD implements much of the capacity-building mission, the Foreign Assistance Act of 1961 vests responsibility for these activities with the Secretary of State.⁵⁰ Human rights vetting of partner-nation government units

Counterterrorism Campaign in Colombia.

⁴³ UNODC, *World Drug Report 2011*, UNITED NATIONS, 2011, at 99, *available at* http://www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf.

⁴⁴ Seelke, *supra* note 1.

⁴⁵ *Id.*

⁴⁶ 22 U.S.C. Ch. 32 (2013).

⁴⁷ Pub. L. 101-510, § 1004, Stat. 1485 (1990).

⁴⁸ Pub. L. 105-85, § 1033, Stat. 1629 (1998).

⁴⁹ Pub. L. 108-375, §1021, Stat. 1811 (2004).

⁵⁰ See Foreign Assistance Act of 1961, Pub. L. 87-195 as *amended through* Pub. L. 113-76 (2014), Pub. L. 112-74, §620J of the re-designated as §620M and amended. This aid condition originated in a provision first introduced by Senator Patrick Leahy as an amendment to the 1997 Foreign Operations Appropriations Act (Pub. L. 104-208) restricting International

and individuals is conducted prior to the receipt of any type of training, financial assistance, or capacity building. U.S. forces will not cooperate with or support any person or group about which the DoS has received 'credible evidence' of a 'gross violation of human rights.'⁵¹ Additionally, general and country-specific performance criteria must be met before a nation can receive counter narcotics assistance. Performance criteria may include whether the partner-nation has engaged in or tolerated particularly severe violations of religious freedom; or whether it has failed to undertake serious and sustained efforts to combat particularly severe violations of religious freedom.

Making use of these legal authorities, SOUTHCOM recently sent a team of military lawyers to meet with partner nation representatives and discuss the legal considerations associated with criminalizing, interdicting, and successfully prosecuting narco-trafficking activities. The resulting discussion illuminates the systemic challenges SOUTHCOM and our partner nations face as we look for ways to improve our counter-drug efforts within each nation's justice system.

Partner-nation representatives expressed multiple areas of concern during the discussions including, 1) violence against participants in the judicial system, 2) corruption within the judicial system, and 3) the above concerns, as they relate to partner nation transition from the inquisitorial to the accusatorial justice system. To prevent violence from influencing the system, some nations, such as Nicaragua, have adopted various protections and flexibilities within their domestic law, which allow for shielding the identity of witnesses, judges and prosecutors throughout the entire trial process. Other nations are still exploring legal options and were interested in the identity concealment measures allowed under U.S. law and the possibility of sharing model legislation. U.S. representatives explained the limited identity concealment measures available in our justice system, such as the Federal Witness protection program, due to U.S. Constitutional requirements of accusatorial confrontation. This type of exchange of concerns and ideas has built mutual understanding of the complex environment SOUTHCOM and its partner nations work within to combat illicit trafficking and helps to seal the gaps that TOC networks seek to exploit.

Narcotics Control assistance to foreign security forces found to have committed gross violations. Encoded in Human Rights and Security Assistance, 22 U.S.C. § 2304 (2012) .

⁵¹ *Id.*

VI. LOOKING AHEAD

As the federal budget begins to constrict, so will the resources available for this fight. The demand for more assets to combat illicit trafficking must also be balanced against the demand to combat illegal migration, counter international terrorism, provide humanitarian assistance, and support basic infrastructure building and maintenance. If a U.S. Coast Guard cutter is tasked with ensuring safety of life at sea and is therefore required to patrol an area known to be a historic route for illegal migrant entry, that asset is not then available to patrol the Northern Coast of Colombia searching for illicit drug traffic. With the decrease in available ships, planes and manpower, comes a corresponding decrease in detection and monitoring of the area of responsibility and subsequent interdiction of illicit goods. "In 2013, Joint Interagency Task Force South was unable to take action on 74% of actionable illicit trafficking events due to lack of assets."⁵² As General John Kelly, Commander of U.S. Southern Command explained after recent congressional testimony, "It's almost a scientific equation: more assets, more [illicit drug] tonnage."⁵³

This paradigm brings forth two increasingly important concepts for the DoD and SOUTHCOM. First, it requires enhanced interagency coordination and support to find synergies and efficiencies within our own system. Second, it highlights the value of building partner capacity. Through this effort, we enable our partner nations to better contribute to the fight in the future, and better address illicit trafficking at its source. While those of us working in support of SOUTHCOM recognize this is only one aspect of a whole of government approach against the scourge of illicit trafficking, we take this responsibility very seriously. The complex problem of illicit trafficking demands continued commitment, and SOUTHCOM will remain resolute in this fight as long as it is tasked with this important mission.



⁵² General John F. Kelly, United States Marine Corps, Commander United States Southern Command, Posture Statement Remarks Before the 113th Cong. House Armed Serv. Comm. (Feb. 26, 2014).

⁵³ Claudette Roulo, *More Ships Equal More Drugs Seized, SOUTHCOM Commander Says*, AM. FORCES PRESS SERV., Mar. 13, 2014, available at <http://content.govdelivery.com/accounts/USDOD/bulletins/aacf0c?reqfrom=share>.

ARTICLE

Human Trafficking: *An Issue of Human and National Security*

Roza Pati*

*"Human trafficking is a crime against humanity. We must unite our efforts to free the victims and stop this increasingly aggressive crime which threatens not only individuals but the basic values of society and of international security and justice, to say nothing of the economy, and the fabric of the family and our coexistence."*¹

-Pope Francis

ABSTRACT

There can be little doubt that trafficking in human beings, this billions-of-dollars illicit industry, is a horrendous by-product of global poverty and the unchecked greed. As this avalanche of people enslavement rolls down into our communities, it is adversely impacting the individual, the nation-state and humankind. It is as much endangering the security of the individual human being as it is interfering with the security of the nation. Hence, in this day and age of technology and globalization, the concept of national security, should, in accordance with our values, include human security, as the only way to effectively counter global threats and to achieve a public order of human dignity.

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¹ Pope Francis, *Address of Pope Francis to the New Ambassadors Accredited to the Holy See on the Occasion of the Presentation of the Letters of Credence* (Dec. 12, 2013), available at http://www.vatican.va/holy_father/francesco/speeches/2013/december/documents/papa-francesco_20131212_credenziali-nuovi-ambasciatori_en.html.

Back in 1945, Edward Stettinius Jr., U.S. Secretary of State, reporting on the San Francisco Conference that established the United Nations, noted, with remarkable foresight:

“The battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of an enduring peace.”²

Today, almost 70 years later, we are still struggling to be free from fear, free from want, and free to live a life of dignity in our communities. In the context of human trafficking, interference with these freedoms is both its cause and its consequence. This paper will first focus on defining the notions of national security and human security, then describe the scope and magnitude of human trafficking globally, in our Western hemisphere, as well as in our own Sunshine State, analyze the connection of human trafficking to national security, and conclude with a brief appraisal and recommendation.

Table of Contents

| | | |
|------|--|----|
| I. | A CURSORY LOOK AT THE TRADITIONAL CONCEPT OF NATIONAL SECURITY..... | 31 |
| II. | THE ADVENT OF THE CONCEPT OF HUMAN SECURITY..... | 32 |
| III. | HUMAN SECURITY AND HUMAN TRAFFICKING | 33 |
| A. | <i>Human Trafficking: Its Scope and Magnitude</i> | 33 |
| B. | <i>Human Trafficking in the Sunshine State</i> | 35 |
| C. | <i>A Snapshot of Human Trafficking in South, Central America & the Caribbean</i> | 37 |
| IV. | HUMAN TRAFFICKING AND SECURITY: THE IMPACT ON OUR STATE AND REGION..... | 38 |
| V. | APPRAISAL AND RECOMMENDATION..... | 41 |

² Franklin Delano Roosevelt, U.S. President, State of the Union Address: Freedom from fear and freedom from want are key parts of the Four Freedoms proclaimed as post-WWII goals (Jan. 6, 1941), *available at* <http://iipdigital.usembassy.gov/st/english/inbrief/2012/08/20120802134072.html#ixzz2w3AS00Ai>; Listen to the speech at <http://www.fdrlibrary.marist.edu/fourfreedoms>.

I. A CURSORY LOOK AT THE TRADITIONAL CONCEPT OF NATIONAL SECURITY

Different from human security that is people-centered and emphasizes the idea of shielding people from pervasive threats while empowering them to develop resilience to adversity, the policy of the traditional notion of security focuses on the military and defense survival tools to avoid war and severe adversity or to triumph through them, if and when prevention fails. It is all done in the name of untouchable sovereignty, political independence and territorial integrity of the nation-state, by harnessing power—economic, political, or diplomatic *vis-à-vis* the power of other states and non-state actors. Though in the final analysis, people are the beneficiaries of national security policies as well, the focus of the latter is on a specific nation and its citizenry, rather than on a universal dimension of the security of every human being, no matter where the person might be located.

Arthur Rizer and Sheri Glaser, trial attorneys with the United States Department of Justice, discussed the definition of “national security” in a 2011 article. Analyzing statutes like the National Security Act and PATRIOT Act, they concluded that there is no one definition of the term “national security.”³ However, they did find guidance in the Immigration and Nationality Act, which provides: “the term ‘national security’ means the national defense, foreign relations, or economic interests of the United States.”⁴ Further reference is made to President George W. Bush emphasizing protection of our constitutional system, our economic system as well as United States’ interests around the globe.⁵ These definitions express pretty much the traditional approach to security.

However, in today’s world, even such descriptions of ‘national security’ have been viewed as flexible, to include various emerging security issues, such as energy security, cyber security, environmental security, and even President Clinton’s broad perception of security for “our people, our territory and our way of life,”⁶—a concept that comes closer to the notion of human security.⁷

³ Arthur Rizer & Sheri Glaser, *Breach: The National Security Implications of Human Trafficking*, 17 WIDENER L. REV. 69, 74 (2011).

⁴ *Id.*, referring to 8 U.S.C. § 1189 (d)(2) (2006).

⁵ *Id.*

⁶ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 16 (2007)

⁷ See United Nations Office on Drugs and Crime, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* 81-101 (2008); Richard Friman & Simon Reich, *Human*

II. THE ADVENT OF THE CONCEPT OF HUMAN SECURITY

In 1994, the United Nations Development Programme released the Human Development Report that, *inter alia*, focused on a new dimension of security, “human security”.⁸ Human security was to be understood as relating more to people rather than the entity of the nation-state. It is about the legitimate concerns of ordinary people in their everyday lives, and the way they see security: as protection from hunger, unemployment, disease, crime, environmental hazards and civil and political unrests and repression. What really matters to people is for them, in the final end, to enjoy freedom from want, freedom from fear and freedom to live in dignity.

The present notion of security requires shifting the thought from territorial security, exclusively, to a greater emphasis on human security, from ensuring security through military power to achieving security through sustainable human development. In this line of thinking, the policy implications go above and beyond military means and defense capacities, with primary attention given to preventive diplomacy, to addressing the root causes of threats, to the engagement and commitment to capacity and nation-building globally, to a more equitable economic development.⁹

Six major emerging threats were identified: unchecked population growth, disparities in economic opportunities, excessive international migration, environmental degradation, drug production and trafficking, and international terrorism. These threats transcend national borders, they constitute a challenge to our global human security, and they clearly impair the national security of any nation-state, no matter how powerful that nation might be.

Human trafficking, the modern form of slavery, is at the intersection of all of the threats identified above, either because such threats are the push-and-pull factors for human trafficking,¹⁰ or because human trafficking *per se*

Trafficking and Human Security, in HUMAN TRAFFICKING, HUMAN SECURITY, AND THE BALKANS (Richard Friman & Simon Reich eds. 2007); See also Mohamed Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 INTERCULTURAL HUM. RTS. L. REV. 249 (2006).

⁸ UNDP, HUMAN DEVELOPMENT REPORT 1994, Chapter II, at 22.

⁹ Read more on such issues at UN Trust Fund for Human Security, *Human Security in Theory and Practice* (2009).

¹⁰ Consider for instance the great vulnerability that creates ample ground for traffickers and

creates fertile ground for augmenting some of these threats.¹¹ Hence, there is an innate correlation of national security and human security: they are mutually reinforcing the, primarily, protective functions of national security as well as the, primarily, empowerment role of human security.¹²

III. HUMAN SECURITY AND HUMAN TRAFFICKING

A. *Human Trafficking: Its Scope and Magnitude*

Human trafficking is widely recognized as the second largest criminal industry worldwide and a fast-growing transnational organized crime, aptly addressed in the United Nations Convention on Transnational Organized Crime and its supplementing Protocols.¹³ Labeled modern-day slavery, human trafficking is enslavement, a crime against humanity, as it includes “the exercise of any or all of the powers attaching to the right of ownership over a person...”¹⁴ Indeed, it is a fast-growing black market industry throughout the planet: no country is immune from this criminal enterprise. It affects communities across the board, on a micro- and macro-level, be they countries of origin, transit or destination.

smugglers in Latin America: a recent report noted that 1 in 3 Latin Americans has reported of being a victim of a violent crime, and 5 out 10 Latin Americans perceive that security in their respective countries has deteriorated. Hence, the way out for most of them is fleeing the country with hope of reaching a more secure place, like the United States. See Human Development Report for Latin America 2013-2014, CITIZEN SECURITY WITH A HUMAN FACE: EVIDENCE AND PROPOSALS FOR LATIN AMERICA (Nov.12, 2013). Available at <http://www.undp.org/content/undp/en/home/librarypage/hdr/human-development-report-for-latin-america-2013-2014/>. For the idea of having private sector become a “relevant stakeholder dedicated to citizen security and economic development in Central America,” see University of Miami Center for Hemispheric Policy: Celina Realuyo, *Harnessing Economic Development to Counter Transnational Organized Crime in Central America* 10 (July 25, 2013), available at https://umshare.miami.edu/web/wda/hemisphericpolicy/Task_Force_Papers/Realuyo%20-%20Central%20America%20Task%20Force%20Paper.pdf.

¹¹ For a good analysis on human trafficking and human security see generally Louise Shelley, *Human Security and Human Trafficking*, in HUMAN TRAFFICKING AND HUMAN SECURITY 10 (Anna Jonsson ed., 2009).

¹² Read more on these issues at United Nations Trust Fund For Human Security, Human Security Approach, available at <http://www.unocha.org/humansecurity/human-security-unit/human-security-approach>.

¹³ A good account of the TOC Convention is to be found in MATS R. BERDAL, MONICA SERRANO, TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? 90 (2002).

¹⁴ ICC Statute, Article 7 (1/c) and (2/c). For details, see Roza Pati, *States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus & Russia*, 29 B.U. INT'L L.J. 79 (2011).

People have fallen and are still falling into modern-day slavery in appalling numbers. It is estimated that up to 27 million people in the world today are under some form of human trafficking.¹⁵ The ILO has estimated that about 20.9 million people are exploited in forced labor, bonded labor, forced child labor, or sexual servitude.¹⁶ In 2006, the United States records indicated that about 800,000 people were trafficked across international borders yearly, 80% of which are women and 50% of the latter are minors.¹⁷ Human trafficking challenges the rule of law through perpetuating the culture of corruption¹⁸ and aggravating the status of safety, security and preservation of law of every nation involved.¹⁹

The proceeds from trafficking in human beings range from Interpol's 2001 estimate of \$19 billion²⁰ to a business group's finding of over \$31 billion a year.²¹ Transnational organized crime, including human trafficking, weapons and drug trade, continues to pose a great threat to the territories and population of many countries, and has been described as the dark side of

¹⁵ KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 8 (2000).

¹⁶ International Labor Organization (ILO), *ILO Global Estimate of Forced Labour: Results and Methodology*, 2012. [hereinafter: ILO Report 2012].

¹⁷ See Department of State, *Trafficking in Persons Report* (Jun. 2006), at 6; Alison Siskin & Liana Sun Wyler, *Trafficking in Persons: U.S. Policy and Issues for Congress*, Congressional Research Service RL34317 (Dec. 2010); *BATTLEGROUNDS: GOVERNMENT AND POLITICS* 284 (Lori A. Johnson et al. eds., 2011).

¹⁸ See Sheldon X. Zhang & Samuel L. Pineda, *Corruption as a Causal Factor in Human Trafficking*, in *ORGANIZED CRIME: CULTURE, MARKETS AND POLICIES* 45-46 (Diana Siegel & Hans Nelen eds., 2008); Malinvisa Sakdiyakorn & Sutthana Vichitrananda, *Corruption, Human Trafficking and Human Rights: The Case of Forced Labor and Sexual Exploitation in Thailand*, 3 *NACC J.* 54 (2010); Ko-Lin Chin, *The Social Organization of Chinese Human Smuggling*, in *GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES* 190-194 (David Kyle & Rey Koslowski eds., 2nd ed. 2011); Alexis A. Aronowitz, *HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS* 62-63 (2009); Reagan R. Demas, *All Hands on Deck: Collaborative Global Strategies in the Battle Against Corruption and Human Trafficking in Africa*, 6 *U. ST. THOMAS L.J.* 204, 211-215, 219, 220 (2008); Clara A. Dietel, *"Not Our Problem": Russia's Resistance to Joining the Convention on Action against Trafficking in Human Beings*, 32 *SUFFOLK TRANSNAT'L L. REV.* 161, 161, 162 (2008).

¹⁹ United Nations Office on Drugs and Crime, *AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT AND ACTION* 81-101 (2008); Richard Friman & Simon Reich, *Human Trafficking and Human Security*, in *HUMAN TRAFFICKING, HUMAN SECURITY, AND THE BALKANS* (Richard Friman & Simon Reich eds. 2007); see also Mohamed Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 *INTERCULTURAL HUM. RTS. L. REV.* 249 (2006).

²⁰ Nico A. Gemmell, *Human Trafficking. The Effects of Modern-Day Slavery on the Global Economy*, at <http://www8.georgetown.edu/centers/cndls/applications/posterTool/index.cfm?fuseaction=poster.display&posterID=1752>.

²¹ SMWIPM, *The Business Community against Human Trafficking*, at <http://www.endhumantraffickingnow.com/public/structure/2.html>.

globalization.²² It is one of the most serious security problems in our contemporary world,²³ one of the six kinds of national and international security threats permeating the planet, as recognized by the United Nations in 2004,²⁴ and accompanying one of the other threats that closely relates to trafficking: *excessive international migration*,²⁵ i.e. the mostly illicit and unregulated movement of persons across borders.

As such, it is a major concern of human security and also of national security. It is a hybrid threat to our country's national security, for a variety of reasons, which will be discussed further down, with major human and social impact, impairing, thus, our national security directly and indirectly. Consequently, mainstreaming human security within national security, and as part of it, by also combating human trafficking from its root causes to its prevention and prosecution, enhances our security as a nation, as it strengthens the opportunity for development of all humans involved.

B. *Human Trafficking in the Sunshine State*

Often known as the *third largest hub* of human trafficking in the United States,²⁶ Florida is a very attractive place for traffickers exploiting foreign and domestic victims.²⁷ The State features all major forms of human trafficking, from forced farm labor, to domestic servitude, to commercial sexual exploitation, etc.²⁸

²² Peng Wang & Jingyi Wang, *Transnational Crime: Its Containment Through International Cooperation*, ASIAN SOCIAL SCIENCE 5, No. 11, November 2009, at 25. See also TOM J. FARER, TRANSNATIONAL CRIME IN THE AMERICAS 195 (1999).

²³ Leo S.F. Lin, *Conceptualizing Transnational Organized Crime in East Asia in the Era of Globalization: Taiwan's Perspective*, Research Paper No. 146, October 2010, at 7.

²⁴ Those threats are (1) Economic and social threats, including poverty, infectious disease and environmental degradation, (2) Inter-State conflict, (3) Internal conflict, including civil war, genocide and other large-scale atrocities (4) Nuclear, radiological, chemical and biological weapons, (5) Terrorism and (6) Transnational organized crime. *Ibid.*

²⁵ United Nations Human Development Report (1994), Chapter II, at 34.

²⁶ Adam S. Butkus, *Ending Modern-Day Slavery in Florida: Strengthening Florida's Legislation in Combating Human Trafficking*, 37 STETSON L. REV. 297, 323. See also Adriana Hauser and Mariano Castillo, *A Heavy Toll for the Victims of Human Trafficking*, CNN, August 26, 2013, showcasing, inter alia, victims' stories and referencing briefly the impact of the Safe Harbor Act, as well as Gina Jordan, *Florida Ranks Third In Human Trafficking But Can't Prosecute Many Cases*, WLRN (August 15, 2013), available at <http://wlrn.org/post/florida-ranks-third-human-trafficking-cant-prosecute-many-cases>.

²⁷ A good overview of human trafficking in Florida, as well as the legislative and judicial response to it, can be found at: Lydia Butler, *Modern-Day Slavery Eclipsing the Sunshine State Compels Safe Harbor Legislation in Florida*, 7 INTERCULTURAL HUM. RTS. L. REV. 191 (2012).

²⁸ FSU CENTER FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA RESPONDS TO HUMAN TRAFFICKING

The pervasive nature of human trafficking in Miami, and generally in Florida, is due to opportune conditioning factors, both environmental and predispositional.

Environmental factors that contribute to trafficking are multifold: Florida's long coastline; its function as the gateway to the Americas; its booming year-round agricultural industry; Miami International Airport, one of the largest international airports in the world; the Port of Miami, known as cruise capital of the world and the cargo gateway of the Americas; South Florida being one of the most frequented tourist destinations with all the accompanying hospitality and other tourist-oriented services; being the place of retirement for many citizens from the North and a vacation home for many wealthy foreigners; home of many military bases from the Naval Air Station of Key West, to the Air Reserve Base in Homestead to the US Southern Command, etc. All of these factors create a high-end demand for all kinds of services, legal and illegal, as they also create a dynamic market competition for cheap unskilled labor and inexpensive goods and services.²⁹

Predispositional factors, inter alia, include: Miami's and Florida's multicultural composition that displays a variety of cultures sometimes converging and sometimes diverging in terms of customs, attitudes towards the law, conduct prejudicial towards women and children as well as towards minorities. Consider in this regard, traditional institutions like the Haitian *Restavec*, or the Latin American "*machismo*," that create a subculture in which children and women, respectively, are exploited with ease. Furthermore, this multicultural environment makes it very easy for the traffickers to have their victims blend in within our community.³⁰

This wave of human trafficking has been met with a *zero-tolerance* policy towards traffickers. The Florida Legislature, the Attorney General, the Department of Children and Families, the Miami-Dade County State Attorney's Office, as well as a very robust civil society, have all been actively engaged in dealing with the challenge that human trafficking presents for our state, and many times have come up with effective tools to combat this illicit form of

27 (2003) [hereinafter FSU FLORIDA REPORT].

²⁹ For more information, see FSU FLORIDA REPORT, *Id.*, as well as from the FSU CENTER FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA STRATEGIC PLAN ON HUMAN TRAFFICKING (2010) [hereinafter FLORIDA STRATEGIC PLAN].

³⁰ See e.g., BUTKUS, *supra* note 27.

human exploitation.³¹

C. *A Snapshot of Human Trafficking in South, Central America & the Caribbean*

Our neighboring countries serve as source, transit and destination places for human trafficking and its victims. The International Labor Organization estimates that in this region at least 1.8 million people are exploited in forced labor.³² U.S. Department of State has ranked most of the Central and South American countries in Tier 2, meaning that while they are not in compliance with the international minimum standards of the Trafficking Victims Protection Act (TVPA), they are making significant efforts to combat trafficking and protect victims. However, nine of these countries are ranked in the Tier 2 Watch List, namely: Barbados, Guyana, Haiti, Honduras, St. Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela, meaning that they have to be kept under scrutiny for the coming year. Cuba was the only country in Tier 3, meaning that it is not in compliance and is not making significant efforts to combat trafficking.³³

The Congressional Research Service identifies South America to be a primary source for people trafficked into the United States and Canada. It also serves as transit area for Asian victims transferred to the United States, Canada and Europe.³⁴

Some of these countries, such as Brazil, Costa Rica and the Dominican Republic are preferred centers of child sex tourism.³⁵ At least one million children toil as domestic servants in South and Central America, with Haiti

³¹ See generally The 2013 Florida Statutes (Chapter 787), available at http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0787/0787ContentsIndex.html. A brief summary of recent efforts made by the U.S. Attorney's Office for Florida's Southern District, can be found in Wifredo Ferrer, *Human Trafficking Is a Blight that Must Be Eradicated*, MIAMI HERALD, January 25, 2014. Also see Brett Clarkson, *Florida Is a "Hub" for Human Traffickers, Attorney General Says*, SUN SENTINEL, September 23, 2012, and generally visit the website of the Office of the Attorney General of Florida Pam Bondi, noting "Florida is a Zero-Tolerance State for Human Trafficking, available at <http://myfloridalegal.com/pages.nsf/Main/AF860EB7606CF92D85257A7D00458CD7>. See also the contribution of academia: *The Miami Declaration of Principles on Human Trafficking*, 1 INTERCULTURAL HUM. RTS. L. REV. 12 (2006).

³² International Labor Organization (ILO), *ILO Global Estimate of Forced Labour: Results and Methodology*, 2012. [hereinafter: ILO Report 2012].

³³ U.S. Department of State, *TIP Report*, June 2013 [hereinafter: *TIP Report* 2013].

³⁴ CONGRESSIONAL RESEARCH SERVICE: Clare Ribando Seelke, *Trafficking in Persons in Latin America and the Caribbean* 4 (July 15, 2013), available at <http://www.fas.org/sgp/crs/row/RL33200.pdf> (hereinafter: CRS 2013).

³⁵ *Ibid*, at n.18.

being overwhelmed with this phenomenon.³⁶ Organized crime groups, such as ones from Guatemala, are heavily involved in selling women,³⁷ while it is also well-known that drug syndicates like the Mexican *Zetas* are actively engaged in human trafficking.³⁸

Furthermore, multinational gangs composed of Central Americans, Russians, Japanese and Ukrainians, to mention but a few, constitute a solid network that traffics people across the border between the United States and Mexico.³⁹

IV. HUMAN TRAFFICKING AND SECURITY: THE IMPACT ON OUR STATE AND REGION

Talking about defense and national security, Congresswoman Ileana Ros-Lehtinen has observed: “In South Florida, drug and human trafficking are one of the most pervasive security threats.”⁴⁰ This succinct remark encompasses the gist of the critical impact that transnational organized crime in general and human trafficking in particular has on our security, both state and human security.

Human trafficking, a growing form of transnational organized crime, poses a national and international threat to global human security and it requires, by default, effective international cooperation.⁴¹ Transgressing national borders within and into our Western Hemisphere, human trafficking is now a *business* of choice for well-organized and versatile crime syndicates. Let us review only a few such structures. Central America and Mexico have long been the well-established smuggling routes of drugs and illegal migrants into

³⁶ *TIP Report* 2013.

³⁷ CRS 2013, at 6.

³⁸ See Tim Johnson, *Mexican Criminal Gang Turns to Migrant Smuggling*, MCCLATCHY-TRIBUNE SERVICE, August 15, 2011, and also Paris Martinez, *How Mexico's Zetas Enslave Engineers*, INSIGHT CRIME ORGANIZED CRIME IN THE AMERICAS, October 28, 2012, (as cited in CRS 2013, at 7, Fn.28).

³⁹ CRS 2013 at 7.

⁴⁰ Ileana Ros-Lehtinen, *Defense and National Security: Keeping Our Country and Our Community Safe*, available at <https://ros-lehtinen.house.gov/defense>.

⁴¹ For an analysis of efforts made towards international cooperation in combating human trafficking see generally Roza Pati, *Combating Human Trafficking Through Transnational Law Enforcement Cooperation: The Case of South Eastern Europe*, in POLICING ACROSS BORDERS: THE ROLE OF LAW ENFORCEMENT IN GLOBAL GOVERNANCE (Springer 2012).

the United States.⁴²

More effective border control coupled with more stringent immigration laws gave rise to a more sophisticated crime syndicate that expanded its reach far beyond drug trafficking, into other areas of enhanced convenience and higher profitability: smuggling people, and also, more and more, exploiting people in slavery-like conditions.⁴³ Development in trade and communication made it easier for them to outsource the trafficking crime and accompanying money laundering. By now, these well-heeled criminal organizations have come to know the ins and outs of law enforcement, judicial systems, as well as tax systems of the countries they operate in in the recruitment, transit and exploitation of their victims.

In addition to using human trafficking victims as drug mules,⁴⁴ human trafficking has also been proven to be a source of funding for terrorist organizations. They are using human trafficking to bankroll their operations, to gain easy access to the United States⁴⁵ through human trafficking routes, and to engage their corrupt contacts in document fraud in countries of Central, South America and the Caribbean, by selling passports to other nationals⁴⁶ or by forging passports.⁴⁷

A quick look at the Salafi Network (Global Salafi Jihad), which is present and quite powerful in Mexico and other parts of Central America,⁴⁸ reveals that after the physical break-up of these groups in the wake of the 9/11 Counter-Terrorism campaign, the network has become more of a spontaneous and self-

⁴² See Swante E. Cornell, *The Interaction of Drug Smuggling, Human Trafficking and Terrorism*, in HUMAN TRAFFICKING AND HUMAN SECURITY 48, 49-50 (Anna Jonsson ed., 2009).

⁴³ See, for instance, the involvement of Russian organized crime and the Mexican cartels in the commercial sex trade of young girls in Florida. Cf. Michael Williams, *Human Trafficking is Happening in Palm Beach County*, News Channel 5, available at http://www.wptv.com/dpp/news/local_news/special_reports/human-trafficking-is-happening-in-palm-beach-county (last visited March 10, 2012).

⁴⁴ United Nations Office on Drugs and Crime, *Drug Mules: Swallowed by the Illicit Drug Trade*, available at: https://www.unodc.org/southasia/frontpage/2012/october/drug-mules_-swallowed-by-the-illicit-drug-trade.html.

⁴⁵ See Cornell, *supra* note 43, at 50.

⁴⁶ See *Honduran Official: Al Qaeda Recruits Central American Gangs*, ASSOCIATED PRESS, October 21, 2004, and also J. Seper, *Al Qaeda Seeks Ties to Local Gangs*, WASHINGTON TIMES, September 28, 2004.

⁴⁷ U.S. Army War College Strategy Research Project: Sandra L. Keefer, *Human Trafficking and the Impact on National Security for the United States* 4 (15 March 2006).

⁴⁸ See *id.* On the issue of Islamic extremists' presence in Central America, see Cornell, *supra* note 43, at 50.

organized home-grown initiative. That means that it is not centralized any longer, but has assumed local autonomy, which focuses on self-financing and self-training, while it maintains informal communications, which are more difficult to monitor. Their leadership has also changed into new local, more aggressive and more reckless clusters of persons who are less educated and with a criminal alignment beyond sheer ideology. Hence, they are resorting, *inter alia*, to human trafficking to finance their activities and to plan for the future.

Another crime group well connected to human trafficking is the so called *Mara Salvatrucha* (MS 13), which started as a street gang in Los Angeles and has now gained a regional multi-national dimension, spreading its heavy-hitting criminal activity from the United States, to Mexico, to El Salvador, to Guatemala, to Honduras, etc. Their primary money-making venture is people smuggling and human trafficking along the United States-Mexican border.⁴⁹ They are known to infiltrate Hispanic communities, including the community of South Florida.⁵⁰ They are set up in a paramilitary-type structure in the mode of insurgencies in Central and South America, and they resort to the use of violence without any scruples. The gang also constitutes a greater threat because of its potential alliance with terrorists in order to smuggle them into the United States.⁵¹

To summarize, human trafficking is a crime that inherently breeds more crime, while corroding the fabric of the society, the life of the individual and the security of the nation. It is indeed an infamy that poisons human society⁵² at its core.

⁴⁹ Rizer & Glaser, *supra* note 4, at 84.

⁵⁰ See U.S. Immigration and Customs Enforcement, Operation Community Shield secured over 2388 gang arrests since February 23, 2005; out of these arrests, 72 were in Miami, with a number of other arrests in various parts of Florida, including Fort Lauderdale, Orlando, Fort Myers, etc. Chart available at: <http://onemorecup.files.wordpress.com/2010/08/gangarrestmap.jpg>.

⁵¹ Michele McPhee, *Gang Tied to Terrorists*, BOSTON HERALD, January 5, 2005, at 5.

⁵² Letter from Pope John Paul II to Archbishop Jean-Louis Tauran, in STOP TRAFFICKING IN HUMAN BEINGS (Franco Angeli s.r.l. ed., 2003).

V. APPRAISAL AND RECOMMENDATION

Needless to note, such an interwoven fabric of crime does create an enormous threat to our borders and the rule of law and a menace to our most cherished fundamental values: universal human rights, respect for human dignity, and enjoyment of freedom and liberty. So, how are we to successfully address it?

This author believes that a genuine commitment to combating human trafficking must be informed by the guiding light of the dignity of all human beings, regardless of where they are born or where they live. It requires a powerful involvement on the part of the state⁵³ and a well-focused human rights approach to addressing human trafficking is a necessity.⁵⁴ This approach goes beyond the focus on victim protection and non-criminalization of her acts. A human rights approach encompasses the essence of human security to address the root causes that make people vulnerable to being trafficked, to being easily defrauded or coerced into labor or sexual servitude.⁵⁵ Such vulnerabilities exist on the level of individual human being as well as on the level of the nation-state. They arise from widespread poverty on our planet, partial or full power vacuums and ungoverned lands, corruption and lawlessness in some states as well as unregulated and unchecked migration. Additional push factors could be civil unrest, political repression and wars. They could be environmental degradation and natural calamities. They could also be cultures of abuse towards women, children and minorities.⁵⁶ Pull factors are, *inter alia*, the cultures of greed and consumerism, the constant demand for cheap labor, cheap products and services,⁵⁷ and the unrestrained

⁵³ See Roza Pati, *The Categorical Imperative to End Modern-Day Slavery: Subsidiarity, Privatization, and the State's Duty to Protect*, in DER STAAT IM RECHT. FESTSCHRIFT FÜR ECKART KLEIN ZUM 70. GEBURTSTAG (Duncker & Humblot, M. Breuer et al., 2013).

⁵⁴ For an analysis of the developments showing state positive obligations in combating human trafficking from a human rights' perspective, see Pati, *supra* note 15.

⁵⁵ On this subject, see Roza Pati, *Beyond the Duty to Protect: Expanding Accountability and Responsibilities of the State in Combating Human Trafficking*, in THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOR OF PROFESSOR KALLIOPI KOUFA 319 (2009). For a counter-position, see generally Ryszard Piotrowicz, *The Legal Nature of Trafficking in Human Beings*, 4 INTERCULTURAL HUM. RTS. L. REV. 175 (2009).

⁵⁶ For a general discussion of how racial, ethnic, or national difference can facilitate the trafficking of domestic servants, for instance, see Bridget Anderson & Julia O'Connell Davidson, *IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY* 31 (2003).

⁵⁷ Modern consumption-based culture and psychology has been studied, theorized and

demand for the adult entertainment industry.

Regardless of where such vulnerabilities spring from, they create the adequate soil for human trafficking to thrive. They are the cause of human trafficking. In turn, human trafficking is the cause of further criminality, further vulnerability for our citizen and for every human being, our nation and every nation on earth. It is irrelevant whether we label human trafficking a matter of national security or not. What matters is that this global pernicious phenomenon commands this great nation's attention, leading to action and ultimate victory in building a world free from fear and free from want, a world public order of human dignity.



criticized quite extensively. *See, e.g.*, BENJAMIN R. BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE (2007); Peter Corrigan, THE SOCIOLOGY OF CONSUMPTION (1998); CRAIG GAY, THE WAY OF THE (MODERN) WORLD: OR, WHY IT'S TEMPTING TO LIVE AS IF GOD DOESN'T EXIST (1998); ALEX WOOLF, CONSUMERISM (2004); Peter N. Stearns, CONSUMERISM IN WORLD HISTORY: THE GLOBAL TRANSFORMATION OF DESIRE (2001).

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

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Table of Contents

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

⁵ *Id.* at § 7045(c).

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

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

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

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

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

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

¹² *Id.*

transportation specialists operating at the orders of Mexican cartels ship the illicit cargo to the Central American Isthmus, where they make their way by land to the United States. Middle men are paid not with cash, but with cocaine, creating a supply and competition for local markets, which leaves an exhaust of instability,¹³ corruption,¹⁴ and violence¹⁵ through Central America and Mexico. While the northbound smuggling vectors are populated by cocaine and methamphetamines, they are populated southbound by bulk cash and weapons.

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

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

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

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

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

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

¹⁷ Office of National Drug Control Policy, *2013 National Drug Control Strategy*, http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs_2013.pdf.

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

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

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

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

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

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

Pursuant to customary international law, vessels of the United States, which are comprised for the most part by those documented pursuant to United States law²¹ or certificated in accordance with the laws of one of the 50

¹⁸ *Id.*

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

²⁰ 14 U.S.C.A. § 89(a) (2013).

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

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

Based on the well-established principles of customary international law, vessels of foreign nations located within the territorial seas of the United States, i.e. the water stretching from the baseline²⁴ out to twelve nautical miles²⁵, are subject to United States jurisdiction and thus, to boarding by the Coast Guard, unless engaged in a recognized high seas freedom, such as innocent passage.²⁶ Additionally, those located within the contiguous zone of the United States, i.e. the water stretching from the 12 nautical mile mark out to the 24 nautical mile mark²⁷, are subject to the jurisdiction of the United States, when infringing on the customs, fiscal, immigration or sanitary laws of the United States.²⁸

B. *Vessels of Foreign Nations*

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

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

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

²⁴ *Id.* at art. 6-13.

²⁵ *Id.* at art. 3.

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

²⁷ LOS, *supra* note 23, at art. 33.

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

²⁹ LOS, *supra* note 23, at art. 92

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

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

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

³¹ *Id.*

³² 22 U.S.C.A. § 2291 (2012).

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

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

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

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

³⁴ LOS, *supra* note 23, at art. 92.

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

³⁶ *Id.*

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

³⁸ LOS, *supra* note 23, at art. 110.

³⁹ *Id.*

⁴⁰ *Id.*

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

III. DOMESTIC LEGAL REGIME

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

A. *Maritime Drug Law Enforcement Act*

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

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

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

⁴³ U.N. Drug Convention, *supra* note 30, at art. 3, 4.

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

⁴⁵ 46 U.S.C.A. s. 70503 (2013).

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

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

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

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

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

⁴⁹ 14 U.S.C.A. § 89(a) (2013).

⁵⁰ LOS, art 92, 110.

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

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

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

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

IV. OTHER CONSIDERATIONS FOR THE UNITED STATES' INTERAGENCY

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

A. *Support the Recapitalizing of Coast Guard Assets*

There continues an obvious and well-documented need for the Coast Guard to continue its recapitalization efforts.⁵⁵ Without the hardware to do the interdictions, the legal regime is only as good as the paper on which it is written. The interdiction aspect of supply reduction requires assets: ships, helicopters, law enforcement teams, and persistent surveillance. The DHS layered strategy⁵⁶ requires long range patrols into the deep Caribbean Sea and eastern Pacific Ocean. Coast Guard seizures of cocaine being transported via maritime conveyance yields more gross tonnage in these patrol areas than the cocaine seizures of all other Federal agencies combined.⁵⁷ In 2012 for example, the Coast Guard seized more cocaine than all that seized by all

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

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

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

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

agencies in the continental United States combined.⁵⁸ Seizures closer to the source countries of Colombia and Ecuador also yield higher purity cocaine⁵⁹ and larger load sizes.⁶⁰ Failure to replace Coast Guard ships one for one will surrender patrol areas previously patrolled by Coast Guard and Navy ships, the latter carrying Coast Guard law enforcement detachments (LEDETs) trained and ready to conduct law enforcement boardings. Indeed, due to the ships' aging and increasing mechanical challenges, the United States has already surrendered some of those areas.⁶¹ Collapsing to the continental United States amounts to a goal line defense, and forgoes the efficiencies of patrolling close to the South American landmass.

B. *Recognize Another Prominent Threat Stream*

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

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

⁵⁹ *Id.*

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

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

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

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

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

C. Capture the Data

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

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

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

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

D. Judge and Witness Protection

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

E. Explore Expansion of the Joint Interagency Task Force Concept

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

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

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

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

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

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



ARTICLE

Promoting Partnerships to Combat Illicit Trafficking

Celina B. Realuyo *

ABSTRACT

The age of globalization has afforded us greater access to goods, services, financing, and information - faster, better, and cheaper—from an increasingly interconnected economy. The breakdown of commercial barriers has lifted millions from poverty and promoted the free movement of labor, capital, technology, and ideas around the world. Alongside all this unprecedented progress, we have witnessed a dark side of globalization that has empowered illicit networks including terrorists, criminals and proliferators that threatens security and prosperity. The global trafficking of drugs, arms, people, and counterfeit goods, and the money laundering that accompany these illicit activities, compromise the safety and soundness of consumers, rob inventors of their intellectual property, and deny significant tax revenues used to support nations.

Governments have been engaged in combating illicit trafficking since the age of the ancient Greeks and Romans; what is different today is that the drivers of globalization have magnified the scope and velocity of these illicit activities. In many cases, international drug cartels, gangs, and terrorist groups

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are better armed, funded, and trained than the government security forces charged with confronting them. Since these illicit activities rely on traditional supply and demand features of markets, governments need to actively engage partners in the private and civic sectors to better detect, disrupt, dismantle, and deter these illicit networks that undermine our security and prosperity. This article will underscore the need to promote vigorous partnerships among the public, private, and civic sectors of society to combat illicit networks.

Table of Contents

| | | |
|------|---|----|
| I. | GLOBAL CHAINS AND ILLICIT TRAFFICKING..... | 60 |
| II. | U.S. NATIONAL STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME..... | 61 |
| III. | RECENT VICTORIES AGAINST ILLICIT TRAFFICKING..... | 63 |
| A. | <i>The Arrest of the World’s Most Wanted Drug Lord – “El Chapo” Guzmán.....</i> | 63 |
| B. | <i>2014 NFL Super Bowl XLVIII Crackdown on Sex Trafficking.....</i> | 64 |
| IV. | PARTNERING TO COMBAT ILLICIT TRAFFICKING..... | 66 |
| A. | <i>Public Education and Awareness Campaigns.....</i> | 66 |
| B. | <i>Reporting and Information-Sharing Mechanisms.....</i> | 68 |
| C. | <i>Feedback Loops.....</i> | 69 |
| D. | <i>Dissemination of Lessons Learned/Best Practices.....</i> | 69 |
| E. | <i>Political Will.....</i> | 70 |
| V. | CONCLUSION..... | 70 |

I. GLOBAL CHAINS AND ILLICIT TRAFFICKING

Illicit networks seek to navigate, infiltrate, and/or undermine global supply chains to further their activities and enhance their power. They actually rely on open societies with the free flow of goods, people, and capital. Just like legitimate businesses, illicit networks are matching the supply and demand for goods, services, funding, and information for their clients. Illicit actors use and even seek to co-opt supply chains to facilitate the movement of “bad people and bad things” like drugs, guns, and counterfeit goods around the world.

Four critical elements comprise any global supply chain, regardless of industry or geography, whose integrity must be preserved and protected at all cost, as follows:¹

1. *Material*: What is being moved through the supply chain? People, goods, commodities, services, data? Where are those materials originating and delivered?
2. *Manpower*: Who staffs the supply chain? Who are the key enablers of that supply chain? Who controls the supply and these mechanisms or modes of conveyance?
3. *Money*: Who owns or finances the supply chain? What business model is being used to generate revenue? Where is the financing coming from and directed to?
4. *Mechanisms*: What modes of conveyance are supply chains using? Are people, goods, data, and services moving by land, or air, or sea, or through cyberspace? How is the supply chain organized?

Each of these four critical elements of global supply chains has its unique features, and the security of each is vital to safeguarding supply chains. Who is responsible for securing these elements? Governments? Industry? In light of heightened global competition, the private sector has identified and adopted the most efficient means of matching supply and demand for goods, services, and information and incorporate risk management mechanisms.² Similarly, illicit networks have implemented these best practices; they are constantly monitoring the new safeguards put in place to protect supply chains and devising ways to circumvent them. Unfortunately, government regulations and international safety standards to secure global supply chains still lag far behind.

Illicit actors are well aware of these weaknesses and exploit them to further

¹ See e.g., Celina B. Realuyo, *Securing Global Supply Chains in an Age of Uncertainty: Focus on Food Safety*, 10 GEORGE MASON UNIVERSITY CENTER FOR CRITICAL INFRASTRUCTURE AND HOMELAND SECURITY CRITICAL INFRASTRUCTURE REPORT 9 (July 2011), available at http://tuscan.gmu.edu/centers/cip/cip.gmu.edu/wp-content/uploads/2013/06/CIPHS_TheCIPReport_July2011_GlobalSupplyChain.pdf.

² *Ibid.*

their interests. They capitalize on gaps in governance, regulations, and oversight to bolster their enterprises. Illicit networks easily adapt to the changing operating environment. They often serve as service providers for each other. For transnational criminal organizations, maximizing profits is their ultimate mission. Their activities distort global markets and pricing, undermine consumer confidence, and even endanger consumers around the world, as in the case of counterfeit drugs. As a result of globalization, the sheer volume and velocity of international trade makes it virtually impossible to control and secure global supply chains. Nevertheless, governments must keep up with the ways illicit traffickers are exploiting the increasingly borderless world and identify the vulnerabilities of global supply chains. Accordingly, governments must develop measures to combat illicit networks leveraging and safeguarding the four critical elements of supply chains: materiel, manpower, money, and mechanisms. New strategies to combat transnational organized crime and illicit networks are increasingly addressing these challenges.³

II. U.S. NATIONAL STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME

The Obama Administration recognized transnational organized crime (TOC) as a national security threat and issued the first Strategy to Combat Transnational Organized Crime in July 2011. The strategy states that transnational organized crime, often times manifested by illicit trafficking, threatens U.S. interests by taking advantage of failed states or contested spaces; forging alliances with corrupt foreign government officials and some foreign intelligence services; destabilizing political, financial, and security institutions in fragile states; undermining competition in world strategic markets; using cyber technologies and other methods to perpetrate sophisticated frauds; creating the potential for the transfer of weapons of mass destruction (WMD) to terrorists; and expanding narco-trafficking and human and weapons smuggling networks. Terrorists and insurgents increasingly are turning to criminal networks to generate funding and acquire logistical support. TOC also threatens the interconnected trading, transportation, and transactional systems that move people and commerce throughout the global economy and across our borders.⁴

³ Celina B. Realuyo, *Collaborating to Combat Illicit Networks: Interagency and International Efforts in the Americas*, in CONVERGENCE: ILLICIT NETWORKS AND NATIONAL SECURITY IN THE AGE OF GLOBALIZATION, ch.14 (NDU Press, 2013), available at <http://www.ndu.edu/press/convergence.html>.

⁴ *U.S. Strategy to Combat Transnational Organized Crime 2011*, WHITE HOUSE, (July 2011), available at http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized

The strategy's key policy objectives are to:

1. Protect Americans and our partners from the harm, violence, and exploitation of transnational criminal networks.
2. Help partner countries strengthen governance and transparency, break the corruptive power of transnational criminal networks, and sever state-crime alliances.
3. Break the economic power of transnational criminal networks and protect strategic markets and the U.S. financial system from TOC penetration and abuse.
4. Defeat transnational criminal networks that pose the greatest threat to national security by targeting their infrastructures, depriving them of their enabling means, and preventing the criminal facilitation of terrorist activities.
5. Build international consensus, multilateral cooperation, and public-private partnerships to defeat transnational organized crime.

Key actions include measures to:

- A. Reduce the demand for illicit drugs in the United States, thereby denying funding to illicit trafficking organizations.
- B. Continue to attack drug trafficking and distribution networks and their enabling means within the United States to reduce the availability of illicit drugs.
- C. Sever the illicit flow across U.S. borders of people, weapons, currency, and other illicit finance through investigations and prosecutions of key TOC leadership, as well as through the targeting of TOC networks' enabling means and infrastructure.
- D. Identify and take action against corporate and governmental corruption within the United States.
- E. Work with Congress to secure ratification of the Inter American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials.
- F. Seek accession to the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime.

The strategy's other priority actions seek to:

- Enhance Intelligence and Information Sharing;
- Protect the Financial System and Strategic Markets Against Transnational Organized Crime;
- Strengthen Interdiction, Investigations, and Prosecutions;
- Disrupt Drug Trafficking and Its Facilitation of Other Transnational Threats; and
- Build International Capacity, Cooperation, and Partnerships.

III. RECENT VICTORIES AGAINST ILLICIT TRAFFICKING

A. The Arrest of the *World's Most Wanted Drug Lord* – *"El Chapo" Guzmán*

On February 22, 2014, Mexican Marines, with cooperation from and information sharing with U.S. government agencies, including the Drug Enforcement Agency (DEA), arrested "El Chapo" Guzmán, notorious leader of Mexico's most powerful Sinaloa Cartel.⁵ The takedown of "the most wanted drug lord in the world" marked a major victory for U.S. and Mexican authorities, who had been hunting him down over the past 13 years when he managed to escape from a Mexican prison. The Sinaloa cartel is said to be responsible for as much as one-third of the cocaine, marijuana, heroin and methamphetamines entering the U.S. With operations in Europe and Asia, the cartel flaunts an international presence unmatched by any other criminal organization. Guzmán built an extensive network that can smuggle tons of drugs into the country of his choosing.

The DEA believes the Sinaloa cartel sells more narcotics today than Colombian drug dealer Pablo Escobar did at the height of his career. Former undercover DEA agent Bob Mazur said the U.S. drug market is too attractive for a cartel like Guzmán's to stay underground for too long, despite this takedown. Just as an example, the Sinaloa cartel buys a kilogram (2.2 pounds) of cocaine in Colombia or Peru for about \$2,000. It then can get as much as \$10,000 for that kilo in Mexico and as much as \$30,000 in the U.S. Marked up for retail, a kilo of cocaine in some U.S. cities can reach \$100,000. Colombian and Mexican cartels can achieve as much as \$39 billion annually in drug sales from the U.S. alone, according to the Justice Department. If Sinaloa actually is responsible for about one-third of all U.S. narcotics, it could be making \$13 billion a year.⁶

While the capture of "El Chapo" is a significant milestone in the fight against the Mexican drug cartels, illicit drug trafficking by the Sinaloa cartel will continue due to the lucrative nature of the business and their well-established trade routes and networks throughout the Western Hemisphere. The hunt is on for two of the possible leaders to replace "El Chapo" Guzmán. Sinaloa cartel kingpin, Ismael Zambada, known as "El Mayo," is considered a probable successor to Guzmán. He helped run the cartel when Guzmán was in prison from 1993 to 2001. Zambada's son, Vicente, or "El Mayito," is facing a federal

⁵ Kelly Riddell, Arrest of drug kingpin 'El Chapo' expected to have little impact on drug trade, WASH. TIMES, Feb. 27, 2014, *available at* <http://www.washingtontimes.com/news/2014/feb/27/us-drug-trade-expected-to-continue-after-arrest-of/>.

⁶ *Ibid.*

grand jury indictment in Chicago and has claimed he was a DEA informant.⁷

Juan Jose Esparragoza, "El Azul," or "Mr. Blue" is another possible successor. He is a former Mexican federal police detective, believed to be the top negotiator and moneyman for Sinaloa, with strong ties to Colombian gangs and other Mexican smugglers. The U.S. Treasury Department calls him the "godfather of Mexican narcotics," and has designated him a narcotics kingpin.⁸ U.S. agencies are offering rewards of up to \$5 million for information leading to the arrest of Esparragoza. Mexican and U.S. authorities are analyzing how the capture of "El Chapo" will affect the Sinaloa cartel and monitoring movements, telecommunications, and money movements among its members.

B. 2014 NFL Super Bowl XLVIII Crackdown on Sex Trafficking

Human trafficking, often referred to as "modern slavery," is considered the second most lucrative illicit activity in the world after drug trafficking. Human trafficking is defined in the U.N. Trafficking Protocol as "the recruitment, transport, transfer, harboring or receipt of a person by such means as threat or use of force or other forms of coercion, of abduction, or fraud or deception for the purpose of exploitation." According to the UNODC, the most common form of human trafficking (79%) is sexual exploitation. The State Department believes that there are an estimated 27 million victims of human trafficking around the world, but only 46,570 were identified in 2012.⁹ Earlier this year, an active public awareness campaign to focus attention on sex trafficking and extensive local, state, federal law enforcement operations to pursue human traffickers was launched ahead of Super Bowl XLVIII held at the Meadowlands. High-profile special events like the Super Bowl, which draw large crowds, have become lucrative opportunities for child prostitution criminal enterprises, according to Ron Hosko, assistant director of the FBI's Criminal Investigative Division. He stated the FBI and its partners remain committed to stopping this cycle of victimization and putting those who try to profit from this type of criminal activity behind bars.¹⁰

⁷ Terri Rugar, *El Chapo has been arrested. Who's the most-wanted drug lord now?*, THE WASH. POST, Feb. 24, 2014, available at http://www.washingtonpost.com/world/national-security/el-chapo-has-been-arrested-whos-the-most-wanted-drug-lord-now/2014/02/24/85c329ec-9d78-11e3-b8d8-94577ff66b28_story.html.

⁸ *Treasury Targets Corporate Network of Sinaloa Cartel Drug Lord "El Azul,"* DEP'T OF TREASURY, July 24, 2012, available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1649.aspx>.

⁹ *Trafficking in Persons Report 2012*, DEP'T OF STATE, last visited May 20, 2014, <http://www.state.gov/j/tip/rls/tiprpt/>.

¹⁰ Christina Corbin, *Missing children rescued from Super Bowl sex trade in FBI sting*, FOX NEWS, available at <http://www.foxnews.com/us/2014/02/04/fbi-sting-rescues-missing-children-from->

Twenty-five child prostitutes between the ages of 13 and 17 were rescued and forty-five “pimps” and others associated with exploiting teens as sex workers were arrested in New Jersey. The arrests were the result of a 10-month investigation that targeted sex trafficking ahead of Super Bowl XLVIII, according to FBI’s Newark Division spokeswoman Special Agent Barbara Woodruff. Many of the girls were reported missing from New York and New Jersey. Investigators did not find any links between the traffickers and organized crime. Most of the suspects were either members of trafficking rings who traveled to New Jersey to profit from tourists attending the Super Bowl, or offenders who normally operate in the area, according to Thomas Hauck, a supervisory special agent with the Newark field office. The advertisements were scattered around websites like Craigslist and BackPage, promising romantic rendezvous at New Jersey casinos, hotels and homes with women who were “just legal.” For all the pretty phrasing, federal investigators say they knew exactly what the people behind each post were offering — child prostitutes, some as young as 13-years-old. The operation was part of the Innocence Lost National Initiative, established in 2003 by the FBI’s Criminal Investigative Division, in partnership with the Department of Justice and the National Center for Missing and Exploited Children, to combat child prostitution.¹¹

In Super Bowl-related vice operations in New York, law enforcement made 200 arrests for sex trafficking and related crimes. New York Police Department vice units trained in dealing with sex trafficking and prostitution converged on certain parts of the city conducting both street busts and high-end, undercover call girl stings to try and curtail some of the sex trafficking business in anticipation of the Super Bowl. The NYPD and the Federal Bureau of Investigation say they have dedicated more resources to the issue and have been working cases to target traffickers who victimize young women and men in the sex trade. Most of the operation has focused on johns and sex trafficker, and the police have stressed that in most cases, they treat sex workers as victims.¹² The public education campaign along with these law enforcement operations were accredited with shining the spotlight on the scourge of human trafficking, particularly the exploitation of minors in the sex trade.

super-bowl-sex-trade/.

¹¹ James Queally, *Federal sting leads to rescue of 25 child prostitutes, arrest of 27 suspects in N.J.*, THE STAR-LEDGER, Feb. 4, 2014, available at http://www.nj.com/news/index.ssf/2014/02/federal_sting_leads_to_rescue_of_25_child_prostitutes_arrest_of_27_in_nj.html.

¹² Shimon Prokopczyk, *NYPD conducts pre-Super Bowl crackdown on sex trafficking*, CNN, available at <http://www.cnn.com/2014/01/28/justice/pre-super-bowl-sex-trafficking-busts/>.

IV. PARTNERING TO COMBAT ILLICIT TRAFFICKING

While cooperation among government agencies and nations to combat illicit networks has been underway for years, more actors in the private and civic sectors should be engaged to contribute to this fight. In the age of globalization, illicit trafficking has thrived in open markets and societies. Since their activities take place in the global marketplace, private enterprises and civil society can play an important role in detecting, disrupting, and deterring these illicit actors. Depending on the geography, industry, or service sector, non-government actors often have important and useful information on illicit trafficking that could assist government agencies in combating illicit trafficking.

To foster collaboration among the public, private and civic sectors, the following five elements should be part of a concerted strategy for promoting partnerships to combat illicit trafficking:

- 1. *Public Education and Awareness Campaigns*
- 2. *Reporting and Information-Sharing Mechanisms*
- 3. *Feedback Loops*
- 4. *Dissemination of Lessons Learned/Best Practices*
- 5. *Political Will*



A. *Public Education and Awareness Campaigns*

Illicit trafficking takes place because there is a market for illicit goods and services; therefore, every effort must be made to prevent or curb the demand that encourages drug, counterfeit, and human trafficking. Public education campaigns can play an important role in raising awareness of issues like human trafficking and drug trafficking. These educational programs can be designed, promoted, and implemented by the public, private, and civic sectors

to reach as wide an audience as possible.

Regarding drug abuse, although cocaine use has decreased over the past decade, the U.S. continues as the number one consumer of cocaine; meanwhile, prescription drug abuse is the fastest-growing drug problem in the U.S. and has been classified as an epidemic by the Centers for Disease Control and Prevention.¹³ On the national level, drug deaths have doubled in the past decade to surpass automobile fatalities and gun homicides as the leading cause of accidental death in America. The reason is not that more people are using drugs, but that people are using more dangerous combinations. "Substance abuse in America has become more dangerous, more addictive, and more deadly than any other period in our lifetimes," says James N. Hall, a drug epidemiologist at Nova Southeastern University, who recently warned of an "emerging heroin epidemic" in Florida.

Prominent actor, Philip Seymour Hoffman, was discovered on February 2, 2014 dead on the bathroom floor of his Greenwich Village townhouse with a needle stuck in his arm. What was initially reported as a suspected fatal heroin overdose turned out to be a polydrug death, involving not only heroin, but also cocaine, amphetamine, and prescription tranquilizers.¹⁴ The actor had entered a drug rehabilitation program in 1989 when he was 22 and had been sober for more than two decades until he relapsed in 2013. Celebrities are not the only ones consuming these dangerous drug cocktails; ordinary consumers are increasingly turning to perilous polydrug use. In Florida, there were 117 heroin-related deaths in 2012 (the last year for which numbers are available), only one of which was heroin on its own, a single case in Sanford, according to the Florida state medical examiner's office. In Miami, there wasn't a single cocaine-related death that didn't involve other substances. The most common ingredient found in fatal drug mixes is the prescription tranquilizer benzodiazepine (followed by alcohol, oxycodone, and cocaine), not surprising perhaps because in recent years Florida has stood at the epicenter of a massive wave of prescription drug abuse that only now is subsiding.¹⁵

To prevent drug abuse and curtail demand, the White House Office of Drug Control Policy has stepped up its prevention efforts through public awareness campaigns. It launched a National Youth Anti-Drug Media Campaign, known as Above the Influence that balances broad prevention

¹³ White House ONDCP website, <http://www.whitehouse.gov/ondcp>.

¹⁴ Michael Muskal, *Philip Seymour Hoffman died of accidental drug overdose: coroner*, L.A. TIMES, Feb. 28, 2014, available at <http://www.latimes.com/nation/nationnow/la-nn-philip-seymour-hoffman-casue-death-20140228,0,453983.story#ixzz2wQNA8n4b>.

¹⁵ Frank Owen, *How Ravers Pioneered the Drug Trend That Killed Philip Seymour Hoffman*, MIAMI NEW TIMES, Mar. 20, 2014, available at <http://www.miaminewtimes.com/2014-03-20/news/polydrug-use-ultra-miami-philip-seymour-hoffman/>.

messaging at the national level with targeted efforts at the local community level. The Above the Influence brand remains one of the most widely recognized youth brands in the country and continues to strengthen teen anti-drug beliefs.¹⁶ The accidental drug-induced death of prominent celebrities like Philip Seymour Hoffman can serve as a teachable moment to educate others on the dangers associated with abuse of heroin, cocaine, prescription painkillers, and polydrug use.

B. Reporting and Information-Sharing Mechanisms

Since illicit trafficking takes place in free markets and open societies, the private and civic sectors often detect illicit activity before government authorities do. They know their industry, market, and community better than anyone and can serve as the eyes and ears for law enforcement. Tip lines to law enforcement agencies have been in existence and useful for decades, and the "see something, say something" slogan instituted after the tragic attacks of September 11, 2001 has encouraged average citizens to be more aware of their environs and report suspicious activities. The FBI website has a means by which the public can report violations of U.S. federal law or submit information in a criminal or terrorism investigation as follows: Submit a tip electronically; Contact your local FBI office; Contact your nearest overseas office; or Report online crime or e-mail hoaxes. For specific types of illicit trafficking, more mechanisms for information sharing from the public must be established with government authorities at the local, state, and federal levels. In addition, the public needs advice on how best to report suspicious activity and what details to include.

Institutions in the non-profit sector are getting more involved in anti-trafficking initiatives and serving as vehicles to report illicit activities. One such organization is the Polaris Project committed to combating human trafficking and modern-day slavery. This non-profit organization operates a confidential, centralized 24-hour national human trafficking hotline for the United States. This national model is now regarded as one of the best-functioning anti-trafficking hotlines in the world, and it has played a role in identifying over 11,000 survivors of trafficking over the course of fielding over 85,000 calls. The Polaris Project also connects professionals, victims, and community members to information and services to address human trafficking. For the victims, it offers comprehensive clinical social services through specialized local offices in Washington, D.C. and New Jersey and provides lessons learned, promising practices, and counter-trafficking strategies to local, national, and international

¹⁶ White House ONDCP website, <http://www.whitehouse.gov/ondcp>.

audiences.¹⁷ Organizations like the Polaris Project should be applauded for their active campaign to combat human trafficking and offers of assistance to victims.

C. Feedback Loops

Government agencies must establish secure and appropriate feedback loops for members of the private and civic sector to inform them on how information sharing actually impacts efforts to combat illicit trafficking. These feedback loops would demonstrate how information provided by the public directly contributed to a law enforcement operation against an illicit actor. To maintain the integrity of the chain of custody of evidence in these cases, government officials must judiciously decide what details of the case can be shared with non-government entities who assisted in the operation. In the post-9/11 environment, the public has played an important role in “seeing something and saying something” to thwart homegrown terrorist plots, but often times complained that they never knew how their assistance or tips affected an investigation. These feedback loops would encourage more active engagement by the private and civic sectors to collaborate with government authorities to combat illicit trafficking.

D. Dissemination of Lessons Learned/Best Practices

To illustrate the benefits from public, private, and civic sector partnerships, lessons learned and best practices developed to identify and counter illicit trafficking need to be documented and disseminated. One sector that has successfully implemented this system is the financial services industry to combat money laundering and terrorist financing in the U.S. Through trade associations and compliance training programs, the financial services industry is sharing case studies that highlight methods employed by illicit actors that abuse international financial systems to launder criminal proceeds or finance terrorist groups. With emerging financial innovations such as mobile payments, prepaid/store of value cards, and virtual banking, anti-money laundering practitioners are identifying how illicit traffickers might use these systems to move, store, and spend their dirty money and are disseminating these lessons learned to best protect financial institutions from aiding and abetting money launderers.

¹⁷ The Polaris Project website, <http://www.polarisproject.org/what-we-do>.

E. *Political Will*

The most vital aspect of partnering to combat illicit trafficking is political will. While all the other key elements such as education programs, reporting mechanisms, feedback loops, and sharing best practices may be in place, they will only succeed with real commitment in these collaborative partnerships from the public, private, and civic sectors. Participants must be active stakeholders. Public pledges to fight drug, arms, counterfeit, and human trafficking are not enough. Partners must be committed to allocate the time, effort, and resources necessary to work toward the common goal of addressing illicit trafficking.

V. CONCLUSION

Over the past decade, we have witnessed the proliferation of illicit trafficking that threatens the security and prosperity of citizens around the globe. Drug, arms, counterfeit, and human trafficking endangers consumers, economies, and citizen security. Historically, governments were charged with ensuring the security of its citizens, markets, and territory. With globalization breaking down traditional barriers to allow the free flow of people, goods, services, and capital, nation states are no longer able to effectively combat illicit trafficking alone. Therefore, a concerted effort by all sectors of society—public, private, and civic sectors—must be mobilized to address the scourge of illicit trafficking. As described above, a multi-faceted strategy for partnering must be designed that includes educational campaigns, information-sharing mechanisms, feedback loops, best practices/lessons learned, and political will to actively engage various stakeholders to combat illicit trafficking in its various forms. National security is everyone's responsibility in this globalized world, and effective partnerships among the public, private, and civic sectors can cultivate a "whole of society" approach to combat illicit trafficking.



ARTICLE

Transnational Influences on Financial Crime

Jeremy Kuester

ABSTRACT

Transnational Crime¹ can loosely be defined as a crime that occurs across borders and is differentiated from domestic and international crime by the absence of a single sovereign or supranational power that has absolute jurisdiction over the crime. The dynamics of actors in transnational spaces, as well as the lack of a clear enforcing authority in such spaces, creates significant challenges to efforts to disrupt and deter transnational crime. Addressing these types of crimes requires a holistic approach from state and non-state actors using a variety of tools, many of which are not traditionally law enforcement in nature. Focusing on the financial aspects of transnational crime, this paper seeks to outline some of the current tools available for addressing transnational crime, as well as advocating for an integrated approach to enforcement.

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¹ See G.A. Res 55/25, ¶ 6, U.N. Doc. A/RES/55/25 (Nov. 15, 2000). The U.N. Convention against Transnational Organized Crime, signed December 2000, characterizes an offence as transnational in nature if:

- a) It is committed in more than one State;
- b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another state.

Table of Contents

| | | |
|------|---|----|
| I. | TRANSNATIONAL SPACES AND SOVEREIGNTY..... | 72 |
| II. | NATURE OF TRANSNATIONAL OFFENSES..... | 73 |
| III. | THREAT FINANCE..... | 74 |
| IV. | SOVEREIGN MECHANISMS FOR ENFORCING FINANCIAL ASPECTS OF CRIMES | 76 |
| V. | FINANCIAL INSTITUTIONS AND THE EXCHANGE OF INFLUENCE..... | 77 |
| VI. | IMPLICATIONS..... | 79 |

I. TRANSNATIONAL SPACES AND SOVEREIGNTY

In the academic community there has been considerable debate as to whether the international system of nation-states has collapsed in the face of globalism and retreated to a transnational structure where nation-states face declining influence.² The rise of transnationalism is not necessarily mutually exclusive with the international system. Rather, the international system—and the exclusive interactions between nation-states—may have been subsumed into a larger transnational construct that incorporates the activities of nation-states and those of non-state actors on a relatively even plane of influence.

When speaking of the differences of internationalism and transnationalism, it often devolves into perspectives on sovereignty. In the traditional, modern, international system of nations, sovereignty often refers to the state's exclusive control over the territory bounded by its borders.³ Sovereignty enables the state to dictate the norms of the society inhabiting the state's borders.⁴ Under the transnational system, the concept of territory

² See John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 *REVIEW OF INT'L POLITICAL ECON.*, no. 1, 1994, at. 53-80; David O. Friedrichs, *Transnational Crime and Global Criminology: Definitional, Typological, and Contextual Conundrums*, 34 *SOCIAL JUSTICE*, no. 2, 2007, at 4-18; Willem van Schendel, *Spaces of Engagement: How borderlands, illicit flows, and territorial states interlock*, in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS AND THE OTHER SIDE OF GLOBALIZATION*, 38-68, (Ind. Univ. Press, 2005); Peter Shields, *Borders as information flows and transnational networks*, *Global Media and Communication*, *SAGE JOURNALS*, (Jan. 22, 2014), <http://gmc.sagepub.com/content/10/1/3>. See, e.g., SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (Columbia University Press, 1996).

³ Friedrichs, *supra* note 2, at 4-18.

⁴ Agnew, *supra* note 2, at 53-80.

becomes blurred and therefore understandings of sovereignty become increasingly complex.

Enabled by economic globalization and integrated global telecommunication networks, social structures have been allowed to form outside the scope of the traditional state model.⁵ Virtual cyber networks and the international financial system have become transnational spaces, which must ensure the rights and privileges of participants outside the scope of sovereign powers, while still bound by the processes and infrastructures that are national in nature.⁶ Norm-setting, typically a sovereign responsibility, becomes a balancing act between state and non-state participants in a transnational space. Both have tremendous influence over the other, though neither can absolutely dictate to the other. Given this dynamic, efforts to address crime in transnational spaces must also be a balancing act between state and non-state action.

II. NATURE OF TRANSNATIONAL OFFENSES

Transnational crimes, like the trafficking offenses that are the subject of this symposium, can generally fall into two categories: crimes of borders and crimes of transnational spaces. Crimes of borders are those that involve activity that physically crosses borders. Trafficking offenses are the most common examples of this type of transnational crime, as nearly all trafficking offenses involve the movement of something tangible from one jurisdiction to another. National authorities have been cooperating on addressing these crimes for decades.

Crimes of transnational spaces, however, are more difficult to address. Crimes of transnational spaces, involving virtual communities or ungoverned spaces,⁷ may involve activities or components that never fall under the jurisdiction of any nation or authority. Cyber-crime, money laundering, and even international terrorism are representative examples of this type of transnational crime. National authorities have stepped up efforts to cooperate on addressing these crimes, but are also coming to the conclusion that traditional enforcement tools may not be as effective.

⁵ Shields, *supra*, note 2.

⁶ Sassen, *supra*, note 2.

⁷ For example, places where a government cannot exercise control, like the border between Afghanistan and Pakistan or the region between Saudi Arabia and Yemen.

III. THREAT FINANCE

Because of the profit motive of most criminal networks/conspiracies, financial network analysis has long been an important element in the investigation of organized crime and its subsidiary activities.⁸ It is only relatively recently that these same techniques have been applied to broader transnational issues, including terrorist networks, proliferators of weapons of mass destruction, international drug trafficking organizations, and transnational organized crime, as transnational criminal networks are considered a credible threat to national security.

Transnational criminal threats and illicit trafficking networks continue to expand dramatically in size, scope, and influence—posing significant national security challenges for the United States and our partner countries. These threats cross borders and continents and undermine the stability of nations, subverting government institutions through corruption and harming citizens worldwide. Transnational criminal organizations have accumulated unprecedented wealth and power through trafficking and other illicit activities, penetrating legitimate financial systems and destabilizing commercial markets. They extend their reach by forming alliances with government officials and some state security services.⁹

What had once been almost exclusively the province of law enforcement communities is now increasingly coming under the purview of the national security community – and is being addressed through its suite of tools. From a financial perspective, two significant developments in the national security community are being leveraged against transnational criminal organizations.

First, financial sanctions under the authorities of the International Emergency Economic Powers Act (IEEPA) are now being leveraged against the problem set.¹⁰ These powerful tools are designed “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy

⁸ *A Brief History of the FBI*, FEDERAL BUREAU OF INVESTIGATION, last visited April 7, 2014, available at, <http://www.fbi.gov/about-us/history/brief-history>. Interestingly, during one of the “golden eras” of organized crime under Prohibition, it was the Department of the Treasury that had jurisdiction over those offenses and not the Department of Justice.

⁹ *National Security Strategy*, WHITE HOUSE, 49, May 2010, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹⁰ See Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities, 50 U.S.C. §§ 1701 – 1707 (2013); Blocking the Property of Transnational Criminal Organizations, Exec. Order No. 13581 (July 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/25/executive-order-blocking-property-transnational-criminal-organizations>.

of the United States.”¹¹ Consider some of the other sanctions programs under IEEPA authorities¹² and judge the level of importance the government is placing on the issue of transnational crime.

Second, a new perspective on threat network intelligence analysis has arisen. In the wake of the attacks on September 11, 2001, organizations across the intelligence, defense, and law enforcement communities developed or augmented their existing threat finance intelligence units. Many of these efforts focused on terrorism finance, but the U.S. also faces challenges in proliferation, narco-trafficking and illicit finance. Threat finance intelligence elements have grown as agencies have come to understand that the common denominator of these threats is money - how it moves and how it supports these endeavors.

While competing definitions may abound, “threat finance” may most aptly be defined as any financial activity associated with actors, operations, or systems that threaten the security or stability of the U.S. Financial activity typically refers to raising, storing, moving, and transferring money or other items of value. Actors threatening the U.S. include an array of transnational networks that have a direct or indirect impact upon U.S. national security or its infrastructure. Some examples include terrorist groups; proliferators of weapons of mass destruction; hostile, corrupt, or ostracized foreign regimes; transnational criminal organizations – including, cyber criminals, drug traffickers, and third-party money launderers. Less interested in the profit motive, practitioners of threat finance are more interested in uncovering what can be learned about a transnational threat network by understanding how it interacts with the transnational space of the international financial sector. Threat finance intelligence has come to serve as the foundation for many of the government’s efforts to address transnational networks and illicit finance.

¹¹ 50 U.S.C. § 1701.

¹² See Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order 13224 (Sep. 24, 2001); Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, Exec. Order 13382 (June 29, 2005), *available at* <http://www.state.gov/t/isn/c22080.htm>; Blocking Property of the Government of Iran and Iranian Financial Institutions, Exec. Order 13599 (Feb. 6, 2012). For a complete list of the sanctions programs administered by the Office of Foreign Assets Control, please see <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

IV. SOVEREIGN MECHANISMS FOR ENFORCING FINANCIAL ASPECTS OF CRIMES

The Asset Forfeiture and Money Laundering Section of the Department of Justice's Criminal Division investigates and prosecutes complex, multi-district, and international criminal cases involving financial institutions and individuals who violate the money laundering statutes, the Bank Secrecy Act, and other related statutes. The Money Laundering Control Act, for example, makes it illegal to conduct certain financial transactions with proceeds generated through specified unlawful activities.¹³ The Currency and Foreign Transactions Reporting Act requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering.¹⁴ Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.¹⁵

International efforts to address financial crimes are primarily directed at preventing criminals from making use of the proceeds of their crime, as well as combatting the influence of transnational criminal actors on the legal economy. In addition to the anti-money laundering and counter-terrorist financing recommendations of the Financial Action Task Force,¹⁶ there are four UN conventions that primarily make up the international regime on illicit financing (UNODC). The 1988 Convention against the Illicit Traffic in Narcotics Drugs and Psychotropic Substances is the first international convention to have criminalized money laundering.¹⁷ The 2003 Convention against Transnational Organized Crime¹⁸ and the 2005 Convention against Corruption¹⁹ extend the predicate offense for money laundering beyond drug trafficking to all serious

¹³ See Money Laundering Control Act, 18 U.S.C. §§ 1956-57 (1986).

¹⁴ See Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5330 (2012); Financial Crimes Enforcement Network, Department Of The Treasury, 31 C.F.R. ch.X (commonly referred to as the "Bank Secrecy Act" or "BSA")

¹⁵ *FinCEN's Mandate from Congress*, DEP'T OF TREASURY, last visited Apr. 7, 2014, http://www.fincen.gov/statutes_regs/bsa/.

¹⁶ The Financial Action Task Force (FATF) Recommendations are internationally endorsed global standards against money laundering and terrorist financing and are designed to increase transparency and enable countries to successfully take action against illicit use of their financial system. Please see <http://www.fatf-gafi.org/topics/fatfrecommendations/>.

¹⁷ See Convention against the Illicit Traffic in Narcotics Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/14 (1990).

¹⁸ See United Nations Convention Against Transnational Organized Crime, No. 39574, as adopted by G.A. Res 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

¹⁹ See U.N. Convention against Corruption, as adopted by G.A. Res. 58/4, U.N.Doc. A/RES/58/4 (Oct. 31, 2003).

crimes, while urging states to create comprehensive regulatory and supervisory regimes to combat money laundering. The 2002 International Convention for the Suppression of the Financing of Terrorism required member states to protect financial systems from abuse by terrorist actors.²⁰

With the exception of the authorities and agreements directed at countering the financing of terrorism, almost all of the formal authorities described above are directed at disrupting the beneficial use of proceeds of crime. This is an important tactic in combating the threat posed by transnational criminal organizations, but it only addresses one aspect of the underlying financial network that may underpin the criminal organization. In combining threat finance intelligence with the financial sanctions under IEEPA, as discussed above, the U.S. Government has another powerful tool for directly targeting the criminal network itself.

V. FINANCIAL INSTITUTIONS AND THE EXCHANGE OF INFLUENCE

Clearly, the role of law enforcement authorities are critically important in the enforcement of money laundering and transnational financial crime, but the tools of the national security community are important to worldwide efforts to combat these crimes. This doesn't imply military action should be used to address this issue, but that in transnational spaces, the information-sharing and outreach conducted by the national security community can be extremely effective.

We've already discussed the international financial system as being a transnational space. Within that system, large international financial institutions are influential actors that can and often do have significant impact on the financial system. Large international financial institutions are both participants in a transnational space and transnational networks themselves. They have branch offices and subsidiaries all over the world; share information, expertise, and resources throughout the institution; and must comply with the regulatory regimes in every jurisdiction in which they operate. Even with the efforts of organizations like the U.S. Department of the Treasury, the Financial Action Task Force, and the United Nations to establish minimum standards for the regulation and oversight of financial institutions on illicit finance, there is still quite a bit of differentiation between jurisdictions. While many jurisdictions adhere to the minimum standards, they are still free to add other measures on top of those standards, which add complexity to a financial institution's compliance function. With penalties for non-compliance passing

²⁰ See International Convention for the Suppression of the Financing of Terrorism, No. 38349, *as adopted by* G.A. Res 54/109, U.N. Doc A/RES/54/109 (Dec. 9, 1999).

the billion dollar mark, the consequences for financial institutions continue to escalate.²¹

One response of the financial industry has been to come together independently and respond to local and international efforts to establish standards for financial crime compliance. One such organization is known as the Wolfsberg Group. The Wolfsberg Group is an association of eleven global banks, which aims to develop financial services industry standards, and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing Policies. The Wolfsberg Anti-Money Laundering Principles for Private Banking were published in October 2000, and most recently revised in June of 2012.²²

While financial institutions have always been responsible for their own decisions regarding risk, those decisions are influenced by the regulatory environment. Given the increasingly high penalties for non-compliance and the fast-moving pace of change in world-wide financial crime regulations, individual international financial institutions, in some situations, have gotten out in front of their regulators. For example, in November 2013, HSBC implemented a policy to ask customers to show evidence of what they planned to do with some large cash withdrawals.²³ Enhanced due diligence is an appropriate response to potentially risky circumstances, and is commonly found in guidance from regulators. In this situation, however, the determination to request this information from customers was wholly internal, perhaps influenced by HSBC's past penalty, but certainly not dictated by its regulator. This type of self-policing may be happening more. In response to recent sanctions against certain Russian officials, JP Morgan made the news for blocking a transaction between a Russian embassy and an insurer, effectively "self-sanctioning."²⁴ In an industry with a reputation for pushing the boundaries of the letter of the law, this perceived shift towards stricter tolerances for financial crime risk have significant implications for the transnational enforcement of transnational crime.

Forums created by the Wolfsberg Group, as well as by forward leaning financial institutions, create opportunities by governments to influence and

²¹ Chad Bray, *HSBC Apologizes After Cash Withdrawal Issue in Britain*, N.Y. TIMES, Jan. 26, 2014, available at <http://dealbook.nytimes.com/2014/01/26/hsbc-apologizes-after-cash-withdrawal-issue-in-britain/>.

²² The Wolfsberg Group, <http://www.wolfsberg-principles.com/index.html>, last visited April 7, 2014.

²³ Bray, *supra* note 21.

²⁴ Thomas Grove & Megan Davies, Megan, *Russia says JP Morgan 'illegally' blocked embassy money transfer*, REUTERS, Apr. 1, 2014, available at <http://www.reuters.com/article/2014/04/01/us-ukraine-crisis-russia-usa-idUSBREA3010820140401>.

inform key actors in the international financial system. Governments already influence, successfully it appears, financial institutions through their regulatory and oversight authorities. Moreover, discussions between governments and financial institutions on financial crime risk occur on a regular basis.²⁵ But many of these discussions occur in the construct of the overseer/overseen relationship, which can have a chilling effect on more robust collaboration. Financial institutions, however, have a great deal of legitimacy in the international financial system, and have considerable ability to set the norms of that system. Within the transnational space of the financial system, those qualities place financial institutions on a similar plane of influence as governments. It is important to engage these institutions from that perspective and respect their ability to act outside the exclusive scope of sovereign authority.

VI. IMPLICATIONS

So what are the implications for the practitioner? In short, the legal environment is increasingly complex. In addition to the array of national and international laws, regulations, and other authorities that govern transnational criminal law enforcement, one must consider the independent activities of influential transnational actors. Legal advice is not complete unless it considers the norms of the society in which the client acts. Typically, those norms are reflected in the laws of the land, but this is not always true in transnational spaces. Rather, influential actors in transnational spaces may act independently or set norms for the society of that transnational space. This is particularly true in the financial arena, as the risk-based decisions of major international banks exceed the scope of the national regulations under which they operate. Failure to understand the risk appetite of these banks may result in substantial financial loss.



²⁵ For example through the Bank Secrecy Act Advisory Group that is overseen by the Financial Crimes Enforcement Network.