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United States v. Nunez: The Eleventh Circuit Enables an Expansive Standard of Determining a “Vessel Without Nationality” for Jurisdictional Purposes

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I. OVERVIEW

One stormy evening in the Caribbean Sea on a well-traveled drug-trafficking route between the Dominican Republic and Puerto Rico, four Dominican nationals were adrift in a small, homemade vessel without power.¹ All four men were aware of the cargo they were carrying: one-hundred-eighty kilos of cocaine, with a street value of about thirty million dollars.² The crew stated they had agreed that they would set off for Puerto Rico in a small homemade vessel on Christmas Eve, 2018, but gave differing accounts of how long they had been at sea, first five to six days, then five to seven hours.³ Faced by inclement weather and the onset of engine troubles, the men decided to turn back to the Dominican Republic.⁴ Before reaching the intended destination, the vessel was spotted by a United States Coast Guard plane patrolling the area, which radioed its position to the nearby Coast Guard cutter *Richard Dixon*.⁵ The patrol vessel launched an “over the horizon boat” to intercept the stricken vessel.⁶ Officers noted “frantic” activity by the men aboard, and saw them

1. *United States v. Nunez*, 1 F.4th 976, 980 (11th Cir. 2021). According to the defendants, they were approached by strangers or “friends” with money in exchange for the transport of several “bales” from the Dominican Republic to Puerto Rico. *Id.* at 981-82.

2. *Id.* at 982.

3. *Id.* at 981.

4. *Id.* at 982.

5. *Id.* at 980.

6. *Id.* at 981.

throwing “bales” into the water.⁷ When questioned regarding who was in charge, the crew replied that they took turns piloting the vessel.⁸ The smugglers were taken onboard the *Richard Dixon*, which transported them to St. Thomas in the U.S. Virgin Islands ten days later.⁹ From there, a Department of Homeland Security agent took them to Mobile, Alabama for interrogation, where all four men stipulated to knowingly conspiring to transport cocaine from the Dominican Republic to Puerto Rico.¹⁰ When questioned about who the captain was, the men said there was no captain and one of them “laughed when the agent asked.”¹¹

The men were charged under the Maritime Drug Law Enforcement Act (MDLEA) for “willfully, knowingly and unlawfully [conspiring] with each other . . . to distribute and possess with the intent to distribute approximately 182 kilograms of cocaine,” to which the defendants pled not guilty.¹² Preceding trial, the government sought a ruling for jurisdiction over the defendants’ vessel as a “stateless vessel,” which the court granted, having considered the attached statements by the officers who inspected the vessel, who found no “indications of nationality . . . markings, paperwork, or identification numbers” in their search.¹³ At trial, the defendants immediately moved for a mistrial for lack of jurisdiction, yet never sought to introduce any evidence challenging jurisdiction or cross examine any government witnesses on the topic.¹⁴ At the conclusion of the trial, the defendants moved for acquittal for failure to establish jurisdiction, but Judge Beaverstock held “to the extent I need to make a separate ruling, . . . I find that we have subject matter jurisdiction in this court over this case.”¹⁵ The jury found the defendants guilty on the counts of possession and intent to distribute under MDLEA, and sentenced each crewmember to 152-188 months in prison.¹⁶ On appeal, the United States Court for the Eleventh Circuit *held* that because the vessel failed to present

7. *Id.* at 980-81. A search of the boat indicated that the serial number of the motor was filed off, there was “no fishing or recreational equipment” aboard, and most of the space was taken up by fuel containers and bales of cocaine.

8. *Id.* at 981.

9. *Id.* The boat itself was destroyed by Coast Guard officers once their search of the vessel was complete.

10. *Id.* at 981-82.

11. *Id.* at 982.

12. *Id.*

13. *Id.*

14. *Id.* at 982-83. The judge offered to let them question the government’s witnesses; but Nunez said he “was not afforded an opportunity to subpoena the witnesses [he] wanted,” yet could not name any such witnesses.

15. *Id.* at 983.

16. *Id.*

paperwork, fly a flag, or any other internationally-recognized means of asserting a claim of nationality, the defendants' vessel was under the United States' jurisdiction as a vessel without nationality. *United States v. Nunez*, 1 F.4th 976 (11th Cir. 2021).

II. BACKGROUND

A. *Early History of Registration*

As long distance seaborne trade became a lucrative enterprise, coastal polities have desired to protect their merchants on the sea.¹⁷ As a result, nations sought to register vessels by flying their flag, not only to ensure crews were predominantly of that nation, but also to avail those vessels of the laws of the flag state, offering protection from pirates and privateers.¹⁸ By the dawn of the twentieth century, earlier vessel registration rules were codified into internationally applicable regulations and norms.¹⁹ The League of Nations was an early adopter of this trend in the Declaration Recognising the Right to a Flag of States Having no Sea-Coast of 1921, which ensured the right of all nations to fly a flag and avail themselves to the protection of the flag state, a treaty still in force a century later.²⁰ Following World War II, the United Nations became the new nexus for regulating vessels on the high seas, starting with the Convention on the High Seas in 1958.²¹ This convention codified some of the basic international criteria for national ship registration, including the requirement that each vessel fly the flag of a registry country and that such vessels must possess relevant documentation.²² This treaty was the first of four international agreements collectively known as the United Nations

17. See e.g. HUGO GROTIUS, MARE LIBERUM 7-8 (James Brown Scott ed., Ralph van Deman Magoffin trans., Oxford University Press 1916) (1608) (international waters should be freely navigable by all maritime nations, written by Grotius to critique the Portuguese *Mare Clausum* policy, meant to monopolize trade with the east).

18. See An Act for the Encouraging and Increasing of Shipping and Navigation 1660, 12 Cha. 2 c.18 (Eng.) [hereinafter Navigation Act of 1660]. As a preeminent mercantile power, Great Britain naturally took the lead in codifying requirements for registration, with one of the first ship registration requirements being requested of all ships in the home islands and the colonies in the Navigation Act of 1660, to keep other nations out of trade with her colonies.

19. See Declaration Recognising the Right to a Flag of States Having No Sea-Coast, Apr. 20, 1921, 174 U.N.T.S. 74.

20. *Id.*; United Nations, Division of Ocean Affairs and Law of the Sea, <http://www.un.org/depts/los>.

21. Convention on the High Seas arts. 5-6, Apr. 29, 1958, 450 U.N.S.T. 2312 [hereinafter Convention on the High Seas].

22. *Id.* at art. 5.

Convention on the Law of the Sea (UNCLOS).²³ However, unresolved disputes remained regarding environmental protections and deep seabed mining, with the final draft of UNCLOS arising in 1982.²⁴ The U.S. objected to the amended convention on the grounds that it opposed its economic and security interests; as a result the Senate never ratified UNCLOS.²⁵ Despite not ratifying the Convention, the State Department and successive presidential administrations consider it codified customary law, so these agreements serve as a foundation for national and international maritime law to this day.²⁶ The concepts and customs first noted in the Convention on the High Seas are expanded to secure the notion that flag states exercise exclusive jurisdiction over vessels registered to them.²⁷ But not all vessels comply with such registry regimes. Vessels that fail to comply by having no registered nation are collectively known as “vessels without nationality.”²⁸ Because they have no flag state to register under, these vessels are bereft of the exclusive protection of the flag state, leading to questions of what nation has jurisdiction over them.²⁹ National efforts to quell drug trafficking frequently meet difficulties under these rules, as smugglers routinely exploit flag law to avoid jurisdiction.³⁰

B. National Registration and the Maritime Drug Law Enforcement Act

The jurisdictional quandaries posed by the issue of smugglers using stateless vessels did not escape the notice of Congress. In response to Congress’s prior failures to develop legislation accounting for

23. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

24. See *Id.*; Ronald Reagan, *Statement on United States Actions Concerning the Conference on the Law of the Sea*, 1982 Pub. Paper 911 (July 9, 1982).

25. See *id.*

26. Ronald Reagan, *Statement on United States Actions Concerning the Conference on the Law of the Sea*, 1982 Pub. Paper 911 (July 9, 1982); Ronald Reagan, *Statement on United States Oceans Policy*, 1983 Pub. Paper 378 (March 10, 1983).

27. UNCLOS, *supra* note 23, at arts. 91-92.

28. *United States v. Nunez*, 1 F.4th 976, 984 (11th Cir. 2021) (quoting 46 U.S.C. § 70502(d)(1)).

29. See UNCLOS, *supra* note 23, at art. 92 (Stating that “[s]hips shall sail under the flag of one state only and . . . shall be subject to its exclusive jurisdiction on the high seas,” implying ships not sailing under a flag will not be entitled to such protections by default).

30. See *United States v. Alvarez-Mena*, 765 F.2d 1259 (5th Cir. 1985); see also Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 *YALE J. INT’L L.* 433, 444 (2012) (Noting that the stateless vessel issue has prominence concerning other illegal acts on the high seas, such as illegal fishing operations in the North Atlantic).

jurisdictional questions with stateless vessels, it passed the Maritime Drug Law Enforcement Act (MDLEA) to attempt to resolve the issue of stateless vessels by extending jurisdiction over them in international waters.³¹ After 1986, federal courts expanded their jurisdictional bounds to international waters beyond the standard twelve nautical mile boundary of the territorial sea delineated in UNCLOS.³² Owing to the nature of interceptions “upon the high seas,” this expansive jurisdiction has enabled prosecution under the Act to be tried in “any [federal] district” of the United States.³³ The list of vessel types under United States jurisdiction includes not only a “vessel assimilated to a vessel without nationality,” per the 1958 Convention on the High Seas, but also a separate definition of “vessel without nationality” further addressed in Section 70502 of the Act.³⁴

Under the definition of a stateless vessel as provided by the MDLEA, many factors are considered concerning the actions of the master or captain in claiming the vessel’s nationality.³⁵ Section 70502(d) details three factors that must be assessed to determine if a ship is a vessel without nationality.³⁶ Such indications include (1) “a claim of registry that is denied by the nation whose registry is claimed,” (2) the person in charge “fails . . . to make a claim of nationality or registry for that vessel,” and (3) “a claim of registry . . . for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.”³⁷ Under subsection (e), a claim of state registry “includes only” documents “evidencing the vessel’s nationality as provided in article 5 of the 1958 Convention on the High Seas,” flying a national flag, or a “verbal claim of nationality or registry by the master or individual in charge of the vessel.”³⁸ Federal district and circuit courts of appeal have often grappled with the nuances of the statutory construction since the passage of the MDLEA.³⁹

31. See Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501-70508 [hereinafter MDLEA]; S. Rep. No. 99-530, at 15-16 (1986).

32. 46 U.S.C. § 70503(b); UNCLOS, *supra* note 23, at art. 3.

33. 46 U.S.C. § 70504(b)(2).

34. 46 U.S.C. § 70502(c)(1)(A), (B).

35. 46 U.S.C. § 70502(d).

36. *Id.*

37. *Id.*

38. 46 U.S.C. § 70502(e); *Cf.* Convention on the High Seas, *supra* note 21, at art. 5.

39. See *United States v. Obando*, 891 F.3d 929, 934 2018 AMC 1671 (11th Cir. 2018) (Holding that painting a flag on the side of the vessel does not amount to “flying a flag”); *United States v. Victoria*, 876 F.2d 1009, 1010 (1st Cir. 1989) (held that vessel in question was without

In many vessels without nationality cases, the lack of commonly accepted indicia of nationality is enough to establish jurisdiction under the MDLEA beyond the listed criteria.⁴⁰ Early precedent was set in *United States v. Rosero*, in which then Circuit Judge Alito noted the difference in construction between “includes” in section 70502(d) of the Act, which defines the types of vessels covered, and “only includes” when referring to how a master or captain makes a claim of registry.⁴¹ The court did not consider “includes” to be all encompassing language, based on legislative history and the notion that terms that have “accumulated settled meaning under . . . the common law,” and that “unless the statute otherwise dictates, that Congress [meant] to incorporate the established meanings of these terms.”⁴² Thus, the court concluded that the subject vessel is under U.S. jurisdiction if it is “stateless under international law,” with Congress indicating its preferences in the legislative history.⁴³

However, other circuits have taken issue with this broad interpretation of the steps necessary for a stateless vessel designation, leading to a circuit split.⁴⁴ The key contention rests on the requirement under section 70502(e)(3), that “a verbal claim of nationality or registry by the master or individual in charge of the vessel” is required to help establish nationality.⁴⁵ The notion that such a question was necessary to establish jurisdiction was addressed by the Second Circuit in *United States v. Prado*, in which the court concluded it was necessary to ask not only if there was a “*master or individual* in charge,” but also if any such individuals wish to make a claim of nationality on the vessel.⁴⁶ This argument hinged on the rationale that if no visible indications of nationality are aboard, the investigating Coast Guard officers must “ask

nationality when it “not only failed to respond to multilingual inquiries about its nationality, but also the Coast Guard could find no evidence of its nationality on board”).

40. See 46 U.S.C. § 70502(d).

41. *United States v. Rosero*, 42 F.3d 166, 170 (3d Cir. 1994); see also *United States v. Matos-Luchi*, 627 F.3d 1, 4, 2011 AMC 2257 (1st Cir. 2010) (“That the listed examples do not exhaust the scope of Section 70502(d) is confirmed by Congress’ contrasting use of the phrase ‘includes only’ in a related provision, [and] by its evident and explicit attempts to sweep quite broadly”).

42. *Rosero*, 42 F.3d at 170-71 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)); see also H.R. Rep. No. 323, at 22 (“The terms of art used in the proposed [1980] amendment are defined so as to comport with international law . . .”).

43. *Rosero*, 42 F.3d at 171; 46 U.S.C.A. § 70502(d); S. Rep. 99-530, 16 (“trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned”).

44. See, e.g., *United States v. Prado*, 933 F.3d 121 (2d Cir. 2019).

45. 46 U.S.C. § 70502(e)(3).

46. *Prado*, 933 F.3d at 129 (emphasis added) (quoting 46 U.S.C. § 70502(e)(3)).

the master or individual in charge whether the vessel is registered in any nation” as a matter of statutory procedure.⁴⁷ As this procedure was partially disregarded, the court found no jurisdiction on the basis that “statelessness is established by the master’s failure to assert a claim only when that failure is in response to a request.”⁴⁸ This requires officers to ask (1) if there was a *master or individual in charge* present, and (2) if said individual would like to make a claim of registry for the vessel.⁴⁹ The issue of requiring investigators to ask both questions, even if there is no answer to the first, is a source of conflict amongst federal courts.

In the Eleventh Circuit, there is no consensus on the issue of asking the individual in charge.⁵⁰ Over the course of several decisions, judges of the Eleventh Circuit have taken a variety of positions on what satisfies section 70502(e)(3).⁵¹ Failure to answer when asked if there is a master onboard by the person in charge satisfies the provision, as the statute requires this affirmation, per *United States v. De La Cruz*.⁵² In that case, the court found that a captain hiding amongst his crew to evade the questions of investigating officers meant that there was no master to render a claim of nationality, thus meeting their duty of asking if there was an individual in charge to claim registry.⁵³

In contrast, a different panel ruled there was no jurisdiction in *United States v. Guerro*, where Coast Guard officers asked for a master in charge, but not if there was an individual in charge aboard, nor if the vessel was registered.⁵⁴ The panel held that the statute demanded both questions be asked in full by officers, even if there was not an affirmative response to the first question.⁵⁵ It also held that asking the two questions with the correct terminology was essential to applying jurisdiction.⁵⁶ It further determined that the district court’s finding of jurisdiction would have been logical had the officers also asked for the individual in charge as well as

47. *Id.* at 130.

48. *Id.* at 131.

49. *See id.*

50. *See United States v. De La Garza*, 516 F.3d 1266, 1272 (11th Cir. 2008) (holding flagless vessel to be without nationality despite no mention of a verbal claim of nationality at the time of the interception); *but see United States v. Guerro*, 789 F. App’x 742, 747-48 (11th Cir. 2019) (where asking only if there was a master aboard and failing to request a verbal claim of nationality afterwards torpedoed government’s claim of jurisdiction).

51. *See United States v. Obando*, 891 F.3d 929, 936, 2018 AMC 1671 (11th Cir. 2018); 46 U.S.C. § 70502(e)(3).

52. *United States v. De La Cruz*, 443 F.3d 830, 832 (11th Cir. 2006).

53. *Id.*

54. *Guerro*, 789 F. App’x at 747-48.

55. *Id.* at 748.

56. *Id.*

the master, and still received no answer from the smugglers.⁵⁷ Circuit Judge Tjoflat dissented from this interpretation of subsection (e), noting that it “merely defines how someone can make a ‘claim of nationality’—it is irrelevant for determining whether a vessel is stateless when no one aboard the vessel makes a claim of nationality when given the opportunity to do so.”⁵⁸ His contention was that section (d)(1) was the only part of the statute that “governs determining the nationality of the vessel,” and that section (e) is irrelevant if there was no claim of nationality made in the first place.⁵⁹ From these conflicting opinions on the intention of sections (d) and (e), it is clear the Eleventh Circuit has had difficulty posing precisely what is necessary for officers to ask vessel occupants to satisfy claims of no nationality of a vessel.⁶⁰

III. THE COURT’S DECISION

In the noted case, the Eleventh Circuit considered if the United States had jurisdiction over the defendants’ craft as a “vessel without nationality” under the MDLEA and international custom.⁶¹ First, the court looked to 46 U.S.C.A. § 70502(c) and (d), noting the defendants’ vessel fit many of the characteristics of a vessel without nationality, and found that § 70502 was not an exhaustive list of factors.⁶² The panel subsequently turned to “reasonably well-developed” international law on the subject and determined that the defendants’ vessel failed to demonstrate any customary indication of nationality.⁶³ The defendants argued that the Coast Guard was required to ask the master the nationality of the ship, but the court’s interpretation of the statute and the record did not demonstrate there was such a figure onboard.⁶⁴

First, the panel elucidated the meaning of “vessel without nationality” under the MDLEA.⁶⁵ Referencing language from § 70502, the court noted that a vessel without nationality includes “a vessel aboard which the master or individual in charge fails . . . to make a claim of nationality or registry for that vessel,” which established some instances

57. *Id.*

58. *Id.* at 751 (Tjoflat, J. dissenting).

59. *United States v. Guerro*, 789 F. App’x 742, 752 (11th Cir. 2019).

60. *Id.* at 751-52.

61. *United States v. Nunez*, 1 F.4th 976, 985 (11th Cir. 2021).

62. *Id.* at 984.

63. *Id.* (quoting *United States v. Rosero*, 42 F.3d 166, 170-71 (3d Cir. 1994)); *see also United States v. Matos-Luchi*, 627 F.3d 1, 6, 2011 AMC 2257 (1st Cir. 2010).

64. *Nunez*, 1 F.4th at 986; *See* 46 U.S.C. § 70502(e).

65. *Nunez*, 1 F.4th at 984-85; *See* 46 U.S.C. § 70502(d)(1).

of where a vessel may hold no nationality.⁶⁶ However, the panel determined the factors to be foundational examples, noticing how the list of factors in the Act was not exclusive; the three circumstances provided being exhaustive steps when analyzing the status of the defendants' vessel.⁶⁷ This allowed the court to explore other precedents for their jurisdictional ruling.

Next, international law and custom was examined to resolve the matter.⁶⁸ It was determined that the most common indicator of a vessel's nationality were the display of a flag and markings or documents to the effect of the ship's nationality.⁶⁹ Such markings are held to be crucial in the jurisdiction of a vessel, as they bind the ship to a particular jurisdiction.⁷⁰ However, in this instance, the court found that the defendants' vessel lacked any of the "customary signs of nationality" respected worldwide, with no flags, markings or documents asserting a claim of nationality.⁷¹ Because no indicators of the vessel's nationality were provided by visual inspection or verbal acknowledgement of someone in charge, the ship was held to be a vessel without nationality and subject to U.S. jurisdiction.⁷²

Finally, the court considered the defendant's challenge to the finding of jurisdiction.⁷³ Nunez contended that as none of the Coast Guard officers provided a chance for "the master or individual in charge of the vessel" to make "a verbal claim of nationality or registry," the vessel could not be a vessel without nationality.⁷⁴ The panel found this reasoning flawed because statutory definitions indicate there must be a single individual in charge to declare a nationality, of which there was none.⁷⁵ It also concluded that the record did not state anyone tried to claim a nationality for the craft.⁷⁶

Following its ultimate ruling on the status of the smugglers' vessel, the panel supported its decision with precedents from the circuit and

66. *Nunez*, 1 F.4th at 984 (quoting 46 U.S.C. § 70502(d)(1)).

67. *Id.*

68. *Nunez*, 1 F.4th at 984-85; *see* *United States v. Rosero*, 42 F.3d 166, 170-171 (3d Cir. 1994).

69. *Nunez*, 1 F.4th at 985.

70. *Id.*; *see also* Convention on the High Seas, *supra* note 21, at art. 4.

71. *Nunez*, 1 F.4th at 985.

72. *Id.* at 986.

73. *Id.*

74. *Id.* (quoting 46 U.S.C. § 70502(e)).

75. *Id.* at 285.

76. *Id.*

discussed how international law does not “undermine [its] conclusion.”⁷⁷ However, it was left open to individual nations how to ascertain if a vessel is stateless.⁷⁸ The Eleventh Circuit concluded its holding by addressing the split with the Second Circuit regarding the latter’s interpretation of not asking for the master in *Prado*.⁷⁹ It reasoned that the other circuit took an overly narrow view on § 70502(e), ignoring the “non-exhaustive” list set out under § 70502(d)(1).⁸⁰ Thus, the Eleventh Circuit found that the defendants’ vessel met the statutory requirements and customs under U.S. and international law to be described as a vessel without nationality, and therefore falling within U.S. jurisdiction.⁸¹

IV. ANALYSIS

The Eleventh Circuit panel headed by Judge Pryor was correct in its holding that the craft in contention was a vessel without nationality under the MDLEA. It correctly interpreted sections 70502(d) and (e) to construe the defendant’s vessel as a vessel without nationality, despite the Eleventh Circuit’s split decisions over similar facts in the past.⁸² The notion that “includes” in relation to methods of identifying vessel registration is not exclusive to the listed provisions in (d) was a clear distinction from the “includes only” language in (e), enabling the inclusion of international custom in determining if a vessel is without nationality.⁸³ The panel was also correct in its disagreement with the holding by the Second Circuit in *Prado*, as section 70502(e) was not applicable to determining vessel without nationality status so much as codifying how a master or individual in charge may declare the nationality of the vessel.⁸⁴ However, the court made a glaring omission when it did not address the fact that it had come to an opposite conclusion on the issue only two years before in *Guerro*.⁸⁵ Though the court was ultimately correct in their decision, it should have referred the matter to be heard by an en banc panel.

77. *United States v. Nunez*, 1 F.4th 976,986-87 (11th Cir. 2021).

78. *Id.*; see *United States v. Cabezas-Montano*, 949 F.3d 567, 589 n.14 (11th Cir. 2020); *United States v. De La Cruz*, 443 F.3d 830, 832 (11th Cir. 2006); *United States v. De La Garza*, 516 F.3d 1266, 1271-72 (11th Cir. 2008); Convention on the High Seas, *supra* note 21, at art. 6.

79. *Nunez*, 1 F.4th at 987-88.

80. *Id.* at 986, 988.

81. *Id.* at 976.

82. *Id.* at 984-86; see *United States v. Rosero*, 42 F.3d 166, 170-71 (3d Cir. 1994); *United States v. Guerro*, 789 F. App’x 742, 747-48 (11th Cir. 2019) (Decisions on the issue of MDLEA jurisdiction where the court reaches different results).

83. 46 U.S.C. § 70502(d), (e).

84. *United States v. Nunez*, 1 F.4th 976, 985-86 (11th Cir. 2021).

85. *Guerro*, 789 F. App’x at 747-48.

First, the Eleventh Circuit has properly followed much of the precedent offered by its prior decisions, as well as those of other circuits regarding applicable factors of a vessel without nationality.⁸⁶ The court was correct in its interpretation that section 70502(d) of the MDLEA was a “non-exhaustive” list of factors pertaining to vessels without nationality, inclusive of international norms and procedures concerning the identification of vessels lacking a nationality.⁸⁷ These norms were namely a lack of documents indicating nationality and not flying the flag of a registry state, as seen in the record.⁸⁸ Meeting international criteria for a stateless vessel is significant in that it follows precedents in and out of the circuit and demonstrates clear guidelines for international partners in American efforts to curtail the trafficking of cocaine and other substances into American waters and further afield.⁸⁹ The court was also correct in finding that as there was no claim of nationality by the “master or individual in charge” after only inquiring about an authority figure, but not asking any of the crew to make a claim of nationality.⁹⁰ It is significant for the panel to separate the claim of nationality issue into two parts, (1) if there was a master or other individual in charge on the vessel, and (2) if that individual wishes to make a claim of nationality, as the answer to the latter is predicated on if there is an affirmative answer to (1).⁹¹ Thus, the court was cognizant of the broader array of factors contemplated in section 70502(d) and that a master or individual in charge was needed to verbally claim nationality, a fact not demonstrated in the record.⁹²

Second, the Eleventh Circuit panel was correct in its analysis of *Prado*, in consideration of the “non-exhaustive nature of the examples in section 70502(d)(1).”⁹³ While of the listed examples provided in section

86. See *Rosero*, 42 F.3d at 171; *United States v. Matos-Luchi*, 627 F.3d 1, 6, 2011 A.M.C. 2257 (1st Cir. 2010).

87. *Nunez*, 1 F.4th at 988.

88. *Nunez*, 1 F.4th at 986; see also *United States v. De La Cruz*, 443 F.3d 830, 832 (11th Cir. 2006) (“The vessel in question flew no flag, carried no registration paperwork, and bore no markings indicating its nationality[.] . . . the crew made no claims about the boat’s nationality or registry”).

89. Bennett, *supra* note 27, at 443 (American courts universally find that stateless vessels are entitled to little protection under international law).

90. *Nunez*, 1 F.4th at 986; see also *United States v. Cuevas-Esquivel*, 905 F.2d 510, 513 (1st Cir. 1990) (holding that the vessel in question was one without nationality and subject to the United States’ jurisdiction when “no one identified himself as the master or person in charge, and the vessel had no name, no flag, or other identifying characteristics”).

91. *Nunez*, 1 F.4th at 981, 985; see also *De La Cruz*, 443 F.3d at 832 (“vessel’s captain concealed himself among the crew and failed to identify himself or the vessel’s nationality”).

92. 46 U.S.C. § 70502(d).

93. *Nunez*, 1 F.4th at 987-88; see 46 U.S.C. § 70502(d).

70502(d)(1), only (B) applies to the current scenario, the court recognized the difference in intention and statutory construction between 70502(d) and (e), as the former is predicated on “includes” while the latter is “includes only,” and correctly reasoned that the latter was meant to limit factors exclusively to those listed, while the Second Circuit glossed over this discrepancy in *Prado*.⁹⁴ In addition, the Second Circuit was too hasty in overturning the convictions on the basis that the Coast Guard officers under the set of facts presented did not ask for a verbal claim of nationality on the vessel, something that did not need to happen given the two step nature of the questioning to establish jurisdiction.⁹⁵ The Eleventh Circuit correctly reasoned that if there is not a master or individual in charge on board, then there is no one aboard to make the verbal claim of nationality under section 70502(e).⁹⁶ In light of the fact that the smugglers in the noted case all claimed to be the master, a hierarchical position that demands only one person be in authority over the others, no one was truly in charge, and thus there was no one with authority to make a verbal claim of nationality of the vessel.⁹⁷ The Eleventh Circuit was correct in its split with the Second Circuit on the issue of verbal claim of nationality requirements.

However, the panel left its analysis of precedents incomplete by not discussing *Guerro*, another recent holding of the same circuit that is clearly contrary in its conclusions.⁹⁸ Here, the persons of interest also remained silent as to if there was the master present, but later said he “went into the water” after their vessel sank, and was not available for questioning.⁹⁹ As Judge Martin came to conclusions similar to those of the Second Circuit in *Prado*, omitting mention of this case was an oversight on the panel’s part, who could have noted the error in Judge Martin’s approach to the Coast Guard questioning.¹⁰⁰ Addressing this case would have offered the panel a further opportunity to address the contention that section 70502(e) was operative in the context of determining if the vessel was stateless or not instead of merely offering ways to make a claim of nationality.¹⁰¹ An opportunity was also lost to concur with the dissent in *Guerro* in which

94. *Nunez*, 1 F.4th at 987-88; 46 U.S.C.A. § 70502(d), (e); *see also* United States v. Prado, 933 F.3d 121 (2d. Cir. 2019).

95. *See Prado*, 933 F.3d at n.5; *Nunez*, 1 F.4th at 987-88.

96. *Nunez*, 1 F.4th at 988. There is one notable difference between the two fact patterns in that in *Prado*, only a master was asked for, and not an individual in charge. Asking for both can be crucial, but the Coast Guard under these facts did ask for both authority figures.

97. *Id.* at 986.

98. United States v. *Guerro*, 789 F. App’x 742 (11th Cir. 2019).

99. *Id.* at 745.

100. *See id.* at 748-50.

101. *Id.*; *Prado*, 933 F.3d at 130.

many of the same issues on the operative effects of sections 70502 (d) and (e) are expressed, especially as Judge Tjoflat penned the dissent and was one of the circuit judges ruling on the noted case.¹⁰² Thus, to resolve potential confusion over how the Eleventh Circuit should construe sections 70502 (d) and (e), the court should have addressed the inner circuit conflict arising from *Guerro*.¹⁰³ In addition, the panel (but especially Judge Tjoflat) should have called for an en banc rehearing to resolve the matter in the Eleventh Circuit and any confusion on how section 70502 is interpreted in the Circuit.¹⁰⁴

V. CONCLUSION

Ultimately in the noted case, the Eleventh Circuit came to the conclusion that the vessel intercepted by the Coast Guard presented in the record was a vessel without nationality, and thus subject to jurisdiction in American Courts under the MDLEA. The panel was correct in its findings that international norms of vessel registry can be incorporated into the statutory construction of section 70502, and that if there was no master or individual in charge on board, then the Coast Guard is not required to ask the crew to make a verbal claim of registry.

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102. *Guerro*, 789 F. App'x at 751 (Tjoflat, J. dissenting).

103. *Id.*

104. *Id.*

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