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Eugene Kontorovich

Northwestern University School of Law, e-kontorovich@law.northwestern.edu

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A TORT STATUTE, WITH ALIENS AND PIRATES

*Eugene Kontorovich**

The pirates of the Caribbean are back—not in another fantastical film, but in the litigation over the reach of the Alien Tort Statute (ATS). For the first time since a wave of maritime predation in the Caribbean in the early nineteenth century, Supreme Court justices are seriously discussing the legal issues surrounding piracy. The crime has emerged as the test case for evaluating the major controversies about the reach of the ATS—namely, extraterritorial application and the existence of corporate liability. At oral argument in *Kiobel v. Royal Dutch Petroleum Co.*, justices of all persuasions invoked piracy as a paradigm or precedent,¹ as had the lower courts before them.² When the Court surprisingly delayed its decision, and instead called for new briefing and argument on the extraterritorial scope of the statute, it became even clearer that the battle over the ATS would be a naval engagement;³ indeed, the briefs of the plaintiffs and numerous amici repeatedly refer to piracy as a paradigm.⁴

This Article examines the questions before the Court in *Kiobel*: the relevance of “piracies”—in the Constitution and at sea—to extraterritoriality and corporate liability under the ATS. Much of the discussion of piracy law in ATS cases has been inaccurate or incomplete.⁵ Furthermore, the new attention to piracy should—but as yet has not—direct attention to pirates’ very own constitutional provision, the Define and

* Professor, Northwestern University School of Law.

¹ See Transcript of Oral Argument at 23–24, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. argued Feb. 28, 2012) (Justice Breyer citing piracy as precedent for corporate liability) (link); *id.* at 21 (Chief Justice Roberts citing piracy as precedent against corporate liability).

² See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 156 (2d Cir. 2010) (Leval, J. dissenting) (suggesting absurdity in the idea that pirates could avoid civil liability through incorporation) (link); *Kiobel*, 621 F.3d 111, *reh’g denied*, 642 F.3d 268, 270–71 (2011) (using piracy as precedent for non-corporate remedies under the ATS) (link); see also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (en banc) (using piracy as precedent to demonstrate the extraterritorial applicability of the ATS) (link); *id.* at 798 (Kleinfeld, J., dissenting) (using piracy as a precedent to demonstrate that the ATS does not apply to torts occurring in other sovereign states).

³ Coincidentally, this newfound relevance of piracy comes as federal courts struggle with the first criminal prosecutions of the offense in centuries. See, e.g., *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012) (link).

⁴ See, e.g., Petitioners’ Supplemental Opening Brief at 35, *Kiobel*, No. 10-1491 (link).

⁵ In a particularly egregious example, the Ninth Circuit said that the ATS drafters may have had the Barbary Pirates in mind. See *Sarei*, 671 F.3d at 745. Yet those sea raiders were never thought to be actual pirates in violation of international law, as they acted under sovereign authority. They were never prosecuted for piracy, but rather treated as military enemies. They were described as “pirates” only as an insulting popular idiom.

Punish Clause,⁶ which contains implicit limits on extraterritorial and, in particular, universal jurisdiction over international offenses.

Part I argues that the Constitution's treatment of piracy limits one form of extraterritoriality, universal jurisdiction (so called "foreign-cubed" suits), to offenses, like piracy, that have been established as universally cognizable by the law of nations. It does not, however, allow Congress to extend universal jurisdiction to the many international offenses that have not risen to universal jurisdiction status in international law. Part II turns from constitutional limits to statutory interpretation and the applicability of presumptions against extraterritoriality. Supreme Court piracy cases show that even for universally cognizable offenses, Congress must explicitly indicate that it wishes to extend extraterritorial jurisdiction. Statutory references to international law do not make the presumption against extraterritoriality disappear. Part III examines what piracy law teaches about corporate liability, concluding that the civil remedies available against pirates make the piracy example inapposite to ATS corporate liability. Part IV briefly concludes.

I. THE CONSTITUTIONAL MAXIMUM OF EXTRATERRITORIALITY

A. *A Middle Ground on Extraterritoriality*

The litigation and accompanying academic debate over the meaning and scope of the Alien Tort Statute (ATS) has been a marvel of surprising ideological transpositions. It is usually liberals who support reading international principles into domestic law, while conservatives disfavor such importation. But on the issue of corporate liability—to generalize broadly—liberals have urged the Court to look to U.S. common law while suddenly cosmopolitan conservatives have favored the adoption of a rule from international law and practice. The game of jurisprudential Twister does not stop there. On the question of extraterritoriality, liberals tend to look to international law—which is home to the doctrine of universal jurisdiction—and conservatives tend to invoke the parochial presumption against extraterritoriality. Neither position is fully correct. There may be a place for extraterritoriality in ATS cases, but only in a much narrower class of cases than where it is currently applied.⁷

⁶ See, e.g., *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) (link).

⁷ See also Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1080–91 (2011) (arguing that because international law supplies the rules of decision in ATS cases, the statute can apply extraterritorially when international law authorizes universal jurisdiction) (link); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 272–75 (2009) (arguing that courts in ATS cases have improperly ignored whether the suits would fall under universal jurisdiction in international law) (link).

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As this Part will show, what is at stake ATS in cases like *Kiobel* is not simple extraterritoriality, but full universality, a kind of extraterritoriality on stilts. Answering *Kiobel's* territoriality question requires consideration of Congress's power to "define and punish Piracies and Felonies on the high Seas, and Offences against the Law of Nations,"⁸ the constitutional basis for the ATS (and for law treating piracy) as currently construed by the courts. As will be shown, this clause suggests that the Constitution only gives Congress the power to extend universal jurisdiction to things that clearly have that status in international law.

B. *Universality, Not Mere Extraterritoriality*

The issue of ATS's geographic scope is widely described as one of *extraterritoriality*. Yet *Kiobel* is not about mere extraterritoriality. Even the most controversial and aggressive uses of extraterritoriality typically involve the regulation of American conduct abroad, or of foreign conduct that has substantial, targeted effects in the U.S.⁹ As a constitutional matter, Congress can always fall back on its Foreign Commerce power¹⁰ for authority to make such laws. ATS cases like *Kiobel*, however, involve suits by foreigners against foreigners for conduct that took place entirely abroad and has no particular effect on the U.S.¹¹ For U.S. courts to assert jurisdiction over these "foreign-cubed"¹² suits thus calls for an extreme version of extraterritoriality: universal jurisdiction. Universal jurisdiction poses much greater problems than mere extraterritoriality; it raises the question of where the federal government—supposedly one of limited powers—gets the authority to regulate conduct with no domestic nexus, with federal courts sitting as little "world courts."

C. *Universal Jurisdiction as a Constitutional Question*

1. *Piracies vs. Other "Offenses"*

As noted in *Sosa v. Alvarez-Machain*,¹³ the last case in which the Supreme Court addressed the Alien Tort Statute, Founding era common law incorporated three "international offenses"—piracy, assaults on ambassadors, and violations of safe conduct. Piracy occurs, by definition,

⁸ U.S. CONST. art. I, § 8, cl. 10. (link).

⁹ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (applying the Sherman Antitrust Act to foreign conduct with expected domestic effects) (link).

¹⁰ U.S. CONST. art. I, § 8, cl. 3.

¹¹ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (link).

¹² See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 794 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part); see also *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) (describing the first "foreign-cubed" securities class action to reach the Second Circuit) (link).

¹³ 542 U.S. 692 (2004) (link).

on the high seas, outside the jurisdiction of the U.S. Thus, *Sosa* reasoned, the First Congress must have assumed the ATS would provide a cause of action at least for those offenses. Moreover, the Court held, contemporary international law violations of similar stature could also be brought under the statute. Because piracy by definition took place outside the jurisdiction of the United States, proponents of foreign-cubed ATS suits argue that *Sosa's* citing piracy as a paradigm ATS cause of action demonstrates that the statute applies extraterritorially.

This argument draws the wrong inferences from piracy's inclusion in the list of domestically cognizable international law offenses in the Founding Era. Piracy differed in significant ways from the other two offenses mentioned in *Sosa*, which limits its relevance in the ATS context. Piracy was not simply a violation of the law of nations. It was also—unlike the other two international wrongs mentioned *Sosa*—a universally cognizable offense.¹⁴ This was crucial to both its constitutional and its statutory treatment. Yet ATS cases try to extend this precedent to non-universal jurisdiction cases.

In addition, the difference in the international legal status of piracy and the other two offenses is reflected and cemented in Article I. The ATS is generally thought to draw on the power to “define and punish . . . Offences against the law of nations.”¹⁵ Yet ATS actions for piracy (of which there are none on record) would presumably involve the companion power, in the same clause, to define and punish “piracies . . . on the high seas.”¹⁶ Thus, whatever is jurisdictionally true of “piracy” need not be true of other “Offenses” that can be reached under the ATS: they derive from separate—though related—Article I powers.

Piracy is both a high seas felony and an offense against the law of nations. The Constitution's singling out of piracy is striking and demands explanation because it creates a double-redundancy with the subsequent terms. *Does* anything make piracy different from other high seas felonies and international law offenses? Yes: piracy was the only universally cognizable offense at the Founding. Starting with this textual observation, prior scholarship has explained that “piracy” is singled out because of its singular feature—its jurisdictional consequences. Congress could punish piracy universally, but such power did not extend to other “Offenses.” At most, the Constitution only permits universal jurisdiction over other universally cognizable offenses in international law.¹⁷

Thus, the same provisions that empowers Congress to selectively implement customary international law also limits such legislation *by*

¹⁴ See *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

¹⁵ U.S. CONST. art. I, § 8, cl. 10.

¹⁶ *Id.*

¹⁷ See *Dire*, 680 F.3d at 454–55 (citing Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. REV. 149, 164–67 (2009) (link)).

customary international law. There is evidence for this not just in the structure of the clause, but also in grand jury instructions of Justices Wilson and Story, the pronouncements of Chief Justice John Marshall, and important judicial and Congressional precedents from the early Republic. For example, in *United States v. Furlong*, the Supreme Court in 1820 found that a statute that purported to punish “murder” by “any person” on the high seas did not apply universally because it was not a universal jurisdiction crime.¹⁸

Because murder was not universally cognizable, such an “offence committed by a foreigner upon a foreigner in a foreign ship” is a matter in which “Congress . . . ha[s] no right to interfere.”¹⁹ The Court suggested this limitation was constitutional, noting that universal jurisdiction would exceed “the punishing powers of the body that enacted it”²⁰—that is, the regulation would go beyond the Define and Punish Clause. As John Marshall put it in on the House floor in 1800: “[T]he people of the United States have no jurisdiction over offenses committed on board a foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government.”²¹

The presumption against extraterritoriality is normally a matter of reconstructing legislative intent. But when extraterritoriality rises to the level of *universality*, it raises constitutional questions about Congress’s power to regulate such conduct in the first place. Drawing on another canon—constitutional avoidance—universal jurisdiction should not be exercised except over the mostly clearly established universal jurisdiction offenses.

This is particularly true in ATS cases, where Congress has failed to exercise its power to “define.” That word was included in the Constitution because international law was thought to be too “vague and deficient” to provide a judicially administrable rule.²² In other words, not only is it often hard to determine what international law is, but it can also come down to a political judgment. Flesh must be put on the bones of international law before it can be the basis for liability in American courts. In the ATS, Congress passed the job given to it by the Constitution to the courts.

2. *Promiscuous Universal Jurisdiction in the ATS*

U.S. courts cannot get creative in defining the contours of international offenses. Congress does not have unlimited license to “define” offenses

¹⁸ 18 U.S. (5 Wheat.) 184 (1820) (link); see also Kontorovich, *supra* note 17, at 174–83 (discussing and documenting early views of Justices Wilson, Story, and Marshall).

¹⁹ *Furlong*, 18 U.S. at 197, 198.

²⁰ *Id.* at 196.

²¹ *United States v. Robins*, 27 F. Cas. 825, 865 (D.S.C. 1799) (No. 16,175) (link).

²² See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911) (link).

beyond what international law has established. When Congress delegates this power to the courts, the latter have even less latitude for creativity lest they raise non-delegation concerns.²³ Thus, courts must stick very closely to well-established international precedents.²⁴ The Supreme Court recently made this point in the war crimes context.²⁵ Yet in the ATS context, courts typically apply universal jurisdiction (UJ) without any examination of whether the relevant conduct is treated as universally cognizable by the law of nations. The list of universal jurisdiction offenses that is generally agreed upon is quite short, and therefore should be easy to check. Thus, The Restatement (Third) of the Foreign Relations Law of the United States concludes that, even with the “expanding class of universal offenses,” that status only attaches to “piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes.”²⁶ Another oft-cited enumeration, The Princeton Principles on Universal Jurisdiction, also add crimes against peace, crimes against humanity, and torture.²⁷

Yet courts in ATS cases have extended UJ to norms that are not generally regarded as universally cognizable, such as apartheid,²⁸ wartime property confiscation,²⁹ forced labor,³⁰ and child labor.³¹ These cases do not even make token efforts to establish that the norms were subject to universal jurisdiction, and often make no distinction between American and foreign co-defendants. The piracy precedent, for all it is worth, does not justify, and indeed contradicts, such across-the-board universal extraterritoriality—instead, piracy only supports universality for offenses that have clearly achieved that status in international law. Courts have been delegated the power to “define” international law in ATS cases, but this definition cannot be inconsistent with, or in anticipation of, well-established international law.³²

²³ Congressional delegations must be cabined by some “intelligible principle” which by definition is narrower than Congress’s Article I power. *See* *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (link).

²⁴ *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause*, 106 NW. U. L. REV. (forthcoming 2012).

²⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 611–12 (2006) (plurality opinion) (holding that “conspiracy” to commit war crimes is not a violation of international law and thus could not be punished under commissions convened under the Offenses Clause) (link).

²⁶ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 & cmt. a (1986) [hereinafter RESTATEMENT] (link).

²⁷ PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (Stephen Macedo ed., 2001) (link).

²⁸ *See* *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (dicta); *In re S. African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (link); *see also* RESTATEMENT, *supra* note 26, at § 404, reporter’s note 1 (noting that a treaty to assign UJ status to apartheid has not received the assent of most nations, including the U.S.).

²⁹ *See* *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (link).

³⁰ *See* *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074 (C.D. Cal. 2010) (link).

³¹ *See id.* at 1075.

³² *See* Kontorovich, *supra* note 24.

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Justice Ginsburg has suggested that *Sosa* approved extraterritoriality by favorably citing *Filartiga v. Pena-Irala*, a universal jurisdiction case.³³ Indeed, *Sosa* quoted *Filartiga*'s famous analogy between modern human rights universal jurisdiction and its precursors: "[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."³⁴ Yet, this is hardly decisive. Again, *Sosa* was not a universal jurisdiction case, so the issue was not before the Court. Moreover, it could be that the ATS allows universal jurisdiction for a few norms like torture that are generally considered to have that status in international law, but not for others.

II. PIRITICAL PRESUMPTIONS

A. *The Exceptionality of Piracy*

ATS cases like *Kiobel* involve entirely foreign conduct and thus, put into play the canon of statutory construction against extraterritorial application.³⁵ The Supreme Court recently reasserted this presumption with respect to other statutes in the face of decades of contrary lower court practice.³⁶ However, the presumption is not absolute. Thus, some courts have argued that if there was ever a place for not applying the canon, it would be in a statute about the "law of nations." Piracy was an offense that *by definition* could only take place outside the territory of the U.S. Since piracy is presumably actionable under the ATS, some courts have reasoned that the extraterritoriality canon is inapplicable.³⁷

Again, cases like *Kiobel* raise issues not just of extraterritoriality but of universality. Universal jurisdiction cases go far beyond what is implicated by the standard territoriality presumption because the latter doctrine applies to statutes designed to regulate American interests. Thus, even if one thinks statutes concerning international law could be more easily found to apply

³³ See Transcript of Oral Argument, *supra* note 1, at 14.

³⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

³⁵ Though often traced to *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812) (link), that case turned largely on principles of international law. The longstanding modern canon appears to be independent from the *Schooner Exchange* rule and is not concerned with potential conflicts with foreign laws. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878–939 (2010).

³⁶ See *Morrison*, 130 S. Ct. at 2878–939.

³⁷ See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 21 (D.C. Cir. 2011) ("Exxon posits a novel form of the canon, for it appears beyond debate that piracy is contemplated by the ATS, and piracy can occur outside of the territorial bounds of the United States." (citations omitted)) (link); *id.* at 78 (Kavanaugh, J., dissenting) (agreeing with majority on this point). Judge Kavanaugh attempts to distinguish high seas extraterritoriality from "foreign country" extraterritoriality. But since vessels on the high seas fall within the jurisdiction of their flag state, adjudicating crimes on foreign vessels raises the same issues of interference with other countries as crimes within foreign borders.

extraterritorially, reading universal jurisdiction into a statute is another matter altogether.³⁸

Moreover, it is not clear that *Sosa* was right about Congress's belief that the ATS would be a vehicle for piracy suits. Although piracy was one of the three offenses incorporated into common law, it stood on very different remedial footing than the other two. Civil remedies against pirates were almost exclusively in rem. While damages actions were possible, it is hard to find any evidence of such suits, and they would likely have been far too marginal to command Congress's solicitude. Moreover, piracy by a U.S. vessel would, in an important sense, not be extraterritorial because a ship on the high seas is fully within the territorial jurisdiction of its flag state. Finally, while piracy took place by definition outside the borders of the U.S., violations of safe conduct, another of the ATS's three historical paradigms, were by definition strictly territorial. It is hard to see why one would model ATS territoriality on the former and not the latter, especially for causes of action that do not necessarily arise extraterritorially. Piracy was understood as a unique offense in international law when the ATS was passed. Even if the ATS applied to it, this demonstrates that Congress would want to discard extraterritoriality presumptions for other offenses.

B. *Presumption Still Applies to International Crimes*

The fact that a statute deals with matters of international law does not mean it automatically triggers universal jurisdiction or suspends presumptions against extraterritoriality. For example, in *United States v. Palmer*, Chief Justice Marshall read a statute criminalizing "piracy" by "any person" as requiring a U.S. nexus, even though it was clear that Congress could constitutionally apply the statute universally.³⁹ To be sure, Congress quickly overrode the *Palmer* construction, at least partially, and Justice Marshall appears to have gotten it wrong as a matter of congressional intent (though not necessarily as a textual matter).⁴⁰ Yet Congress's response to *Palmer* does not disprove the existence of the presumption as applied to international law offenses. Presumptions are generalizations about congressional intent. Those generalizations are, of course, sometimes wrong, and in those cases Congress can say so.

A presumption is only valuable if it is usually right. The anti-extraterritoriality rule stops making sense if one thinks that by invoking international law terms, or at least universal jurisdiction offenses, Congress usually intends to use the full extent of the jurisdiction allowed to it by

³⁸ Federal courts have found *universal extraterritoriality* only in the face of the clearest statement of congressional intent. See, e.g., Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 70503(b) (2012) (link).

³⁹ 16 U.S. (3 Wheat.) 610, 610 (1818) (link).

⁴⁰ See Colangelo, *supra* note 7, at 1063–65.

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international law.⁴¹ Congress's critical reaction to *Palmer* aside, the evidence goes in the opposite direction. Recent federal statutes do not extend universal jurisdiction to war crimes but do apply it to torture (in both cases making the foreign application clear) though both are universal jurisdiction offenses in international law.⁴² Indeed, in the 1820s, the Navy Department was instructing warships to only interfere with pirates attacking U.S. ships.⁴³ Today, the stated policy of almost all nations, including the U.S., is to avoid any exercise of universal jurisdiction over piracy.⁴⁴ Indeed, most nations do not have laws against most universal jurisdiction offenses (leaving aside the question of civil remedies). In short, the universal cognoscibility of an offense is relevant to Congress's constitutional ability to regulate it but not necessarily relevant to whether that power has been maximally exercised.

The ATS was passed by the very same Congress that authored the piracy law at issue in *Palmer*. If the presumption applied to an anti-piracy law, one would think a court would apply it equally to sister statutes dealing with law of nations violations. On the other hand, if presumptions have validity because Congress knowingly treats them as background rules,⁴⁵ they would have less bite with the legislation of the First Congress, which had not yet considered the presumption.

Justice Ginsburg has suggested that the Supreme Court implicitly approved of ATS extraterritoriality in *Sosa v. Alvarez-Machain*.⁴⁶ But *Sosa* involved "simple" extraterritoriality—and did not raise foreign-cubed issues—because it involved U.S. federal agents and their local contractors abducting a Mexican national (who had been involved in the torture and murder of a U.S. federal agent) so that he could stand trial in the U.S. Few cases could have a tighter U.S. nexus.

Reading a U.S. territorial or other nexus requirement into the statute is consistent with its purpose. The statute was designed to give an avenue of redress to aliens aggrieved by law of nations violations for which the U.S. might be held responsible by foreign powers. The ATS's reference to international law does not untether it from American interests. Consider by analogy Article III's Ambassadors Clause.⁴⁷ This clause provides that the

⁴¹ See *id.* at 1074–75.

⁴² See, e.g., Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006) (link).

⁴³ One might think different presumptions should apply to criminal and civil statutes. In the case of pirates, for example, civil remedies against foreign pirates would only be available after the Executive had decided to engage in enforcement action.

⁴⁴ See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 326 (2010) (link).

⁴⁵ See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010) (“[T]he presumption . . . preserv[es] a stable background against which Congress can legislate with predictable effects.”).

⁴⁶ Transcript of Oral Argument, *supra* note 1, at 12–13.

⁴⁷ U.S. CONST. art. III, § 2, cl. 2.

Supreme Court will have original jurisdiction over suits involving ambassadors and does not textually limit the class of ambassadors involved. Yet when a U.S. Ambassador—that is, an emissary *from* Washington—sought a trial before the Court, he was dismissed out of hand in one short paragraph.⁴⁸ The Ambassadors Clause (or perhaps just the similarly worded statute conferring the jurisdiction) only applies to *foreign* ambassadors because that is the *purpose* of the jurisdiction: to avoid offending *other* countries.⁴⁹

One might suggest that the policies behind the anti-extraterritorial presumption, such as avoiding conflicts with foreign laws, do not apply to the ATS. Under the ATS, it is *international* law that is to be applied. This is the same everywhere—what can be the conflict? First, the definition of international law is “vague,” varying from one nation to another; this is why the Framers made Congress “define” it. To pretend that different national conceptions of international law cannot conflict comes close to the discarded pretense that the several states apply a single common law, with perceived conflicts being a mere epiphenomenon.⁵⁰ Second, international law is silent as to the method of its enforcement, particularly on the question of penalties. With the exception of the U.S., no country has civil remedies for extraterritorial torts, and several have filed briefs protesting such litigation under the ATS. Certainly the punitive damages conflict with other legal regimes comes not just from penalizing what they choose to legalize but also from penalizing to different degrees. Different degrees of penalty can create substantive inconsistency, as the Supreme Court recently noted in ruling on federal preemption of Arizona’s immigration laws.⁵¹ In a further irony, the *Kiobel* plaintiffs argue that ATS cases should *not* be governed purely by international law but that the Court should borrow important rules of decision—such as corporate liability—from U.S. domestic law.

Palmer may reflect a presumption distinct from but related to the extraterritoriality one: a presumption against universality. The assumption is that Congress legislates selfishly, to vindicate parochial American interests, rather than for the sake of cosmopolitan justice. This approach is well illustrated by directives issued by Secretary of the Navy Smith Thompson in 1823 to a naval squadron sent to the Caribbean to suppress what turned out to be the last great wave of international piracy in the Age of Sail:

From the generality of [the statute], it would seem to embrace those of every nation or country upon which any

⁴⁸ See *Ex parte Gruber*, 269 U.S. 302 (1925) (link).

⁴⁹ *Id.* at 303.

⁵⁰ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (link).

⁵¹ See *Arizona v. United States*, No. 11-182, slip op. at 12–15 (U.S. June 25, 2012) (holding that “additional penalties” for violation of same substantive law creates direct conflict) (link).

piratical aggressions may have been committed. Admitting the act might be extended this far, *it does not appear to have been the general object of the law*; and it is thought by the President most advisable, at present, not to give it a like indiscriminate practical construction as to all vessels. The great object [of the statute] . . . was to protect the merchant vessels of the United States and their crews from piratical aggressions

If, however, you shall discover depredations upon other vessels, committed under such gross and aggravated circumstances, as to leave little doubt of the piratical character, it will be your duty to capture and bring in the aggressors No authority is given to *retake* the vessels of any foreign nation.⁵²

These instructions refer to the piracy statute *after* Congress had amended it to allow for universal jurisdiction, in response to the Supreme Court's *Palmer* decision. Yet the Executive effectively rules out universal jurisdiction. The instructions suggest several important points for the ATS. First, universal jurisdiction, even for piracy, was regarded as extraordinary, and those interpreting the statute continued to apply a narrow construction based on the basic principle that U.S. laws are primarily concerned with U.S. interests. Obviously, one can quibble about the interpretive value of naval orders. But these were self-conscious, executive interpretations of a statute, authored by a cabinet secretary (and subsequently a Justice on the Supreme Court)—Smith Thompson. The case for extraterritorial application of the ATS places extraordinary weight on a single sentence in a memorandum by the Attorney General. Together, the two executive branch interpretations point the same way—a requirement of some U.S. nexus.

The orders do suggest that under “aggravated circumstances” universal jurisdiction could be exercised for crimes that undoubtedly had that status under international law, though the instructions are ambiguous on this point (and could also be read to forbid the capture of pirates attacking foreign ships from non-U.S. vessels, which would rule out all universal jurisdiction). At a minimum, the Executive raised the bar significantly beyond what was required in international law. Indeed, the instructions show that the Executive played a crucial gate-keeping role in universal jurisdiction over piracy. Because even civil remedies against pirates were in rem, they could only be enjoyed in the rare cases where the Executive had authorized a capture and decided to bring the vessel in for adjudication (for

⁵² 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 211–12 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton, 1860) (link).

reasons of convenience, they were often burned at sea or turned over to local authorities).

III. PIRATES, INC.

While corporations can routinely be held liable under U.S. domestic law, it is far from clear that the law of nations creates similar liability. Indeed, it is hard to identify any cases in which corporations have been held liable for violating the law of nations outside the ATS context. Because pirates were engaged in a multi-person profit-making enterprise—a business of sorts—piracy has been invoked as a precedent for corporate liability in international law and, given *Sosa*, one that should be near and dear to the ATS.⁵³

Yet, while piracy law does not *disprove* the possibility of corporate liability, neither is it an example or precedent for its existence, even by way of analogy. First, the civil remedy against pirates was the condemnation of their vessel, an *in rem* proceeding in admiralty. Second, the pirates were *not* a share corporation. Typically, pirates owned their vessel jointly. The organization of a pirate vessel was essentially a partnership—with elected officers—rather than a share corporation. There was no separation of ownership from control, the central characteristic of the modern public corporation.⁵⁴ Consequently, the condemnation of the vessel simply operated as a fine against the principals, those who had directly violated international law. Modern corporate liability, by contrast, seeks to impose costs on diffuse absentee shareholders, who do not exercise direct control over the international law violations of their corporate agents. *In rem* proceedings against pirates, therefore, were more analogous to *in personam* actions against corporate directors or officers responsible for the tort than against their employer.

The *in rem* nature of the proceedings is crucial. The purpose of such a proceeding was primarily to determine the legal rights in the vessel, not to provide compensation to victims of piracy. Thus, if the pirates had originally pirated the vessel they sailed on—as was often the case—the libel would serve to restore it to its owners (minus a claim for salvage by the captor) and nothing more. Moreover, the proceeds of a condemnation would be used to pay the captor. *In rem* jurisdiction therefore was a way of privately financing the dangerous and under-supplied service of actually apprehending pirates. Crucially, victims of the pirates from *other vessels* could not make any claim for condemnation.

Justice Breyer, Judge Leval, and others have speculated about what would happen if pirates incorporated. Would “Pirates, Inc.” be shielded

⁵³ See, e.g., *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (link).

⁵⁴ See PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* 37–42 (2009).

from liability? To be sure, because jurisdiction was in rem, the identity of the owner did not matter. But ATS cases pose a different question: Could Pirates, Inc. be pursued for damages separate from the libel of their vessel and tort suits against individual pirates? The practice of condemning pirate vessels does not serve as any precedent for an affirmative answer.⁵⁵

The closest precedent involved a vessel that had not gone on a premeditated piratical cruise, but nonetheless engaged in opportunistic acts of piracy during an otherwise legitimate journey, unbeknownst to the vessel's owner. Justice Story found that the innocence and ignorance of the absentee owner was no defense to the in rem condemnation of his vessel⁵⁶ but also made clear that this was a particular doctrine of admiralty, not one of tort damages.⁵⁷ Indeed, the condemnation would not extend to the cargo if its owners did not direct the piratical offense. Yet, in many ways it is the cargo owners who are the ultimate "bosses" of the journey—they hire the ship from an owner, who hires a master, who ultimately hires a crew. Indeed, Justice Story suggested the immunity of the innocent cargo owners would persist even if the master of the pirate ship was their direct agent, or if they also owned the vessel itself.⁵⁸

Justice Story made clear that the forfeiture in rem, despite the owner's innocence, was necessary to ensure effective compensation to victims.⁵⁹ Supporters of corporate ATS liability make arguments with a superficially similar tone—without forfeiture in rem, victims have no remedy and offenders no deterrence. Yet the policy behind in rem jurisdiction was not about going after the deepest pocket. Rather, the "necessity" came from the difficulty foreign plaintiffs faced in obtaining personal jurisdiction over ship owners or even identifying them. Indeed, far from guaranteeing compensation to all victims, in rem proceedings capped recovery at the value of the vessel minus salvage and admiralty fees, leaving absent claimants with nothing. Today, damages actions are available against the

⁵⁵ By an amazing coincidence, another ATS case pending in the federal courts gives a potential example of incorporated "pirates." The case involves a suit by Japanese whalers against a Washington-based environmentalist group famous for using boats to obstruct whaling on the high seas. The whalers said the hazardous tactics of Sea Shepherd amounted to "acts of violence or depredation" and thus constitute piracy under the United Nations Convention on the Law of the Sea (UNCLOS). The defendant group is incorporated as a non-profit, and there is not the kind of separation of ownership and control found in share corporations. Illustrating the distinction from typical corporate cases, the group's founder and director also captains its vessels and was named as a co-defendant. The defendants have not raised the corporate liability issue, perhaps because the plaintiffs have only sought equitable relief. Moreover, the district court surprisingly held that Sea Shepherd's conduct could not be piracy because it was not committed for "private ends" as required by UNCLOS because it "is uninterested in financial gain" and only wants to "save the . . . whales." *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, No. C11-2043RAJ, 2012 WL 958545, at *12 (W.D. Wash. Mar. 19, 2012).

⁵⁶ *The Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844) (link).

⁵⁷ *Id.* at 232.

⁵⁸ *Id.* at 236-37.

⁵⁹ *Id.* at 232.

responsible corporate officers and agents, and personal jurisdiction is much broader.

The notion of Pirates, Inc. expresses an intuitive incredulity that investors in pirate ventures—and these exist today—could avoid liability. Yet this question is inapposite to ATS corporate liability in two ways. First, such investors are, at best, only liable under international law if they “intentionally facilitated” the *actus reus* of piracy.⁶⁰ The requirement of actual “intent” itself suggests a limitation of liability to individuals. Moreover, the investors in Pirates, Inc. are acting solely with the purpose and knowledge of funding a violation of international law. This is quite unlike the shareholders of the multinational corporations in ATS cases. In short, the pirate financiers are also the ringleaders; they are putting up money specifically to commit acts of piracy.

Second, it remains entirely unclear if absentee investors in pirate ventures, whether incorporated or not, are liable under international law. The natural reading of the United Nations Convention on the Law of the Sea is that it *only* applies to facilitators on the high seas, and not land-based accomplices.⁶¹ To be sure, national laws have long provided criminal punishment for land-based accomplices, but this supplements, rather than implements, the law of nations. For example, federal piracy statutes have long treated land-based assistance to pirates as a separate offense—“confederating with pirates”—distinct from “piracy as defined by the law of nations.”⁶² Fitting out pirates is not defined as piracy and carries a much lighter penalty. Moreover, when national law is used to augment international law crimes, universal jurisdiction is not available since it can only be created by the law of nations.

It is neither odd nor perverse that the law of nations would not necessarily reach Pirates, Inc. Captured pirates face criminal punishment, which was death until the twentieth century, and in the U.S remains life in prison. This is a serious deterrent and one that it is not surprising international law has not needed to supplement. Moreover, piracy is a universal jurisdiction offense. Universal jurisdiction is made possible by the narrow scope of the offense—conduct on the high seas. It is not surprising that the definition of the offense does not extend to land-based investors; the international consensus on treating piracy as a universal offense might well not be tenable if it included conduct purely within the sovereign territory of a single state.

⁶⁰ See United Nations Convention on the Law of the Sea art. 101(c), Dec. 10, 1982, 1833 U.N.T.S. 397, 436 (link).

⁶¹ See United Nations Convention on the Law of the Sea art. 86, *supra* note 60, at 432.

⁶² See 18 U.S.C. §§ 1657, 1651 (2012) (link).

CONCLUSION

Piracy is the oldest and most well-established international offense. Thus, it is not surprising that questions about the extraterritorial scope and availability of corporate liability under the ATS look to piracy as a paradigm. Yet many have taken away the wrong lessons. The Constitution does permit extraterritorial—indeed, universal—jurisdiction over piracy. But it does not do so for all “Offenses against the Law of Nations.” Indeed, the broader jurisdictional scope for piracy is the primary reason it is mentioned separately in the Constitution. At most, the Constitution only allows foreign-cubed suits for offenses that have the same international status as piracy, but courts in ATS cases have skipped this crucial first step. Moreover, even if one accepts *Sosa*’s dictum—the ATS was intended to apply to piracy—this does not mean it was intended to extend the constitutional maximum scope of jurisdiction. For one, other contemporaneous piracy laws did not apply to foreign-cubed cases. Additionally, other contemporaneous *jurisdictional* statutes did not confer the constitutional maximum jurisdiction even when they echoed the relevant constitutional language.

Nor does the international legal status of piracy provide a precedent for the liability of modern share corporations. Pirate syndicates were partnerships with no separation of ownership and control. In rem condemnation of a vessel is different in crucial ways from money damages, perhaps most significantly in the inherent limitation of the extent of liability.