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# Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals about the Limits of the Alien Tort Statute

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IMPLEMENTING *SOSA* v. *ALVAREZ-MACHAIN*:  
WHAT PIRACY REVEALS ABOUT THE LIMITS  
OF THE ALIEN TORT STATUTE

*Eugene Kontorovich\**

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## INTRODUCTION

The Supreme Court partially settled a long-standing dispute about the purpose and scope of the Alien Tort Statute (ATS) when it decided *Sosa v. Alvarez-Machain*<sup>1</sup> at the end of its 2004 term—but in doing so, it raised an equally important set of questions that bear greatly on the future of ATS litigation. The ATS was enacted by the First Congress but lay dormant until its revival by the Second Circuit in 1980 as a tool of international human rights litigation. It provides that district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations.”<sup>2</sup> There has been considerable controversy over whether the statute simply grants “jurisdiction” for offenses created elsewhere, or whether it authorizes suits to be brought directly on the basis of “the law of nations,” now commonly called customary international law (CIL).<sup>3</sup>

*Sosa* (mostly) chose the former reading, holding that the ATS is “jurisdictional in the sense of addressing the power of the courts to entertain certain cases concerned with a certain subject.”<sup>4</sup> The Court rejected as “frivolous” and “implausible” the contention that the law allows for a wholesale incorporation of substantive CIL norms into federal common law,<sup>5</sup> or that it authorizes the creation of “a new cause of action for torts in violation of international law” that are not otherwise actionable under U.S. statutes.<sup>6</sup> In this understanding, the function of the ATS is quite modest and limited.

1 124 S. Ct. 2739 (2004).

2 Alien Tort Statute, 28 U.S.C. § 1350 (2000). While the Supreme Court has consistently referred to the provision as the Alien Tort Statute, it is also sometimes called the “Alien Tort Claims Act,” though there seems to be no basis for this appellation, and it may even be misleading. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 592–93 (2002) [hereinafter Bradley, *Alien Tort Statute*] (“Human rights advocates now commonly refer to the Statute as the ‘Alien Tort Claims Act,’ a title suggesting that the Statute is more than just a jurisdictional provision.”); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 457 n.3 (2001) [hereinafter Bradley, *Human Rights Litigation*] (noting that there appears to be no historical basis for the “Alien Tort Claims Act” appellation).

3 Given the voluminous pre-*Sosa* scholarship examining the ATS, this Article does not consider the abstract merits of the possible interpretations of the statute. Rather, it focuses on understanding the position taken by *Sosa* in this controversy and translating *Sosa* into a workable test for future claims.

4 *Sosa*, 124 S. Ct. at 2755 (2004).

5 *Id.*

6 *Id.* at 2772.

However, the Court did not entirely shut down ATS human rights litigation. Backtracking on its “only jurisdictional” interpretation, it held out the possibility that the statute might allow judicial recognition of a narrow subset of modern CIL-based causes of action. That subset would be those offenses substantially analogous to those for which the First Congress specifically intended the ATS to provide jurisdiction. These are the three law of nations offenses described by Blackstone as being part of common law: offenses against ambassadors, violations of safe passage, and piracy.<sup>7</sup> The Court did not say for certain that modern CIL offenses could be brought directly under the ATS. Nor did it set out a clear method for determining whether a CIL norm sufficiently resembles the Blackstonian offenses, leaving the “ultimate criteria” for future resolution.<sup>8</sup>

While *Sosa* may at first glance seem open-ended (or in the words of the dissent, “hardly . . . a recipe for restraint in future cases”)<sup>9</sup> the inquiry that it demands is far more restrictive than may initially appear. *Sosa* contains the outlines of a rather demanding test to determine whether a particular international law claim can be subject to jurisdiction under the ATS. The test is historical, requiring a close examination of those “characteristics” of the eighteenth century offenses that gave them their special status in the common law and the law of nations. Applying this test to a variety of purported new international norms will become a significant subject of litigation in the lower courts in the wake of *Sosa*,<sup>10</sup> litigation that could result in conflicting decisions due to the Court’s scant description of the test it envisions.

This Article fleshes out the historical test contemplated by *Sosa* by identifying the salient characteristics of the Blackstonian offenses, which in turn become the characteristics that a CIL norm must possess to be actionable under the ATS. These characteristics are particularly important limiting criteria when the suit is brought by foreigners against foreigners, a controversial use of the ATS that the Court sug-

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7 *Id.* at 2761–62.

8 *Id.* at 2765.

9 For example, one of the formulations the Court used to describe the limits on new CIL actions was that they must be “specific, universal, and obligatory.” *Id.* at 2775 (Scalia, J., concurring). The Court found that Alvarez’s arbitrary detention claim did not satisfy this standard and thus reversed an en banc decision of the Ninth Circuit. Yet, as Justice Scalia observes, this can only result in confusion, because “specific, universal, and obligatory” was “the very formula that led the Ninth Circuit to its result in this case.” *Id.* (Scalia, J., concurring).

10 *Id.* at 2776 (Scalia, J., concurring) (“[I]n this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors.”).

gests should be allowed, if at all, only for norms that bear a particularly close resemblance to the eighteenth century paradigms. Piracy is jurisdictionally and conceptually most closely related to the modern human rights offenses that have been litigated under the ATS. It was the only universal jurisdiction (UJ) offense known to common law and the law of nations, and thus this Article pays particular attention to the characteristics that gave it this status. Indeed, the Court itself emphasizes piracy as the benchmark for any judicial recognition of new international norms, and piracy has been invoked as a model or precedent by those who support using U.S. courts to hear cases involving human rights abuses committed by foreigners abroad.

Part I describes the controversy over the meaning of the ATS. It then explains the confusing quasi-resolution to this controversy reached in *Sosa*, and criticizes the opinion for a fundamental inconsistency in its treatment of changes in the nature of CIL and federal common law since the enactment of the ATS. This Part pays particular attention to the role of UJ in ATS litigation to date, and examines whether *Sosa* itself was a UJ case or otherwise casts light on the UJ question. Part I shows that *Sosa* adopts a historical test that only allows for CIL causes of action that significantly resemble the few Blackstonian offenses contemplated by the first Congress. Implementing this test requires identifying the relevant characteristics of the earlier offenses, and of piracy in particular.

Part II concerns itself with the identification of these characteristics—which is in effect the construction of the specific “questions” in the *Sosa* “test.” As Part II shows, a combination of six characteristics allowed piracy to become and remain a universally cognizable offense against the law of nations. First, piracy was a crime in the municipal law of all nations; international law merely reflected an already ubiquitous condemnation of the conduct. Second, piracy had a narrow and universally agreed on definition; the conduct it proscribed was well understood, thus preventing conflicts between states about the propriety of UJ. Third, all nations made piracy punishable by death. Thus UJ would not lead to forum shopping or disputes among nations as to what punishment should be inflicted. Fourth, and perhaps most importantly, pirates were private actors who had refused the protection of their home states by failing to obtain a letter of marque, an easily-secured authorization that would make their conduct perfectly legal. They could expect little succor from their home state, since they had turned their back on it, and thus a prosecuting nation would not expect the home state to take offense. Fifth, piracy occurred on the high seas. While this did not make traditional jurisdictional limitations moot, it did make conventional enforcement difficult, and thus

UJ might seem an attractive auxiliary to domestic prosecution. Finally, pirates indiscriminately attacked the ships of all nations, as they were not constrained by ties of national loyalty or the limitations contained in a letter of marque. Thus maritime states had a particularly strong interest in punishing pirates because their ships could fall prey to them, and all states would be economically harmed by disruptions of international commerce.

These six features minimized the problems and dangers that would otherwise accompany UJ. Because piracy—and no other offense—had these characteristics, a norm of universal cognizability could emerge and persist for centuries without nations defecting from, and thus changing, it. Other offenses possessed some of these features, but lacking the full complement, none received the same treatment as piracy in international law. Unlike piracy—and unlike much of recent ATS litigation—the other two law of nations offenses enforced by common law courts involved offenses committed by Englishmen within England.

Part III administers *Sosa's* historical “test” to modern human rights offenses, and finds that they do not pass. New CIL norms do not possess one or more of the important properties that made piracy safe for UJ and enforceable by common law. Thus providing redress for modern CIL offenses would entail profound dangers not contemplated by the First Congress when it enacted the ATS with the limited purpose of allowing suits dealing with piracy, ambassadors, and safe conducts. Comparing piracy to modern international law norms reveals that new causes of action under the ATS cannot be created without abandoning the fidelity to the historical paradigms mandated by the Court. The “door” that *Sosa* leaves “ajar subject to vigilant doorkeeping”<sup>11</sup> has nothing behind it.

## I. *SOSA* AND THE RELEVANCE OF PIRACY TO ATS CLAIMS

### A. *The ATS Controversy Unresolved*

The ATS came into being as part of the first Judiciary Act, which established the federal courts and regulated their jurisdiction.<sup>12</sup> Not much else is known about the statute: no legislative history exists, and there are few other contemporaneous hints about its purpose and meaning.<sup>13</sup> For two hundred years after its passage, the ATS lay in

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11 *Id.* at 2764.

12 Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79.

13 See *Sosa*, 124 S. Ct. at 2754–55; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (“The debates over the Judiciary Act in the

desuetude.<sup>14</sup> The Second Circuit resuscitated it in the landmark *Filar-tiga v. Pena-Irala*<sup>15</sup> decision. That case involved a suit by Paraguayans against former Paraguayan officials, alleging torture in violation of CIL.<sup>16</sup> The court found that § 1350 gave it jurisdiction to hear the case because it was filed “by an alien” and alleged a “violation of the law of nations.” Moreover, the Second Circuit concluded that CIL also provides a cause of action because it believed international law to be, in toto, “part of the federal common law.”<sup>17</sup>

*Filar-tiga* transformed the statute into a tool for foreigners to seek redress in federal courts for a variety of abuses committed by governments around the world. While only a few courts of appeals adopted the Second Circuit’s view of the statute, this was enough to allow a wide-ranging docket of ATS cases. ATS suits have sought, and often obtained, recovery for violent repression of political dissent and other abuses by, among others, the president of Zimbabwe,<sup>18</sup> the former president of the Philippines,<sup>19</sup> the former prime minister of China,<sup>20</sup> the 1970s leadership of Ethiopia,<sup>21</sup> and members of prior military regimes in Nigeria<sup>22</sup> and Guatemala.<sup>23</sup> Other cases involved Bosnian women suing for mass rape organized by a Bosnian-Serb political

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House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly . . . Historical research has not as yet disclosed what section 1350 was intended to accomplish.”); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.”).

14 In only one case during that period did a court rely solely on the statute for jurisdiction. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 184, 202 n.111 (2004).

15 630 F.2d 876 (2d Cir. 1980).

16 See *id.* at 878.

17 *Id.* at 885.

18 See *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 405 (S.D.N.Y. 2002).

19 See *Hilao v. Estate of Marcos*, 103 F.3d 789, 790–92 (9th Cir. 1996).

20 See Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown*, N.Y. TIMES, Sept. 1, 2000, at A6.

21 See *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (upholding recovery for the plaintiff under the ATS).

22 See *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 907–08 (N.D. Ill. 2003) (denying the summary judgment motion of the defendant Nigerian general).

23 *Xuncax v. Gramajo*, 886 F. Supp. 162, 197–98 (D. Mass. 1995) (awarding compensatory and punitive damages against Guatemalan generals under the ATS).

leader,<sup>24</sup> and claims against the Japanese government for using Asian women as sex slaves during the Second World War.<sup>25</sup>

In another branch of ATS litigation, foreigners have sued foreign and American *corporations* for violating international human rights and environmental norms in their operations abroad, or abetting such violations by foreign governments.<sup>26</sup> These suits may be more financially promising for plaintiffs, as they do not face sovereign immunity obstacles and multinational corporations probably have more assets in the United States with which to satisfy a judgment than a general of a deposed Third World regime. Given the widespread use of torture, murder, and political repression by the governments of the world, the ATS cases represented but a small fraction of what could have been brought under *Filartiga's* broad construction of the statute. The limiting factors may have been foreigners' ignorance of the unique and novel opportunities afforded them in U.S. courts, or their lack of access to them, perhaps as a result of the very repression of which they might complain.<sup>27</sup>

While *Filartiga* reached its conclusions about the ATS somewhat casually, the subsequent wave of litigation led scholars to consider § 1350 quite closely. A substantial corpus of scholarship has arisen around the statute. The commentary can be roughly sorted into four different interpretations, two focusing on the statute as a source of substantive law, and two viewing it as jurisdictional only. At one extreme was the full-blown "cause of action theory" under which the statute provided jurisdiction and allowed for common law causes of action for international law violations *not limited to those known in*

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24 *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (reversing dismissal of a suit under the ATS).

25 *Hwang Geum Joo v. Japan*, 332 F.3d 679, 680–81 (D.C. Cir. 2003), *vacated by* 124 S. Ct. 2835 (2004).

26 *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91–92 (2d Cir. 2000) (upholding jurisdiction over a suit by a Nigerian national against Dutch and British firms for supporting human rights abuses by Nigerian authorities); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003) (denying the defendant Canadian energy company's motion to dismiss a complaint accusing it of complicity in the Sudanese government's ethnic cleansing campaign); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002) (holding that the ATS provides jurisdiction and a cause of action in a suit by Papua New Guineans alleging environmental and human rights abuses by an international mining company).

27 *Cf. Van Tu v. Koster*, 364 F.3d 1196, 1199–200 (10th Cir. 2004) ("We agree with the district court that . . . some degree of equitable tolling w[as] appropriate on the basis of plaintiffs' [Vietnamese villagers'] poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel.").



1789.<sup>28</sup> A narrower interpretation saw the statute as affording a cause of action, but one locked into the particular content of the 1789 law of nations, and not continuously updated by developments in CIL.<sup>29</sup> On the other side of the debate, scholars argued that the statute was purely jurisdictional and could not be the basis for any common law recognition of international offenses. One version of this interpretation saw jurisdiction as extending to suits between aliens,<sup>30</sup> while a narrower reading found it to apply only to suits *against* American nationals.<sup>31</sup> *Sosa* was the Supreme Court's first encounter with these questions.<sup>32</sup> Like *Santa Claus*, the Court's opinion brought something for everyone. Of the four major interpretations developed by scholars, *Sosa* partially endorses the first,<sup>33</sup> as well as the second,<sup>34</sup> and the third,<sup>35</sup> and perhaps the fourth.<sup>36</sup>

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28 See, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 489–93 (1989); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 62 n.4 (1988); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 224 (1996); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 41–42 (1985).

29 See, e.g., Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 446–47 (1995) (arguing that the statute was designed to allow for redress of violations of prize law).

30 See Bradley, *Alien Tort Statute*, *supra* note 2, at 626–29.

31 *Id.* at 630–37.

32 Between *Filartiga* and *Sosa*, the Court had only heard one case brought under § 1350. However, it did not have occasion to interpret the ATS in that case. Because a foreign state was the defendant, the Court ruled that the action could only be brought, if at all, under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330–1331, 1602–1611 (2000), and not the ATS. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

33 See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2773 (2004) (refusing to “close the door to further independent judicial recognition of actionable international norms” under the ATS).

34 *Id.* at 2761–62 (holding that Congress only intended to allow actions for the three Blackstonian offenses, and if a present-day CIL norm can be actionable under ATS, it must resemble those offenses).

35 *Id.* at 2764 (“All members of the Court agree that section 1350 is only jurisdictional.”).

36 *Id.* at 2763 (noting that even if a new CIL norm is cognizable under the ATS, it is quite another thing for federal courts “to consider suits . . . that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government has transgressed these limits”).

## B. *Sosa's Holding: A Historical Test*

### 1. The Background to *Sosa*

*Sosa* was the second case in which the Mexican national Humberto Alvarez-Machain gave the Court occasion to elaborate on the obscure relationship between American and international law; both cases involve the same facts. In 1985, a Drug Enforcement Administration agent was tortured and murdered in Mexico. U.S. officials believed that Alvarez participated in the crime by keeping the agent alive so as to prolong his agony. Alvarez was indicted by a federal grand jury, but Mexico refused an extradition request. This prompted the DEA to abduct Alvarez from Mexico, bringing him to the United States to stand trial. *Sosa* is a Mexican national recruited by the DEA to carry out the Mexican side of the operation.<sup>37</sup> Alvarez challenged the federal court's jurisdiction over him on the grounds that the process that brought him before the court was illegal, in violation of the extradition treaty between the United States and Mexico. The case ultimately went to the Supreme Court, which held that the abduction did not violate the treaty because the treaty dealt with extraditions and had nothing to say one way or another about abductions outside the extradition process.<sup>38</sup>

Alvarez was subsequently tried before a jury in a California district court, but before the jury could deliver a verdict the judge entered an acquittal for Alvarez on the grounds that the government had withheld potentially exculpatory evidence and failed to bring him before a magistrate promptly upon bringing him into the country.<sup>39</sup> Free from prosecution, Alvarez turned around and filed a civil action based on his kidnapping against the DEA, several agents, as well as *Sosa* and other Mexican nationals who assisted in the abduction. He sought damages under the Federal Tort Claims Act (FTCA) against the governmental actors (the United States was eventually substituted for the individual agents). He also sued *Sosa* under the ATS, claiming that his seizure and abduction constituted a tort in violation of the law of nations. The various cases were consolidated on appeal, and the

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37 *Id.* at 2746.

38 *United States v. Alvarez-Machain*, 504 U.S. 655, 664–66 (1992). The Court also rejected the contention that the treaty should be interpreted in light of a CIL norm against cross-border abductions; in doing so, it seemed to implicitly conclude that such an international norm, if it exists, would not of its own force give justiciable rights or defenses to individuals. *Id.* at 666–69.

39 *See Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996).

Ninth Circuit upheld the claim of illegal detention (but not cross-border abduction) under the ATS and FTCA.<sup>40</sup>

## 2. The Supreme Court's Holding

The Supreme Court reversed the Ninth Circuit, holding that the ATS is a jurisdictional statute that does not incorporate by reference all of substantive international law as possible causes of action. For specific international law norms to be actionable, Congress must pass specific implementing legislation. If this were all *Sosa* held, the decision would be easy to understand and to apply, for only one statute currently in force creates a cause of action for violations of human rights abroad.<sup>41</sup> Yet the Court took an additional step that will produce much litigation in the lower courts. It suggested that a "narrow set" of international law violations are directly actionable under the otherwise purely jurisdictional statute. After examining the statute's history, the Court concluded that Congress passed the ATS assuming it could be used immediately, without further legislation, to hear a "very limited set of claims" alleging violations of the specific law of nations norms that were also part of common law:

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [i.e., Blackstone's three offenses].<sup>42</sup>

Again, had the Court gone no further, the decision would be easy to implement. ATS cases since *Filartiga* have not involved ambassadors, safe conducts, or pirates, and thus causes of action would still in practice be confined to those granted by the Torture Victim Protection Act (TVPA). Yet, although the Court acknowledged that there is "no basis to suspect" that the First Congress wished to allow any other law of nations offenses to be directly actionable, and had grounded its conclusions thus far in a reconstruction of legislative intent, it none-

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40 In *Sosa*, the Supreme Court reversed the FTCA judgment on the grounds that the statute does not waive sovereign immunity for claims "arising in a foreign country." *Sosa*, 124 S. Ct. at 2747. This Article focuses exclusively on the ATS portion of the *Sosa* decision.

41 Torture Victim Protection Act of 1991 (TVPA) § 2, 28 U.S.C. § 1350 (2000) (creating a civil action for extrajudicial killing and torture under color of foreign law).

42 *Sosa*, 124 S. Ct. at 2761.

theless went on to say that federal courts may be able to create causes of action for a narrow subset of *new* international law offenses. The question left open is what, if anything, falls in that subset.

*Sosa* makes clear that the test is historical. The ATS only provides jurisdiction over those new CIL offenses that significantly resemble the “historical paradigms” contemplated by the First Congress. It is not enough for an offense to be recognized by today’s CIL. Rather, it must violate CIL in a way that *connects* it to the concerns manifest in the eighteenth century offenses described by Blackstone and contemplated by Congress. As the Court put it, a claim under the ATS must share the “characteristics” of the “relatively modest set of actions alleging violations of the law of nations” offenses<sup>43</sup> that the statute sought to furnish jurisdiction for.<sup>44</sup> Establishing what modern CIL offenses can be brought under ATS will thus require analogizing to the “historical paradigms.” To do this, one must first identify the “features of the 18th century paradigms.”<sup>45</sup>

The Court mentioned two of the features that a modern international law offense must share with piracy and the other eighteenth century models. The international norm must be near universal in its acceptance,<sup>46</sup> and the conduct it prohibits must be defined with considerable specificity.<sup>47</sup> Arbitrary arrest and detention, the international law norm at play in *Sosa*, did not qualify under the “clear definition” criterion. So the Court did not have an occasion to explore *all* of the characteristics of piracy relevant to its status as offense against the law of nations in the eighteenth century. But the Court made clear that specificity and widespread acceptance do not exhaust the limiting principles implicit in the historical paradigms.<sup>48</sup> For example, *Sosa* suggests that whether the CIL norm limits liability to private actors could be another limitation.<sup>49</sup> Identifying *all* of the relevant “features” will be essential to navigating post-*Sosa* litigation in the lower courts.

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43 *Id.* at 2759.

44 *Id.* at 2761.

45 *Id.* at 2761–62.

46 *Id.* (limiting ATS jurisdiction to international law norms “accepted by the civilized world”).

47 *Id.* at 2761–62, 2765–66.

48 *Id.* at 2766 n.21 (“This requirement of clear definition is not meant to be the only principle limiting the availability of relief in federal courts for violations of customary international law, though it disposes of this case.”).

49 *Id.* at 2766 n.20.

### 3. The Court's Inconsistency

*Sosa* managed to embrace at least three of the four competing interpretations of the ATS only through a major inconsistency in its treatment of twentieth century transformations in the nature of CIL and federal common law. On one hand, the Court concludes that Congress meant the ATS to accommodate radical changes in the law of nations, even a change as fundamental as the shift from classic international law, which dealt primarily with relations between states, to modern international law, which deals largely with the treatment by states of their internal populations. While today's "international law" is an entirely different creature from the "law of nations" mentioned in the 1789 Judiciary Act, the Court suggests that Act may track external developments.<sup>50</sup>

Not so when it comes to changes in the understanding of the nature of law itself, and their bearing on the power of federal courts. Since *Erie Railroad Co. v. Tompkins*,<sup>51</sup> federal courts have been incapable of creating common law, because, in the modern understanding, such law is not discovered but made, and is thus a legislative function beyond the limited power of the Article III judiciary.<sup>52</sup> Thus CIL cannot be recognized as part of federal common law without separate legislative authorization.<sup>53</sup> Yet according to *Sosa*, the understanding of common law-making power that is to guide implementation of the ATS is not today's understanding, but something closer to the 1789 understanding.<sup>54</sup> While the Court says the First Congress understood that its entire conception of the proper provenance of the law of na-

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50 *Id.* at 2761–62 (holding out the possibility that the ATS authorizes claims "based on the present-day law of nations").

51 304 U.S. 64 (1938).

52 *Sosa*, 124 S. Ct. at 2762, 2764.

53 For the argument that *Erie* precludes recognition of CIL as part of federal common law, see Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 847–55 (1997).

54 See *Sosa*, 124 S. Ct. at 2761 ("[N]o development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga* . . . has categorically precluded federal courts from recognizing a claim under the 'law of nations' as an element of common law."); see also *id.* at 2764 ("*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances."). But see *id.* at 2773 (Scalia, J., concurring).

[T]he creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. Post-*Erie* federal common lawmaking (all that is left to the federal courts) is so far removed from that general-common-law adjudication which applied the law of nations that it would be anachronistic to find

tions might be overthrown, and would want the ATS to adapt to such changes, the Court refuses to ascribe to Congress any such intention with regard to changes in federal common law.

The inconsistent treatment of these two developments suggests a result-driven reasoning. There are two consistent interpretations of the effect of changes in the nature of international and federal common law on the scope of the ATS. Either consistent interpretation would have doomed modern ATS litigation. One consistent treatment would find that while both common law and international law stand on a different footing today than in 1789, courts applying the statute today should use the modern understanding of common *and* international law. While this would mean that new human rights offenses are legitimately part of the “law of nations” within the meaning of the statute, federal courts would not be able to recognize causes of action based on them. On the other hand, the Court could have held that the ATS preserves the 1789 understandings of both international law *and* the common lawmaking powers of federal courts. Under this result, federal courts would be able to recognize enforceable international norms absent congressional action—but these norms would be limited to unexciting things like offenses against ambassadors. The Court could only avoid killing off human rights litigation in U.S. courts by finding that the ATS preserves the federal courts’ common lawmaking power as it stood in the eighteenth century, while allowing the scope and subjects of that power to keep pace with the organic growth of CIL norms. And that is precisely what the Court decided.

It managed to reach this puzzling result by repeatedly invoking an imagined legislative intent. Yet even assuming such a thing as legislative intent exists,<sup>55</sup> it seems improbable that one can reconstruct any congressional expectations about the impact of radical developments the earliest of which came 145 years after the passage of the relevant statute. It makes no sense to speculate about what the First Congress would have “expected” to happen if the “common law might lose some metaphysical cachet on the road to modern realism.”<sup>56</sup> Since the First Congress did not expect the usurpation of their jurisprudential worldview, it is hard to say that they would have any definite notion as to what should happen in such an event, or even much cared.

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authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.

*Id.* (Scalia, J., concurring).

55 See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544–48 (1983); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992).

56 *Sosa*, 124 S. Ct. at 2765.

Nor can one coherently deduce from the ATS what Congress would have wanted to happen if the content of “the law of nations” changed radically. Ascribing to the First Congress intentions regarding a contingency it certainly did not anticipate allows the Court to promote *its* current intent.

### C. *Sosa and UJ*

A unique and controversial component of ATS litigation has been the exercise of UJ by U.S. courts.<sup>57</sup> *Filartiga*, which spawned modern ATS litigation, relied on UJ.<sup>58</sup> In international law, a country’s jurisdiction is based on and congruent with the scope of its sovereign power. States only have jurisdiction over crimes committed within their territory (known as territorial jurisdiction), or by or against their nationals (nationality and passive-personality jurisdiction).<sup>59</sup> UJ is a

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57 See Robert H. Bork, *Judicial Imperialism*, WALL ST. J., July 12, 2004, at A16 (“The expansion of ATS so that our courts can judge the actions of foreigners in their own countries is a version of the embryonic concept of universal jurisdiction.”).

58 *Filartiga v. Pena-Irala*, 630 F.2d 876, 885–87 (2d Cir. 1980).

59 See Kontorovich, *supra* note 14, at 188–89 (explaining the different categories of jurisdiction in international law). Courts and commentators also sometimes invoke the “protective principle,” under which states can punish activities committed by foreigners abroad that cause serious harm in the prosecuting state. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 307 (5th ed. 1998); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 238–39, (1995). The scope of the protective principle is uncertain and controversial, because under loose notions of harm and causation it could encompass a wide variety of extraterritorial conduct and ultimately shade into UJ. See Kontorovich, *supra* note 14, at 190. Nonetheless, U.S. courts have sustained some exercises of the protective principle, particularly in antitrust and drug trafficking cases. *E.g.*, *United States v. Alomia-Riascos*, 825 F.2d 769 (4th Cir. 1987).

The protective principle of international law permits a nation to assert subject matter criminal jurisdiction over a person whose conduct outside the nation’s territory threatens the national interest. Thus under international law the United States could exercise criminal subject matter jurisdiction over foreign nationals for possession of large quantities of narcotics on foreign vessels upon the high seas, even in the absence of a treaty or arrangement.

*Id.* at 771 (citations omitted). One possible limitation on the protective principle involves the gravity or nature of the harm—the prosecuting nation’s “security” must be at stake. *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (“Yousef’s prosecution [for planning to blow up a commercial airliner] by the United States is consistent with the ‘protective principle’ of international law. The protective (or ‘security’) principle permits a State to assume jurisdiction over non-nationals for acts done abroad that affect the security of the State.”); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 402(3) cmt. f (1987) (suggesting that the protective principle applies only to conduct “directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems”). However, “security” also proves to be an elastic concept

narrow exception to these sovereignty-based principles, under which certain crimes can be prosecuted by any nation, even if the forum state has no connection with the offense.<sup>60</sup>

While there are arguments about which CIL offenses qualify as universal, the oft-mentioned candidates include the human rights offenses that have been litigated under the ATS—torture, war crimes, and genocide.<sup>61</sup> While UJ holds out the promise of bringing perpetrators of atrocious crimes to justice, it can also work much mischief. Assertions of UJ by one nation can be perceived as interference in the internal affairs of other countries. This can strain diplomatic relations and lead to interstate conflict. As a result, UJ over human rights offenses remains controversial. Only a few European nations have dabbled with UJ.<sup>62</sup> None appear ready to make a habit of it, and some nations that were at the forefront of UJ have disowned their tentative experiments.<sup>63</sup> Depending on how lower courts interpret *Sosa*, the

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that has been held to encompass extraterritorial drug trafficking. *United States v. Gonzalez*, 311 F.3d 440, 446 (1st Cir. 2002) (“Congress obtains authority to regulate drug trafficking on the high seas under the ‘protective principle’ of international law, which permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security.”) (citation omitted).

60 See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997) (“Where a state has universal jurisdiction, it may punish conduct although the state has no links of territoriality or nationality with the offender or victim.” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (1987))); see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24 (describing UJ as jurisdiction with no “nexus between the regulating nation and the conduct, offender, or victim”).

61 See Bradley, *supra* note 60, at 324 & n.7 (“Although there is some debate over what additional offenses are now subject to universal jurisdiction, most scholars seem to agree that it extends to the slave trade, genocide, war crimes, and torture.”); Kontorovich, *supra* note 14, at 206–07 (describing methods of selecting modern universal offenses).

62 See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 88–219 (2003) (surveying UJ legislation and cases in many nations around the world and finding only twenty cases in the past ten years).

63 Spain, for example, drew attention and interest to UJ in 1998 when it requested the extradition of Chilean General Augusto Pinochet from Britain under a Spanish law that seemed to authorize UJ over certain gross human rights abuses. See Luis Benavides, *Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case*, 42 I.L.M. 683 (2003). But last year, Spain’s Supreme Court, in a case involving massive human rights abuses in Guatemala, completely repudiated UJ. Reversing lower tribunals, it held that Spain will not assert UJ over genocide. See *id.* at 686. For foreign human rights abuses to be justiciable in Spanish courts, there must be a “direct link to a national Spanish interest in regard to this crime.” *Id.* at 701. Such a link is necessary to “legitimize” the prosecution, *id.*, because it could otherwise be seen as an encroachment on the other nation’s sovereignty, *id.* at 697. Belgium was another pioneer of UJ that has since retreated. In 1993, it passed a law authoriz-



United States may turn out to be the nation that most frequently and broadly exercises UJ. So while *Sosa* holds that the ATS gives federal courts jurisdiction, a separate question is how much jurisdiction it gives; that is, whether it authorizes *universal* jurisdiction. If the ATS grants UJ to the federal courts, this would raise the further question of whether such a jurisdictional grant would be consistent with Article III of the Constitution.<sup>64</sup>

### 1. *Sosa* as a UJ Case

*Sosa* itself may involve UJ—but only in the most narrow and technical sense. Both the plaintiff and the defendant were foreign nationals. Thus the case would not fall into either the national or passive-personality bases of international jurisdiction. The substantive conduct is more difficult to classify. The alleged tort involved the seizure of Alvarez in Mexico and his kidnapping into the United States. The Ninth Circuit ruled that only the actions committed within Mexico—the detention—constituted a tort and so the case arose entirely outside of U.S. territory.<sup>65</sup>

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ing UJ over certain crimes, and in 2001 even convicted four Rwandan nuns for participating in that country's genocide. See Stefaan Smis & KimVan Der Borght, *Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (As Amended By the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 740, 741 & n.21 (2003). But in response to foreign relations problems caused by UJ cases against foreign leaders, Belgium severely pared back the UJ law. See Patrick Lannin, *Belgium to Scrap War Crimes Law*, WASH. POST, July 13, 2003, at A19 (reporting that Belgium's elimination of UJ in cases brought by private parties was a response to claims against Israeli Prime Minister Ariel Sharon, British Prime Minister Tony Blair, and President George W. Bush). Privately-initiated cases alleging human rights abuses—the equivalent of ATS cases—now require a direct connection with Belgium either on the part of the victim or offender. See Smis & Van Der Borght, *supra*, at 743. Public prosecutions are restricted to situations in which the defendant's home state or international tribunals are incapable of dealing with the matter. *Id.* at 744.

64 The constitutional question is beyond the scope of this Article. However, it bears noting that UJ would be unworkable if the ATS is an implementation of Article III's alienage jurisdiction, as opposed to federal question jurisdiction, because foreigners are not diverse from foreigners. See Bradley, *Alien Tort Statute*, *supra* note 2, at 634–37 (arguing that the ATS implements Article III's alienage jurisdiction, which requires a U.S. citizen on one side of the case).

65 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2748 (2004) (“In the Ninth Circuit’s view, once Alvarez was within the borders of the United States, his detention was not tortious . . . Alvarez’s arrest . . . was said to be ‘false,’ and thus tortious, only because, and only to the extent that, it took place and endured in Mexico.”).

If so, the case can not be grounded in territorial jurisdiction either.<sup>66</sup>

Yet all this ignores the substantial U.S. connection to the case. The detention and abduction were conceived of and planned in the United States by agents of the U.S. government. The purpose was to bring Alvarez to the United States to stand trial—for the murder and torture of a U.S. law enforcement agent. Indeed, Alvarez's suit was in spirit a civil "counterclaim" to the failed prosecution against him—a case over which the United States certainly had jurisdiction. Thus the nexus between the second *Alvarez* case and the United States appears quite tight. Moreover, it is not clear how much bearing the Ninth Circuit's determination that the tort arose entirely in Mexico should have on the procedural question of whether the case falls within the territorial jurisdiction of the United States under international law. The Ninth Circuit based its holding on substantive principles of tort law; it did not deny that the case had a substantial relationship to the United States, and indeed, in the FTCA section of its ruling, it stressed this relationship.<sup>67</sup>

The set of facts relevant to determining whether an offense falls within territorial jurisdiction as opposed to UJ may be broader than those that determine where a tort arose for choice of law and FTCA purposes. In other words, the fact that the cross-border aspect of the abduction may not have been independently tortuous does not mean that the cross-border aspect cannot serve to establish territorial jurisdiction. Indeed, looking at the U.S. connections would be consistent with the principle that jurisdictional facts can be broader than, and distinct from, those necessary to make out a case for relief. It would take a blinkered view of the case to consider it a strong precedent for UJ under the ATS.

At most, *Sosa* is akin to pseudo-universal jurisdiction cases such as the Nuremberg prosecutions and the *Eichmann* case.<sup>68</sup> These famous war crimes prosecutions are not pure UJ cases, although they are often cited as precedents supporting current efforts to universalize jurisdiction over human rights cases. While the Allied war crimes tribunals did invoke concepts of universality,<sup>69</sup> they were clearly not strangers to the crimes they were prosecuting. They had established a strong nexus with the offenses by fighting and winning the war in

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66 *Id.* at 2783 (Breyer, J., concurring) (observing that the "underlying substantive claim" arose "outside the United States" and suggesting that only the universal principle of jurisdiction can sustain the case).

67 *Alvarez-Machain v. United States*, 331 F.3d 604, 637–41 (9th Cir. 2003).

68 *Eichmann v. Atty. Gen.*, 36 I.L.R. 277 (S. Ct. Isr. 1962).

69 See Kontorovich, *supra* note 14, at 195 & n.64.

which the enemies' war crimes had been committed; moreover, as the occupying powers, they succeeded to the prosecutorial prerogatives of the defeated nations, and thus could be said to be simply exercising territorial jurisdiction.<sup>70</sup> *Eichmann* is similar. While the Israeli Supreme Court invoked universal principles,<sup>71</sup> it was clear that Israel's interest in Eichmann's crimes was not random. Israel acted as the only sovereign representative of the Jewish people,<sup>72</sup> and the only reason it might not have jurisdiction under the standard categories is that Eichmann's crimes predated the state's creation. One can quibble about whether these cases deserve to be called exercises of "universal jurisdiction," though it seems hypertechnical to ignore the substantial connection Israel and the Allies had with the crimes, connections that were in fact superior in quantity and quality to those of any other state. Whether one calls this UJ or not, such cases provide inadequate precedent for full-blown UJ of the *Filartiga* variety.

## 2. *Sosa* as a UJ Holding

Whether or not hearing *Sosa*'s claims required exercising UJ, the Court's opinion does not explicitly address the UJ question.<sup>73</sup> Instead, the Court ruled that there is no jurisdiction over *Sosa*'s substantive claim of abduction *regardless* of where it occurred or who the parties were: the substantive norm itself is insufficiently definite to fall within the small set of CIL offenses actionable under the ATS. The question that the Court answered in the affirmative—whether the ATS confers jurisdiction over cases brought by aliens suing under certain causes of action created by CIL—is distinct from the question of whether the ATS grants the district courts *universal* jurisdiction over such offenses. The UJ question would only arise if the norm was found to be actionable. Then the Court would have had to make the further determination of whether the ATS contemplates purely UJ suits—

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70 See *id.* at 195.

71 See *Eichmann*, 36 I.L.R. at 292, 299–300 (describing piracy as a "classic" UJ offense that provides precedent for UJ over war crimes).

72 Indeed, Eichmann was convicted of "crimes against the Jewish people" in addition to the more general "crimes against humanity," demonstrating that Israel had a specific, unique, and differentiable stake in his punishment. See Kontorovich, *supra* note 14, at 197.

73 Justice Breyer's opinion is the only one to directly address the UJ question. He believes that entertaining Alvarez's claim would require exercising UJ, which he felt would be inappropriate, though he also holds out the possibility that it might be proper for some other claims that could be brought under the ATS. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring).

ones with no connection to the United States other than the plaintiff's decision to sue here—to redress violations of such norms.

CIL both creates the offenses actionable under the ATS and also deems some of them universally cognizable. But under international law, the exercise of UJ over universal offenses is not mandatory.<sup>74</sup> Thus it is entirely consistent to import causes of action from CIL into federal common law without granting district courts UJ over such claims. Indeed, other nations have incorporated international law offenses into their criminal codes but require a traditional basis of jurisdiction for prosecution. UJ does not automatically accompany human rights offenses when they become part of a nation's substantive law. Moreover, since the Court ruled that the ATS's jurisdictional grant is distinct from the causes of action it borrows from international law,<sup>75</sup> it need not track international law notions of jurisdiction. To give a concrete example, although *Sosa* holds that the ATS confers a private right of action for "infringement of the rights of ambassadors,"<sup>76</sup> it gives no reason to believe that district courts can hear a case brought against, say, Mali, by the Ghanaian ambassador to that country, and alleging harassment at the hands of Mali.

Furthermore, *Sosa* sounded a cautionary note that suggests at least a strong presumption against UJ, described by the Court as "suits . . . that would go so far as to claim a limit on the power of foreign governments over their citizens."<sup>77</sup> District courts should be "particularly wary" of allowing ATS cases that might have "implications" for U.S. foreign relations.<sup>78</sup> "New norms of international law"—which overlap significantly with the roster of purported UJ offenses—are particularly likely to "raise risks of adverse foreign policy consequences."<sup>79</sup> UJ cases present precisely these risks.<sup>80</sup> The defendant's home state may see a judgment from a country with no stake in the dispute as officious intermeddling, while the plaintiff's home state (if different from the defendant's) may regard UJ suits in foreign

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74 See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (noting that under UJ states "may" prosecute certain offenses); Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 404–06 (2001); Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 72 (2000) ("[U]niversal jurisdiction has traditionally been interpreted to be permissive and not mandatory.").

75 *Sosa*, 124 S. Ct. at 2763–64.

76 *Id.* at 2756.

77 *Id.* at 2763.

78 *Id.*

79 *Id.*

80 See Bradley, *Human Rights Litigation*, *supra* note 2, at 460–64.

courts as a usurpation of a sovereign's prerogative to secure justice for its nationals.<sup>81</sup> As Judge Bork has noted: "When U.S. courts begin to judge actions taken by foreigners in their own countries, the result is not to avoid tensions but [to] exacerbate them."<sup>82</sup> It is precisely such concerns about giving offense to foreign nations that have until recently entirely deterred American judges from entertaining UJ suits.<sup>83</sup> *Sosa* makes clear that these concerns have not been diminished by

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81 Indeed, the Supreme Court illustrated the risks of exercising UJ over ATS cases by pointing to pending class actions against multinational corporations "alleged to have participated in, or abetted the regime of apartheid that formerly controlled South Africa." *Sosa*, 124 S. Ct. at 2766. That litigation has drawn protests from the present South African government. See *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (J.P.M.L. 2002). South Africa is not particularly solicitous of those who abetted the former regime, but believes such litigation will upset its domestic amnesty process. Such a complaint shows that there are many ways to step on other countries' toes.

82 See Bork, *supra* note 57.

83 See, e.g., *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.).

[T]here is also a protest filed by the French consul against the jurisdiction of the court, upon the ground, that this is a French vessel, owned by French subjects, and, as such, exclusively liable to the jurisdiction of the French tribunals . . . I am fully aware of the importance and difficulty of this case, considered under some of the aspects, in which it has been presented to the court. The case has already, as we are informed, and truly, become the subject of diplomatic intercourse between our government and that of France . . .

. . . .

I feel myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the king of France, to be dealt with according to his own sense of duty and right. No one can be more sensible than myself of the real magnitude and intricacy of the questions involved in this cause. . . . [T]he American courts of judicature are not hungry after jurisdiction in foreign causes . . . If I could have had my choice of causes, this class is not that, which would have been selected from peculiar favour.

*Id.* at 840, 851; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS does not authorize "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens"); Bork, *supra* note 57.

[I]t would have been preposterous for a small, weak nation clinging to the Atlantic seaboard to have given jurisdiction to its courts to entertain, for example, human-rights suits by Britons against the British crown for actions taken in Britain. Rather than soothing foreign nations . . . such tort actions would have inflamed them.

*Id.*

developments in CIL, and should continue to deter judges from asserting UJ.

However, some language in *Sosa* leaves the door “ajar” for assertions of UJ under the ATS.<sup>84</sup> The Court cautions that ATS cases with implications for foreign relations should be heard “if at all, with great caution.”<sup>85</sup> The “if at all” may bolster judges inclined to follow Justice Story’s admonition “not rashly to engage in asserting jurisdiction over foreign causes.”<sup>86</sup> However, those judges who wish to provide redress for massive human rights offenses are unlikely to consider themselves reckless.<sup>87</sup> If they choose to continue entertaining such cases, they would doubtless think they are acting with due caution. *Sosa* also sympathetically cites the influential passage from *Filartiga* that derives, by analogy, UJ over torture from the UJ that historically applied only to piracy.<sup>88</sup> So until the Court revisits the ATS to rule on the UJ issue, some lower courts will probably continue to allow the statute to be used as a vehicle for foreign plaintiffs to file suit in the United States for torts unrelated in any way to the United States.<sup>89</sup>

84 *Sosa*, 124 S. Ct. at 2763.

85 *Id.* at 2764.

86 *La Jeune Eugenie*, 26 F. Cas. at 851.

87 Professor Bradley has described the appeal of human rights litigation to federal judges in these terms:

It is . . . easy to see the attractions of this litigation for some federal judges. In many cases, there is little dispute that egregious conduct has occurred. . . . Furthermore, federal judges may perceive that if they do not pass judgment on this conduct, no one will. And the general unenforceability of their judgments in these cases may actually give judges and juries more freedom to express their moral condemnation of this conduct. In short, federal judges may perceive that these cases offer them a rather unadulterated vehicle for “doing justice.”

Bradley, *Human Rights Litigation*, *supra* note 2, at 459 (citation omitted). In other words, the judges are moved by the “odium” of the conduct—the very motive that Justice Story suggested should not make the federal judiciary “hungry after jurisdiction in foreign causes.” *La Jeune Eugenie*, 26 F. Cas. at 851.

88 *Sosa*, 124 S. Ct. at 2765–66 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.” (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980))).

89 The only case to have applied the *Sosa* test at the time of this writing (October 2004) dismissed a claim of a violation of international law arising from the displacement of a relative’s remains as part of a Holocaust memorial constructed at a death camp in Poland. *See Weiss v. Am. Jewish Comm.*, No. 03 Civ. 5727 (JES), 2004 WL 2072080, at \*5–6 (S.D.N.Y. Sept. 14, 2004). However, it is not likely that this claim would have been recognized under the ATS even before *Sosa*.

### D. Piracy as the Benchmark for ATS Suits

Of the three eighteenth century offenses cited by the Court, piracy is the closest (which is not to say close) eighteenth century analog to modern human rights offenses. Thus its characteristics will be most relevant to identifying the subset of CIL norms actionable under the ATS. The Court placed special emphasis on piracy as a historical model, citing a piracy case to illustrate the proposition that actionable norms must be defined with specificity.<sup>90</sup> Piracy's unique status as the benchmark for ATS claims is emphasized in Justice Breyer's concurrence, which cast the Court's holding in these terms: "[T]o qualify for recognition under the ATS a norm of international law" must share the features that "characterized 18th century norms prohibiting piracy."<sup>91</sup> The law of piracy is uniquely relevant to ATS litigation because of its procedural aspects as much as its substantive content.<sup>92</sup> Piracy was both the paradigmatic offense against the law of nations, and also the original UJ offense—the one for which UJ was created.

#### 1. Safe Conducts and Offenses Against Ambassadors

The policies underlying the common law's enforcement of the international norms concerning safe conducts and ambassadors involved considerations quite different from those present in modern human rights litigation. The Blackstonian offenses were committed *within* the forum state against foreign nationals.<sup>93</sup> The offenses risked vexing foreign states because they were committed against foreigners whom the forum state had promised to protect, and in the case of ambassadors, who had high status in the foreign states' governments. Such offenses at best threaten "serious consequences in international affairs" and if not "adequately redressed could rise to an issue of war."<sup>94</sup> Clearly "adequate redress" can only be provided by that nation where the ambassador was molested, or the safe conducts violated—a UJ prosecution by a third-party state would do nothing to repair relations between the injuring and victim states.

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90 *Sosa*, 124 S. Ct. at 2765–66 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

91 *Id.* at 2782 (Breyer, J., concurring) (emphasis added). Significantly, Justice Breyer makes no mention of ambassadors and safe passages as relevant to the selection of today's CIL norms actionable under the ATS.

92 *Id.* at 2782–83 (Breyer, J., concurring).

93 *Id.* at 2782 (Breyer, J., concurring).

94 *Id.* at 2756; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*68 (explaining that these norms are enforced by English law because if such offenses against foreigners went unpunished it could "involve the two states in war").

As both Blackstone and *Sosa* recognize, of the many law of nations offenses that existed in the eighteenth century, these few were recognized by common law because they implicated the parochial interests of England. That these offenses happened to violate the law of nations was not sufficient for the common law to take cognizance of them. Rather, as *Sosa* concedes, common law courts only enforced international norms when doing so furthered the self-interest of the sovereign.<sup>95</sup> The common law enforced these norms, Blackstone explains, to maintain the Crown's amicable relations with the victims' home states, and in the case of safe conducts, which were often issued to merchants, to protect Britain's commerce.<sup>96</sup> Indeed, these offenses were punished as treasons against the king. Judicial enforcement of these norms *preserved* the legislature and executive's control of foreign relations by preventing private parties from thrusting the kingdom into war through their unilateral activities.

For ATS purposes, these two offenses can—at most—only provide a historical analog for violations of international law committed by Americans. They provide no precedent for the redress in American courts of human rights violations committed by foreigners abroad. Surely American relations with Paraguay would not be strained if U.S. courts refused to hear *Filartiga*; no “issue of war” could have arisen from an American court's declining jurisdiction over a suit by Chinese nationals against the Chinese leadership. To the contrary, asserting UJ over CIL norms may imperil the forum nation's relations with other states, precisely the consequence that common law enforcement of the ambassadors and safe conducts norms sought to avoid.

These historical analogs differ fundamentally in their “characteristics” from CIL claims raised against U.S. defendants under the ATS. Such claims have fallen into two categories: claims against the government or official actors,<sup>97</sup> and claims against U.S. corporations, usually alleging complicity in human rights abuses by foreign governments.<sup>98</sup> A crucial characteristic of the ambassadors and safe conducts norms

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95 *Sosa*, 124 S. Ct. at 2760–61.

96 4 BLACKSTONE, *supra* note 94, at \*67–68.

97 *See, e.g.*, *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004) (upholding dismissal as untimely of an ATS suit by Vietnamese villagers against former American soldiers for an alleged massacre during the Vietnam War); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (holding that the ATS provides a cause of action against INS officials and private contractors in an action by asylum seekers complaining of degrading conditions in a New Jersey detention center run by contractors).

98 *See, e.g.*, *Nat'l Coalition Gov't of the Union of Burma v. Unocal*, 176 F.R.D. 329, 334–35 (C.D. Cal. 1997).



was that they only applied to actions taken *by private parties*.<sup>99</sup> The law of nations in the eighteenth century recognized that governments could violate international law, and some offenses could only be committed by governments. For an international offense to be recognized at common law, the defendant had to be a private actor. As Blackstone explained:

[W]here *the individuals* of any state violate this general law, it is the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if *private subjects* were at liberty to break them at their own discretion.<sup>100</sup>

Thus these offenses do not support ATS recognition of causes of action against official U.S. actors.

Nor do they support recognition of causes of action alleging human rights abuses by U.S. corporations operating abroad. The eighteenth century norms applied solely to foreigners enjoying the protection of the forum state, either through the grant of safe-passage, or through recognition of diplomatic status. The admission of such aliens created, in effect, a special duty of care in relation to them. The necessity of common law enforcement of the ambassadors and safe-conducts norms comes from the defendant being unreachable by the aggrieved foreign state, which would thus have to act against England as a whole if it feels its nationals have been denied justice. Similarly, injuries to foreign nationals committed by U.S. corporations abroad can be remedied by the nations where those corporations operate.<sup>101</sup> Of course, it is unlikely that these nations will choose to do so, because ATS plaintiffs usually allege that the corporate human rights abuses were done in partnership with the foreign government. But this only underscores the dissimilarity between the modern ATS litigation and the earlier common law offenses. There can be no danger to U.S. relations with, say, Burma if Burmese nationals are not allowed to sue in U.S. courts for human rights offenses

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99 See 4 BLACKSTONE, *supra* note 94, at \*73 (noting that the law of England only punishes offenses against “universal law” that are “committed by private persons”).

100 *Id.* at \*68.

101 See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477–80 (2d Cir. 2002) (upholding dismissal on forum non conveniens grounds of an ATCA suit brought by Ecuadorian citizens against an oil company alleging environmental harms from its Ecuadorian operations and noting that such actions are best adjudicated in Ecuador). After *Sosa*, the factors pertinent to forum non conveniens, a venue doctrine, become relevant to the very existence of a cause of action under the ATS.

allegedly committed by U.S. corporations with the complicity of the Burmese government.<sup>102</sup>

## 2. Piracy and UJ

Piracy provides the closest analog to the UJ offenses that have made up the bulk of ATS litigation. According to Blackstone, while offenses against ambassadors and bearers of safe-conducts would only be punished by the nation where the offense occurred, “every community hath a right . . . to inflict . . . punishment” upon pirates.<sup>103</sup> Piracy was the offense for which UJ was created, and for centuries it remained the sole UJ offense.<sup>104</sup> Proponents of expanding UJ to human rights offenses claim piracy as a precedent and model.<sup>105</sup> Justice Breyer’s concurrence in *Sosa* focuses on the special relevance of piracy to ATS litigation. He notes that there can be a consensus as to the substantive content of an international norm, but this is distinct from the further “procedural consensus” needed to make the norm universally cognizable.<sup>106</sup>

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102 See *Unocal*, 176 F.R.D. at 336 (describing alleged human rights abuses connected to the construction of a gas pipeline as a joint venture between the defendant corporation and the Burmese government).

103 4 BLACKSTONE, *supra* note 94, at \*71.

104 See Kontorovich, *supra* note 14, at 190; Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS., Winter 2001, at 67, 80–81 (“The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.”).

105 See Kontorovich, *supra* note 14, at 184–85 & nn.10–16, 203 & nn.117–18 (explaining the importance of the “piracy analogy” to modern UJ and citing cases and commentary analogizing new universal offenses to piracy). As Judge Michael Kirby of the Australian Supreme Court put it recently:

[T]here are precedents that would encourage a common-law judge to uphold universal jurisdiction. Courts of the common-law tradition have done so in the past in relation to pirates . . . . Such people were . . . the perpetrators . . . of grave crimes against mankind. To this extent the notion of universal jurisdiction is not entirely novel or extralegal. What is new is the expansion of crimes to which universal jurisdiction is said to apply.

Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points,”* in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES 240, 258 (Stephen Macedo ed., 2004) [hereinafter UNIVERSAL JURISDICTION]; see, e.g., Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 194 (1997) (“Piracy served as . . . the progenitor of some of the later jurisdictional expansions.”).

106 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2782–83 (2004) (Breyer, J., concurring).

The bar for the latter consensus is much higher than for the former because of the dangers to international stability inherent in UJ.<sup>107</sup> Adjudicating purely foreign conduct can "threaten the . . . harmony" between nations, straining foreign relations and potentially leading to hostilities.<sup>108</sup> Thus UJ under the ATS is only appropriate when it would be "consistent with principles of international comity."<sup>109</sup> Piracy's sole claim to UJ for hundreds of years suggests this will only occur in a very limited range of circumstances. The Supreme Court has already held that the First Congress did not grant federal courts UJ even over criminal *piracy* prosecutions.<sup>110</sup> The First Congress's wariness about UJ even over piracy suggests that any modern offense that might receive universal cognizance must *at least* bear all the hallmarks that made piracy both a substantive violation of the law of nations and the only universally cognizable one.

## II. PIRACY AND THE CHARACTERISTICS OF UJ CRIMES

Despite the importance of piracy as a precedent for modern human rights offenses, the reasons why it was actionable under common law and universally cognizable have not been systematically explored. UJ can be dangerous: what made piracy safe for UJ? Answering this question leads to an understanding of which modern CIL offenses, if any, can be dealt with on a universal basis without vexing foreign relations.

Most cases and commentary embrace the theory that piracy was universally cognizable because of its extraordinary heinousness.<sup>111</sup> In

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107 *Id.* (Breyer, J., concurring); *see also* Kontorovich, *supra* note 14, at 184 (describing how UJ can have dangerous consequences).

108 *Sosa*, 124 S. Ct. at 2783 (Breyer, J., concurring).

109 *Id.* (Breyer, J., concurring).

110 *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 632-33 (1818) (Marshall, C.J.) ("[N]o general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."). The Court has been even firmer in refusing to interpret statutes as extending UJ to high seas offenses other than piracy, precisely because of the foreign relations concerns pointed up in *Sosa*. *See United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

If by calling murder *piracy*, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent.

*Id.* at 198.

111 *See* Kontorovich, *supra* note 14, at 205 ("The modern argument for universal jurisdiction sees the historic treatment of piracy as evidence of an exception to standard jurisdictional limitations based on the 'outrageousness' or 'heinousness' of the

this view, piracy demonstrates that international law has always extended UJ to what each era deems the most odious conduct.<sup>112</sup> As it happens, the current roster of UJ crimes—such as genocide, war crimes, and torture—are expressly selected based on their intrinsic heinousness. If piracy's unique status was also based on heinousness, it would provide a venerable precedent for incorporating modern human rights norms into the ATS.<sup>113</sup> However, the heinousness explanation does not fit the historical facts, as has been shown in a previous article, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*.<sup>114</sup> The heinousness account begins with what many international lawyers believe *should* be the proper model of UJ—the moral enormity of the offense. Defining UJ as based on heinousness, the account then anachronistically shoehorns piracy UJ into that model. *The Piracy Analogy* demonstrated that piracy's UJ status was not attributable to the heinousness of the conduct; indeed, it was not even regarded as particularly heinous, at least not in the way that modern

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crime.”); *id.* at 185 n.10 (citing cases and commentary asserting that the substantive heinousness of the conduct is the common rationale for UJ from piracy onwards); Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 127 (2003) (“Many commentators and jurists incorrectly . . . assert that the basis of universal jurisdiction arises from the ‘heinous’ nature of the crime itself.”); *see also* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 153, 165–67 (1996) (noting that “[p]iratical acts were made subject to universal jurisdiction . . . because they were considered particularly heinous and wicked acts of violence and depredation” and arguing that this provides a precedent for UJ over war crimes); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (arguing that the “rationale” for universal jurisdiction over piracy was that the “fundamental nature” of the offense consisted of “particularly heinous and wicked acts”); Scharf, *supra* note 104, at 80–81 (“Many of the crimes subject to the universality principle are *so heinous in scope* and degree that . . . any state may, as humanity's agent, punish the offender. . . . Piracy's *fundamental nature* and consequences explained why it was subject to universal jurisdiction. Piracy often consists of *heinous acts of violence or depredation*.”) (emphasis added); Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or is it Only Two?*, 5 THEORETICAL INQUIRIES L. 199, 223–24 (2004) (arguing that the “analogy to piracy is persuasive” although piracy differs in some ways from modern human rights offenses). *But see* REYDAMS, *supra* note 62, at 58 (criticizing the piracy analogy).

112 *See, e.g.*, Joyner, *supra* note 111, at 164–65 (explaining that the “universality principle . . . holds that some crimes are so universally abhorrent . . . that jurisdiction may be based solely on securing custody of the perpetrator”); Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001) (arguing that human rights offenses are universally cognizable because they are “so heinous”).

113 *See* Kontorovich, *supra* note 14, at 204–10.

114 Kontorovich, *supra* note 14.

human rights offenses are.<sup>115</sup> *Sosa* appears to agree, rejecting heinousness as the common rationale of UJ and instead holding that the determination of which offenses can be heard under the ATS requires a close relation to the specific characteristics and policies underlying piracy law, of which moral enormity is not one: “[A]lthough it is easy to say that some policies of prolonged arbitrary detentions are *so bad* that those who enforce them become enemies of the human race [the phrase historically used to describe pirates], it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses.”<sup>116</sup> This in effect rejects *Filar-tiga*’s famous formulation that any heinous international offense makes the human rights offender sufficiently like a pirate—*hostis humani generis*—to be sued on a universal basis under the ATS.<sup>117</sup> But if not heinousness, what then explains piracy’s special status? This Part, picking up where *The Piracy Analogy* left off, identifies the characteristics of piracy that made it the sole universally cognizable offense.<sup>118</sup>

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115 Only the basic outlines of the argument can be sketched here. First, the exact same behavior engaged in by pirates was perfectly legal, and certainly not universally cognizable, when committed with sovereign authorization—the letter of marque issued to privateers. See *id.* at 210–14. Privateers were simply licensed pirates, yet all maritime nations issued licenses authorizing the former to attack and plunder civilian shipping and respected the licenses issued by other nations. *Id.* at 214–22. By contrast, heinousness as it is understood in today’s CIL denotes conduct that is so horrible that it could not be mitigated by sovereign authorization. Indeed the prototypical modern UJ offenses of war crimes and genocide presuppose such authorization. *Id.* at 217–18, 222–23. Second, *The Piracy Analogy* shows that piracy was a form of robbery and understood to be not significantly more heinous than robbery in general. It was regarded as culpable but not the most reprehensible crime. *Id.* at 223–26.

116 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2769 (2004) (emphasis added).

117 See *Filar-tiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become—like the pirate . . . before him—*hostis humani generis*, an enemy of all mankind.”).

118 *Sosa* noted, but did not elaborate on, the first two of these characteristics. Some commentators have noted the importance of other features, such as piracy’s occurrence on the high seas and commission by private actors, in explaining the crime’s universal status. Other characteristics, such as the uniformity of punishment meted out to pirates by various nations, have been entirely overlooked. Perhaps there are other factors that could make an offense suitable to UJ, but these factors have yet to be revealed by experience. In the meantime, *Sosa*’s insistence that any new ATS cause of action be “comparable” to the historical paragon requires keeping in view *all* of the characteristics that contributed to piracy’s unique status.

### A. *Uniform Condemnation*

*Sosa* specifically holds that universal condemnation must be a characteristic of any ATS offense.<sup>119</sup> Certainly the broad international condemnation of piracy was relevant to its unique legal status as a UJ offense enforced by common law. There was no disagreement among states about whether piratical conduct should be punished. There can be no international consensus about making an offense universally cognizable if there is not even agreement about its wrongfulness.<sup>120</sup> It is important to specify what “uniform condemnation” means in this context. The universal condemnation of piracy was not just embodied in the law of nations norm against it—piracy was also a serious crime under the municipal laws of every nation. Thus the condemnation was not “top down,” but “bottom up.” However, uniform condemnation was a *necessary* but insufficient condition for piracy to become universally cognizable. Countless offenses were crimes in all countries, from murder to coining, but none became an offense against the law of nations or universally cognizable. Thus while uniform condemnation is a useful starting point for determining whether the ATS provides a right of action for CIL norms, the inquiry cannot stop there.

### B. *Narrowly-Defined Offense*

Of the many characteristics of the eighteenth century norms that provide limiting principles for modern ATS actions, the Supreme Court placed special emphasis on their having a considerable degree of “specificity.”<sup>121</sup> It is important to add that their content was not only “definite” and “specific,” but narrow as well: they applied to discrete and easily-delimited types of conduct. Without international agreement about the defining elements of an offense, it would be easy for nations to exercise UJ opportunistically for political ends.<sup>122</sup> If the

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119 *Sosa*, 124 S. Ct. at 2761.

120 *See* *United States v. Yousef*, 327 F.3d 56, 105 (2d Cir. 2003) (“The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where crimes . . . are universally condemned by the community of nations.”).

121 *Sosa*, 124 S. Ct. at 2761.

122 *See Yousef*, 327 F.3d at 106 (holding that terrorism is not subject to UJ because “[u]nlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now *have fairly precise definitions* . . . ‘terrorism’ is a term as loosely deployed as it is powerfully charged”) (emphasis added); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (arguing that “the nations of the world are so divisively split on the legitimacy of such [terrorist] aggression as to make it

boundaries of an offense are unclear, it would be difficult to determine whether a borderline assertion of UJ is legitimate or a form of what has become known as "lawfare."<sup>123</sup> Furthermore, like any other CIL norm, UJ requires the consent of all nations. The greater the precision of an offense's definition, the easier it is to determine whether nations have in fact consented to its universal cognizability, and the less reluctant they may be to grant such consent.

Piracy was defined as robbery on the high seas without state authorization.<sup>124</sup> All nations concurred as to the definition, and it was stable—its content did not vary in the least for hundreds of years.<sup>125</sup> In the seminal piracy case of *United States v. Smith*,<sup>126</sup> Justice Story inquired "whether the crime of piracy is defined by the law of nations with reasonable certainty."<sup>127</sup> He quickly concluded that "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . all writers concur, in holding, that robbery . . . upon the sea, *animo furandi*, is piracy."<sup>128</sup>

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impossible to pinpoint an area of harmony or consensus"); *id.* at 806–07 (Bork, J., concurring) (arguing that the acceptability of terrorism is a question as to which there is "little or no consensus and in which the disagreements concern *politically sensitive issues*") (emphasis added).

123 See Brigadier General Charles J. Dunlap, Jr., *It Ain't No TV Show: JAGS and Modern Military Operations*, 4 CHI. J. INT'L L. 479, 480 (2003) ("Lawfare is specifically the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective.").

124 See 4 BLACKSTONE, *supra* note 94, at \*72.

125 There have been recent attempts to change the definition, most notably the recent Convention on the Law of the Sea. It defines piracy much more broadly, calling it "any . . . acts of violence or detention . . . committed for private ends." U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 101(a), 1833 U.N.T.S. 397, 435. This would encompass not just robbery, but assault, rape, murder and so forth. But this broad definition was entirely unknown in 1789. It bears noting that there appear to be no instances of UJ under this broader definition of piracy. Indeed, the new, broader definition demonstrates the necessity of narrowly defining an offense to maintaining a consensus as to its universal cognizability. Commentators have powerfully criticized the Convention's definition, arguing that its indeterminacy has robbed it of all practical usefulness. See ALFRED P. RUBIN, *THE LAW OF PIRACY* 333 (2d ed. 1998); Samuel Pyeatt Menefee, *The Case of the Castle John, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L.J. 1, 4 (1993).

126 18 U.S. (5 Wheat.) 153 (1820).

127 *Id.* at 160.

128 *Id.* at 161.

Tying the definition to the well-understood crime of robbery made it particularly tractable; no new concepts were needed.<sup>129</sup>

However, one commentator has recently argued that piracy lacked an “authoritative definition,” and thus “disagreement over the scope or contours of a universal crime does not deprive the offense of its universal character.”<sup>130</sup> The alleged definitional uncertainty concerns whether pirates had to operate from purely larcenous motives, or *animo furandi*.<sup>131</sup> It is true that *animo furandi* was discussed in some piracy cases. Blackstone, however, does not mention any kind of motive as an element of the offense. Moreover, the suggestion that the occasional discussions of *animo furandi* makes the offense vague misapprehends the point of the concept in piracy law. It was never used as a separate mens rea element of the offense, but rather as a test for the existence of an undisputed element, namely, the absence of state sponsorship.<sup>132</sup>

Piracy had to be committed without sovereign authorization; otherwise it would simply be legal privateering. Courts looked to *animo furandi* as a proxy for sovereign authorization in situations like civil wars and insurrections, where the identity or existence of the relevant sovereign was debatable.<sup>133</sup> There was never any suggestion, however,

129 See 4 BLACKSTONE, *supra* note 94, at \*72 (defining piracy as “those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there”) (emphasis added).

130 Scharf, *supra* note 104, at 81.

131 See *id.*; see also Randall, *supra* note 111, at 795 (“While universal jurisdiction over piracy has existed for centuries, international law was slow to define the exact meaning and scope of ‘piracy.’ Less than sixty years ago, scholars noted a ‘great variety in opinions as to the scope of the term,’ and concluded that ‘there is no authoritative definition.’” (quoting Harvard Research in Int’l Law, *Draft Convention and Comment on Piracy*, 26 AM. J. INT’L L. 739, 749–65 (Supp. 1932))).

132 See *The Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (holding that the “*animo furandi*” requirement simply refers to the basic element of piracy under the “general law of nations” that the conduct be committed “without any sanction from any public authority or sovereign power”); Menefee, *supra* note 125, at 4 (describing “*animo furandi*” as an element that simply excludes privateers and others authorized by “recognized powers”); Samuel Pyeat Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT’L L. 127, 142–43 (1990).

133 See RUBIN, *supra* note 125, at 82; Menefee, *supra* note 125, at 4–5 (noting that the principal focus of the *animo furandi* requirement was “the legitimacy of the power granting the commission”). The Convention on the Law of the Sea does not require pirates to have *animo furandi* or any other specific motive, and makes clear that the real inquiry is into sovereign authorization. Under the Convention, the crime must be committed by a “private ship” for “private ends,” of which greed is only one. U.N. Convention on the Law of the Sea, *supra* note 125, at 435. A ship sailing under a writ of marque authorizing it to attack other vessels would not be serving “private ends,”



that sea robbers operating out of motives other than greed would be beyond the reach of piracy law and UJ.<sup>134</sup> Nor does there appear to be any piracy case where the defendant, though not in the service of an established or putative state, was acquitted for lack of *animo furandi*. The lack of substantial dispute over the existence of an *animo furandi* requirement can also be inferred from the fact that many pirates operated from political motives, or at least from some mix of politics and profit.<sup>135</sup>

### C. *Uniform Punishment and Double Jeopardy*

All nations provided for the same punishment for piracy—death.<sup>136</sup> Differences in punishment across nations results in forum shopping, weakened deterrence, and conflict between states that prescribe different penalties.<sup>137</sup> For example, if Britain had some interest in prosecuting pirates that attacked its ships, but the United States seized them first, Britain would not have to worry that U.S. courts would let them off easy—or punish them too severely.<sup>138</sup> The problem of differential penalties is made acute by the international double jeopardy norm, known by the civil law term “*non bis in idem*.”<sup>139</sup> This principle precludes subsequent prosecutions by other nations or tribunals for a given universal offense as surely as double jeopardy

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but a ship without a commission that attacks vessels for political purposes would still be seeking “private ends,” i.e., ends not established or endorsed by a sovereign state. See Menefee, *supra* note 132, at 142–43.

134 The Supreme Court rejected the notion that an attack by a private vessel apparently attributable to the captain’s insanity would not be piracy for lack of *animo furandi*: such conduct is piracy “whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power.” *The Malek Adhel*, 43 U.S. (2 How.) at 232.

135 See Kontorovich, *supra* note 14, at 217; Menefee, *supra* note 132, at 142–43.

136 See ADAM SMITH, LECTURES ON JURISPRUDENCE 131 (R. L. Meek et al. eds., Oxford Univ. Press 1987) (1896).

137 See Steiner, *supra* note 111, at 220 (“[F]eatures of criminal prosecutions that differ among states inevitably raise questions about the administration of universal jurisdiction. . . . They may raise concerns about forum shopping to heighten the likelihood of prosecution and conviction.”).

138 See, e.g., Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT’L L. & POL’Y 317, 357–58 (1994) (“The United States is concerned that the court will develop an unacceptable interpretation of crimes and that risk of double jeopardy problems will preclude national courts from prosecuting individuals acquitted by a politicized international court.” (citing Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to the Hon. Dan Quayle, Pres. of the Senate 1 (Oct. 2, 1991))).

139 The term literally means “not twice for the same thing.” BLACK’S LAW DICTIONARY 1665 (7th ed. 1999).

prohibits repeated prosecutions of the same conduct by a single state.<sup>140</sup> Thus the first nation to prosecute a UJ offense determines the penalties.<sup>141</sup>

Crucially, *non bis in idem* is an *exception* to the standard international practice regarding prior foreign prosecutions because it only applies to *universal* crimes. Most nations adhere to some version of the “the multiple sovereignties” principle. If a single act violates the laws of multiple nations and each nation has jurisdiction over the offender, each nation can prosecute in sequence.<sup>142</sup> Violating the law of each sovereign is a separate offense. In U.S. law, such repeated prosecutions do not violate the Fifth Amendment’s bar against double jeopardy.<sup>143</sup> As the Supreme Court has observed, the multiple sover-

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140 The Princeton Principles agree that a nation’s “good faith” exercise of UJ should be recognized as final and binding on all subsequent nations. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 23 (Stephen Macedo ed., 2001), available at [http://www.princeton.edu/~lapa/unive\\_jur.pdf](http://www.princeton.edu/~lapa/unive_jur.pdf). However, several participants in the project “questioned whether the prohibition on double jeopardy . . . was a recognized principle of international law.” *Id.* at 34.

141 A related concern is that the nation directly harmed by piracy would not be satisfied with an acquittal by another nation exercising UJ, and would simply ignore the international double jeopardy prohibition. This problem was articulated in the surprisingly obscure case of *United States v. Kessler*, 26 F. Cas. 766 (C.C.D. Pa. 1829) (No. 15,528). The judge urged the jury that the 1820 piracy statute should not be read as creating UJ, because prosecuting cases unconnected to the United States might put the defendant at risk of future double jeopardy:

Suppose this defendant, after a full and fair trial, should convince this jury of his entire innocence and be by them acquitted. He would, on a fundamental principle of our criminal law, think himself out of jeopardy and absolved from all further responsibility on this account. Under this belief he goes to France. . . . *Would the courts of that country pay any regard to your judgment in relation to a crime committed in one of their vessels on the person and property of their subjects, and more especially if the offender also was one of their subjects?* Questions and difficulties of this sort are avoided by confining our cognizance of offences on the high seas to our own ships, leaving other nations to take care of their own.

*Id.* at 774 (emphasis added). After hearing these instructions, the jury returned an acquittal. *Id.* at 775.

142 See Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Dem*, 33 VAND. J. TRANSNAT’L L. 1263, 1272–73 (2000) (describing the variety of state practices with regard to international double jeopardy and concluding that while some countries “afford foreign criminal judgments the same legal effect they do to domestic criminal judgments” other states adhere to a multiple sovereignties approach and there is no “general consensus among nations” on the matter).

143 U.S. courts have consistently held that the United States can prosecute defendants for conduct that has resulted in foreign convictions. *Id.* at 1279–81 (citing fed-

eighties doctrine is most important when there is considerable variation between the penalties the different sovereigns provide for the offense.<sup>144</sup>

The justification for the multiple sovereignties principle is inapplicable to UJ offenses, since UJ is itself not based on sovereignty. Under UJ, states exercise a single shared jurisdiction. UJ treats “the community of nations . . . as a juristic community.”<sup>145</sup> Each nation’s courts act as agents for the world.<sup>146</sup> Thus a second nation prosecuting the same offense would be as inappropriate as a U.S. district court prosecuting a crime already adjudicated in another district. In *United States v. Furlong*, Justice Johnson described the bar on multiple prosecutions as a defining feature of UJ over piracy:

Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.<sup>147</sup>

Further confirmation of the view that nations prosecuting piracy do not act as sovereigns asserting their several jurisdiction but rather as agents of the international order can be found in a pair of nineteenth century British extradition cases—which also suggest the possi-

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eral cases allowing for the prosecution of defendants previously convicted in foreign nations). While several courts of appeals have consistently applied the multiple sovereignties principle to foreign prosecutions, the Supreme Court has only addressed the issue in the federal-state context. *Id.* at 1279 n.118. The multiple sovereignties doctrine has frequent application *within* the United States, where the federal government can prosecute a defendant based on the same conduct that has already resulted in state charges, and vice versa, without running afoul of the Double Jeopardy Clause. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

144 *Lanza*, 260 U.S. at 385 (justifying the multiple sovereignties rule by pointing out that if some states provide for less punishment than the federal government, “the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect”).

145 Quincy Wright, *War Criminals*, 39 AM. J. INT’L L. 257, 282 (1945).

146 See Joyner, *supra* note 111, at 165 (arguing that the “only basis” for exercising UJ is “the assumption that the prosecuting state is acting on behalf of all states”); Wright, *supra* note 145, at 280 (arguing that nineteenth century courts exercising UJ over pirates acted as agents of the world community).

147 *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820). Justice Johnson’s statement in *Furlong* remains the leading authority for the principle, at least in the United States. However, like most judicial pronouncements on UJ over piracy, this one was dicta of the grossest sort. *Furlong* did not involve piracy; thus it did not present the issue of UJ, let alone the implications of such jurisdiction for successive prosecutions by different sovereigns.

ble abuses that could result from UJ. In *In re Tivnan*, Britain arrested American pirates but refused to extradite them. The relevant treaty required rendering of defendants belonging to “each nation’s jurisdiction.” The British courts upheld the refusal to extradite. Since piracy was a *universal* offense, the pirates were not particularly within the jurisdiction of the United States. Britain argued that the treaty meant only parochial U.S. jurisdiction and not “the jurisdiction which the whole world shares with them.”<sup>148</sup> Similarly, *Attorney-General v. Kwok-A-Sing*<sup>149</sup> involved a Chinese pirate who attacked French shipping in international waters and fled to Hong Kong. China requested his extradition under a treaty that allowed rendition of those who had committed “any crime or offence against the laws of *China*.” The Council held that “if he is punishable by the law of *China*, he is only so punishable because he has committed an act of piracy which . . . is justiciable everywhere” and the treaty did not contemplate extradition in such circumstances.<sup>150</sup>

#### D. *Private Actors Who Reject Sovereign Protection*

Pirates were private actors; their conduct did not involve governmental action in any way. Blackstone specifically pointed out that cases in which the common law “aid[ed] and enforce[d] the law of nations” all involve offenses “committed by private persons.”<sup>151</sup> The eighteenth century law of nations recognized that some offenses (such as violations of the laws of war) could only be committed by official actors, and others could be committed by private actors. It only allowed for UJ over the latter offenses. The drafters of the 1789 Act, even if they could have contemplated it serving as a vehicle for new offenses, must have understood it as confined to torts by “private persons.”

The lack of state sponsorship was essential to the definition of piracy. From the seventeenth through early nineteenth centuries, all maritime states issued licenses, called letters of marque and reprisal, to merchant ships known as privateers. A letter of marque authorized its bearer to attack and seize civilian ships on the high seas—essen-

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148 *In re Tivnan*, 122 Eng. Rep. 971, 985 (Q.B. 1864) (Crompton, J.) (“Is this a piracy within the words of the statute? It is to be within the jurisdiction of the United States; but does that mean within the jurisdiction which the whole world shares with them?”), quoted in *In re Stupp*, 23 F. Cas. 281, 291 (C.C.S.D.N.Y. 1873) (No. 13,562).

149 5 L.R.- P.C. 179 (1873).

150 *Id.* at 200 (emphasis added).

151 See 4 BLACKSTONE, *supra* note 94, at \*73.

tially the same conduct that constituted piracy.<sup>152</sup> Yet the privateer was not only free from UJ, he was not guilty of any crime.<sup>153</sup> The only difference between a lawful privateer and an outlaw pirate was the latter's lack of sovereign authorization.<sup>154</sup> Thus someone who committed the actions constituting piracy but did so with sovereign authorization would not violate the law of nations.

The limitation of the law of nations norm against piracy to those commerce-raiders who acted purely on private initiative served two interrelated ends. First, it reduced the chances that prosecution would cause interstate hostilities. Indicting a foreign official can be perceived as a grave insult by his government, and an interference with his nation's sovereignty.<sup>155</sup> Second, official conduct is political conduct. Keeping this outside the scope of international law reduces the opportunities for it to become a political tool, and keeps judges focused on their traditional task of righting wrongs on a retail basis rather than ruling on broad questions of foreign policy.<sup>156</sup> Modern human rights offenses, on the other hand (such as war crimes and

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152 See ANGUS KONSTAM, *PRIVATEERS & PIRATES 1730-1830*, at 3 (2001) (describing privateering as "a form of nationally sponsored piracy"); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law Of War*, 86 CAL. L. REV. 939, 1127 n.772 (1998) ("Acts of piracy often appear on their face exactly the same as acts—lawful even into this century—of maritime privateering.").

153 See DAVID CORDINGLY, *UNDER THE BLACK FLAG*, at xvii-xviii (1995).

154 See 1 BLACKSTONE, *supra* note 94, at \*251 ("[T]he lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seize the property . . . without hazard of being condemned a robber or a pirate."); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1690 n.67 (2000) ("Without a letter, such actions would constitute piracy; with one, military actions became a legitimate form of privateering under international law.").

155 For example, the Spanish indictment and request for extradition of General Augusto Pinochet, a senator and former dictator of Chile, strained relations between Santiago and Madrid and London, which faced a Spanish extradition request. See *Regina v. Bow St. Metro. Stipendiary Magistrate*, 1 A.C. 61 (H.L. 2000) (Lloyd, L.).

On 3 November 1998 the Chilean Senate adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-territorial jurisdiction. They resolved also to protest that the British Government had disregarded Senator Pinochet's immunity from jurisdiction as a former head of state.

*Id.* at 89.

156 The limitation of UJ to private actors does not entirely purge the question of political considerations because private parties can act with political ends. During civil wars, insurrections, and secessions, the question of whether someone is a private actor can require, or at least imply, judgments about political legitimacy. See Kontorovich, *supra* note 14, at 222.

genocide) invariably involve state action.<sup>157</sup> As a result, some scholars have argued that piracy does not provide a precedent for modern UJ over state actors.<sup>158</sup>

Yet merely characterizing pirates as private actors does not go far enough in explaining piracy's unique status in the law of nations. A state is likely to have some interest in the fate of all of its nationals, not just its officials. So while it is true that asserting UJ over governmental actors would be more objectionable than over private ones, it is not clear why UJ over private parties would not be at least somewhat objectionable to the defendant's home state. Consider, for example, the solicitude of Britain, France, Australia and other Western nations for their nationals captured in Afghanistan by the United States. Indeed, states show concern about such things as the non-extension of consular rights to their nationals charged with crimes abroad, even when prosecuted by the nations where the offense was committed. It would be even more obnoxious if the prosecuting state has not even been injured by the defendant; exercising jurisdiction in such a case could be seen as officious intermeddling, or as an overtly political act.<sup>159</sup>

On closer examination, pirates achieved their unique status because they were not *simply* private parties. Rather, they were private parties who often acted *against the interest of their home state* and who had intentionally *waived their home state's protection*.<sup>160</sup> Blackstone em-

157 See BROWNLIE, *supra* note 59, at 236 ("The essential feature of the definition [of piracy] is that the acts must be committed for private ends.").

158 See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 362 n.230 (1997) (observing that nineteenth century piracy jurisdiction "cannot be invoked as a basis to construe the original understanding of the [Alien Tort Statute] to extend to the acts of a foreign sovereign and its agents committed on foreign soil in violation" of international law); Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 *VA. J. INT'L L.* 63, 75 & n.25 (2004) ("[T]here was no state responsibility implicated by pirate offenses.").

159 See Steiner, *supra* note 111, at 223.

In comparison with piracy, the contemporary use of universal jurisdiction weakens the criticism that the forum is simply advancing its own interests. Such interests are now undifferentiated from the community or global interest in curbing massive and grievous violations, whereas the powerful seafaring nations could literally refer to their concrete and differentiated interests in both punishing the defendant and deterring similar conduct.

*Id.*

160 This understanding of UJ was adopted by Hannah Arendt, who initially supported the UJ prosecution of Eichmann by analogizing his crimes to piracy. She later concluded that the piracy analogy only supports UJ over those who renounced any sovereign protection. The pirate fell under UJ because "he has chosen to put himself outside all organized communities" and he "acknowledged obedience to no flag what-

phasized this when discussing why the common law allows for universal punishment only of pirates. The pirate, according to Blackstone, has intentionally “renounced all the benefits of society and government.”<sup>161</sup> The “benefits” that the pirate has renounced are the protection and solicitude of his home state. While the home state might object to a UJ prosecution of a non-piratical criminal, it would not do so for those who knowingly waived such protection. As Justice Story put it, in words that clearly hearken back to Blackstone’s discussion, pirates were “not under the acknowledged authority, or *deriving protection* from the flag or commission of any government.”<sup>162</sup> Blackstone’s conception envisions three classes of international law offenders: official actors, private actors, and those who have gone outside the private/public dichotomy to the “savage state of nature.”<sup>163</sup> The common law only acted against those in the second and third classes, and did so on a UJ basis only for those in the third class (pirates).

To understand why pirates were a *particularly* unprotected class of private actors, one must recall that piracy existed side-by-side with privateering. The sole difference was that the privateer had a license to capture and despoil ships, while the pirate did not. Obtaining a writ of marque was notoriously easy; one did not have to demonstrate nautical prowess or moral probity.<sup>164</sup> The writ of marque offered two advantages to the issuing state. First, the writ limited the bearer to preying on ships of hostile nations. States that issued writs of marque wanted to direct commerce-raiding to where they regarded it most useful to them. At the same time, they did not want their nationals to embroil them in disputes and potential hostilities with neutral nations (the same consideration that informs the common law enforcement of the norms regarding ambassadors and safe passages). Second, letters of marque usually required privateers to split the proceeds of their captures with the licensing power.<sup>165</sup> Pirates were those com-

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soever.” HANNAH ARENDT, *EICHMANN IN JERUSALEM* 262 (rev. ed. 1965). This led her to the conclusion that Israel could only prosecute him for crimes against Jews, not for crimes against humanity. *Id.* at 269. For a summary of Arendt’s views, see David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE J. INT’L L.* 85, 124 n.140 (2004).

161 4 BLACKSTONE, *supra* note 94, at \*71.

162 *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 (1820) (emphasis added). Yet in another purported UJ case, the objections of the ship’s home state to U.S. jurisdiction led Justice Story to yield to the foreign relations imperatives and refuse to exercise jurisdiction. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822) (No. 15,551).

163 4 BLACKSTONE, *supra* note 94, at \*71.

164 See Kontorovich, *supra* note 14, at 211–12 (describing procedures for securing a writ of marque).

165 See *id.* at 214.

merce raiders who refused to share their earnings with any government. They sometimes competed for prizes with licensed privateers, thus reducing potential revenues for the licensing state. Pirates acted against the interests of their home state and so could expect no succor from it.

These considerations explain the legal fiction of *statelessness* famously articulated by Blackstone<sup>166</sup> and subsequently by Chief Justice Marshall in *United States v. Klintonck*.<sup>167</sup> In *United States v. Palmer*,<sup>168</sup> decided two years before *Klintonck*, Marshall had held that the federal piracy statute,<sup>169</sup> which criminalized piracy committed by “any person,” did not apply to crimes by foreigners against foreigners.<sup>170</sup> Marshall recognized that such UJ could result in judicial interference with other nations’ sovereign prerogatives.<sup>171</sup> In *Klintonck*, Marshall appended an odd qualification to *Palmer*: the statute does cover piracies by those who are not nationals of any state.<sup>172</sup> The Certificate upheld the indictment because the defendants had “throw[n] off their national character by cruising piratically.”<sup>173</sup>

Marshall’s entire discussion of statelessness may have been unnecessary because, as the Attorney General stressed, *Klintonck* was a citi-

166 4 BLACKSTONE, *supra* note 94, at \*71 (explaining that pirates were universally punishable because they “renounced all the benefits of society and government”).

167 18 U.S. (5 Wheat.) 144 (1820).

168 16 U.S. (3 Wheat.) 610 (1818).

169 Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 114.

170 See *Palmer*, 16 U.S. (3 Wheat.) at 633–34. Marshall wrote:

The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act . . . .

*Id.* Quite unnecessarily, Marshall opined in unsupported dicta that Congress *could have* chosen to punish foreigners for piracies against foreigners under the UJ principle. *Id.* at 630 (“[T]here can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”). However, he interpreted the statute on the assumption that Congress had not *intended* to authorize UJ. *Id.*

171 *Id.* at 632–33.

172 *Klintonck*, 18 U.S. (5 Wheat.) at 152. Speaking for the Court, Marshall opined:

We think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State.

*Id.*

173 *Id.* at 153.



zen of the United States;<sup>174</sup> no special jurisdictional theory was needed. It is not clear why Marshall did not simply look to *Klintock's* citizenship. It may be because in the previous case, *Palmer*, he supported his holding that Congress had not intend to create UJ by citing the statute's title—"an act for the punishment of certain crimes *against the United States.*"<sup>175</sup> *Klintock* had seized a Danish vessel,<sup>176</sup> and if the title of the act had the legal effect Marshall suggested in *Palmer*, it might also be thought to exclude crimes by Americans against foreigners. So to sustain jurisdiction over a crime committed by a U.S. national, the Chief Justice shoe-horned the case into the universal theory by arguing that the defendant was stateless, and that the statute allowed jurisdiction over stateless people. The statelessness notion is obviously a fiction, though one that continues to confuse discussions of UJ over piracy.<sup>177</sup> There is nothing magical about piracy that destroys its perpetrators' national connection. Modern piracy law is more positivist, recognizing that whether a pirate throws off his national character is a matter for his home state to decide.<sup>178</sup> This is consistent with the facts of *Klintock*, where the high court of the home state, the United States, deemed him stateless, though it could have reached the same result by treating him as an American national.

Marshall's holding that UJ could only extend to those who "acknowledge the authority of no State"<sup>179</sup> is simply a shorthand for the idea that UJ only applies when it will not lead to interstate conflict

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174 *Id.* at 144.

175 *Palmer*, 16 U.S. (3 Wheat.) at 631 (emphasis added).

176 *Klintock*, 18 U.S. (5 Wheat.) at 145.

177 *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003) (stating that "[s]tates and legal scholars have acknowledged for at least 500 years" that piracy is a universal offense in part "because the crime occurs statelessly on the high seas").

178 *See* U.N. Convention on the Law of the Sea, *supra* note 125, at 437 ("A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived."). Current U.S. law allows for the prosecution of "stateless" drug smugglers seized on the high seas (however, unlike in Chief Justice Marshall's view, the mere act of engaging in the prohibited activity does not make the vessels stateless). The "statelessness" of the current U.S. statute is also a patent fiction—a ship can be treated as stateless despite being registered by a foreign state, so long as that state explicitly or implicitly disavows a connection with the vessel. *See* Maritime Drug Law Enforcement Act (MDLEA) § 3, 46 U.S.C. app. § 1903(c)(2)(A)–(C) (2000) (defining "vessel without nationality" as being one whose claim of registry is "denied by the flag nation whose registry is claimed" or simply not "affirmatively and unequivocally" confirmed by the registering ship when queried by U.S. officials). Thus the MDLEA's statelessness inquiry, like Chief Justice Marshall's, focuses on whether the foreign state is prepared to stand up for the defendant.

179 *Klintock*, 18 U.S. (5 Wheat.) at 152.

because other nations will not stand up for the defendants. Pirates rejected their home states' licensing schemes, thus refusing their home states' protection. Prosecutions of such offenders would be unlikely to cause friction with a foreign state—unlike prosecutions of a foreign state's officials, its nationals acting under color of its law, or its nationals acting in violation of its laws but otherwise within its legal framework.

### *E. Locus Delecti Makes Enforcement Difficult*

Piracy's occurrence on the high seas was certainly relevant to its universal status, yet its significance is widely misunderstood. The same conduct occurring on land would be robbery and not subject to UJ. Yet the high seas locus was in itself insufficient for UJ: murder or any other offense was not universally cognizable even when committed on the high seas.<sup>180</sup> It is sometimes said that because no state has jurisdiction over international waters, traditional notions of jurisdiction simply did not apply and UJ was needed to fill in a jurisdictional lacunae.<sup>181</sup> The flaw in this explanation is that pirates' crimes did not take place in the *water* on the high seas—they were committed onboard *ships*. Maritime vessels have always been considered within the territorial jurisdiction of their flag state,<sup>182</sup> and a victim ship's home state clearly had jurisdiction over pirates that attacked it. Moreover, both the pirates and their victims came from somewhere; thus the crime could have been within the jurisdiction of their home states. In short, traditional jurisdictional concepts appear adequate to deal with piracy without recourse to universality.<sup>183</sup>

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180 See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197–99 (1820).

181 See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2775 (2004) (Scalia, J., concurring in part and dissenting in relevant part) (suggesting that the law of nations norm against piracy arose because they were “beyond all . . . territorial jurisdictions”); Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 840, 855 (2002) (“[T]he only universal offenses that have a long history of general acceptance are piracy and the slave trade, both activities taking place on the high seas, beyond the territorial jurisdiction of any single State.”); Bork, *supra* note 57 (writing that piracy was regarded as a violation of international law giving rise to UJ “because the offense took place on the high seas beyond the reach of any nation’s laws”).

182 See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 4, 18–19 (Sept. 7); OLIVER SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 250–52 (1991).

183 See M. Cherif Bassiouni, *The History of Universal Jurisdiction*, in *UNIVERSAL JURISDICTION*, *supra* note 105, at 40, 47 (explaining that “early modern thinking about piracy was not . . . linked to universal jurisdiction” but rather to views such as Grotius’s that “ships on the high seas were an extension of the flag state’s territoriality” and thus the flag state—and the flag state only—should be able to punish non-nationals for piracy against national ships).

The real problem was not the formal jurisdictional status of the high seas but the practical problem of enforcement.<sup>184</sup> There was almost no governmental control over the seas and no “on the spot” enforcement system, as there would be for crimes within the body of a nation.<sup>185</sup> The high cost of maintaining a navy, and the need to employ it against foreign fleets, made piracy perhaps the most expensive of crimes to police. Because of the vastness of seas, pirates could easily commit their crimes undetected.<sup>186</sup> The many largely uninhabited islands of the Caribbean, replete with unmapped coves and harbors, afforded perfect hideouts for pirates in between cruises. These difficulties were stressed by Adam Smith in explaining why piracy, unlike simple robbery, was a capital offense.<sup>187</sup>

#### F. *Directly Threatens or Harms Many Nations*

Piracy imperiled international commerce and navigation, which many and perhaps all states had an interest in protecting.<sup>188</sup> While

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184 See Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION, *supra* note 105, at 168, 168–69 (“The principle of universality . . . is the way in which international law has responded to the pragmatic difficulties . . . of prosecuting offenses recognized as illegal in domestic legal systems around the world.”).

185 Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 193–94 (1945).

186 See Scharf, *supra* note 104, at 81 (“[P]irates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.”); Osofsky, *supra* note 105, at 194 n.18 (“If the nation owning the ship were the only one that could assume jurisdiction, pirates could easily escape capture and prosecution by boarding ships far from their home ports and keeping them beyond the reach of the home navies.”).

187 See SMITH, *supra* note 136, at 131 (observing that piracy “requires a severe punishment” because of the “great opportunities there are of committing it”). Just as traditional jurisdictional rules were not useless in the face of piracy, the enforcement difficulties should not be overstated. The high seas are vast, but merchant ships generally traveled in known sea-lanes defined by wind and tide and commercial opportunity, and pirates would be found there too. See CORDINGLY, *supra* note 153, at 88–89. Nations could and did police against pirates that threatened their commerce. During outbreaks of piracy they would sometimes dispatch vessels with specific instructions to hunt down the offenders. See Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529 (1911).

188 See, e.g., *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003) (observing that piracy has long been subject to UJ in part “because of the threat that piracy poses to orderly transport and commerce between nations”); Harvard Research in Int’l Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 739 (Supp. 1935) (suggesting that piracy was universally cognizable because “all [states] have an interest in the safety of commerce”); Randall, *supra* note 111, at 795 (noting that since “intercourse among states occurred primarily by way of the high seas,” and because piracy was

some pirates focused their attacks on the shipping of particular nations out of geographic convenience or personal and political grudges, most pirates were ready to attack any targets of opportunity, regardless of what flag they flew. Pirates were famously denounced as "*hostis humani generis*," and this term has come to be nearly synonymous with UJ itself.<sup>189</sup> Indeed, had pirates been content to limit their depredations, they could have legally done so within the confines of a letter of marque; rejecting the licensing process indicates an unwillingness to abide by its limitations, salient among them the limitation of hostilities to the ships of specified nations.

Blackstone saw the direct danger pirates posed to "person or personal property" of all mankind as the primary reason for its direct punishment under common law and its status as the only UJ offense.<sup>190</sup> Thus in the eighteenth century view, piracy was punishable by all nations *not* because of the moral enormity of the offense, but simply because it posed an actual threat to most or all nations—Blackstone describes the international law norm against piracy as in effect authorizing national "self-defence."<sup>191</sup> Thus even piracy's status as an offense against both common law and the law of nations provides little basis for true UJ, that is, jurisdiction over conduct that does not threaten the forum state to the extent that prosecution can be reasonably described as "self-defense."

### G. Summary

Six characteristics of piracy and piracy law contributed to its unique status as a UJ offense in both international and common law.

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indiscriminate in its targets, it was a matter of "concern to all states"); Sammons, *supra* note 111, at 126 ("[P]irates launched attacks . . . against the vessels and citizens of many nations . . . . The transnational aspect of piracy is the most significant factor in justifying the exercise of universal jurisdiction over it.").

189 See 4 BLACKSTONE, *supra* note 94, at \*71 (citing Sir Edward Coke's description of pirates); Randall, *supra* note 111, at 794. However, modern courts and commentators have misunderstood the significance of the "*hostis humani generis*" characterization. The term has sometimes been regarded as one of opprobrium—pirates are so bad that they are everyone's enemy. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate . . . before him— *hostis humani generis*, an enemy of all mankind."). This understanding of *hostis humani generis* proceeds from the assumption that piracy was, like modern UJ offenses, universally cognizable because of its heinousness, and finds in that epithet evidence that piracy was regarded as particularly heinous. The deficiencies of this account have been described in a previous article. See Kontorovich, *supra* note 14, at 204–37.

190 4 BLACKSTONE, *supra* note 94, at \*71.

191 *Id.*

Because of these features, a nation's assertion of UJ over the offense would be unlikely to disturb its foreign relations. First, all nations criminalized the conduct in their own municipal codes. This however, was a very minimal requirement. Because the crime was narrowly and specifically defined, there would be fewer disputes between nations about whether particular conduct fell within the UJ norm. And because all nations provided for the same punishment, it made relatively little difference which nation prosecuted. Perhaps most importantly, because pirates were private actors, their offenses did not implicate the conduct or policy of any sovereign state. Moreover, because pirates rejected the protection offered by sovereign states in the form of letters of marque, it would be relatively unlikely that any state would object to their prosecution, regardless of the forum.

Piracy occurred on the high seas, the vastness of which made it difficult for any one nation to provide effective enforcement. Moreover, the indiscriminate nature of piratical attacks made it at least somewhat probable that a given pirate had or would threaten the vessels of many nations; and the threat the conduct posed to international commerce, which was primarily borne by sea, directly implicated the economic interest of all states. The interests involved were not abstract and inchoate, like a general interest in maintaining international law, but rather real and material. One might think that far from vexing other states, one nation's use of UJ to punish pirates would please the others. The prosecuting nation would, entirely at its own expense, deal with a problem common to many nations. If pirates may be likened to weeds in a global commons, a nation that single-handedly undertakes to pull out the weeds would not have to worry that it was creating foreign relations problems for itself.

At this point a paradox emerges.<sup>192</sup> Given that piracy's occurrence on the high seas made enforcement particularly costly, why would UJ—which merely allows nations to punish those who had *not* directly injured them—make the problem any more tractable? Similarly, if piracy harmed many nations, why would any one state have an incentive to exercise UJ over them? States do not have an interest in the safety of commerce and navigation in general; they have an interest in the safety of *their own* commerce and navigation. By prosecuting pirates on a universal basis, nations would be conferring a benefit on many states while single-handedly shouldering all the costs, hardly the kind of action one would expect of rational, self-interested states. In-

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192 I explore this puzzle in more detail in a forthcoming article. Eugene Kontorovich, *The Evidentiary Role of Universal Jurisdiction* (work in progress, on file with the author).

deed, the leading scholar on piracy law has shown UJ prosecutions were almost nonexistent.<sup>193</sup> Because enforcement was expensive, it was almost always done for parochial rather than universal ends.

The same paradox has been observed in relation to today's UJ over human rights offenses. The extension of the universal principle to war crimes and genocide is motivated at least partly by the difficulty of preventing such conduct.<sup>194</sup> But precisely because stopping such atrocities is expensive and risky, UJ has done next to nothing to encourage nations unharmed by such offenses to take action against them.<sup>195</sup> In short, some of the factors that made piracy safe for UJ also tended to ensure that such jurisdiction would be exercised rarely, if at all. Thus one should not consider it an anomalous result if *Sosa's* requirement that modern CIL norms possess those features that made UJ over piracy unproblematic in practice precludes federal courts from exercising UJ.

### III. MODERN CIL UNDER *SOSA'S* HISTORICAL TEST

*Sosa* concluded that the "standard" a new CIL norm must meet to be actionable under the ATS can be derived by "look[ing] to the historical antecedents" for such actions.<sup>196</sup> This Article has done just that. Part I.D.1 showed that with the exception of piracy, the historical antecedents were purposefully confined to offenses committed by private nationals of the forum country against specially protected clas-

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193 See RUBIN, *supra* note 125, at 302, 317 n.13, 326 n.50 (finding approximately five UJ prosecutions of pirates in the past 300 years); see also Kontorovich, *supra* note 14, at 192 n.51 (suggesting that paucity of UJ piracy cases may be partially attributable to the use of military power and summary proceedings at sea as primary means of enforcement, as well as to sporadic court reporting).

194 See Cowles, *supra* note 185, at 194 (observing that "war crimes are very similar to piratical acts" in that there is no on-the-spot judicial system to punish it, and arguing that war crimes should thus also be universally cognizable).

195 See Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003) (observing that international war crimes tribunals have little effect). Goldsmith explains:

Nations do not lightly expend national blood and treasure to stop human rights abuses in other nations. The Europeans were unwilling and unable to do so in the Balkans for years. . . . The brute fact is that despite hundreds of thousands of deaths caused by human rights abuses during the past decade . . . no wellspring of support for intervention has developed in the industrialized democracies that possess the military muscle to intervene and stop the abuses.

*Id.*; see Luban, *supra* note 160, at 152 & n.274 (noting that "in reality states have proven unwilling to touch these [UJ] cases with a ten-foot pole," and citing the failure of the United States to get nations to assert UJ over Pol Pot as an example).

196 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765 (2004).

ses of foreigners. This standard would preclude both ATS suits against official U.S. actors and against U.S. corporations acting in conjunction with foreign governments abroad. However, the largest and most controversial portion of ATS litigation thus far has involved suits by foreigners *against* foreigners for human rights abuses abroad.

Piracy is the only possible historical antecedent of such suits, as Justice Breyer emphasizes,<sup>197</sup> and thus its characteristics must be examined particularly closely to derive the limiting principles contemplated by *Sosa*. It is in such suits that the Court urges the greatest caution.<sup>198</sup> Thus courts in ATS cases should be particularly vigilant that any modern CIL norm they wish to recognize possesses those features that made UJ over piracy consistent with maintaining smooth foreign relations. Having isolated and explained those characteristics in Part II, this Part briefly considers whether they are shared by new CIL norms, which are primarily concerned with human rights offenses. It finds that modern CIL offenses do not meet these rigorous criteria.

The comparison can start with the two criteria identified in *Sosa*, universal condemnation of narrowly defined offenses. It is a banality that war crimes, genocide, torture, and similar crimes are broadly condemned. But this broad condemnation means little unless everyone understands these terms the same way; in other words, unless there is uniform agreement as to the specific conduct that falls within these offenses and what conduct does not. It is here that CIL diverges from piracy. For piracy had a narrow and precise definition. In contrast, the definitions of the human rights offenses nominated for UJ are broad and indeterminate, as even supporters of an expanded UJ concede.<sup>199</sup> This raises the possibility that the availability of UJ over such conduct would hinge on the political or moral inclinations of the

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197 *Id.* at 2782–83 (Breyer, J., concurring).

198 *Id.* at 2761–62.

199 See Kirby, *supra* note 105, at 250 (suggesting that judges should be cautious about accepting UJ because “the crimes propounded may be ill-defined”); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 426–27 (2000) (“Defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law. Indeed, of the several definitions that have been ‘promulgated,’ no two are alike.”) (footnote omitted); see also Eugene Kontorovich, *Severe and Prolonged Harm: Defining Torture in International and U.S. Law*, WASH. TIMES, June 25, 2004, at A21 (“‘Torture’ is not defined with any precision in international or U.S. law. There is no authoritative enumeration of the practices that constitute torture.”); E.V. Kontorovich, *Open and Shut*, JERUSALEM POST, May 10, 2002, at B8 (arguing that the Rome Statute creates “vague offenses,” such as “persecution,” which is unhelpfully defined as violating “fundamental rights,”

prosecutors and judges; the vagueness of these offenses would at a minimum give judges great discretion in matters pertaining to foreign relations, a discretion traditionally reserved to the political branches.

Even before *Sosa*, there were signs that courts were becoming increasingly sensitive to the importance of UJ offenses being precisely defined. The Second Circuit, which originated modern ATS litigation, recently rejected the contention that UJ applies to international terrorism on the grounds that “terrorism” lacks a precise or neutral definition.<sup>200</sup> There can be no doubt that as a positive matter, the mantra that “one man’s terrorist is another man’s freedom fighter” is accurate.<sup>201</sup> To be sure, there are sound, narrow definitions of terrorism, such as violence committed by irregular combatants against civilian populations to change the policy of a government. The Second Circuit’s point was not that “terrorism” is a term that cannot be narrowly defined *in the abstract*, but rather that no precise definition has won general acceptance.<sup>202</sup>

Of course, definitional precision is a matter of degree. There will always be gray areas in the definition of *any* crime.<sup>203</sup> All that is argued here is that what was contemplated by piracy was much better understood than what is contemplated by modern human rights offenses such as crimes against humanity and war crimes. At the very least the latter offenses cover more varied types of conduct and thus have a broader surface area over which disagreement and friction can arise. The Supreme Court appears to recognize this in *Sosa*, by requiring not merely some degree of definitional precision, but rather insist-

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another indefinite term given the profound international “disagreement over what rights are ‘fundamental’”).

200 *United States v. Yousef*, 327 F.3d 56, 109 (2d Cir. 2003).

201 *Id.* at 107.

202 See Colum Lynch, *U.N. Approves Anti-Terrorism Initiative*, WASH. POST, Oct. 9, 2004, at A26 (reporting that the U.N. terrorism resolution was reached after a compromise was made with several Muslim nations under which the resolution does not provide “a universal definition of terrorism that could be used to sanction groups that use suicide bombers against civilian targets”).

203 Reciprocity and balance of power issues also affect whether the definition of a crime will be loosely or opportunistically interpreted. Just as some people say that one man’s terrorist is another man’s freedom fighter, nations often denounced other states’ privateers as mere pirates. Yet they did not generally punish them as pirates out of fear that their own privateers would receive the same treatment. It is hard to see such reciprocity playing out with the new UJ offenses, where the forum state is always economically and militarily superior to the defendant’s home state and risks little in direct retaliation.



ing on a high level of definitional certainty, a level that was found lacking in the cross-border abduction norm.<sup>204</sup>

Looking beyond the definitional criteria, CIL norms run into a further and larger obstacle. Most ATS litigation since *Filartiga* would fail the *Sosa* test because it challenges official or semi-official action. The common law only punished offenses committed by private actors in England. When it came to punishing conduct by foreigners, the common law only did so in the case of piracy. That offense was committed not simply by private actors, but by ones who turned their backs on their home states and thus would not be expected to receive any protection from them. Modern UJ offenses, on the other hand, are almost invariably committed under color of law. Indeed, the nature of such offenses as genocide and war crimes contemplates official action. Not surprisingly, most ATS suits have been against the leaders or military officers of foreign governments. Quite unlike pirates, these are people for whom their home state would be expected to have some solicitude. Indeed, the home states of some ATS defendants have challenged American assertions of UJ.<sup>205</sup>

Furthermore, the very definition of piracy entailed rejecting the protection of sovereign states by acting outside their licensing schemes. Thus ATS litigation against private corporations also does not bear the vital characteristics of piracy. Firms like Unocal, Royal Dutch Shell, and so forth are private actors, but they have not foresworn the protection of their home states. To the contrary, they are chartered by or incorporated under the laws of sovereign nations (and they pay taxes). Their treatment in American courts would not be a matter of indifference to these authorities. Moreover, suits against such corporations generally allege coordination with a foreign state, and thus the defendant corporations resemble licensed (and legal) privateers more than pirates acting beyond any sovereign authority.

Other relevant characteristics of piracy are also absent from modern human rights offenses. Pirates attacked the ships of many nations. By disrupting international commerce, they injured the economic interests of many more. As a result, a UJ prosecution would be unlikely to offend other states, for they would benefit from it. But it also suggests that UJ over pirates was less "universal" than it sounds, in that the forum state took action against those who posed a threat to it. This explains why UJ may be in the self-interest of the forum state and

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204 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004).

205 See, e.g., Edward Wong, *China Protests U.S. Rights Suit Against a Leader*, N.Y. TIMES, Sept. 3, 2000, at A4.

why the common law authorized punishing pirates as a form of self-defense. This gave the forum state a motive for prosecuting pirates, and the existence of an identifiable self-defense interest would reduce the chances that a UJ judgment would seem politically motivated, designed to send a message of disapproval about the actions of foreign governments.

Human rights offenses, on the other hand, are almost always committed against groups or individuals entirely within the offender's own state. It is hard to find an ATS suit sounding in UJ where the defendant and plaintiff hail from different countries.<sup>206</sup> Thus the interests of third-party nations are not directly implicated, and their intervention will likely appear as officious intermeddling, or as Judge Bork put it, "judicial imperialism."<sup>207</sup> Because foreign human rights offenders do not threaten U.S. interests in any way that might rise to self defense, the prudential arguments for dealing with such cases becomes much weaker. Moreover, a judicial decision against the defendants in such cases could more likely be perceived as a political condemnation of the foreign government involved. The foreign relations concerns do not disappear in ATS cases simply because they are brought by private litigants rather than public prosecutors. At the very least, judges make the decisions about whether to allow such cases to proceed, and possibly whether to impose liability and what relief to grant. Foreign nations aggrieved by an ATS case can be expected to hold the United States responsible, and not only the plaintiff.<sup>208</sup>

Piracy was everywhere punished by death, and thus UJ did not create forum-shopping possibilities, double jeopardy problems, or set up potential conflicts between the laws of prosecuting states. Yet there is little international consensus about appropriate penalties for the human rights offenses of modern UJ. This has already emerged as a serious obstacle to broadly implementing modern UJ. For example, the Rwandan government originally acquiesced to the exercise of UJ over the Rwandan *genocidaires* by an international court sitting in Sierra Leone. The International Criminal Tribunal for Rwanda (ICTR)

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206 The exception may be *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), which involved abuses during the Bosnian civil war when national boundaries were unclear.

207 See Bork, *supra* note 57.

208 For example, the French government protested vigorously over the potential exercise of UJ over a French vessel in *La Jeune Eugenie*, leading Justice Story to turn it over to France. That case, which inflamed American relations with France, was not a criminal prosecution but rather a libel in admiralty, though the libeled vessel had been captured by a U.S. "public armed schooner." *United States v. La Jeune Eugenie*, 22 F. Cas. 832, 840 (C.C.D. Mass. 1822) (No. 15,551).

does not impose capital punishment, while Rwandan courts routinely executed participants in the genocide. So when the ICTR takes jurisdiction over a defendant, it saves him from the death penalty, creating obvious opportunities for forum shopping by defendants.<sup>209</sup> Indeed, the worst offenders turned themselves in to the international tribunal, sparing themselves the death penalty, while lower-level perpetrators in Rwandan custody were executed.<sup>210</sup> The disparity in punishment infuriated the Rwandan government, leading it to break off its relations with the ICTR and actively interfere with its operations. Similarly, the International Criminal Tribunal for Yugoslavia originally sought to track the sentencing practices of the former Yugoslavia, but abandoned this approach when it became clear it would require imposing the death penalty.<sup>211</sup>

However, the relevance of these problems to ATS litigation is not as obvious as with the other defining aspects of piracy. For one, the United States is one of the only nations that entertains UJ cases of any kind. Thus differences between, say, American and Russian penalties are moot because only American ones are in practice available. Moreover, the civil nature of ATS penalties may mitigate the disparate punishment and double jeopardy problem. Civil recovery avoids emotional debates about the propriety of the death penalty or the relative severity of American jail sentences compared to European ones. A verdict in a civil case does not preclude American criminal proceedings, and it is unclear whether it would have a preclusive effect on subsequent criminal prosecutions in the courts of other nations. On the other hand, Justice Breyer's *Sosa* concurrence suggests that UJ over tort cases does overlap to a significant extent with criminal UJ because the civil/criminal distinction is not as bright in other nations. The "criminal courts of many nations combine civil and criminal proceedings. . . . Thus, universal criminal jurisdiction necessarily contemplated a significant degree of civil tort recovery as well."<sup>212</sup> To the extent this is the case, civil UJ under the ATS does raise differential penalty problems, especially given that U.S. courts are particularly at-

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209 See Brent Wible, "De-Jeopardizing Justice": Domestic Prosecutions for International Crimes and the Need for Transnational Convergence, 31 DENV. J. INT'L L. & POL'Y 265, 274 (2002) (commenting that "a system where a defendant could face the death penalty in one jurisdiction and life imprisonment in another . . . would seem arbitrary and undermine the notion of universality").

210 See *id.* at 274 & n.44.

211 See *id.* at 273-74.

212 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring) (citing Brief for European Commission as Amicus Curiae at 21 n.48, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339)).

tractive for foreign plaintiffs because they award punitive damages, while most nations' courts do not.

#### CONCLUSION

The Supreme Court in *Sosa* declared that the ATS is a primarily jurisdictional statute, but that actions can be brought directly under it for a narrow set of CIL violations. While the Court did not rule out the possibility that the ATS provides a cause of action for some *modern*, human rights-oriented CIL norms, it set a high bar for judicial recognition of such causes of action. In particular, the Court established a historical test under which any new CIL offense must conform to the characteristics of those few violations of the law of nations that were directly enforced by eighteenth century common law. The law of nations only allowed for UJ over piracy, whereas *most* modern ATS litigation is based on the universal theory. Thus of the eighteenth century offenses, piracy is the mold into which modern CIL norms must fit if they are to serve as causes of action under the ATS.

Yet the new CIL norms do not pass *Sosa's* historical test. Modern human rights offenses are not substantially "comparable" to piracy, the benchmark offense. While the new UJ claims piracy as a precedent and inspiration, it disregards the safeguards and limitations that made piracy UJ unproblematic and uncontroversial. UJ over human rights abuses threatens the "adverse foreign policy consequences"<sup>213</sup> that *Sosa* warned of much more than did the "historical paragons" that ATS actions must resemble. Thus under *Sosa*, judges should not create causes of action for the new CIL norms.

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213 *Id.* at 2763.

