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**The Piracy Analogy: Modern Universal Jurisdiction's  
Hollow Foundation**

By Eugene Kontorovich

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# The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation

By Eugene Kontorovich<sup>†</sup>

INTRODUCTION.....	2
<b>I. PIRACY AS THE BASIS FOR MODERN UNIVERSAL JURISDICTION.....</b>	<b>6</b>
A) JURISDICTION OVER PIRACY.....	6
1. <i>International criminal jurisdiction.</i> .....	6
2. <i>Piracy defined.</i> .....	8
3. <i>Piracy as jurisdictional exception.</i> .....	9
B) NUJ ADOPTS THE PIRACY ANALOGY.....	13
1. <i>Nazi war crimes tribunals.</i> .....	13
2. <i>Eichmann.</i> .....	15
3. <i>National courts and international tribunals.</i> .....	16
4. <i>NUJ in Federal Courts.</i> .....	19
5. <i>The piracy analogy ascendant.</i> .....	21
C) THE HEINOUSNESS PRINCIPLE.....	22
D) HOW THE PIRACY ANALOGY SUSTAINS THE NUJ.....	26
<b>II. INVALIDITY OF THE PIRACY ANALOGY: PRIVATEERING.....</b>	<b>29</b>
A) PRIZE LAW.....	29
B) THE EQUIVALENCE BETWEEN PIRACY AND PRIVATEERING.....	33
C) FORM, SUBSTANCE, AND HEINOUSNESS.....	35
D) HISTORICAL RECOGNITION OF THE EQUIVALENCE.....	36
E) PRIVATEERING AS A DEFENSE TO PIRACY.....	39
F) SUMMARY.....	40
<b>IV. INVALIDITY OF THE PIRACY ANALOGY: HEINOUS ROBBERY? .....</b>	<b>40</b>
A) NO MORE HEINOUS THAN ROBBERY.....	40
B) EARLIER ERAS' MORAL HIERARCHIES.....	43
1. <i>Pre-modern recognition of modern human rights offenses.</i> .....	43
2. <i>Heinousness militates against universal jurisdiction.</i> .....	44
<b>IV. EVIDENCE FOR THE PIRACY ANALOGY.....</b>	<b>46</b>
A) VATTEL.....	46
B) UNRELIABLE EPITHETS.....	49
<b>V. CONCLUSIONS AND SOLUTIONS.....</b>	<b>52</b>
A) MODERN UNIVERSAL JURISDICTION NEEDS A NEW RATIONALE.....	52
B) A PROPOSAL FOR REINVENTING MODERN UNIVERSAL JURISDICTION.....	54

## INTRODUCTION

Courts around the world have in recent years embraced the principle of universal jurisdiction, relying on it with ever-increasing frequency to justify proceedings against alleged perpetrators of human rights offenses in foreign countries.<sup>1</sup> Universal jurisdiction allows a nation to prosecute an offense with which it has no specific connection, based solely on the extraordinary heinousness of the conduct. Any nation in the world can prosecute universal offenses, even over the objections of the defendants' and victims' home states.<sup>2</sup> For example, when Belgium indicts Israeli Prime Minister Sharon for war crimes committed against Arabs in Lebanon, or when German and Swiss courts convict Serb officials of war crimes committed against Bosnian Muslims in Bosnia, those prosecuting nations exercise universal jurisdiction.<sup>3</sup>

Universal jurisdiction can have dangerous consequences,<sup>4</sup> especially in the absence of generally-accepted rules limiting its scope. Unlike all other forms of international jurisdiction, the universal kind is not premised on notions of sovereignty or state consent; indeed, it is intended to override them.<sup>5</sup> An assertion

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<sup>1</sup> See Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150 (“With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting . . . for atrocities committed abroad.”).

<sup>2</sup> 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); Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 MANITOBA L.J. 1, 11 (2002) (defining universal jurisdiction as the jurisdiction that all states can exercise “even against the wishes of the State having territorial or any other form of jurisdiction.”); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL FORUM 323, 323-24 (2001) (defining universal jurisdiction as jurisdiction with no “nexus between the regulating nation and the conduct, offender, or victim”).

<sup>3</sup> *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, COMM. ON INT’L HUMAN RIGHTS LAW & PRACTICE, INT’L L. ASS’N 26-28 (2000). [hereinafter *Final Report*, INT’L L. ASS’N] (describing universal jurisdiction prosecutions and convictions in Germany, Switzerland and numerous other European nations).

<sup>4</sup> As Justice Storey observed in a case in which he refused to exercise universal jurisdiction over a supposedly French vessel, “rarely can a case come before a court of justice . . . more likely to excite the jealousies of a foreign government, zealous to assert its own rights.” *United States v. LaJeune Eugenie*, 26 F. Cas. 832, 841 (D. Mass. 1822) (No. 15,551). The mere threat of universal jurisdiction in that case had complicated diplomatic relations between the United States and France. See *id.* See also Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 335, 340 (2001) (explaining that broad universal jurisdiction, especially over acts of state, has the “potential for sparking interstate conflict” and being used “as a tool of interstate conflict”), Bradley, *supra* note 2, at 325 (observing that universal jurisdiction can “undermine peaceful international relations”).

<sup>5</sup> See Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86 (“The doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers.”).

of universal jurisdiction can create conflict, and possibly hostilities, between countries because it can be construed as an encroachment on the sovereign authority of the nations that have traditional jurisdiction over the offense.<sup>6</sup> So for hundreds of years, international law held that universal jurisdiction could only apply to the crime of piracy.<sup>7</sup> In recent decades, however, the scope of universal jurisdiction has grown vastly, encompassing many human rights offenses. The expansion in universal jurisdiction's scope has been accompanied by a dramatic increase in nations' willingness to use it.

The "new universal jurisdiction,"<sup>8</sup> or "NUJ" as it will be called in this Article, has sought to establish its legitimacy by invoking piracy as a precedent, justification, and inspiration.<sup>9</sup> This Article will use the phrase "piracy analogy" to refer to the argument that the NUJ is based on principles implicit in the earlier, piracy-only universal jurisdiction. According to the piracy analogy, international law treated that crime as universally cognizable because of its extraordinary heinousness. Piracy was regarded as so evil that no nation would quibble about

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<sup>6</sup> See Strapatsas, *supra* note 2, at 6 (observing that universal jurisdiction can threaten international relations "because [assertions of universal jurisdiction] can be interpreted by the State where the crime has been committed as demonstrating a lack of trust in its judicial system, a violation of its sovereignty, or interference in its internal affairs.").

<sup>7</sup> In the Restatement (Second) of Foreign Relations Law (1965), piracy was listed as the only universally cognizable offense. The Restatement (Third) of Foreign Relations adds, for the first time, several other universal crimes, such as war crimes and apartheid. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

<sup>8</sup> This Article will refer to the recent expansion of universal jurisdiction to human rights offenses as "modern" or "new" universal jurisdiction, and will call the universal jurisdiction that historically applied to piracy as "old" or "traditional" universal jurisdiction.

<sup>9</sup> M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 108 (2001) ("Piracy is deemed the basis of universal criminal jurisdiction."); Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, WORLD POL'Y J., Spring 2001, at 101, 105 ("Piracy on the high seas is sometimes presented as the classic inspiration for the concept of universal jurisdiction."); Michael Kirby, Criminal Law – The Global Dimension, Speech Before the International Society for Reform of Criminal Law Conference (Aug. 27, 2001), [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_crimlaw.htm#\\_ftn1](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimlaw.htm#_ftn1) [hereinafter Kirby, Criminal Law] ("The international legal principles of universal jurisdiction . . . can be traced to the early responses of the law of nations to piracy."); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 798 (1988) ("The concept of universal jurisdiction over piracy has had enduring value . . . by supporting the extension of universal jurisdiction to certain modern offenses somewhat resembling piracy."); *Crossfire: Barry Carter Interview* (Cable News Network television broadcast, Feb. 27, 1991) (transcript No. 156) ("From an international law standpoint, any court has jurisdiction over Saddam Hussein because what he's done, war crimes, there's a theory of universal jurisdiction . . . It goes back to piracy. Anyone who could catch a pirate could try him.); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 60-63 (1981) (arguing that the NUJ builds on a doctrine that had previously been applied primarily to piracy but could logically extend to any offense widely recognized for its depravity); LOUIS SOHN, *Introduction to BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* (1980) ("The first breakthrough [for punishing "international crime"] occurred when international law accepted the concepts that pirates are "enemies of mankind" and once this concept of an international crime was developed in one area, it was soon applied by analogy in other fields.").

yielding its jurisdiction over the perpetrators of such vile acts to any nation that might care to prosecute them. Thus universal jurisdiction was never about piracy *per se*, the argument goes, but about allowing any nation to punish the world's worst crimes, which historically happened to be piracy. The piracy analogy holds that universal jurisdiction over human rights is simply an application of this well-settled, time-honored principle of universal jurisdiction for the most heinous offenses – and not, as critics, of universal jurisdiction contend, a dangerous and officious usurpation of national sovereignty.

The piracy analogy underpins the NUJ. The seminal decisions in the expansion of universal jurisdiction to new offenses – the decisions of the post-WWII war crimes tribunals, *Eichmann*,<sup>10</sup> and *Filartiga*,<sup>11</sup> – have all relied on the piracy analogy, as have the more recent opinions from the international war crimes tribunals created by the United Nations. These high-profile courts and cases popularized the piracy analogy to such an extent that courts now invoke it casually, taking its validity for granted. The piracy analogy has also won general acceptance by international law scholars.<sup>12</sup> Even those who criticize the NUJ on other grounds do not dispute that it is a logical application of the policies that made piracy universally cognizable. Given that the NUJ is one of the most important developments in international law in recent decades, it is surprising that the piracy analogy that gives NUJ its pedigree has not come in for scrutiny from scholars.

This Article challenges the generally accepted view that piracy was universally cognizable because of its heinousness. The Article shows that the rationale for piracy's unique jurisdictional status had nothing to do with the heinousness or severity of the offense. Indeed, the Article goes further and shows that piracy was not regarded in earlier centuries as being an egregiously heinous crime: thus it simply could not have been made universally cognizable on the grounds of heinousness. Rather, the Article suggests that piracy's universal status related to the fact that pirates acted outside the protection of sovereign states, and thus universal jurisdiction over pirates did not have the potential to antagonize other nations and lead to open hostilities. The Article also reveals that the law of nations as understood by America's founding generation and leading early jurists specifically considered and rejected the idea that heinous crimes should be universally cognizable.

By demonstrating that piracy cannot serve as a precedent for then new universal jurisdiction, this Article calls into doubt the entire line of cases that have relied on the piracy analogy to expand universal jurisdiction to a variety of

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<sup>10</sup> *Eichmann v. Attorney-General*, 36 I.L.R. 277 (Isr. 1962).

<sup>11</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

<sup>12</sup> Michael P. Scharf & Thomas C. Fischer, *Forward to Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 227, 228 (2001) (“Most scholars point to piracy as the first crime of universal jurisdiction recognized by the international community, and liken other crimes to piracy in order to justify, by analogy, the application of universal jurisdiction to those crimes.”); Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361 n.230 (1997) (noting that scholars and judges have treated the status of piracy in the law of nations as a “precursor to modern international human rights law and universal jurisdiction.”).

heinous offenses. It suggests that courts and scholars have accepted the piracy analogy uncritically, allowing NUJ to be built on a hollow foundation. This has several important implications for the future of NUJ. It suggests that NUJ is in fact a bold innovation, and thus it may in fact lead to the kind of conflict between states that the traditional hostility to NUJ sought to avoid. It also shows that the federal courts of appeals that have exercised NUJ are likely acting beyond their constitutional and statutory authorization. Finally, the Article concludes that it is now imperative for supporters of NUJ to find some other way to demonstrate that NUJ is in fact consistent with established principles of international jurisdiction.

Part I begins by describing the rules of international jurisdiction, and the special jurisdictional status those rules accorded to piracy – which for hundreds of years was the only universally cognizable offense. It then outlines the emergence of the NUJ after World War II, and its rapid bloom after the Cold War. The Part shows how the NUJ was explicitly built on the precedent of piracy. Part I concludes by explaining the critical role the piracy analogy plays in justifying NUJ, and thus shows that without the piracy analogy, the legitimacy and wisdom of NUJ would be much more questionable.

By putting piracy law in its legal and historical context, Part II shows that piracy was not regarded as particularly heinous. The same behavior that pirates engaged in – armed robbery of civilian shipping – was often authorized and encouraged by every maritime nation in the form of privateering. That activity differed from piracy only in that the privateer obtained a permit to rob from a sovereign state, and often split his proceeds with the sovereign. The fact that privateering was essentially state-sponsored piracy was abundantly clear to contemporary observers – yet it was a legal, and sometimes respectable, calling. The widespread tolerance and indeed encouragement of sea robbery shows that this activity was not considered to be one of the most heinous or repugnant nature. Privateering shows that historically, there was tolerance of sea robbery incompatible with the kind of “universal repulsion” that modern commentators claim motivated its universal cognizability.

Part III adduces more evidence that piracy was not regarded as extraordinarily heinous. It observes that piracy, by definition, was simply robbery at sea. It then shows that robbery has never been considered one of the most depraved crimes. While piracy was universally cognizable, many other far more heinous offenses were not, further undermining the theory that heinousness was the rationale for piracy’s jurisdictional treatment. Indeed, Part III shows that the specific offenses covered by the NUJ have been considered extraordinarily heinous for many centuries; war crimes, genocide and the like were always considered worse than sea robbery. Yet the law of nations also failed to extend universal jurisdiction to those offenses. Part IV considers the few bits of historical evidence that have been adduced to establish the validity of the piracy analogy. It finds some of the evidence unpersuasive, while the most significant evidence actually turns out to undermine the piracy analogy.

This paper only attempts to show that NUJ cannot be sustained on the basis of the argument on which it has been nourished: that international law has always tolerated, and nations have accepted, universal jurisdiction over heinous

offenses. It does not attempt to present a comprehensive account of why piracy was treated as universally cognizable. However, for the sake of completeness, Part V begins by discussing some possible explanations for piracy's anomalous status. Part V then spells out what the invalidity of the piracy analogy means for the future of NUJ. It suggests that much of current NUJ jurisprudence and commentary rests on a hollow foundation. While NUJ may turn out to be normatively defensible, the piracy-analogy defense of it that many courts and commentators have chosen to make is untenable.

## **I. PIRACY AS THE BASIS FOR MODERN UNIVERSAL JURISDICTION.**

This Part shows how the piracy analogy came to serve as the foundation for the new universal jurisdiction ("NUJ"). It begins by describing the basic rules of international jurisdiction, and explains how universal jurisdiction over piracy has historically been the sole exception from those rules. It then charts the extension of the piracy principle to "human rights" offenses in the wake of World War II, showing how the unique status of piracy was relied upon to legitimize and provide a rationale for the NUJ. Finally, it explains the variety of roles the piracy analogy plays in supporting the NUJ. This suggests that were the piracy analogy invalid, the legal soundness and perhaps the wisdom of the NUJ would become much more dubious.

### **A) Jurisdiction over piracy.**

#### *1. International criminal jurisdiction.*

International law regards criminal jurisdiction<sup>13</sup> as a prerogative of sovereign states.<sup>14</sup> As a result, the traditional limits on national criminal jurisdiction are largely congruent with the limits of national sovereignty.<sup>15</sup> So states obviously have *territorial jurisdiction* over offenses committed within their confines,<sup>16</sup> for control over territory is the hallmark of sovereignty. This principle also gives a nation jurisdiction over matters that take place on vessels that it has registered, in its embassies, and other places considered islands of a nation's

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<sup>13</sup> This Article uses the term "jurisdiction" in its strongest and broadest sense. The term has several degrees of meaning – the power to lay down laws, the power to adjudicate, and the power to punish. Universal jurisdiction gives nations the power to adjudicate and punish those offenses that international law deems universal, pursuant to national statutes that specify the details of the universal offenses.

<sup>14</sup> See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5th ed. 1998). ("The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has.").

<sup>15</sup> See Bassiouni, *supra* note 9, at 89-90.

<sup>16</sup> See BROWNLIE, *supra* note 14, at 303-04 ("Generally accepted and often applied is the objective territorial principle, according to which jurisdiction is founded when any essential constituent element of a crime is consummated on state territory.").

territory outside its primary borders.<sup>17</sup> Furthermore, states sometimes have jurisdiction over offenses committed elsewhere, called *extraterritorial jurisdiction*.

However, since the extraterritorial conduct necessarily occurs within the territory of some other nation, extraterritorial jurisdiction will often involve competing jurisdictional claims between states.<sup>18</sup> The close relation between Westphalian sovereignty<sup>19</sup> and criminal jurisdiction means that one nation's attempt to exercise jurisdiction over persons or matters that also fall within the jurisdiction of another nation might be regarded as an usurpation of the second nation's sovereignty.<sup>20</sup> Such conflicting claims could, at a minimum, "threaten the stability of international legal order"<sup>21</sup> and seriously damage diplomatic relations between states,<sup>22</sup> potentially leading to armed conflict. International jurisdiction rules seek to prevent such problems by dividing jurisdictional responsibility among states in those situations where these responsibilities would likely overlap.<sup>23</sup> Thus a nation can exercise extraterritorial jurisdiction over an offense only when it has a clear nexus with offense, one that gives it jurisdictional priority over other nations.<sup>24</sup> The two main instances of this are crimes committed by or

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<sup>17</sup> This corollary of the territorial principle can be called "flag jurisdiction." See *Steamship Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10; OLIVER SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 245 (1985).

<sup>18</sup> See BROWNLIE, *supra* note 14, at 314 ("The same acts may be within the lawful ambit of one or more jurisdictions.").

<sup>19</sup> See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9 n.\*\* (1995) (explaining how the present system of international law, with its emphasis on sovereign and equal nation-states, originated with the Peace of Westphalia).

<sup>20</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 reporters' note 8 (1987) (observing that "the exercise of criminal . . . jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive."); see also *id.* at 235 (explaining that when states extraterritorial jurisdiction over their nationals residing in another state, the state with territorial jurisdiction often rightly feels aggrieved).

<sup>21</sup> Bassiouni, *supra* note 9, at 89-90.

<sup>22</sup> Here are some recent examples. The Rwandan government has largely broken off contact with the ICTY over its investigation of war crimes committed by the Rwandan army, see *UN Tribunal Invites Rwanda for Talks on Strained Relations*, AGENCE FRANCE-PRESSE, Oct. 30, 2002. Chile's relations with Spain were tested by the latter's efforts to prosecute Gen. Pinochet; Israeli-Belgian relations are strained by the latter nation's contemplation of proceedings against Israeli Prime Minister Ariel Sharon. See Sharon Sadeth, Aluf Benn, & Ammon Barzilai, *Israel Recalls Envoy Following Belgian Court Ruling on Sharon*, [WWW.HAARETZDAILY.COM](http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=262391), Feb. 13, 2003, at <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=262391> ("Belgium is helping to harm not only Israel, but also the entire free world, and Israel will respond with severity to this"). See also Herb Keinon, *Brussels Ambassador Recalled after Court Finds Sharon Can Be Tried for War Crimes*, JERUSALEM POST INTERNET EDITION, Feb. 12, 2003, at <http://www.jpost.com/servlet/Satellite?pagename=JPost/A/JPArticle/PrinterFull&cid=1045024693642> ("Belgium's arrogating to itself the right to deal with issues that are none of its business.").

<sup>23</sup> See BROWNLIE, *supra* note 14, at 313-14 (discussing principles followed by nations in exercising extraterritorial jurisdictions, such as non-intervention, accommodation, mutuality, and proportionality.)

<sup>24</sup> See *id.* at 313 ("[T]here should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction).

against its nationals, respectively known as the *nationality*<sup>25</sup> and *passive personality principles*<sup>26</sup> of jurisdiction.

A fourth, and much less widely used category of extraterritorial jurisdiction is the *protective principle*,<sup>27</sup> where the activities abroad might cause harmful consequences in the prosecuting state. An antitrust conspiracy hatched abroad is the classic case, but protective jurisdiction is rarely invoked because to the extent the activities abroad cause direct harm to citizens of the prosecuting nation, it is just an instance of the nationality principle.<sup>28</sup> Yet if the harm is diffuse or indirect, and involves the general interests of a nation, then the protective principle threatens to justify extraterritorial jurisdiction in a large and vague class of cases, making the division of jurisdictional authority between sovereign states uncertain, and generating numerous opportunities for interstate conflict.

## 2. Piracy defined.

The essence of the offense consists of nothing more than robbery at sea.<sup>29</sup> All definitions of piracy as an internationally recognized offense agree on three central elements.<sup>30</sup> Firstly, it must occur on the high seas. Secondly, it must involve stealing. And finally, and crucially for the purposes of this Essay, the plunder must be undertaken without the permission of a sovereign state. The absence of any of these elements would be fatal to a piracy prosecution and would

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<sup>25</sup> See *id.* at 306 (“Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts.”). See also HENKIN, *supra* note 19, at 236-38 (discussing state authority to “prescribe law for its nationals even when they were outside its territory.”).

<sup>26</sup> See HENKIN, *supra* note 19, at 239 (“[A] state’s interest in seeking to protect its nationals when they are abroad by applying its law to persons who injure them.”).

<sup>27</sup> See BROWNLIE, *supra* note 14, at 307. See also *id.* at 238-39 (defining the protective principle).

<sup>28</sup> See BROWNLIE, *supra* note 14, at 304 n.14. For other examples in which the protective principle is applied, see also HENKIN, *supra* note 19, at 238.

<sup>29</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (Story, J.) (“Whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that . . . its true definition by the law is robbery upon the sea. . . . We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery on the high seas.”); *Dole v. New Eng. Mut. Marine Ins. Co.*, 7 F. Cas. 837, 846-47 (D. Mass. 1864) (No. 3966) (“Robbery on the high seas is piracy under the law of nations by all authorities.”); *Fitfield v. Ins. Co. of Pa.*, 47 Pa. 166, 187 (1864) (“A pirate, according to the most approved definitions, is a sea robber.”); *Cameron (Alexander James) v. HM Advocate*, 1971 S.L.T. 202, 205 (H.C.J.) (Scot.) (“The essential elements of this crime are no more and no less than those which are requisite to a relevant charge of robbery where that crime is committed in respect of property on land and within the ordinary jurisdiction of the High Court.”). In *Smith*, Justice Story’s encyclopedic “footnote h” on the definition of piracy in the law of nations collects scores of English and civil law sources for this proposition; the judges and commentators all concur that only the locus of the crime separates piracy from ordinary robbery, and that indeed, piracy is but a species of robbery. 18 U.S. at 163 n.h. See, e.g., *Rex v. Dawson*, 8 William III, 1696, 5 *State Trials*, 1 ed. 1742, cited in *Smith*, 18 U.S. at 163 n.h. (“Now piracy is only a *sea term* for robbery, *piracy being a robbery committed while in the jurisdiction of the admiralty.*”) (emphasis in original).

<sup>30</sup> The terms *piracy* and *pirate* was also used loosely and imprecisely to refer to any serious crime committed on the seas. See ALFRED P. RUBIN, *LAW OF PIRACY* 213 (2d. ed. 1998) [hereinafter RUBIN, *PIRACY*]. The colloquial use of the term, particularly by judges and legislators, has often caused confusion, but the essential elements of the offense remain clear.

preclude the exercise of universal jurisdiction. The high seas element means that “piracy” within territorial waters does not give rise to universal jurisdiction. Most authorities describe piracy as actions at sea that would be punishable as robberies if committed on dry land.<sup>31</sup> Indeed, Justice Story noted that “robbery” and “piracy” were often used interchangeably.

### 3. Piracy as jurisdictional exception.

Pirates operated on the high seas, which lay outside the territorial jurisdiction of any nation, a sort of global commons. But the ships they attacked were registered in a particular nation and thus within that nation’s flag jurisdiction; those on board were presumably nationals of some state and thus within its passive personality jurisdiction. Thus the locus of piracy did not render standard jurisdictional rules inapplicable – for every piratical offense at least one country could certainly punish the pirates under traditional jurisdictional rules. But the law of nations went much further.

For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century), any nation could try and hang any pirates it caught, regardless of their nationality or where on the high seas they were apprehended.<sup>32</sup> The law of nations also permitted any nation that caught a pirate to summarily execute him at sea. To this very day, international law regards piracy as a universally cognizable offense, and several broad international treaties have codified this principle.<sup>33</sup> The legitimacy of universal jurisdiction over piracy has throughout the past several hundred years been recognized by jurists and scholars of every major maritime nation.<sup>34</sup> Indeed, it is hard to find any authority challenging the universal principle as applied to piracy.

The punishment of piracy fell to individual nations, which enacted piracy laws to implement the international law norm. While the national measures varied slightly in how they defined the offense, the common parameters were unlicensed

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<sup>31</sup> See, e.g., *Dole*, 7 F. Cas. at 846 (“Standard writers upon criminal law in defining piracy say ‘it consists in the committing of those acts of robbery and depredation upon the high seas which if committed on the land, would have there amounted to a felony.’”).

<sup>32</sup> See Randall, *supra* note 9, at 791. The laws of piracy and privateering were essentially uniform across maritime nations and in international law in the eighteenth and nineteenth centuries. See Bassiouni, *supra* note 7, at 109-10; DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF THE FIGHTING SAIL* 5 (1999). None of the minor difference bears upon the arguments of this article. Thus with no loss of generality, this article draws mostly on Anglo-American cases and sources from the eighteenth and nineteenth century. See *id.* These sources are more readily available to most readers, and save problems of translation. Also, this article places particular emphasis on the problems of universal jurisdiction as a basis for jurisdiction in American federal courts, which must be guided to some extent by their own precedents, thus making the United States case law particularly relevant.

<sup>33</sup> See Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 6465; United Nations Convention on the Law of the Sea (Dec. 10, 1982), § 105 (ratified by U.S. Senate in 1994) (“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board. The courts of the States which carried out the seizure may decide upon the penalties to be imposed.”).

<sup>34</sup> See *Smith*, 18 U.S. at 163 (noting “the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever”).

robbery and occurrence on the high seas.<sup>35</sup> States could, of course, by statutory fiat call any conduct “piracy,”<sup>36</sup> and the word was sometimes imprecisely applied to an array of nautical offenses having nothing to do with the international crime of piracy.<sup>37</sup> But it was always clear that whatever the content of a nation’s piracy statutes, universal jurisdiction would only exist over acts that fell within the law of nations definition of piracy.<sup>38</sup>

Universal jurisdiction over pirates applied to civil proceedings as well.<sup>39</sup> When a pirate ship was captured and brought into port, where the ship and its accoutrements would be sold in a prize proceeding, those robbed by the pirates could bring suit in admiralty court requesting compensation from the proceeds of the sale.<sup>40</sup> These salvage suits could be brought even when there was not nexus between the pirates and their victims and the jurisdiction where the salvage was held.<sup>41</sup>

An extraordinarily small number of criminal piracy prosecutions can be found that relied on the universal theory of jurisdiction, as Professor Rubin has shown in his authoritative history of piracy law.<sup>42</sup> It has been elaborated in far more commentaries than it has been applied in actual cases.<sup>43</sup> Moreover, some nations, including the United States, did not authorize their courts to hear piracy

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<sup>35</sup> See Randall, *supra* note 9, at 795.

<sup>36</sup> *Steamship Lotus*, 1927 P.C.I.J. at 70 (Moore, J., dissenting) (“[T]he municipal laws of many States denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations.”).

<sup>37</sup> Today piracy is used even more broadly in the vernacular, referring to offenses like infringement of intellectual property rights (software “piracy”). Like the earlier loose usages, this has nothing to do with piracy proper.

<sup>38</sup> See *Dole*, 7 F. Cas. at 847 (“By statutes passed at various times . . . many artificial offenses have been created which are deemed to be amounted to piracy . . . But piracy created by municipal statute can only be tried by that state within whose territorial jurisdiction, on board of whose vessels, the offence thus created was committed.”); See Randall, *supra* note 9, at 795-96.

<sup>39</sup> See, e.g., *The Ambrose Light*, 25 F. 408, 415-16 (1885) (observing, in a libel for piracy, that “piracy has two aspects” – one a “violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel,” and the other being criminal punishment “by the municipal law of the place where the offenders are tried.”).

<sup>40</sup> See *BROWNIE*, *supra* note 14, at 237 (“[T]he rightful owner is not deprived of his title by virtue of acts of piracy relating to his goods.”).

<sup>41</sup> See *LaJeune Eugenie*, 26 F. Cas. at 843 (“No one can doubt . . . that vessels and property in possession of pirates may be lawfully seized on the high seas by any persons, and brought in for adjudication.”).

<sup>42</sup> See RUBIN, *PIRACY*, *supra* note 30, at 302 & n.50 (concluding that universal jurisdiction over piracy has been applied “very few times,” and enumerating less than five cases in the past three hundred years). However, these five cases were certainly not the only instances in which universal jurisdiction was exercised. Universal jurisdiction may have taken place in unreported cases.

Reported cases were far less common in the seventeenth and eighteenth century than they are today. Reporters would be particularly uncommon in remote ports. More importantly, the reported cases might understate the impact of universal jurisdiction over pirates by not reflecting summary proceedings at sea, when pirates would be hanged upon apprehension. It is not clear how often nations with no jurisdictional connection to a pirate would dispense such summary justice, but it was done, and would of course prevent a court from ruling on the universal jurisdiction question.

<sup>43</sup> As one academic proponent of the new universal jurisdiction has delicately put it, “the writings of scholars have driven the recognition of the theory of universal jurisdiction.” Bassiouni, *supra* note 9, at 153.

cases at all if the sole basis of jurisdiction was universal (universal jurisdiction gives every nations the right to prosecute any pirate, but does not imply any duty). This should not be surprising, because exercising universal jurisdiction either bestows uncompensated benefit on those nations with a close jurisdictional nexus to the pirates by providing them with free law enforcement, or vexingly interferes with other nations' notions of justice. Still, it cannot be disputed that for several centuries (and of course in the present day), there was a general and broad agreement in principle, and sometimes in practice, that any nation could prosecute any pirate.

#### 4. *Slavery.*

Some courts and commentators mention slave trading in the same breath as piracy as an example of a universal offense in existence before the post-war development of the NUJ.<sup>44</sup> No evidence supports the view that slaving was a separate universally cognizable offense before World War II. At most, international treaties on slave trading created “delegated jurisdiction,”<sup>45</sup> whereby several nations convey to each other the right to exercise some their jurisdictional powers with respect to a particular offense, making each state an agent of the others. Since such arrangements rest on state consent and the traditional jurisdiction of each state party to such agreements, they in no way challenge the Westphalian jurisdictional system and cannot be considered as institutions of universal jurisdiction. Because slavery was never treated as an independent universal offense, it cannot answer questions about how far universal jurisdiction can in fact extend without stirring conflict between states. Thus the only precedent for the NUJ must be found, if anywhere, in the treatment of piracy.

In the nineteenth century, Britain and the United States, and a few other nations that had banned the slave trade entered a series of treaties that allowed any of the parties to punish each other's slavers, and set up international tribunals to hear such cases. The fact that the treaties were needed shows that international custom at that point did not recognize any rights in “third-party” nations to prosecute slavery as it did with piracy.<sup>46</sup> Contemporary lawyers would clearly

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<sup>44</sup> See, e.g., *Filartiga*, 630 F.2d at 890; *Randall*, *supra* note 9, at 799 (“Piracy and slavery are the prototypical offenses that any state can define and punish.”); *Kirby*, *Criminal Law*, *supra* note 9 (“Universal jurisdiction . . . can be traced to the early responses of the law of nations to piracy and slavery.”); *Final Report*, INT’L L. ASS’N, *supra* note 3, at 3 (“War crimes, like piracy and slavery. . . were to be regarded as offences against the conscience of the civilized world and every nation therefore had an interest in their punishment.”);

<sup>45</sup> Such arrangements have been described as “delegated universal jurisdiction,” *Strapatsas*, *supra* note 2, at 7 (defining it as the situation that obtains when “the original judicial competence over a crime belongs to another State, that either renounces it, yields, or delegates its jurisdiction in favour of the State where the perpetrator is found. This principally occurs by virtue of a . . . treaty.”). While this definition is good, the term is misleading. It is not universal jurisdiction that is being delegated; it is territorial and other traditional types of jurisdiction that are delegated. And delegated jurisdiction can only become “universal” if all nations delegate to all other nations with respect to a particular offense, and if the delegations are non-revocable.

<sup>46</sup> Some slave-trading treaties analogized slave-trading to piracy. See, e.g., *Treaty for the Suppression of the African Slave Trade*, Dec. 20, 1841, art I., 92 Consol. T.S. 437, 441 (declaring slave traffic to be piracy). These treaties appear to use the word “piracy” loosely and colloquially

have regarded such jurisdictional treaties as an acknowledgment of the *absence* of universal jurisdiction. And since none of these treaties provided for universal jurisdiction, they could hardly provide the germ of such a custom.<sup>47</sup> Furthermore, if the signatories intended to take a step toward making slave trading a universal offense, their move did not win broad assent, in part because important maritime powers like Spain still had a legal slave trade.

While examples of states exercising universal jurisdiction over piracy are rare, there is simply *no* state practice to support universal jurisdiction over slave trading.<sup>48</sup> A clear and longstanding international custom of universal jurisdiction over slave trading never developed, and thus it could not become a norm of customary international law. To be sure, the longstanding prohibition of slavery by every nation would be an argument for adding slave trading to the roster of universal offenses today, on the same heinousness principle that is said to justify

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as a general term of opprobrium for crime, particularly maritime crime. Such non-technical usage has long been common (consider software “piracy”), and carries no implication of universal jurisdiction.

<sup>47</sup> See Morris, *supra* note 4, at 341 n.7; Randall, *supra* note 9, at 798 nn. 78-79. Bassiouni concedes that only “a few” of the treaties “establish universal jurisdiction or allow a state to exercise it.” Bassiouni, *supra* note 9, at 112. The treaty language he cites, however, is far from explicit in establishing universal jurisdiction; it says merely that one nation can arrest and try slave traders “who have escaped from the jurisdiction of the authorities where the crimes or offenses were committed.” *Id.* at 112 n.110. The treaty does not state that it applies to non-signatory states, and since treaties as a rule do not apply to states that are not parties, the fairest reading of this passage is one of delegated jurisdiction. Furthermore, nowhere does the treaty say that the nation apprehending the slave trader can prosecute him *over the protest of nations with territorial or national jurisdiction*, the hallmark of universal jurisdiction.

<sup>48</sup> Bassiouni, *supra* note 9, at 114. Supporters of the NUJ often point to Justice Story’s tangled opinion in *LaJeune Eugenie* in support of the proposition that the law of nations made slavery universally cognizable because of its heinousness. Story points to no case exercising universal jurisdiction over slave-traders, nor did his holding make *LaJeune Eugenie* the first. Story did not exercise jurisdiction in that case on universal grounds, but rather on traditional notions of territorial and national jurisdiction. Indeed, his opinion spells out the dangers of universal jurisdiction. The case involved a French-flagged ship with a French crew, seized by a United States ship for its participating in the transatlantic slave trade, which American law has banned. Story found that the ship was in fact American, and its papers to the contrary were a ruse to avoid American jurisdiction. See *LaJeune Eugenie*, 26 F. Cas. at 841. Moreover, the statute under which the ship was to be condemned only banned importation of slaves to the United States, and thus asserted at most a protective principle of jurisdiction; slaving between other nations was not regulated. To be sure, Story argued, in dicta, that slave trading was against “universal law.” But he had to acknowledge that the “law of nations” had not necessarily caught up to the true higher law in that many Christian nations continued to allow and the slave trade. *Id.* at 846-48. But his resolution of the case underscores his fundamental opposition to the exercise of universal jurisdiction, even over heinous crimes. He orders the vessel returned to the King of France, whose ministers had been demanding it, “to be dealt with according to *his own* sense of duty and right.” *Id.* at 851. For even though the slave trade was an “odium” characterized by “atrocious and unfeeling cruelty,” American courts “are not hungry after jurisdiction in foreign causes,” which the high-level French interest in the case had made it. *Id.* Justice Story’s opinion can be seen as dipping a toe into the waters of universal jurisdiction over slaving; subsequent courts did not take the plunge.

the addition of torture and the other offenses of the NUJ.<sup>49</sup> But this would not make it a *precedent* or *historical example* for the NUJ.

## B) NUJ adopts the piracy analogy.

### 1. *Nazi war crimes tribunals.*

For hundreds of years, piracy was the sole universally cognizable offense. This began to change after the Second World War.<sup>50</sup> The victorious powers wanted to prosecute Axis leaders for their unprecedented atrocities. Yet these crimes were not all committed against the Allied nations, and thus traditional jurisdictional rules would not cover all of the conduct in question.<sup>51</sup> Thus several of the Allied tribunals established to prosecute Nazi war criminals invoked the universal principle of jurisdiction to justify their proceedings.<sup>52</sup> Some of these

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<sup>49</sup> Many of the modern authorities that contend slavery is a universal offense seem to mean that it has become one after the Second World War in the same way torture and genocide have, not that it was universally cognizable in the nineteenth century. *See, e.g.,* Randall, *supra* note 9, at 798-99 & n.79. Those who consider slavery a universal offense primarily rely on documents of recent vintage, such as the 1980s conventions on the Seas. The Restatement (Third) of Foreign Relations Law § 404 (1987) says slavery is a universal offense but cites no state practice whatsoever to support its opinion. For a skeptical view of slavery's universal status, see Roger Clark, *Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 390 n.55 (1999).

<sup>50</sup> There had been some tentative steps taken between the two world wars to link war crimes to piracy. A 1922 arms control treaty, aimed particularly at controlling the submarine warfare, and signed by the U.S., Britain, France and Japan, declared the destruction of manned merchant ships to be a violation of the rules of war, and the perpetrator of such acts could be punished "as if for an act of piracy" by "any Power" that catches him. Some commentators see this treaty as the first attempt to shoehorn other crimes into the unique jurisdictional position occupied by piracy. *See* RUBIN, PIRACY, *supra* note 30, at 294.

It is more likely that the treaty had nothing to do with universal jurisdiction at all, and the comparison to piracy meant to illustrate the wickedness of the offense, not its jurisdictional status. The treaty, like all treaties, applies only to signatory states, and thus like the slave trading treaties, had nothing to do with *universal* jurisdiction. The "any Power" referred to is any signatory power. Moreover, the context from which treaties emerged makes it unlikely that universal jurisdiction was on the drafters' minds. During the war, many Allied leaders had described Germany's unrestricted submarine warfare as "illegal," and called for post-war prosecution of the officers responsible. *See* GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 60-62, 72-73, 94-99 (2000). None of these plans seemed to envision universal jurisdiction but rather trial at the hands of the nations whose ships had been sunk; the degree to which each Allied nation cared about the matter and was prepared to expend its political capital on securing such trials was in direct proportion to how much it had suffered from torpedoes. *Id.* (In the end, some officers were ineffectually prosecuted by German courts. *Id.* at 80-82.) In any case, the treaty fails to explain the similarity between war crimes and piracy, which, as Rubin notes, "is not evident." *Id.* at 295. The matter was never pressed, as the provision was never applied against a submariner. *Id.* at 347 n.14.

<sup>51</sup> *See* Randall, *supra* note 9, at 802-03 (summarizing the variety of charges brought against war criminals, and mentioning many, like offenses against domestic civilian populations that would not violate domestic law when committed, that could only be prosecuted by the Allies under a universal theory).

<sup>52</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("It is generally agreed that the establishment of these tribunals [the International Military Tribunal and the zonal tribunals run by particular allied countries] and their proceedings were based on universal jurisdiction."); Randal,

courts explicitly invoked the piracy as *an example* of the “general doctrine called Universality of Jurisdiction,” and claimed this “general” doctrine encompassed war crimes as well.<sup>53</sup> This represents the first judicial use of the piracy analogy to help justify universal jurisdiction over crimes other than piracy.<sup>54</sup>

Some scholars contend that the war crimes prosecutions did not depend on universal jurisdiction because jurisdiction might have existed under other theories.<sup>55</sup> Indeed, the tribunals mentioned several jurisdictional theories, often in the same proceeding.<sup>56</sup> The IMT suggested that its jurisdiction derived from pre-war treaties such as the Kellogg-Briand Pact, which had been signed by the defeated powers; but that treaty did not purport to create any crimes, let alone confer jurisdiction on signatories for their prosecution. Other international treaties, like the anti-slavery accords of the previous century, explicitly gave members criminal jurisdiction over violations by nationals of any signatory state – Kellogg-Briand has no provisions even arguably similar. Some scholars see the Allies as the effective sovereigns of the defeated lands and thus they would only be exercising territorial jurisdiction, albeit a retroactive territorial jurisdiction.<sup>57</sup> Finally, to the extent the Nazi crimes furthered their war aims, they could, under a very liberal interpretation of the protective principle, be seen as directed against all the Allied powers. This point was made by several of the tribunals, but even the most expansive protective jurisdictional theory could not sustain all the prosecutions, because the worst of the Nazi crimes had nothing to do with trying to secure a military advantage. In any case, were the tribunals to sit today, they would probably find the universal principle as a sufficient basis for their jurisdiction.<sup>58</sup> For U.S. Article III courts have more recently ruled that universal jurisdiction – based on the piracy analogy – allows any nation, and not just the victorious Allies, to prosecute Nazi war crimes.<sup>59</sup>

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*supra* note 9, at 806-10 (citing tribunal cases that invoke universal principle). The International Military Tribunal made at best a vague and cursory reference to the universal principle, and clearly saw its jurisdiction as based on other principles. However, the military courts set up by Britain and the United States in the areas of Europe that those countries occupied specifically invoked the universal concept in several cases. Still, jurisdiction in many of these cases could have been justified on other grounds, especially the passive personality principle.

<sup>53</sup> 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (1949) (Brit. Mil. Ct. Almelo).

<sup>54</sup> See Morris, *supra* note 4, at 345 (observing that invocation of the piracy precedent by post-war tribunals “not surprising” because “no specific precedent” existed for trying foreign nationals for war crimes committed against other foreigners).

<sup>55</sup> See, e.g., BROWNLIE, *supra* note 14, at 308.

<sup>56</sup> See generally *id.* at 565-68.

<sup>57</sup> Randall, *supra* note 9, at 785; Morris, *supra* note 4, at 344. If the nation where the crime occurred consents to another nation assuming jurisdiction over the offense, it is arguably not universal jurisdiction at all, but rather a delegation of traditional jurisdiction. Because such consent has often been obtained through force or intimidation (such as the consent to war crimes trials that the Allies received from a defeated Germany and Japan), it is far from obvious whether a proceeding is an example of universal jurisdiction.

<sup>58</sup> See HENKIN, *supra* note 19, at 246-47 (explaining that international law has overcome limitations on exercising jurisdiction over certain “offenses of ‘universal concern,’” such that genocide and war crimes).

<sup>59</sup> *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 556 (N.D. Ohio 1985) (“Piracy is the paradigm of an offense ‘against the common law of nations.’ . . . The principle that the

## 2. *Eichmann*.

The next decisive step in the growth of modern universal jurisdiction was Israel's prosecution of the Nazi war criminal Adolf Eichmann; he had been kidnapped by Israeli intelligence agents from his refuge in Argentina and brought to Jerusalem for trial. Israel's need to justify its proceedings by the universal jurisdiction principle exceeded that of the Allied tribunals: since Israel did not exist at the time of Eichmann's genocidal acts, it would be impossible for it to premise its jurisdiction on any of the Westphalian principles. And thus both the district court<sup>60</sup> and Supreme Court opinions in the *Eichmann* placed the universal principle at the center of their jurisdictional analysis; the *Eichmann* opinions rely on the universal principle much more clearly than any of the Allied tribunal cases.<sup>61</sup>

The Israeli courts also fleshed out the piracy analogy much more than their Allied predecessors. The Supreme Court announced that universal jurisdiction had "wide support" in international law, but admitted that piracy was the only offense that nations agreed should be subject to such jurisdiction.<sup>62</sup> But the Court argued that universal jurisdiction is not coextensive with piracy; rather piracy is an example of universal jurisdiction, and an examination of the "reason" for universal jurisdiction over piracy will reveal that such jurisdiction should also extend to crimes against humanity and war crimes.<sup>63</sup> Eichmann's kidnapping and subsequent trial drew the attention of the entire world. The *Eichmann* case remains a widely cited precedent in universal jurisdiction cases, and thus subsequent cases often implicitly rely on the *Eichmann* piracy analogy.

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perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II."), *aff'd sub nom* Demjanjuk, 776 F.2d 571.

<sup>60</sup> Attorney-General v. Eichmann, 36 I.L.R. 5 (Isr. Jm. D.C. 1961).

<sup>61</sup> See Randall, *supra* note 9, at 810.

<sup>62</sup> Eichmann, 36 I.L.R. at 298 (en banc) (citations omitted):

One of the principles whereby States assume, in one degree or another, the power to try and punish a person for an offence he has committed is the principle of universality. Its meaning is, in essence, that power is vested in every State regardless of the fact that the offence was committed outside its territory by a person who did not belong to it, provided he is in its custody at the time he is brought to trial. This principle has wide support and is universally acknowledged with respect to the offence of piracy *jure gentium*.

<sup>63</sup> *Id.* at 299.

### 3. National courts and international tribunals.

The next (and ongoing) stage in the expansion of the NUJ was spectacular. The range of universally cognizable crimes was broadened, and courts in the U.S. and elsewhere became increasingly willing to invoke universal jurisdiction. Entire courts were created whose jurisdiction could be justified only under the universal principle. In the 1990s, the rhetoric and theory of the NUJ became reality.<sup>64</sup>

It is not an accident that the NUJ had its first bloom in the years after the Second World War, and then a second and even grander flowering in the 1990s.<sup>65</sup> During both periods, the international balance of power was relatively depolarized. In the wake of WWII, the two new superpowers found themselves momentarily on the same side. Once the Cold War began, however, any exercise of NUJ would inevitably be dismissed – no doubt with some justice – as a politically-motivated attack by one great power or its allies on the other side. Such a divided world is not conducive to the development of principles that diminish sovereign power.<sup>66</sup> With the end of the Cold War, only one great power remained, and all the nations of Europe could see themselves as more or less on the same side (as evidenced by the constant expansion of the European Union and NATO). Thus one might expect the NUJ to continue to prosper until a new global power emerges to challenge the supremacy of the United States and its allies.

More proceedings were premised on universal jurisdiction in the 1990s, it seems, than in the entire preceding three hundred years.<sup>67</sup> Relying heavily on the precedent of the Allied war crimes tribunals, which themselves had relied on the piracy analogy, the United Nations Security Council established tribunals to hear cases arising from atrocities committed during the Yugoslav<sup>68</sup> and Rwanda civil wars. While the Allied tribunals could plausibly invoke other jurisdictional grounds – which may be why they casually introduced the piracy analogy, without hardly any analysis – the Yugoslav and Rwandan tribunals can only justify their jurisdiction through the universal theory.

The NUJ prosecutions of the U.N. tribunals and national courts involve a much purer form of universal jurisdiction than the Allied war crimes tribunals and *Eichmann* case from which they draw their inspiration. Though the Allies may not

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<sup>64</sup> Randall, *supra* note 9, at 839-40 (observing that in 1988, despite the expansion of the universal principle, states rarely “actually exercise universal jurisdiction”).

<sup>65</sup> Cf. Morris, *supra* note 4, at 338 (describing history of universal jurisdiction as “long quiescent periods” punctuated by “flurries of activity”).

<sup>66</sup> Even if the exercise of universal jurisdiction is not an instrumental choice, but a consumption activity (that is, some elites have a “taste” for all things universal, including universal jurisdiction, see Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and U.S. Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. PUB. POL’Y 591, 595 (2002)), it would be too expensive a taste to indulge in during the Cold War, when the objects of the jurisdiction could often turn out to be the client states of a hostile superpower.

<sup>67</sup> Of course, good data on earlier universal jurisdiction cases is elusive, see *supra* note 42. It is certainly safe to say that the 1990s saw more universal jurisdiction cases than any previous decade.

<sup>68</sup> See S.C. res. 827, U.N. SCOR, U.N. Doc. S/Res/827 (1993) (establishing international tribunal with jurisdiction to prosecute “violations of international humanitarian law committed in the territory of the former Yugoslavia”).

have had a jurisdictional nexus with all of the Nazi crimes, they had a unique stake in dealing with the Nazi war criminals. The Allies were the ones who had fought and won the long war, and they were the occupying power. This was not a general or universal interest, shared with all nations. Israel prosecuted *Eichmann* not because it had a general interest in redressing his crimes, but because it had a unique and specific claim as the sole sovereign representative of the Jewish people. The NUJ cases of the 1990s, on the other hand, take place in nations with no such direct and differentiable stake in the perpetrator, victim or offense.

Both U.N. tribunals, unlike their Nazi war-crimes predecessors, sit outside of the nations whose crimes they deal with, the ICTY in The Hague, and the Rwandan tribunal in Arusha, Tanzania. Both tribunals operate without the consent of the nations whose crimes they adjudicate and were created by powers that were not at all parties to conflicts whose crimes they prosecute.<sup>69</sup> Again, these tribunals have invoked the piracy analogy to establish their jurisdiction. One of the ICTY's first appellate decisions, reaffirming the tribunal's jurisdiction over a defendant, cited both the *Eichmann* case and a 1950 Nazi war crimes decision of the Supreme Military Tribunal of Italy to demonstrate that universal jurisdiction exists over all crimes that "shock the conscience of mankind."<sup>70</sup>

Furthermore, many foreign nations, particularly European ones, have begun prosecuting people in their own national courts for war crimes and similar offenses committed in Yugoslavia, Rwanda, and elsewhere. Some of these nations have recently adopted statutes specifically authorizing courts to hear cases solely under universal jurisdiction. Furthermore, in the past few years, a few states have begun universal jurisdiction-based proceedings based on conduct that occurred in nations where government authority and control had not collapsed<sup>71</sup> (unlike liberated Europe, Yugoslavia and Rwanda). Foreign courts also rely on the piracy analogy.<sup>72</sup> The trend seems to be towards an ever broader assertion and exercise of universal jurisdiction by the European states.<sup>73</sup>

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<sup>69</sup> The Rwandan tribunal was originally favored by the Tutsi rebels who overthrew the Hutu government that had launched the genocide. Samantha Power, *Rwanda: The Two Faces of Justice*, 50 N.Y. REV. BOOKS, Jan. 16, 2003, at 47. But the Rwandan government wound up voting against the creation of the tribunal, because it would take jurisdiction of the most important defendants but would not sentence anyone to death. BASS, *supra* note 51, at 307. Since then, relations between the new Tutsi-lead government and the tribunal have all but collapsed because the court prosecutes Tutsis as well as Hutus. The government has taken to blocking witnesses from attending court sessions. Power, *supra* note 70, at 48.

<sup>70</sup> Prosecutor v. Tadic, IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (affirming jurisdiction of ICTY) (ICTY App. Oct. 2, 1995); Prosecutor v. Furundzija, IT-95-17/1-T 56 at ¶ 147 (ICTY Trial Chmb. Dec. 10, 1998) (invoking the piracy analogy to establish that torture has joined the piracy as subject of universal jurisdiction), *aff'd*, IT-95-17/1-A (App. Chmb. July 21, 2000).

<sup>71</sup> See, e.g., Glenn Frankel, *Denmark Charges Hussein Foe With War Crimes*, WASHINGTON POST, Nov. 20, 2002, at A17 (reporting on arrest and indictment by Danish authorities of former Iraqi general, accused by Danish prosecutors of genocidal acts against Kurds in Iraqi territory).

<sup>72</sup> Australian courts, facing questions similar to those in *Filartiga*, see text accompanying notes 77-89, have also relied on the piracy analogy to support the proposition that all nations have jurisdiction over all incidents of war crimes and genocide. *Polyukhovich v. Australia* (1991) 172 CLR 501, 565 (Austl.) (en banc) (relying on piracy analogy to support holding that international and Australian law recognizes universal jurisdiction over war crimes, and that Australia's 1945

The process that began with casual invocations of the piracy analogy by the Allied war crimes tribunals may have reached its apotheosis with the newly-formed International Criminal Court.<sup>74</sup> To the extent the tribunal will prosecute nationals of the signatory states, it has merely been delegated the traditional jurisdiction of its sovereign members, as was the case with the slave trading or submarine warfare agreements. The Charter of the tribunal allows for the prosecution of citizens from non-signatory states under certain circumstances. The compatibility of NUJ with the mission and mandate of the tribunal remains uncertain and highly controversial.<sup>75</sup> Nor is it clear whether the tribunal intends to assert such jurisdiction, and thereby risk resistance from the non-signatories, such as the United States. What is clear is that the universal jurisdiction is arguably

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War Crimes Act empowers its courts to exercise such jurisdiction); *see also* Nulyarimma v. Thompson, 8 BHR 135, ¶¶ 135-139 (Fed. Ct. 1999) (Austl.) (Merkel, J., dissenting) (invoking piracy as a “long recognized example” to support proposition that a crime’s universal status made it cognizable by Australian courts even in the absence of legislation criminalizing genocide, though the case involved genocide allegations by aborigines against government officials and would not need any universal theory to sustain jurisdiction). Continental law courts generally do not issue reasoned opinions in the style of the Anglo-American tradition, making it harder to determine whether they have specifically relied on the piracy analogy. It is safe to assume they have, at least implicitly. The European nations have certainly been influenced in their move towards universal jurisdiction by the Allied war crimes tribunals, *Eichmann*, the ICTY, and *Filartiga*, all of which explicitly relied on the piracy analogy.

<sup>73</sup> For example, inspired by the case against Prime Minister Sharon, the Belgian Senate recently approved legislation that would authorize universal jurisdiction prosecutions of foreign heads of state. A Belgian court had ruled earlier in that case that the country’s universal jurisdiction statute did not abrogate head-of-state immunity. The dominant role of Western European nations in the growth of the NUJ might lend some support for the somewhat jocular observation that the establishment of international tribunals exercising universal jurisdiction is “not a policy choice, but rather cultural preference, more akin to a dietary taste or religious choice than an argument deduced from empirical reason.” Anderson, *supra* note 67, at 595. A better explanation for the leading role that rich and powerful nations play is that a nation will not exercise universal jurisdiction if it fears retaliation from the defendant’s home state.

<sup>74</sup> *Rome Statute of the International Criminal Court*, arts. 5-8, U.N. Doc. A/CONF.183/9\* (1998). (establishing court with “international legal personality” and broad jurisdiction).

<sup>75</sup> According to the former United States Ambassador-at-Large for War Crimes, many of the drafters of the Rome Convention intended to allow the Court to exercise universal jurisdiction, although the United States opposed it.

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit . . . these crimes.”). The lack of any reference to universal jurisdiction in the Convention may leave the question obscure, though the rejection of American proposals to change the language of certain provisions in a way that would clearly preclude the exercise of such jurisdiction, *id.* at 20, suggests the American position got the worst of the argument.

David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 17-18. The lack of any reference to universal jurisdiction in the Convention may leave the question obscure, though the rejection of American proposals to change the language of certain provisions in a way that would clearly preclude the exercise of such jurisdiction, *id.* at 20, suggests the American position got the worst of the argument.

consistent with the court's mandate, and the court's willingness to exercise this jurisdiction is a pressing question of international law and international relations. Whether the court's justices and prosecutors accept the validity of the piracy analogy will likely influence its willingness to exercise universal jurisdiction.

#### 4. NUJ in Federal Courts.

The past two decades have seen United States courts begin to entertain cases based solely on the NUJ (though unlike in other nations, the litigation has been exclusively civil). These decisions have upheld "federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens."<sup>76</sup> The piracy analogy has been central to this development. *Filartiga v. Pena-Irala*<sup>77</sup> is the seminal case<sup>78</sup> that first opened federal courts to international human rights litigation. It involved a suit brought under the Alien Tort Claims Act ("ATCA"), originally enacted in 1789 as part of the first Judiciary Act,<sup>79</sup> and dormant until *Filartiga* revived it.<sup>80</sup> The claim in *Filartiga* had been brought by Paraguayan citizens, alleging they had been tortured in Paraguay by the defendant Paraguayan officials. The court held that it had universal jurisdiction to hear the action. It declared, in a now-famous passage: "For purposes of civil liability, the torturer has become – like the pirate . . . before him – *hostis humani generis*, an enemy of all mankind."<sup>81</sup>

The only connection the Second Circuit drew between the pirate and the torturer was that both committed crimes widely regarded as grossly depraved. But while the Court adduced ample evidence for the international repugnance at torture, it did not even attempt to show that piracy had ever generated such sentiment. While the court explained that torture was an extraordinarily heinous offense, and universally regarded as such, it took no such pains with regards to piracy.<sup>82</sup> Nor did the Judge Kaufman's opinion try to prove that piracy was universally cognizable *because* it was regarded heinous: rather, it stated that piracy was heinous, and it was universally cognizable. *Q.E.D.*, heinousness motivates universal jurisdiction.

To find jurisdiction in *Filartiga*, two significant obstacles had to be overcome. Firstly, the Constitution does not give federal courts diversity jurisdiction over suits between aliens. So the Second Circuit found that the suit

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<sup>76</sup> *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (Newman, C.J.).

<sup>77</sup> 630 F.2d 876 (2d Cir. 1980) (Kaufman, J.).

<sup>78</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (observing that *Filartiga* has a stature within public international law comparable to that of *Brown v. Board of Education* in constitutional law).

<sup>79</sup> 28 U.S.C. § 1350 (1948). It was originally part of the first Judiciary Act, as ch. 20, § 12, 1 Stat. 73, 79 (1789).

<sup>80</sup> Jurisdiction under the Act had only been upheld in two cases in the 190 years before *Filartiga*, neither of them appellate decisions; many other cases had rejected the Act as a basis of jurisdiction and "created the impression" that the Act would not serve as means to redress wrongs done to foreigners by their own governments. Blum & Steinhardt, *supra* note 9, at 55 (citing pre-*Filartiga* ATCA cases).

<sup>81</sup> *Filartiga*, 630 F.2d at 890.

<sup>82</sup> *Id.* at 882-85 (drawing on human rights treaties and United Nations declarations to show the general condemnation of torture as a particularly heinous crime).

arises under federal law because international customary law, which recognizes universal jurisdiction over heinous crimes, was incorporated in both its substantive and jurisdictional dimensions into federal common law. Secondly, the statute, which says little, had to be interpreted as actually conferring universal jurisdiction. The piracy analogy is important to both steps. The fact that federal courts cannot hear alien diversity actions stems in part from a view – certainly held by at least some influential Framers<sup>83</sup> – that it is officious and inappropriate for federal courts to interfere in disputes that do not directly concern the United States. In this view, the potential offence such jurisdiction could give to other nations outweighs the interest of the U.S. in hearing the case, an interest which by definition is abstract.

However, if the Framers accepted the NUJ position that heinous crimes could be prosecuted by any nation no matter where they occurred, they would not have considered civil suits arising from such heinous acts as offending the sovereignty of the other nation. Still, this does not mean the ATCA actually conveyed such jurisdiction to the federal courts.<sup>84</sup> But if heinousness-based universal jurisdiction is a purely newfangled post-war notion, unknown to the jurisprudence of the eighteenth century, it would become much harder to contend that the ATCA created such jurisdiction.

While the merits of decision remain controversial, *Filartiga* has been followed by other circuits, and pioneered an important new type of federal litigation. Some courts have assumed universal jurisdiction over high-profile cases with foreign heads of state or senior officials as defendants.<sup>85</sup> Subsequent cases under the ATCA<sup>86</sup> and a much newer statute that raises universal

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<sup>83</sup> See, e.g., ALEXANDER HAMILTON, *Letters of Pacificus*, Nos. 2, 15, THE PAPERS OF ALEXANDER HAMILTON 60 (Harold C. Syrett ed., 1969).

<sup>84</sup> No evidence exists about the intent of the first Congress in passing the Act. *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 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.”). One view of the Act’s purposes – based on inferences from the structure of the Judiciary Act and the concern expressed by some Framers that states might through their actions (create?) foreign problems for which the whole nation would be made accountable – is that the Act sought to ensure aliens a federal forum in cases that involve international law, since a state court might handle such matters in a manner insensitive to the foreign relations concerns of the central government. *Tel-Oren*, 726 F.2d at 782 (Edwards, J.) (concurring) (“Concern that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien’s country of origin, might have led the drafters to conclude that aliens should have the option of bringing suit in federal court, whatever the amount in controversy.”).

<sup>85</sup> See, e.g., *Kadic*, 70 F.3d at 239-40 (relying on piracy analogy to exercise universal jurisdiction over a defendant who headed the breakaway Bosnian Serb republic, but treating him as a non-state actor); *Tachiona v. Mugabe*, 234 F. Supp.2d 401, 416-17 (S.D.N.Y. 2002) (exercising universal jurisdiction over ruling party of Zimbabwe, but declining to exercise jurisdiction over defendant president of Zimbabwe because of his head-of-state immunity).

<sup>86</sup> Post-*Filartiga* cases invariably quote and accept *Filartiga*’s piracy analogy, and often elaborate on it. See, e.g., *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 n.25, 185 (D. Mass.

jurisdiction issues<sup>87</sup> borrow *Filartiga*'s piracy analogy.<sup>88</sup> All of these cases take the piracy analogy and its heinousness premise at face value. No American court has ever *examined* whether piracy provides a valid precedent or reasoned basis for universal jurisdiction over human rights offenses under the ATCA.

##### 5. *The piracy analogy ascendant.*

Despite its notable advances in recent decades, the NUJ itself remains controversial. Some argue that such an expansion would be normatively undesirable,<sup>89</sup> and many make the positive case that nations have not accepted the expanded universal jurisdiction, and thus it is simply not yet an established aspect of international law.<sup>90</sup> Yet oddly enough, scholars – who had laid the groundwork for NUJ before it gained acceptance in courts – have failed to inquire into the piracy analogy's validity, that is, into whether the claimed similarities between piracy and the new universal offenses are real. To the contrary, most commentators have uncritically accepted the notion that piracy provides a good historical precedent for modern exercises of universal jurisdiction.<sup>91</sup> Indeed, some

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1995) (holding, on the basis of the piracy analogy in *Filartiga*, that torture is a “universal” crime and thus federal courts have “universal jurisdiction” in ATCA action brought by Guatemalans against former Guatemalan defense minister alleging brutalities in Guatemala).

<sup>87</sup> *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (“[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes, crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy was in an earlier time and therefore properly included within this type of jurisdiction.”). *See also* cases cited *supra* note 82.

<sup>88</sup> Courts in other nations have relied on *Filartiga*'s piracy analogy as well. Polyukhovich, 172 CLR at 565.

<sup>89</sup> *See, e.g.,* Morris, *supra* note 4, at 352-361 (offering several normative arguments against universal jurisdiction, particularly its lack of due process in politically-motivated prosecutions and potential to vex interstate relations).

<sup>90</sup> For a sampling of recent scholarly criticism, see, Lee Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 840, 856 (2002) (“It is, in fact, difficult to find a single instance in which a State exercised “universal” jurisdiction over offenses taking place within the territory of another State, where none of its nationals were involved.”);

Current legal theories resting on an asserted universal jurisdiction in organs of the international community are the product of good-hearted thinking but cannot work as expected in the world of affairs. The appeal to Latin phrases [like the ones in the title] conceals a lack of thought as to what those phrases actually meant in Roman law and in how they can be applied in the current international order.

Alfred P. Rubin, *Actio Popularis, Jus Cogens And Offenses Erga Omnes?*, 35 *NEW ENG. L. REV.* 265, 280 (2001).

<sup>91</sup> *See, e.g.,* Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 *EMORY INT'L L. REV.* 1, 39 (2001) (“It seems clear that the notion of universal jurisdiction originated from a need to bring pirates . . . to justice.”); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 31 n.37 (2001) (suggesting that opinions discussing jurisdiction over pirates at international law can yield general principles of universal jurisdiction applicable to other offenses).

current academic proposals to add to the universal jurisdiction roster themselves rely on analogies to piracy.<sup>92</sup>

To the extent anyone has disputed the piracy analogy, it has been to note that piracy was a private activity, and thus at least somewhat dissimilar to modern universal offenses like war crimes.<sup>93</sup> But this objection, while not without merit, misses the point. The piracy analogy does not claim that pirates were subject to universal jurisdiction because they were private actors, or that universal jurisdiction depends at all on the nature of the actors. Such an analogy would on its face fail to connect piracy to the Nazi war crimes, the first non-piratical activities to fall within the expanded universal jurisdiction. Rather, as the next section shows, the piracy analogy isolates the moral heinousness of the crime as the common denominator of all universal offenses. Thus the validity of piracy analogy, as it has been elaborated by courts and commentators, depends on whether piracy was universally cognizable because it was considered a particularly heinous offense.

### C) The heinousness principle.

The usefulness of the piracy analogy depends on isolating what it was about piracy that made it universally cognizable, and showing that the same trait can be found in the new universal offenses. In the theory of the NUJ, piracy and other universal offenses share the common denominator of heinousness: the offenses are all widely and deeply despised throughout the world.<sup>94</sup> In other words, in the piracy analogy, piracy becomes merely an illustration of a broader and long-established principle of universal jurisdiction for heinous offenses. Without this step in the argument, the example of piracy could militate *against* an expanded universal jurisdiction: since piracy had for centuries been the *only*

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<sup>92</sup> [H]ostile infliction of biological agents is outside the limits of civilized behavior, and therefore must be a jus cogens crime against humanity. . . . Criminalization [of such conduct] should also serve to establish universal jurisdiction. The analogy here is piracy, and, as in piracy law, any state that can apprehend bioterrorists or investigate their activities should be legally obligated to do so and should have legal authority to prosecute them.

Barry Kellman, *An International Criminal Law Approach to Bioterrorism*, 25 HARV. J.L. & PUB. POL'Y 721, 730-31 (2001); Louis Rene Beres, *An Enemy of Mankind*, JERUSALEM POST, Nov. 3 1995, at 5 (arguing that since terrorists are as deplorable as pirates, nations can kill them wherever they are found, just as pirates could be hung from the yard arm of the vessel that caught them, and thus Israel's practice of assassinating terrorists does not violate international law).

<sup>93</sup> See BROWNLIE, *supra* note 14, at 236 (“The essential feature of the definition [of piracy] is that the acts must be committed for private ends.”).

<sup>94</sup> Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2556-57 & n.78 (1991) (arguing that heinousness is the only “rationale for universal jurisdiction that is equally applicable to pirates and human rights”). See *also id.* at 308, n.42 (noting that multilateral treaties creating mechanisms to handle international problems has promoted the opinion that “the slave-trade, traffic in narcotics, and counterfeiting” can be assimilated to piracy).

universal offense, this might show it to be the only crime well-suited to universal cognizance.<sup>95</sup>

Justice Agranat's opinion for the Israeli Supreme Court in the *Eichmann* case was the first to explicitly recognize the need for a principle to connect piracy with modern universal offenses. Agranat recognized that the NUJ would be vulnerable to the argument that nothing but piracy could be a universal offense unless the feature of piracy that made it universally cognizable could also be found in the new universal offenses. He also understood that reducing universal jurisdiction to a particular rationale, as opposed to an ad hoc accretion of new offenses, would put clear limits on the doctrine and thus at least partially meet the objection that the NUJ would tempt states into overreaching and interference in affairs of others.<sup>96</sup>

The Supreme Court held that the "basic reason" for universal jurisdiction over piracy could be found in its "injurious and murderous effect."<sup>97</sup> It offered no historical evidence or analyses to support this conclusion. Needless to say, this criterion makes war crimes on the Nazi scale a shoo-in for universal jurisdiction.<sup>98</sup> Yet *Eichmann* discussed the piracy analogy at greater length than any subsequent decision from any nation. Subsequent cases have relied on *Eichmann* without independent analysis, thus repeating its errors.

Thus the modern argument for universal jurisdiction sees the historic treatment of piracy as evidence for the existence of an "outrageousness" or "heinousness" exception to standard jurisdictional notions.<sup>99</sup> According to the

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<sup>95</sup> Some judges have in the past expressed this view, but it remains quite unpopular. *See, e.g.,* United States v. McRary, 665 F.2d 674, 678 n.8 (5th Cir. 1982) (dicta) ("Universal jurisdiction' is almost entirely limited to cases of piracy."); *Steamship Lotus*, 1927 P.C.I.J. at 69 (Moore, J.) ("Piracy by law of nations, in its jurisdictional aspects, is *sui generis*."). A few commentators continue to press the point, however. *See* Eliot Abrams, *Justice for Pinochet?*, COMMENTARY (Mar. 1999) at 42 (arguing that piracy is the "exception . . . that proves the rule" that universal jurisdiction does not exist except over stateless actors).

<sup>96</sup> *Eichmann*, 36 I.L.R. at 299-300.

<sup>97</sup> *Id.* at 299.

<sup>98</sup> The Court also mentioned, in passing, what might be an additional criterion for universal jurisdiction – that the crime possesses an "international character." Presumably in *Eichmann*'s case this referred to his crimes being committed throughout several European nations and with the connivance of the puppet governments of those states. The court did not say the crime was merely one of "international concern." The opinion does not make wholly clear whether universal jurisdiction depends also on "international character." This would greatly limit the scope of universal jurisdiction, and in particular would eliminate much of the current "human rights" litigation that depends on universal jurisdiction. It would rule out jurisdiction over crimes committed by a nation solely against its own citizens, as in *Filartiga* and other ACTA cases, *Nulyarimma*, the Rwandan Tribunal, and perhaps the Yugoslav Tribunal.

<sup>99</sup> *Demjanjuk*, 776 F.2d at 583 (holding that because genocide is a heinous crime, "Israel or any other nation" may punish perpetrators of the Shoah); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 20 (D.D.C. 2000) (adopting the position of *Kadic* and Judge Edwards' *Tel-Oren* concurrence that universal jurisdiction under the ATCA will attach to "forms of egregious misconduct"); *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988) (holding that aircraft hijacking was "so heinous and so widely condemned" that it was universally cognizable), *aff'd on other grounds*, 924 F.2d 1086, 288 (D.C. Cir. 1991) (Mikva, C.J.); *Furundzija*, IT-95-17/1-T p. 56 at ¶ 147 (citing *Filartiga* for the proposition that piracy sets a "revulsion" standard for universal jurisdiction, under which torture has also become a universal offense); Pia Zara Thadhani, Note, *Regulating*

heinousness argument, it was the *substantive nature* of pirates' acts<sup>100</sup> – and not their status as private actors, or the location of their crimes – that made them susceptible to universal jurisdiction.<sup>101</sup> Under this view, universal jurisdiction need not be limited to piracy; rather it can expand when the international consensus about the most terrible crimes expands.<sup>102</sup> Thus any crime that comes

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*Corporate Human Rights Abuses: Is UNOCAL the Answer?*, 42 WM. & MARY L. REV. 619, 624-25 & n.36 (2000); Bradley & Goldsmith, *supra* note 12, at 361 n.230 (observing that “some commentators and judges claim that extraterritorial jurisdiction was recognized in 1789 for certain egregious violations of international law” such as piracy, and that this egregiousness principle, most evident in the treatment of piracy, provides the historic and intellectual basis for universal jurisdiction under the ACTA); Randall, *supra* note 9, at 795 (“A more accurate rationale for not limiting jurisdiction over pirates to their state of nationality lies on the fundamental nature of piratical offenses. Piracy may comprise particularly heinous and wicked acts of violence or depredation.”); Blum & Steinhardt, *supra* note 9, at 60 (observing that piracy was universally cognizable because of its “heinousness” and that this principle has been extended to other “universally reprehensible” deeds).

<sup>100</sup> *The Princeton Principles on Universal Jurisdiction*, Principle 1(1), 42 VA. J. INT’L LAW 81,157 (2001) (defining universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime”).

<sup>101</sup> The heinousness rationale for universal jurisdiction parallels the international law theory of *jus cogens*, the idea that some norms override any positive law or agreement between states to the contrary. See Bassiouni, *supra* note 9, at 104 (arguing that the same moral criteria that support *jus cogens* support universal jurisdiction, and thus the two categories are congruent). Randall, *supra* note 9, at 829-30. *Jus cogens* is very much a natural law doctrine, as it holds that certain abstract moral rules derived from abstract principles trump all contrary law. Similarly, jurisdiction over an offense “becomes” universal, trumping all traditional positive notions of sovereignty-based jurisdiction, because of the abstract evil of the offense. The norms that publicists have identified as *jus cogens* closely track universal offenses. *Id.* at 830. The ICTY explicitly linked the concepts of *jus cogens* and universal jurisdiction, arguing that “universal revulsion” at a crime makes it at once a *jus cogens* offense, which implies that it also satisfies the heinousness criterion for universal jurisdiction.

One of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish . . . individuals accused of torture . . . Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.

Furundzija, IT-95-17/1-T, p. 60 at ¶ 156.

<sup>102</sup> Tel-Oren, 726 F.2d at 781 (“Persons may be susceptible to civil liability [under the Alien Tort Act] if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law.”) (emphasis in original); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 21 n.78 (2002) (“The application of universal jurisdiction has expanded based on the reprehensibility of specific crimes sufficient to shock the global conscience.”); Morris, *supra* note 4, at 337 (“The rationale for universal jurisdiction is that crimes such as genocide, war crimes, and crimes against humanity are an affront to humanity.”); Van Der Vyver, *supra* note 92, at 41 (“The criterion for application of the principle of universal jurisdiction must be sought in the heinous nature of the crime . . . and not so much in the absence of territorial jurisdiction of national states with regard to the locality of the crime.”). Professor van der Vyver understands that modern universal jurisdiction theory depends heavily on the law of piracy, but also recognizes that the treatment of piracy has more to do with the statelessness of the criminals and the scene of the crime than with its supposed heinousness. *Id.* at 40-41. It hardly follows from this that the rationale for today’s universal jurisdiction “must” be sought in heinousness; one could just as

to be internationally recognized<sup>103</sup> as being utterly beyond the pale will open the perpetrator to universal jurisdiction; those who commit the most dastardly acts cannot claim protection of a particular nation's jurisdiction.

The precise threshold of evil that a crime must exceed to warrant universal jurisdiction remains unclear. The test can only be qualitative and vague; courts often describe the standard in terms such as "shocks the international conscience,"<sup>104</sup> "viewed with universal abhorrence,"<sup>105</sup> or, more tersely, "heinousness."<sup>106</sup> What is clear is that a particularly high degree of heinousness is required for a crime to fall within the NUJ. Most crimes are arguably heinous in some sense, and if heinousness were synonymous with illegality or even simple badness, most common municipal offenses would be encompassed by the NUJ. Heinousness would become no limitation at all. Yet exponents of the NUJ see heinousness as describing a narrow class of offenses. While it may be impossible, and unnecessary, to reduce this standard to a formulation more precise than "heinous," it must be remembered that the heinousness in question is an extraordinary or aggravated heinousness. As one federal court exercising universal jurisdiction over a civil case put it recently:

The acute form of misconduct entailed in international violations in many cases amounts to *more than mere differences in degree [from their ordinary tort counterparts], and assumes differences in kind so fundamental as to compel distinct treatment under universally recognized rules.* The "enemy of all humankind" . . . ranks as a different species from the ordinary tortfeasor of the typical case. Equally so is the class of universal rules that outcast

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easily argue that universal jurisdiction today would make the most sense in contexts genuinely analogous to piracy. The weakness of one analogy is hardly a reason to concoct an even more tenuous one.

<sup>103</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) ("Universal jurisdiction over specified offenses is a result of universal condemnation of those activities."). Thus the set of offenses subject to universal jurisdiction can expand and contract as international mores change, Beanal, 969 F. Supp. at 371 (noting the scope of universal jurisdiction is "not static"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404, cmt a (1987) (discussing the "expanding class of universal offenses."). In practice it has only expanded: no crimes that have ever entered the rolls of universal jurisdiction offenses have ever been stricken from the list.

<sup>104</sup> See also, M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights*, 59 L. & Contemp. Probs. at 69-71 (1996) ("shock the conscience of humanity"); Strapatsas, *supra* note 2, at 13 (same).

<sup>105</sup> Linder, 963 F.2d at 336; see also *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D. N.Y. 1984).

<sup>106</sup> *Tel-Oren*, 726 F.2d at 781 (observing that universal offenses are those regarded with "universal abhorrence"); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D. N.Y. 1984) (observing that due to its "monstrous" nature, torture has joined piracy among offenses that make its perpetrators "outlaw[s] around the globe"); *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981) (dicta) ("Any nation may take universal jurisdiction when a heinous crime is involved. This principle has been used to justify jurisdiction for the proscription and prosecution of piracy.").

the international outlaw, and thus declare him unworthy of all sovereign protections.<sup>107</sup>

Courts look to municipal laws, international treaties, conventions and United Nations resolutions as barometers of the “international conscience.” But as none of these phrases articulates a clear rule – though greater precision may be impossible – the NUJ has grown through accretion, one new offense at a time.<sup>108</sup> Even when courts conclude that universal jurisdiction does not apply to a particular offense, they often ratify the heinousness theory by using piracy as the benchmark of depravity required for universal jurisdiction.<sup>109</sup>

#### **D) How the piracy analogy sustains the NUJ.**

This section discusses how the piracy analogy fits in to the broader argument in favor of the NUJ. Subsequent Parts of this Article will argue that the piracy analogy is itself fundamentally flawed; an understanding of the role it plays in justifying the NUJ will be useful in assessing the extent to which the validity of the latter is compromised by the invalidity of the former. For if the piracy analogy is merely a rhetorical flourish or an illustrative metaphor, the NUJ would remain conceptually sound without it. This Section shows that while the analogy is often invoked in trivial ways, it also provides crucial intellectual mooring to the NUJ. Without piracy, the NUJ would not – in the current state of the debate – be able to surmount some important objections.

##### *1. Precedent and tradition.*

Supporters of the NUJ, using the piracy analogy, put themselves on the side of tradition by contending that it is nothing new, and thus nothing to worry about.<sup>110</sup> For example, one lawyer testifying before Congress in support of a

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<sup>107</sup> *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 416-17 (S.D.N.Y. 2002) (awarding damages under ATCA to Zimbabwean citizens for extrajudicial killing, torture, denial of political rights, cruel, inhuman and degrading treatment, and racial discrimination that they suffered at the hands of Zimbabwe’s ruling party)

<sup>108</sup> Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (listing “piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes” as “universal offenses.”), with J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 234 (1989) (“There are probably today only two clear-cut cases of universal jurisdiction, namely the crime of piracy *jure gentium*, and war crimes.”).

<sup>109</sup> See, e.g., *United States v. Schiffer*, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993) (citations omitted) (holding that a deprivation of due process in violation of the United Nations Charter in the expatriation proceedings of “a former concentration camp guard of the *Waffen – SS*” cannot be compared in severity to piracy on the high seas, and thus cannot be the basis of universal jurisdiction); *Centre for Independence of Judges and Lawyers of U. S., Inc. v. Mabey*, 19 B.R. 635, 647-48 (D. Utah 1982) (holding that alleged bias and other official misconduct by bankruptcy judge do not rise “to the level of violations of universally accepted international law principles . . . in the same league with piracy on the high seas”).

<sup>110</sup> See, e.g., Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 41 (2002) (“The concept is of ancient pedigree, having been recognized for centuries.”); Roth, *supra* note 1, at 150 (“Kissinger begins by suggesting that universal jurisdiction is a new idea . . .

proposal to give federal courts universal jurisdiction over war crimes reassured the legislators that such jurisdiction had been “historically well-settled” for hundreds of years based on the piracy analogy.<sup>111</sup> Such precedent-based arguments amount to saying that because something has always been done a given way, it should always be done that way.<sup>112</sup> But even if the NUJ has deep historical roots it would not necessarily be sound policy: and of course if it has no precedent, it could still be a beneficial innovation. Such talismanic use of precedent does not amount to reasoned argument.<sup>113</sup> If this were all there were to the analogy, invalidating it would not seriously weaken the merits of the NUJ, though it might sap its rhetorical appeal.

## 2. *Moral consistency.*

The piracy analogy rises above metaphor when used to show that the NUJ is necessary to maintain consistency with widely accepted principles. One attribute of justice is equity, treating like crimes alike. If piracy was universally cognizable because of its heinousness, the argument goes, would it not be perverse to give those accused of war crimes and genocide jurisdictional defenses unavailable to the pirate? By establishing heinousness as the rationale of universal jurisdiction, the piracy analogy puts opponents of the NUJ in the position of having to either question the heinousness of, say, torture, which would be absurd, or concede that it should be treated like piracy.

## 3. *The Filartiga problem.*

Precedent matters in a legal system, like America’s, where the decisions of previous tribunals partially limit the decisional freedom of subsequent tribunals. The *Filartiga* decision was the first in two hundred years to allow a case to proceed under the ATCA, and thus it needed some historical antecedent for its broad assertion of jurisdiction. If universal jurisdiction as it was understood by the founding generation was actually about heinousness and not about piracy specifically, then it would be much easier to argue that the ATCA grants courts universal jurisdiction over human rights offenses. On the other hand, if universal jurisdiction was specifically tailored to the crime of piracy, and contained no

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However, the exercise by U.S. courts of jurisdiction over certain heinous crimes committed overseas is an accepted part of American jurisprudence.”); Benjamin B. Ferencz, *A Nuremberg Prosecutor’s Response to Henry Kissinger*, 8 BROWN J. WORLD AFF. 177, 177 (2001) (“Kissinger . . . He argues, incorrectly, that the notion is of recent vintage. He gives scant weight to ancient doctrines designed to curb piracy.”).

<sup>111</sup> See *Hearing on H.R. 2587: The “War Crimes Act of 1995,” Before the Subcomm. on Immigration & Claims of the House Comm. on the Judiciary*, 104th Cong. (June 12, 1996) (prepared statement of Mark S. Zaid,).

<sup>112</sup> To be sure, a systematic respect for precedent, like that found in the common law, can serve many salutary purposes, like protecting settled expectations. But it would be unrealistic to assume that those defendants likely to encounter the NUJ committed their atrocities with the particular ideas about where or by whom they would be tried: clearly most never expect to be brought to justice at all. In any case, it may be that such expectations, on normative grounds, do not deserve the same solicitude as the expectations of business people about private law.

<sup>113</sup> See Richard A. Posner, *Past Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000).

broader principles applicable to crimes in general, then it would seem unlikely that the ATCA would convey to the courts a jurisdiction unknown to the drafters of the law.

#### *4. Empirical evidence.*

The piracy analogy can help predict how much and in what contexts courts can ignore Westphalian jurisdictional rules without damaging relations between states. Recall that the exercise of universal jurisdiction can be seen as an act of usurpation or contempt, a violation of sovereignty akin to a territorial incursion. Few courts would wish to push universal jurisdiction to the point where it causes international conflict; moreover, few governments would give their jurists the power to do so. Those who would wish to expand universal jurisdiction must be able to show that this would be generally tolerated by states, since for centuries this precise concern has blocked any expansion of the doctrine. What derogations of Westphalian jurisdiction the nations of the world can tolerate an empirical question, and can best be answered by consulting experience. Here the piracy analogy plays a vital role. It suggests that for hundreds of years, nations have been willing to share jurisdiction over offenses that were regarded as extraordinarily heinous. If the NUJ is simply a different incarnation of the animating concept behind piracy law, then it should be no more obnoxious than the latter.

#### *5. Endowment effects.*

The piracy analogy can help convince nations to permit the exercise of universal jurisdiction over their citizens by making such jurisdiction seem fully compatible with a nation's dignity and sovereignty. The United States House of Representatives recently passed a bill would authorize armed resistance to any attempt by the I.C.C. to assert universal jurisdiction over American soldiers or officials.<sup>114</sup> But if the notion of sovereignty has long coexisted with universal jurisdiction over heinous crimes, America should not regard its sovereignty as challenged or infringed on by a foreign tribunal's exercise of universal jurisdiction over Americans. Behavioral psychologists have observed an "endowment effect" whereby people value a thing more if they already have it than if they do not.<sup>115</sup> This suggests that even if America will never be pleased about another nation exercising universal jurisdiction its citizens, it will be less offensive if this did not appear to be a new erosion of American sovereignty, but merely the manifestation of a pre-existing limitation on sovereignty.

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<sup>114</sup> H.R.1646, The Foreign Relations Authorization Act, Fiscal Year 2003, included a with a provision to protect U.S. personnel; however, when the Senate passed its version of the appropriation bill, that section was removed and remained absent from the enacted bill. *See* The Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228 (2002).

<sup>115</sup> RICHARD THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 63-78 (1992); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1327 (1990).

## II. INVALIDITY OF THE PIRACY ANALOGY: PRIVATEERING.

Although it is the major premise of the piracy analogy, little or no evidence has been adduced to support the theory that heinousness motivated universal jurisdiction over piracy. This Part shows that when the legal treatment of piracy is viewed in its historical context – as one part of a system of international norms – it becomes clear that universal jurisdiction was not inspired by a general revulsion at preying on civilian shipping. For the law of every nation and the law of nations countenanced just such behavior when carried out by state-licensed sea-robbers called privateers.

Privateering was “a form of nationally-sponsored piracy which reached its peak in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries.”<sup>116</sup> Privateers engaged in the exact same conduct as pirates. Both the pirate and the privateer made a living by seizing merchant shipping through threat of lethal force. Yet the latter were not subject to universal jurisdiction. Indeed, they were not even regarded as criminals, and a captured privateer would eventually be repatriated to his home state. Attempts to exercise universal jurisdiction over privateering were unheard of, although contemporaries recognized it as the cousin, if not the fraternal twin of piracy. The coexistence of piracy and privateering within one system of legal norms suggest that attacks on civilian shipping were not entirely beyond the pale within that set of norms.

The new universal offenses have, on the other hand, been chosen particularly for their egregious heinousness. Torture and genocide call forth a visceral repugnance. The repugnance would not be diminished if the torture or genocide had the blessing of nations, generals, or religious authorities. Yet clearly this is not how piracy was regarded by the nations of the world, or the law of nations, for a document signed by a third-tier official of a second-rate province could transform pirate into privateer and extinguish all grounds for universal jurisdiction. This disparate treatment is incompatible with the kind of deep revulsion that, according to the piracy analogy, has always motivated universal jurisdiction. The heinousness premise of the piracy analogy holds that certain actions by their very *nature* make the perpetrators amenable to any nation’s jurisdiction. The recognition that piracy and privateering involved the same type of conduct and yet had radically different legal consequences proves that pirates were not universally condemned because of the *nature* of their actions, but rather for their failure to comply with the formalities of licensing.

### A) Prize law.

From the seventeenth century through the nineteenth century, nations would issue licenses, called letters of marque and reprisal,<sup>117</sup> to private vessels

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<sup>116</sup> ANGUS KONSTAM, PRIVATEERS AND PIRATES, 1730-1830 3 (2001).

<sup>117</sup> Marque and reprisal evolved from the medieval practice of reprisal, which allowed people to cross the borders to obtain redress for a specific injury they suffered at foreign hands. By the mid-16<sup>th</sup> century, marque and reprisal came to be used as a general license to prey on foreign shipping. During the war with Holland in the 1660s, King Charles II issued a letter permitting

that permitted them to stop and seize ships and cargo on the high seas.<sup>118</sup> International law recognized the legitimacy of this licensed plunder.<sup>119</sup> All nations acknowledged the right of other sovereign states to authorize privateering, as this form of legal piracy was called. Privateering was such a staple of maritime activity that it is enshrined in the United States Constitution, which explicitly gives Congress the right to authorize commerce raiding.<sup>120</sup> Making off with other people's property, when done under color of a letter of marque, was not considered piratical, or indeed criminal, by any nation. The universal jurisdiction over piracy did not extend to privateering.

Any ship could secure a letter of marque by satisfying certain minimum conditions, like posting a bond.<sup>121</sup> No inquiry into credentials – moral or military – was conducted. The authorities responsible for issuing the writs – the Admiralty on behalf of the British monarch, and State or Treasury department officials or state governments on behalf of Congress – handed them out promiscuously.<sup>122</sup> Not only was there a lack of front-end controls on privateers, there was no supervision of them during their cruises. The only check on privateers by their

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general reprizall against the shippes goods and subjects of the States of the United Provinces, soe that as well his Majestie's fleet and shippes, as also all other shippes and vessels that shalbe commissioned by letters of marque or generall reprizalls . . . may lawfully seize and take all shippes, vessels, and goods belonging to the States of the United Provinces, or anie their subjects or inhabitants within anie the territories of the States of the United Provinces.

Quoted in Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L L. 694, 721 (1933).

<sup>118</sup> C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954 (1997) (“Letters of marque and reprisal were government authorizations to private shipowners to seize property of foreign parties, usually ships or property from ships.”).

<sup>119</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 312 (Campbell trans. 1901) (1st ed. 1625) (stating that all the law of nations endorsed the marque and reprisal practice).

<sup>120</sup> U.S. CONST. art I, § 8 (giving Congress the power to “grant Letters of Marque and Reprisal.”). The existence of the Marque and Reprisal Clause does not reflect any doubts about the propriety of privateering or of a nation encouraging the activity; it is not an attempt to eliminate it through regulation, or an implication that the federal government might not inherently have the power to issue the writs. Rather the purpose of the clause is to make clear that Congress rather than the Commander-in-Chief has the ultimate authority over commissions. This prevents the executive from evading the legislature's power of the purse (because privateers operated from their own funds, they did not require appropriations). See Marshall, *supra* note 119, at 979-80. The clause must be read in conjunction with Art. I, § 10 (prohibiting states from granting privateering licenses), making it clear that part of its purpose was to let Congress act exclusively of the states, which during the Revolution had vexed many of the Framers by granting writs in competition with the Continental Congress.

<sup>121</sup> Even this requirement would be waived when a nation had great need for privateers; for example, during the latter years of the American Revolutionary War, a promise of good behavior would be enough to get a license. KONSTAM, *supra* note 117, at 16.

<sup>122</sup> See KONSTAM, *supra* note 117, at 3 (observing that writs of marque “were issued to almost anyone who applied for them.”), Marshall, *supra* note 119, at 974 (“Commissions were granted as a matter of course” during the American Revolution).

national government occurred after they seized a vessel, when they would have to prove to a prize court that the seizure was lawful in order to gain valid title.<sup>123</sup>

Two types of vessels sought privateers' commissions.<sup>124</sup> The ships that succeeded in taking the most prizes sailed specifically as commerce-raiders. These ships were fast, maneuverable and bristled with cannon; their sole income came from seizing the ships and goods of others.<sup>125</sup> Merchant ships, with the primary purpose of transporting goods, would also sail with letters of marque and a few cannon on the off chance they should encounter an even slower or weaker vessel, which they might pounce on as a target of opportunity.<sup>126</sup> Thus a letter of marque was the Age of Sail's version of horizontal diversification, allowing businessmen to exploit the "synergies" between commerce and commerce-raiding.<sup>127</sup> (Like most forms of prudent diversification, obtaining a writ of marque worked to throw off risk, because profits from privateering were countercyclical to profits from trade: in time of international tension or war, trade diminishes, and privateering increases.)<sup>128</sup>

Letters of marque also set forth rules of conduct, called instructions to privateers, which the captain had to adhere to as the price of his legal protection. The specific terms varied greatly. But the commissions always confined the holder to preying on ships of a particular nationality or nationalities – namely, the enemies of the nation issuing the license. Naturally, no nation issued letters of marque against its own shipping, but thorny questions would arise when citizens of England, for example, would obtain French commissions against English shipping. Nations generally authorized privateering only against the shipping of states with which they were at war.<sup>129</sup> However, nations would also commission privateers during the frequent periods of international tension, short of solemn war. States could issue letters of marque in retaliation for interference with their

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<sup>123</sup> See Marshall, *supra* note 119, at 975 (showing that the only meaningful governmental control over privateers occurred in the prize proceeding).

<sup>124</sup> See *Id.* at 958 n.28 (describing the two types of ships engaged in privateering and noting "the line often blurred," with many having characteristics of both types); DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF THE FIGHTING SAIL* 4-5 (1999).

<sup>125</sup> See PETRIE, *supra* note 125 at 4-5.

<sup>126</sup> *Id.* at 4.

<sup>127</sup> See Marshall, *supra* note 119, at 965 (observing that privateering and trade were seen by the shipowners as complementary activities, so much so that government documents of the 18<sup>th</sup> century referred to privateering cruises as "mercantile voyages.").

<sup>128</sup> See *id.* (observing that as the American Revolution progressed, "privateering and legitimate trade existed in inverse proportions").

<sup>129</sup> See *Hooper v. United States (The French Spoilations Cases)*, 22 Ct. Cl. 408, 428 (1887) ("Letters of marque and reprisal may theoretically issue in time of peace.") *Hooper* notes that the Articles of Confederation do not limit federally-sanctioned privateering to wartime. See also JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, 61 (O.W. Holmes, Jr. ed., 12th ed.1884); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 292 n.151 (G. Wilson ed. 1936) (R. Dana ed., 1st ed. 1866) (observing that letters of marque and reprisal could lawfully issue in peacetime).

shipping short of war – thus, letters of marque and *reprisal*.<sup>130</sup> Most privateering commissions put the shipping of neutral nations off limits, so as not to provoke reprisal, but this limitation was prudential, and not essential to the privateering system. And the goods of neutral nations on board enemy ships were fair game for privateers.

The nationality limitations help explain why nations condoned this cousin of legalized piracy: it allowed them to direct commerce-raiding towards the merchant fleets of their adversaries and rivals, and away from their own fleets. It regularized the enterprise of commerce-raiding, making it more predictable and thus perhaps easier to insure or plan against. Of course this does not explain why France, for example, would honor a foreign writ of marque, even those made out against France. This can be explained by reciprocity – if France did not respect a British letter of marque, Britain would not respect those issued by France, with bloody consequences for the privateers of both nations.<sup>131</sup>

Other conditions in the privateers' instructions related to the decent treatment of captured ships and crew. The most elaborate set of conditions established the procedure for selling the captured ship, a body of rules known as prize law. The prize would be taken before an Admiralty court, which would determine whether the ship was a lawful prize – that is, whether it was taken in accordance with the privateer's letter of marque. If so, the court would sell the prize off and distribute the proceeds. Whoever purchased the prize or its cargo would enjoy superior title even against the original owner, despite the fact that it had been taken from him by force. All nations recognized the legitimacy of prize proceedings as a means of transferring ownership. Seizure of property on the high seas was generally seen as a routine aspect of maritime commerce; and “the laws controlling prize taking were as familiar to the American populace as the rules of baseball are today.”<sup>132</sup>

Another typical provision of the instructions would be an injunction against “breaking bulk” – taking some cargo before the prize proceeding. The government would then take its share of the prize's value – usually ten percent – and the rest would be divided between the privateer's owners, officers and crew in accordance to a formula set out in the ship's articles. The ten percent share helps explain many aspects of privateering, from the governmental insistence on regularized prize proceedings (to ensure the authorities were not being short-changed by the privateer), to the liberal licensing of privateers by admiralty authorities, who were essentially partners in the privateering venture.

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<sup>130</sup> See Hooper, 22 Ct. Cl. at 418. (“Speaking very technically, a letter of marque is merely a permission to pass the frontier, while a letter of reprisal authorizes a “taking in return,” a taking by way of retaliation, a *captio rei unius in alterius satisfactionem*.”).

<sup>131</sup> Federal courts were loathe to recognize the commissions of Confederate privateers during the Civil War, as it would mean recognizing at least in some sense the Confederate government. Thus while several Southerners were convicted of piracy – a crime with only one punishment in federal law – President Lincoln ensured that none were executed, but rather treated as prisoners of war. He understood that Union privateers in Confederate hands would be treated no better than Confederate privateers in Union hands. For a concise review of this episode and the relevant scholarly commentaries, see *United States v. Steinmetz*, 973 F.2d 212, 219 (3rd Cir. 1992).

<sup>132</sup> PETRIE, *supra* note 125, at 2.

## B) The equivalence between piracy and privateering.

Privateering differed from piracy only in the formalities, not in the substantive nature of the conduct itself. Privateers committed acts that would constitute piracy in the absence of a letter of marque<sup>133</sup>: plundering merchant ships on the high seas. As with pirates, this was usually accomplished solely by the threat of violence.<sup>134</sup> Merchantmen had little or no armaments, small crews,<sup>135</sup> and the crews had no incentive to resist,<sup>136</sup> while the privateers and pirates, who divided the spoils, had incentive to fight. If a merchant vessel would not surrender, privateers would resort to arms,<sup>137</sup> just like pirates would. Privateers could lawfully fire on a civilian ship that resisted seizure.<sup>138</sup> When Congress passed a law to encourage privateering in 1813, it offered additional monetary rewards to those private citizens who would “burn, sink and destroy” British merchantmen.<sup>139</sup>

Pirates have a fearsome and vicious reputation for torturing or murdering captives. But these activities were not in themselves piracy, and there was no universal jurisdiction over murder at sea; and pirates who never mistreated prisoners were fully amenable to universal jurisdiction. Moreover, privateers often behaved as badly as pirates,<sup>140</sup> yet this did not throw off their non-universally cognizable status. Thus American authorities long complained of the unrestrained and “piratical” behavior of French privateers, but never stopped treating them as privateers. It was said of these robbers that they were “technically French

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<sup>133</sup> Woodeson, Lect. 4, vol. 2., 422 (“Piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from a prince or State.”), *cited with approval in Smith*, 18 U.S. at 163 n.h.; Dole, 7 F. Cas. at 846 (“Piracy [i]s robbery on the sea . . . as committed by *persons not holding a commission* from or at the time pertaining to any established state.”) (emphasis added).

<sup>134</sup> Manuel Schonhorn, *Postscript to DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES* 706 (Manuel Schonhorn, ed. 1999) (“It was the overwhelming numbers [of men] on a pirate ship that prevailed, and usually without violence.”); Marshall, *supra* note 119, at 968-69 (writing that privateers avoided violence when possible, because their principal goal was plunder, not fighting, and they wanted to take their prize in one piece whenever possible).

<sup>135</sup> Schonhorn, *supra* note 135, at 706 (noting that a typical pirate ship had at least four times as many sailors on it as did a merchant ship).

<sup>136</sup> KOSTAM, *supra* note 93, at 25 (“In most cases the victim realized that resistance would only lead to an unnecessary loss of life, and they surrendered.”).

<sup>137</sup> *Id.* at 25-27 (describing boarding and gunnery tactics used by privateers when victim vessel refused to surrender).

<sup>138</sup> See Marshall, *supra* note 119, at 962 (quoting letters of marque and reprisal issued by Congress authorizing commissioned ships to “by force of arms attack, subdue, and take” any British ship).

<sup>139</sup> These words read just as menacingly then as they do now. When the crew of the American privateer *Greyhound* was captured and brought ashore by Newfoundlanders during the Revolutionary War, the rebels quickly showed their commission to save them from charges of piracy. It caused almost as much trouble as if they had no commission: “When she came to the clause authorizing the privateer to ‘burn, sink or destroy’ enemy shipping the crowd almost got out of hand and threatened to lynch the prisoners.” NATHAN MILLER, *SEA OF GLORY* 264 (2000). Garret law did not prevail; the men were sent to Britain for the duration of the struggle. *Id.* at 265.

<sup>140</sup> The French Spoilations Cases, 22 Ct. Cl. at 430 (describing certain privateers being “as irresponsible” as pirates).

privateers, but actually so irresponsible to governing power as to be in form only superior to freebooters.”<sup>141</sup> The American ambassador to France, Pickering, complained that “were not the privateers acting under the protection of commissions from the French Government, they would be pronounced pirates.”<sup>142</sup>

Such excesses were recognized to be inevitable. For one, pirates and privateers drew their crews from the same rough and destitute labor pool.<sup>143</sup> Indeed, pirates were often laid-off privateers. Thus privateering encouraged piracy; as Daniel Defoe wrote in 1724, “Privateers in Time of War are a Nursery for Pirates against a Peace.”<sup>144</sup> Conversely, when nations needed extra muscle in wartime, they would pardon pirates who agreed to attack enemy shipping. Needless to say, men accustomed to attacking ships for a living often neglected regulations when they encountered a rich prize outside the scope of their commission.

One might think that the instructions to privateers contained in letters of marque would restrain the privateers and result in their conduct being less vicious than that of pirates. But most of these rules dealt with the nationality of the commerce that could be robbed; thus it might limit the number of victims, but does not otherwise change the nature of the offense. Even then, a privateer who exceeded his commission and attacked neutral shipping would pay only in money damages, not with his life.<sup>145</sup> Certainly establishing a regularized procedure of looting would increase the convenience and safety of both victim and perpetrator; for example, privateers would not be tempted to kill prisoners because they would not have to be afraid of leaving witnesses, since they were doing nothing illegal. In this way, if the hope was that licensing would curb the abuses incident to piracy, it was akin to arguments that legalization of drugs or prostitution combined with licensing system would reign in the violence that often accompanies – but does not define – those crimes. But the act that defines piracy – forcible taking on the seas – remains unmitigated by anything in privateers’ instructions.

Some courts and commentators also spoke of “*animo furandi*,” or a larcenous intent, as an essential ingredient of the piracy offense. Some modern scholars also see the quest for private gain, rather than a political purpose, as an essential element of piracy.<sup>146</sup> The *animo furandi* principle might suggest that piracy was considered particularly bad because of the base or selfish motives involved. The attention to *mens rea* could be useful in determining whether those

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<sup>141</sup> Hooper, 22 Ct. Cl. at 434 (describing the conduct of privateers in the Gulf of Mexico at the turn of the eighteenth century).

<sup>142</sup> Letter to Pinckney (Jan. 1797), *quoted in* Hooper, 22 Ct. Cl. at 439.

<sup>143</sup> See RICHARD ZACKS, *PIRATE HUNTER: THE TRUE STORY OF CAPTAIN KIDD* 12 (2002).

<sup>144</sup> DANIEL DEFOE, *A GENERAL HISTORY OF THE PYRATES* 4 (Manuel Schonhorn, ed. 1999).

<sup>145</sup> See Marshall, *supra* note 119, at 976. Of course if such a privateer were caught by one of the neutral nations whose shipping he was attacking, his writ of marque might not save him from the noose.

<sup>146</sup> Morris, *supra* note 4, at 339 (“From its inception, the law of piracy distinguished “pirates,” who operated privately and for private gain, from “privateers” or others commissioned or authorized by states.”); Randall, *supra* note 9, at 797-98 & nn. 70-75 (discussing criticisms of the private-ends requirement).

who seize goods at sea while participating in “a struggle for public power,” such as a rebellion or war<sup>147</sup> are in fact pirates. However, it does not account for the distinction between pirates and privateers in the general run of cases. Both privateers and pirates acted principally for the sake of private gain, and indeed, the name of the former profession attests to their self-interested motives. The difference was that privateers sought their fortunes in a way consistent with the interests of a particular state, and in return received that state’s protection. Privateers could be thought of as government contractors, and as such their motives are not inherently any more political than those of caterers hired to supply school cafeterias.

Privateering was widely regarded as a way to get rich quick while avoiding the hangman’s noose. Even the much-celebrated and occasionally patriotic privateers of the American Revolution were inspired by the prospect of particularly easy spoils.<sup>148</sup> Indeed, sailors signed on to privateers as opposed to naval vessels because the former offered them a much more significant share in captured prizes. To be sure, national goals helped inspire and motivate some privateers, and many more used such rhetoric to help attract sailors.<sup>149</sup> But the same was true of pirates. For example, many pirates who preyed primarily on British ships were Irishmen hostile to Britain, or English Catholics who in their gallows speeches proclaimed, not implausibly, a continued loyalty to James I as their motivation.<sup>150</sup> Motive can be thought to have some substantive moral value in assessing the culpability of an offense. But contrary to the claims of some modern writers,<sup>151</sup> it was not the motive or intent that distinguished privateers from pirates – it was the mere fact of sovereign authorization.

### **C) Form, substance, and heinousness.**

Formalities sometimes matter. Legal authorization can make a significant difference in the morality and social acceptability of conduct. Thus marriage can be described as fornication with a license, redistributive taxation and eminent domain as government-authorized theft and trespass, and war as state-sanctioned murder. In these and many other contexts, the existence of state authorization or licensing transforms conduct from reprehensible to acceptable, even praiseworthy or honorable. This suggests that the differences between privateering and piracy, while paper-thin, may be quite meaningful; and that broad tolerance of the former does not necessarily imply that the latter was not seen as heinous.

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<sup>147</sup> RUBIN, PIRACY, *supra* note 30, at 82.

<sup>148</sup> JOHN F. LEHMAN, ON SEAS OF GLORY: HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY 42-43 (2001); Marshall, *supra* note 119, at 964-65 (describing how Revolutionary War privateers were businessmen, not warriors, and were inspired principally by the prospect of large profits).

<sup>149</sup> One sea captain with a brand-new privateer’s commission tried to recruit rough sailors in Manhattan taverns by promising “a unique *legal* opportunity to steal from pirates and from the hated French.” ZACKS, *supra* note 144, at 11.

<sup>150</sup> KONSTAM, *supra* note 117.

<sup>151</sup> *See* Morris, *supra* note 3.

The point of comparing piracy to privateering is simply to show that the former was not characterized by the kind of *extraordinary* heinousness that serves as the common denominator for the new universal jurisdiction (“NUJ”). This Article does not contend, however, that the acceptance of privateering in earlier eras proves that piracy was regarded as “okay.” Indeed, by definition it was considered reprehensible, as it was illegal, and punished by death.<sup>152</sup> But the piracy analogy says that piracy provides a precedent for universal jurisdiction over offenses based on their *extreme* heinousness. Consider the offenses that, by analogy to piracy, have come within the ambit of the NUJ: genocide, torture, rape, and apartheid. These are indeed among the most despicable acts conceivable; outrageous heinousness is their common denominator. None of these offenses could be redeemed by state authorization or licensing; the acts are innately and always evil. Indeed, some of them can only be committed by nations, yet this does not mitigate their heinousness. Piracy was obviously regarded as belonging to a lesser, ordinary class of evils; thus it is hard to see how its run-of-the-mill heinousness could have served as a basis for selecting it as the only universal offense.

#### **D) Historical recognition of the equivalence.**

Despite the fact that pirates and privateers engaged in the exact same kind of conduct, the legal distinction between the two was solid – but narrow. Jurists found it convenient to define piracy through its close relation to privateering. The jurists of the maritime nations agreed that piracy was nothing more than “privateering without a commission.”<sup>153</sup> Conversely, privateering was nothing more than piracy with a commission. Still, one might argue that drawing too close an equivalence between pirates and privateers risks ignoring moral distinctions much prized by the society that existed in earlier centuries. What to the modern eye might seem a paper-thin difference could have once had great moral significance; perhaps our predecessors saw the failure to secure a writ of marque as an egregiously heinous omission, in the same sense that complicity with genocide would today be seen as heinous. This would be a serious objection to the argument of this Article. However, to their credit, contemporary observers

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<sup>152</sup> Though the death penalty for piracy may say more about the difficulty of apprehending pirates than the moral depravity of the crime. Deterrence can be increased either through greater law enforcement *ex ante*, or heavier punishments *ex post*. As enforcement becomes more difficult or expensive, societies substitute from more policing to heavier punishment. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 244 (5th ed. 1998). The gallows for horse-thievery in the American West is a classic example. *Id.* at 249. Piracy may be another; the seas, like the Old West, are not densely populated, making criminal detection difficult.

<sup>153</sup> *The Ambrose Light*, 25 F. 408, 417 (S.D.N.Y. 1885); *Davison v. Seal-Skins*, 7 F. Cas. 192, 196 (D. Conn. 1835) (No. 3661) (recounting how U.S. Navy released “a nest of pirates” from custody upon learning that they had in fact been acting under commission of Argentinian officials); Naval Regulations of 1876, c. 20 s. 18 (cited in *The Ambrose Light*, 25 F. at 418) (requiring naval vessels to “consider as pirates” the company of any vessel acting as a “privateer without having a proper commission to so act.”); *King James II Irish Pirates Case* cited by *The Ambrose Light*, 25 F. at 422 (“Piracy was nothing but seizing ships and goods by no commission.”).

recognized the substantive equivalence between the actions of pirates and those of privateers.<sup>154</sup>

Courts and legal commentators did not resort to metaphysics, natural law, or legal fiction or rhetoric to obscure the thinness of the pirate/privateer distinction; indeed, they were surprisingly frank about the fact<sup>155</sup> that the distinction did not turn on the relative violence of the pirates' and privateers conduct. The substantive equivalence between piracy and privateering received its pithiest treatment in the seventeenth century poem *Of Honest Theft*.<sup>156</sup> The narrator had been accused by a friend of lifting all his ideas from classical sources. The critic however is a privateer, who gained considerable wealth by plundering Spanish shipping: "fellow Thiefe, let's shake together hands,/ Sith both our wares are filcht from forren lands." The poem concludes with this sharp couplet that links privateering with robbery: "You'le spoile the Spaniards, by your writ of Mart<sup>157</sup>:/ And I the Romanes rob, by wit, and arte." The reader is left to guess whose depredations are the "honest theft" of the title.

This awareness of the consanguinity between piracy and privateering should not be surprising given the origins of privateering. Piracy only acquired its present meaning as an offense against the law of nations when states began conferring their protection on particular sea robbers – in exchange for those robbers not sailing against the protecting nation and sharing with it their spoils. Then piracy, in the criminal sense, came to refer to those sea robbers who remained outside the licensing system. As Professor Rubin explains in his definitive study of piracy law, "the term 'piracy' was historically used to distinguish those who fought as privateers . . . and those who had no valid commissions or sailed under the commissions of unrecognized powers."<sup>158</sup>

Many contemporary observers recognized that privateers aided their nation's war efforts and so celebrated them as patriots. Some privateers, like John Paul Jones and Francis Drake, remain to this day heroes of their nations and major figures in naval warfare. Licensing robbers was regarded by politicians as an acceptable, though perhaps regrettable, price to pay for naval power. As John Adams put it, privateering was a "short, easy, and infallible method" for hurting one's enemy. No nation could afford the expense of a large standing fleet, while there were vast merchant fleets that could easily be enticed into privateering.<sup>159</sup>

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<sup>154</sup> See Marshall, *supra* note 119, at 971 n.92 (describing the opinion, "commonly expressed" in the eighteenth century, that "privateering was little better than piracy," and noting that on the whole Revolutionary War privateers were better than most).

<sup>155</sup> Alexander James, 1971 S.L.T. at 204 (observing that "privateering without a commission or letters of marque" constitutes piracy); *United States v. Jones*, 26 F. Cas. 653, 656 n.2 (D. Pa. 1813) (No. 15,494) ("The words of this learned writer are, 'but whether one be a pirate or not, depends upon the fact, whether he has or not, a commission to cruise.'").

<sup>156</sup> JOHN HARRINGTON, *Of Honest Theft. To my good friend Master Samuel Daniel, reprinted in THE PENGUIN BOOK OF RENAISSANCE VERSE, 1509-1659*, 709 (H.R. Woodhuysen, ed.1993) (1618)

<sup>157</sup> This is an archaic form for a "writ of marque and reprisal." The other unusual spellings also come from the original text.

<sup>158</sup> RUBIN, *PIRACY*, *supra* note 17, at 294.

<sup>159</sup> Fitfield, 47 Pa. at 169 (describing the piracy-privateering distinction and praising privateering as "the substitute for enormous naval establishments.").

The ability to use these private vessels to disrupt and destroy enemy commerce was crucial to the young nation's victory at sea. And of course the private vessels had to be encouraged with the prospect of private gain taken from other states' private vessels. Privateers helped secure victories for the United States in both the War of Independence and the War of 1812.<sup>160</sup> Indeed, the new nation embraced privateering as few countries ever had; in many ports, it became something of a cottage industry, with every man with a ship and a gun setting out to prey on weaker British ships.<sup>161</sup>

The close relation between the two types of sea-robbery was also reflected in the occasional popular movements to end privateering. The fact that nations authorized certain robberies at sea greatly offended the sensibilities of some contemporary observers. If, as these citizens thought, the privateer was morally no better than the pirate, then the letter of marque amounted to governmental involvement in a rather dirty business. These objections to privateering highlight the broad contemporary understanding that it was in essence if not legal status a form of piracy.

In Colonial America, there was broad opposition to privateering "on moral and humanitarian grounds."<sup>162</sup> It became popular during the war because of its usefulness, and again fell out of favor with more enlightened people. Consider the Virginia Supreme Court's post-Revolutionary eighteenth century lament at what it saw as the government's endorsement of robbery: "Peiracy is now generally denominated hostility to mankind . . . but is privateering, which many of the present enlightened age seem to think justifiable, any thing but piracy licensed imperialy, and can such a license consecrate it?"<sup>163</sup> But the court did not challenge the legality of privateering; only its morality. By the mid-nineteenth century, one of the largest circulation periodicals of the day, *Harper's New Monthly Magazine*, had launched a campaign against the licensing of privateers.<sup>164</sup> The *Harper's* series stressed that both pirates and privateers took that which was not theirs, and were thus *pari delicto*.<sup>165</sup>

Privateering was tolerated in international law, despite broad awareness that it entailed a morally dubious compromise that helped sustain a detested industry, because the maritime powers depended on it as a tool of naval policy.<sup>166</sup> Yet if piracy were regarded as the most "heinous" behavior in the new universal sense, such a compromise between morality and expedience could not have been arrived at, or it would not have been arrived at by so many nations, and persisted

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<sup>160</sup> See LEHMAN, *supra* note 149, 44-46; KONSTAM, *supra* note 117, at 3 (describing privateering as "a vital part of [America's] maritime strategy" in these wars); MILLER, *supra* note 140, at 281-82.

<sup>161</sup> MILLER, *supra* note 140, at 255. During the Revolutionary War, the Continental Congress issued 1,697 letters of marque, and individual states issued hundreds more. These vessels seized roughly 2,208 British ships. *Id.* at 260.

<sup>162</sup> See Marshall, *supra* note 119, at 967.

<sup>163</sup> Page v. Pendleton, 1793 Va. LEXIS 53, \*2 n.b ; Wythe 211 (Va. 1793) (note in 1795 edition of text).

<sup>164</sup> pp.596 ff. (July 1864).

<sup>165</sup> *Id.* at 607.

<sup>166</sup> KONSTAM, *supra* note 117, at 3.

over such a long time. Other compromises between need and morality, like slavery, proved far less durable. The United Kingdom had abandoned slavery in the early nineteenth century, as did half of the United States. The official protection of such vile conduct could no longer be borne. Yet no nation repudiated privateering until the Treaty of Paris in 1856, and even then they did so in an effort to disarm their enemy's privateers. And many maritime powers, including the United States and Spain, never joined that treaty. Though Washington stopped issuing letters of marque after the Civil War, it retains the power to do so.<sup>167</sup>

### **E) Privateering as a defense to piracy.**

The close relation between piracy and privateering becomes particularly apparent in the many famous piracy prosecutions that turned on the validity or existence of a letter of marque: privateering was one of the most commonly heard defenses to a charge of piracy.<sup>168</sup> In these cases, no one debates the facts of the defendants' depredations. Rather, all attention focuses on the validity of a commission, which makes the difference between freedom and death for the defendant. Because the legal distinction between the two was thin, hard cases often stretched it to the breaking point. The validity of commissions became particularly murky during rebellions and secessions, when the break-away government began issuing letters of marque.<sup>169</sup> Are those sailing with such documents universally cognizable pirates or legal privateers? At the beginning of the Revolutionary War, the British deemed colonial privateers mere pirates. The Civil War forced American courts to decide the same issue with respect to Confederate privateers, who were also found to be pirates despite their letters of marque. British courts reached different conclusions on the same issue. And throughout the nineteenth century, American courts had to wrestle on the legitimacy of writs of marque issued by Latin American revolutionaries, tin-pot despots, governors, and mid-level military officers.<sup>170</sup> In these cases the pirate-

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<sup>167</sup> It is possible that the long disuse of letters of marque has led to their condemnation as a matter of customary international law. *See* LEHMAN, *supra* note 149, at 68. Even if generally true, the implications of such a norm for the United States would be unclear because "it has been thought that the constitutional provision empowering Congress to issue letters of marque deprives it of the power to join in a permanent treaty abolishing privateering." BLACK'S LAW DICTIONARY 1196 (6th ed. 1990) ("privateering"). And if the legislature's commissioning power cannot be negated despite the nation's consent as expressed in a treaty, it seems doubtful that something as diffuse and amorphous as a customary international law prohibition on privateering could strip Congress of that power.

<sup>168</sup> Many defendants also plead duress claiming the other pirates forced them to join the gang on pain of marooning or death. *See generally* DEFOE, *supra* note 145.

<sup>169</sup> Fitfield, 47 Pa. at 169 ("If the Jeff Davis was not a privateer she was a pirate, and if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern Confederacy.") (emphasis in original).

<sup>170</sup> *The Ambrose Light*, 25 F. at 408 (involving seizure of privateer vessel commissioned by a member of a Caratagenan junta, who also happened to own the vessel); *Novion v. Hallett*, 16 Johns. 327, 335 (Ct. Err. N.Y. 1819) ("If the Cathagena schooner [which purported to sail as a writ of marque], in the present case, had no commission as a letter of marque, then, according to the charge of the judge, the taking of the plaintiff's brig was an act of piracy.").

privateer distinction could turn on a matter as mundane as whether a particular official had assumed his duties as of the date of the letter.

#### **F) Summary.**

The side-by-side coexistence of legal privateering and universally punishable piracy within the same legal order undermines the theory that sea-robbery was regarded as a wildly depraved practice, entirely outside the bounds of civilized conduct. Were piracy seen as singularly heinous offense, sovereign authorization might mitigate the offense but not negate it. A comparison will highlight this point. Sovereign authorization is no defense to charges of genocide or war crimes precisely because they are seen as heinous in the way that piracy was not. To be sure, piracy was regarded as morally wrong. But the heinousness-based view of universal jurisdiction that roots itself in piracy law does not posit that universal jurisdiction should apply to *all* conduct widely recognized as amoral and illegal, but only to those few crimes that most offend the contemporary conscience. Natural law concepts inform the heinousness principle, the NUJ, and indeed, much of modern human rights law. The heinousness of the NUJ is an inherent heinousness, an evil inherent in certain actions. Yet sea robbery was not historically regarded wrong as a matter of natural law, such that it could not be made proper by a sovereign's say-so; this much is clear from issuance by every maritime nation of licenses to engage in sea-robbery.

#### **IV. INVALIDITY OF THE PIRACY ANALOGY: HEINOUS ROBBERY?**

Long before the international law of piracy emerged, civilized nations all criminalized certain conduct, like arson and murder; and all agreed that certain crimes were worse than others. Yet the law of nations only made piracy a universal crime. If heinousness explains universal jurisdiction, then piracy must have been regarded as a *singularly* heinous crime. Proponents of the heinousness view have done nothing to document the proposition that piracy was historically regarded as among the most heinous offenses. The piracy analogy often resorts to circular reasoning: because only piracy was treated as a universal offense, it must have been considered the most heinous. This Part attempts to draw on contemporary sources to reconstruct where piracy fell in the ranking of offenses. This Part finds that piracy was considered not a substantively graver offense than many other crimes that did *not* receive universal treatment. While piracy was certainly a serious crime, it was not thought to be the worst, and thus heinousness cannot explain why it was subject to universal jurisdiction.

#### **A) No more heinous than robbery.**

Piracy was simply a subspecies of robbery, and it was defined by reference to robbery on land.<sup>171</sup> Thus as an approximation, it can be inferred that it was considered as reprehensible as robbery in general. Property crimes were certainly regarded by all nations as serious offenses, especially when they resulted in a substantial or ruinous taking, as would often be the case with piracy. But property crimes have also long been considered categorically less severe than crimes against the person, such as wounding, rape, and murder.

To be sure, piracy was a troublesome variety of robbery. Its occurrence on the high seas was considered an aggravating circumstance because it made the robbery harder to police – but this makes it comparable to night burglary and horse thievery. Furthermore, many offenses could and did occur regularly on the high seas, and yet none were subject to universal jurisdiction. For example, assault or murder on the high seas unaccompanied by robbery would not be treated as a piracy by the law of nations<sup>172</sup> (though it could be treated as such by municipal law); the unique jurisdictional rules governing piracy would not come into play. Thus the location was not regarded as making an offense more depraved or heinous. Nor can one infer heinousness from the particularly harsh penalty a piracy conviction carried; the penalty can largely be explained not by the magnitude of the offense but by the difficulty of bringing pirates to justice.

Courts did not attempt to rank piracy in a broader hierarchy of offenses; as the penalty was established, such moral investigations would serve little purpose. Yet in a few cases the United States Supreme Court had occasion to consider where piracy fell within the universe of serious offenses. In *United States v. Palmer*<sup>173</sup>, the same Court that made favorable comments about universal jurisdiction over piracy also implied that the crime was no more culpable than ordinary robbery. The case turned on the construction of the law passed by Congress in 1790 criminalizing piracy, the first legislation pursuant to the Define and Punish clause. The act called for a mandatory death penalty upon conviction of piracy, defined as “murder or robbery, or any other offence, which if committed within the body of a county, would, by the laws of the United States, be punishable with death.”

The question faced by the court was whether the phrase “which if committed” modified both the particular and general antecedents – murder, robbery and “other offence[s]”, or only the last, undefined category. The latter reading would mean the statute condemned high-seas murder, robbery *and* in addition any offense that would be capital on land; while under the former reading

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<sup>171</sup> See Smith, 18 U.S. at 163 n.h (“*Piratae, latrines, praedones*, are used to denote the same class of offenders; the first term being generally applied to robbers or plunderers on the sea, and the others to robbers or plunderers on land. The terms are, indeed, convertible in many instances.”).

<sup>172</sup> See *id.* (citing with approval treatise writer who states that an assault at sea “without taking or pillaging something away does not constitute the crime” of piracy as defined by the law of nations).

<sup>173</sup> 16 U.S. (3 Wheat.) 610 (1818). The case is most often remembered for Chief Justice Marshall’s dictum that the Define and Punish Clause allows congress to give federal courts universal jurisdiction over pirates. *Id.* at 630 (“There 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.”).

the statute would only punish that subset of maritime murders and robberies that would be capital offenses on land. As it happens, federal law did not prescribe death for *any* robbery committed on land, no matter how grand or greedy. The defendants stood accused only of stealing goods from a ship; thus under the broader interpretation urged by the government, they would hang, and on the narrower one, they would not even have committed an offense.<sup>174</sup>

This created a moral conundrum for the court. Chief Justice Marshall admitted that the defendants' position had great strength,<sup>175</sup> as it would be odd to assume, in the face of an ambiguous statute, that congress "intend[ed] to "make that a capital offence on the high seas, which is not a capital offence on land."<sup>176</sup> Yet the defendants' semantically plausible reading of the statute would make piracy as defined by the law of nations entirely unpunished by the statute, and thus rob the law of what was generally understood as its principal objective. Congress, Marshall reasoned, clearly intended in this act to legislate against such robberies, and if it happened to artlessly describe the object of its legislation, the court need not accept this error at face value. The defendant's reading would embarrass the young country's commercial ambitions by giving free reign to pirates.

Justice Johnson dissented, arguing that the government's proposed interpretation created an unfair "inconsistency"<sup>177</sup> between the punishment of robbery on land and sea: "it is literally true, that under [the majority's interpretation] a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement."<sup>178</sup> For Justice Johnson, this inconsistency provided the key to decoding the ambiguous statute: Congress cannot have intended to create such a sharp horizontal inequity in its treatment of robbers.

Justice Johnson clearly regarded piracy as no more reprehensible than robbery, and less so than murder. More importantly, the Chief Justice's opinion for the court also reflects this ordering. The majority opinion concedes that its interpretation would lead to unequal treatment of equal crimes; it does not argue, as it might have, that the disparity in punishment is based on some substantive distinction between land robbery and sea robbery. The majority and minority simply disagree whether considerations of national policy outweigh those of individual justice; Marshall accepted the inconsistency that was most compatible with strong federal power.<sup>179</sup> Indeed, the act's language only becomes ambiguous,

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<sup>174</sup> *Id.* at 636-37 (Johnson, J., dissenting in part) ("Singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or the question of whether a relative, which may take in three antecedents just as well as one, shall be confined to one alone.").

<sup>175</sup> *Id.* at 628 ("[the defendants'] argument is entitled to great respect on every account.").

<sup>176</sup> *Id.* at 627.

<sup>177</sup> *Id.* at 638.

<sup>178</sup> *Id.* at 639.

<sup>179</sup> Chief Justice Marshall's resolution seems preferable, for horizontal inequity would exist whichever way the case came out, since under Justice Johnson's reading, one who stole thousands on land might be imprisoned, while one who stole entire ships at sea would not even violate the

and in need of interpretation, for those who believe that robbery at sea is no more heinous than robbery on the land. Without this background assumption, there is no inconsistency, and no need for the elaborate and extended consideration of statutory language and legislative intent found in the court's opinion.

## **B) Earlier eras' moral hierarchies.**

### *1. Pre-modern recognition of modern human rights offenses.*

The laws and mores of the nineteenth and eighteenth centuries severely condemned the specific conduct for which courts seek to assert universal jurisdiction today. Since the Enlightenment, these acts have been regarded as extraordinarily heinous, in the sense that term is used in the NUJ. Yet the law of nations never made these crimes universally cognizable. For example, slaughtering civilians in wartime has long been considered a barbarous practice.<sup>180</sup> (It may well be that the era of total war has hardened modern sensibilities to the large-scale slaughter of innocents in wartime.) The eighteenth century law of nations also denounced several offenses only recently rediscovered by "human rights" law: population transfer,<sup>181</sup> state-sponsored rape,<sup>182</sup> and the use of toxins and other weapons of mass destruction.<sup>183</sup>

Yet jurisdiction over such offenses was strictly limited to the nation of the victim or the offenders.<sup>184</sup> The universal condemnation of war crimes, genocide and the like has not resulted from a recent refinement in international mores; the condemnation goes back centuries.<sup>185</sup> And while the Second World War gave the

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law. Given the unavoidability of a land-sea inequality, it makes sense to opt for the interpretation that gives some effect to the statute, and some protection to innocent merchant shipping.

<sup>180</sup> See Vattel, LAW OF NATIONS bk. II, § 150 (1833) (opining that since noncombatants "make no resistance. . . consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least degree civilized, acquiesces in it.").

<sup>181</sup> *Id.* at bk. II, § 90 ("It is not allowable to drive a nation out of a country which it inhabits. . . . no nation has a right to expel another people from the country they inhabit, in order to settle in it herself.").

<sup>182</sup> *Id.* at bk. II, § 147 ("If, sometimes, the furious and ungovernable soldier carries his brutality so far as to violate female chastity . . . the officers lament those excesses; they exert their utmost efforts to put a stop to them; and a prudent and humane general even punishes them whenever he can.").

<sup>183</sup> *Id.* at bk. II, § 157 (denouncing the poisoning of water supplies in time of war as a violation of international law).

<sup>184</sup> See *id.* at bk. II, § 147; SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 171 (Michael Sivlerthorne, trans., Cambridge 1991) (1673) ("The extent of licence in war is such that, however far one may have gone *beyond the bounds of humanity* in slaughter or in wasting and plundering property, the opinion of nations does not hold one in infamy.") (emphasis added). Pufendorf recognized both the barbarity of war-time atrocities, and yet acknowledged that they were not judicially cognizable. One might argue that the mere fact that nations allowed "licence" in wartime, and did not attempt to exercise universal jurisdiction over such acts, demonstrates that such conduct was not regarded as outrageously heinous, or at least not as heinous as it is regarded today.

<sup>185</sup> See also ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 154 (1997) [hereinafter RUBIN, ETHICS AND AUTHORITY] ("It is very hard to see any significant advance in moral enlightenment since that time [of Vattel].").

offenses of genocide and war crimes a greater salience in the conscience of the world, one must remember that part of what made the German atrocities so shocking was that the heinousness of such actions appeared to be taken for granted well before the twentieth century. The fact that the NUJ offenses have for many centuries shocked the conscience of humanity, almost certainly more so than piracy, and yet were not subject to universal jurisdiction alongside piracy, shows that heinousness had nothing to do with the rationale for piracy's unique jurisdictional status.

2. *Heinousness militates against universal jurisdiction.*

*United States v. Furlong*,<sup>186</sup> the first American case to use the term “universal jurisdiction,”<sup>187</sup> states that extreme heinousness *precludes* universal jurisdiction, and that piracy was universally cognizable because it did not rank among the worst offenses. *Furlong* directly contradicts the heinousness principle that underpins the piracy analogy. It shows that heinousness was not regarded by America's leading jurists as the rationale for universal jurisdiction; it also shows that the heinousness theory would not be consistent with universal jurisdiction over piracy, since piracy was not considered one of the most heinous offenses. This remarkable section of the *Furlong* opinion has been overlooked in subsequent discussions of universal jurisdiction,<sup>188</sup> yet it merits close examination as a rare discussion of the relative severity of piracy in relation to other offenses.

Justice William Johnson used the *Furlong* case to consider, in *dicta*, whether Congress could use the Piracy Act to establish universal jurisdiction over crimes like murder that clearly did not constitute piracy under the law of nations. He ultimately concluded that the Define and Punish Clause made international law the outer limit of Congressional authority; Congress could not seize jurisdiction over conduct simply by dubbing it “piracy” if that conduct clearly did not involve “piracy” as a term of art in the law of nations. If Congress could call murder “piracy,” then it could assert universal jurisdiction over murders committed anywhere. Murder fell far enough outside any colorable definition of piracy that Congress could not, through fiat, assimilate the crimes without violating the Define and Punish clause. Here the Court comes to the point about heinousness.

There exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered an offense within the criminal jurisdiction of all nations. . . . Not so with murders. It is an offence too abhorrent to the feelings of man, to have made it necessary that it

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<sup>186</sup> 18 U.S. (5 Wheat.) 184 (1820).

<sup>187</sup> *Id.* at 197. A recent comprehensive report on universal jurisdiction mistakenly states that the term was coined in a 1945 law review article. *Final Report, INT'L L. ASS'N*, *supra* note 3. This error highlights the general unfamiliarity scholars of universal jurisdiction have with *Furlong*, one of cases that most strongly challenges the central assumptions of the new universal jurisdiction.

<sup>188</sup> Rubin takes note of the case, but his brief discussion of it is useless because he mistakenly thinks the Court found piracy to be a more horrible crime than murder. RUBIN, PIRACY, *supra* note 30, at 147. Rubin wonders how the Court arrived at such a counterintuitive ranking. It did not.

also should have been brought within this universal jurisdiction. And hence, punishing it when committed in the jurisdiction . . . of another nation, has not been acknowledged as a right [of other nations].<sup>189</sup>

The court did not expand further on this point, but its reasoning can be reconstructed. Murder inflicts a uniquely grave injury on the victim, depriving him of his life, while piracy, as the court points out, deprives him only of property. The heinousness of the crime of murder will more likely raise a cry for vengeance in the victim's home state – hence the reference to “the feelings of man” – which will have a great desire to punish the perpetrator. It would be both unnecessary and officious for a third-party nation to intrude its own judicial processes.<sup>190</sup> Judeo-Christian tradition has long held that avenging murder is not only the right of the victim's political unit, but its duty; universal jurisdiction over murder would usurp this deeply felt responsibility and thus antagonize the nation with traditional jurisdiction.

Because robbery shocks the conscience less than murder,<sup>191</sup> it is less certain that any nation would strive to try the perpetrator of piracy. The injury caused by piracy is essentially monetary, and as a result it can be spread out among ship-owners, insurers, traders and consumers. The harm borne by any one nation would not be as focused or acute as with murder. Thus making the offense universally cognizable could conceivably encourage the prosecution of offenses that would otherwise go unpunished, whereas this would not be so with the more heinous offenses, like murder.

It bears noting that the Supreme Court decided *Furlong* just a few days after handing down its decision in *United States v. Smith*. The landmark *Filartiga* opinion relied on *Smith* for its theory that universal jurisdiction over particular acts emerges from a universal recognition of their heinousness.<sup>192</sup> Yet the unanimous opinion in *Furlong* directly contradicts the heinousness theory by finding that murder could not be a universally cognizable offense precisely because of the strong “international consensus”<sup>193</sup> condemning homicide. Thus

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<sup>189</sup> *Id.* at 196-97.

<sup>190</sup> Both the concerns about redundant effort and intermeddling can be seen in the opinion. The Court mentions the former consideration explicitly, and adverts to the latter when it warns that extending the universal treatment of piracy to murder would result in the “most offensive interference with the governments of other nations.” *Id.* at 198.

<sup>191</sup> Justice Johnson did not cite any authority for the view that robbery is less heinous than murder, referring only to the “feelings of man.” The position was as obvious in 1820 as today. Similarly, in his *Palmer* dissent, he cites no authority to show that robbery on land and sea ought to be equally culpable, relying instead on “natural reason.” 16 U.S. at 639. Justice Johnson was a positivist judge not inclined to drawing law from abstract moral principles, see RUBIN, PIRACY, *supra* note 30, at 147; in light of his judicial philosophy, his comments in both *Furlong* and *Palmer* essentially take judicial notice of general moral sentiments.

<sup>192</sup> *Filartiga*, 630 F.2d at 883. Judge Kaufman also relied on *Smith* for the controversial holding that the Define and Punish Clause only incorporates international law into American law to the extent that Congress chooses to do so. *Id.* at 886-87. The Court issued its opinion in *Smith* on Feb. 25, 1820, and *Furlong*, which refers numerous times to the recent decision in *Smith*, on March 1.

<sup>193</sup> *Filartiga*, 630 F.2d at 883.

*Furlong* not only provides strong support for the view that the ranking of crimes in terms of “heinousness” did not differ in any relevant respect in the 19<sup>th</sup> century from how we would rank them today, it strongly refutes the notion that the recognition of “universal” offenses in the law of nations turns on the heinousness of the offense or the universal repugnance it generates.

#### IV. EVIDENCE FOR THE PIRACY ANALOGY.

There is little affirmative evidence that eighteenth and nineteenth century jurists thought that piracy jurisdiction was premised on heinousness, or that piracy jurisdiction could provide principles applicable to other offenses. Proponents of the piracy analogy point to two types of historical evidence to support the argument that heinousness is the constant rationale of universal jurisdiction, then as now. Firstly, and most promisingly, many scholars invoke the writings of the extraordinarily influential Swiss philosopher Emmerich de Vattel.<sup>194</sup> These scholars, starting with Blum and Steinhardt, point to a passage from Vattel’s *Law of Nations* that on its face strongly endorses, normatively and descriptively, the heinousness view of universal jurisdiction.<sup>195</sup> Yet the much-cited passage – not to mention the less-cited sentences that immediately follow it – on closer reading tends to show exactly the opposite. Vattel did not think even the most depraved offenses were or should be universally cognizable. The second class of evidence consists of the many references to piracy as a “heinous” offense. Subpart B argues that such condemnations were rhetorical. Judges apply such epithets to many offenses not even plausibly subject to universal jurisdiction. The use of such words says nothing about whether piracy was seen, as the piracy analogy would have it, as a *particularly* heinous crime.

##### A) Vattel

The primary historical support adduced for the piracy analogy is a passage by Vattel.<sup>196</sup> This single source could be very useful in reconstructing the Founding generation’s views on universal jurisdiction, as his treatise was widely read and admired by the leading figures in American politics and jurisprudence,

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<sup>194</sup> Stephens, *supra* note 111, at 41 n.173; Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT’L & COMP. L. 1, 36 n.40 (1994).

<sup>195</sup> VATTEL, *supra* note 181, at bk. I, §. 233.

<sup>196</sup> [A]lthough the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.

*Id.*

before and after the founding of the Republic.<sup>197</sup> Courts and scholars continue to turn to Vattel for a better understanding of the Founders' conception of international relations and international law.<sup>198</sup>

Supporters of universal jurisdiction argue that the Vattel passage proves that "pirates were merely a type. . . of universal offender," and that the doctrine always encompassed any "heinous" offense.<sup>199</sup> At first glance, the Vattel's language seems to support the view that the First Congress understood that piracy was universally cognizable because of its heinousness, and other heinous crimes would have a similar jurisdictional status. But when examined more closely, this paragraph shows that Vattel opposed universal jurisdiction outside the piracy context, and perhaps even for pirates.

Firstly, Vattel was not a treatise-writer in the contemporary sense; he did not confine himself to summarizing or elucidating the state of the law. Rather, he was a political philosopher, influenced by Leibniz and Hobbes, and as often normative and prescriptive as descriptive.<sup>200</sup> Vattel distinguishes pirates from other heinous offenders by noting that the former "are" universally punished, the latter "ought" to be. The passage in question does not purport to describe customary practice,<sup>201</sup> but rather his views of sound policy.

Secondly, *The Law of Nations* mostly speaks to the exercise of executive, not judicial authority.<sup>202</sup> Courts in the early years of the Republic understood this; they carefully distinguished his judicially-oriented pronouncements from his political ones.<sup>203</sup> The passage relied on by Blum and Steinhardt falls in the latter

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<sup>197</sup> Students of Vattel included Benjamin Franklin, Thomas Jefferson, James Madison, and Alexander Hamilton, who frequently cited him in his cabinet opinions and public arguments. DANIEL G. LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC* 11, 65 (1985). Vattel's book was the most cited authority on international law from its publication in 1758 through the first several decades of the nineteenth century. See RUBIN, *ETHICS AND AUTHORITY*, *supra* note 186, 40 & n.25. Chief Justice Marshall frequently turned to Vattel for guidance. See, e.g., *Brown v. United States*, 12 U.S. 110, 124 (1814); *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 143 (1812) (arguing that just as foreign ambassadors have immunity, foreign troops taking asylum in another country are similarly exempt from its jurisdiction). Still, Justice Story cautioned that even Vattel cannot be read as an infallible guide to international law. *Brown*, 12 U.S. at 140-41 (dissenting) ("Of the character of Vattel as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded; though a learned civilian, sir James Mac Intosh, informs us that he has fallen into great mistakes in important 'practical discussions of public law.'").

<sup>198</sup> *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 n.12 (1978) (noting that Vattel was the most cited authority on international law in the first fifty years of the republic, and relying on him to determine meaning of terms "treaty" and "compact" as used in the Constitution).

<sup>199</sup> Blum & Steinhardt, *supra* note 9, at 60 & n.36.

<sup>200</sup> See LANG, *supra* note 198, at 10, 15-16 (discussing Vattel as a philosopher, and observing that "Vattel's goal was to justify [the European nation-state system and the balance of power] not simply in terms of necessity of expedience, but in terms of right.").

<sup>201</sup> The paragraph in question does not cite to a single case of universal jurisdiction over non-pirates, or refer to any actual state practice along those lines.

<sup>202</sup> Vattel deals with criminal jurisdiction in two other sections of the book that are explicitly labeled "jurisdiction." VATTEL, *supra* note 181, bk. II, § 84-85.

<sup>203</sup> *Rose v. Himely*, 8 U.S. 241, 272 (1808) (Marshall, C.J.) ("The doctrines of *Vattel* have been particularly referred to. But the language of that writer [on the matter of when a rebellious area should become a new sovereign] is obviously addressed to sovereigns, not to *courts*."); *The Ambrose Light*, 25 F. at 433-434.

category. It does not speak of *jurisdiction* at all. A careful reading of the *hostis humani passage* reveals that it contemplates summary proceedings of an entirely non-judicial nature. It recommends direct executive action, not criminal prosecution. If poisoners ought be “exterminated wherever they are seized,” the exterminator is presumably a soldier or policeman.<sup>204</sup> Vattel does not contemplate bringing the “seized” offender back for trial.

The remainder of Vattel’s paragraph – not quoted by Blum and Steinhardt and subsequent proponents of the new universal jurisdiction (“NUJ”) – does discuss judicial proceedings, and rejects universal jurisdiction. If the nation that has a traditional jurisdictional nexus wishes to exercise its jurisdiction over a heinous offender in the custody of another nation, the nation holding the heinous offender should not conduct its own proceeding under a universal theory. Rather, it should turn the offender over to his home state, since that is the place “principally interested in punishing him.” Thus Vattel did not see the broad *hostis humani generis* status as providing a basis for universal jurisdiction, for such jurisdiction can be exercised by any nation over the objection of the offender’s home state. Extradition is also preferable where possible, Vattel writes, because “it is proper to have criminals regularly convicted by a trial in due form of law.” This again shows that the “extermination” by a disinterested nation that Vattel spoke of did not refer to any kind of jurisdiction; it also shows that he may have been concerned with the due process problems inherent in having a suspect tried in a forum with which he has no jurisdictional link.

Vattel actually discussed the possibility of universal jurisdiction, and rejected it outright. This accords fully with his broader views. *The Law of Nations* is a defense of a robust notion of national sovereignty, one that trumps notions of universal justice.<sup>205</sup> “It does not belong to any foreign Power to take cognizance of the administration of a sovereign of another country, to set himself up as judge of his Conduct or to oblige him to alter it,”<sup>206</sup> Vattel wrote in a passage that would be quoted by Alexander Hamilton.<sup>207</sup> Vattel wanted to confine criminal jurisdiction to the pure territorial principle, allowing a nation to take jurisdiction over offenses committed by its *own* citizens abroad only when they would be discriminated against by the tribunal with territorial jurisdiction.<sup>208</sup> Finally, in the same paragraph as the passage cited approvingly by Hamilton, Vattel flatly denounces universal jurisdiction. He writes that if a state is not itself directly

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<sup>204</sup> This view is strengthened by Vattel’s use of the term *hostis humani generis*. “*Hostis*” means “enemy” in the military sense, and its application to pirates stemmed from the theory that a nation’s vessels could attack pirates absent a declaration of war or any formal hostilities. The term’s provenance has long been forgotten by all but a few scholars of piracy and the law of war, but it was certainly understood by Vattel, a close reader of Grotius. By calling the broader category of wrongdoer “*hostis*,” Vattel situates this passage in the context of military operations (which remain a primary focus throughout the book), and not the context of adjudication.

<sup>205</sup> LANG, *supra* note 198, at 18.

<sup>206</sup> VATTEL, *supra* note 181, bk. II, § 55.

<sup>207</sup> HAMILTON, *supra* note 84.

<sup>208</sup> VATTEL, *supra* note 181, bk. I, § 84.

harmed by a violation of the law of nations, it has no business attempting to punish that violation.<sup>209</sup>

## **B) Unreliable epithets.**

Supporters of the heinousness theory of universal jurisdiction point out that judges in piracy cases sometimes described the offense as “heinous,” or “odious,” or called its perpetrators *hostis humani generis*.<sup>210</sup> In a weak sense, any felony can be accurately described as “heinous.” For heinousness to motivate universal jurisdiction, piracy would have to in some way be more heinous than all other crimes. Thus for them to serve as historical evidence for the piracy analogy, judicial references to piracy’s heinousness would need to indicate that piracy was a singularly heinous offense. However, this does not appear to be what judges meant when they called piracy “heinous.” Rather, they used the word “heinous” to indicate that piracy is a serious felony, one among many serious felonies, all of which are heinous.<sup>211</sup> Judges did not set out to demonstrate that there was anything about piracy that made it particularly bad, that might account for its special jurisdictional status.

More importantly, the condemnatory adjectives so often attached to piracy in the case reports reflect the authors’ rhetoric, not their reasoning. The adjectives are dropped casually into opinions. This can be seen by the easiness with which offenses get branded as heinous. The Supreme Court variously bestowed the title of Most Heinous Crime to murder<sup>212</sup> and treason<sup>213</sup>: piracy thus did not stand out for its depravity. The fact that several offenses were described as being most heinous shows that the use of these adjectives by judges is primarily rhetorical, and certainly does not imply the level of heinousness necessary for universal jurisdiction.

Nor can other frequent references to the wrongfulness of piracy lead to the inference that this wrongfulness motivated universal jurisdiction. Judges commonly denounce criminals for the wantonness of their offense; indeed, were

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<sup>209</sup> Vattel, *supra* note 181, bk. II, § 55 (“The Spaniards violated all rules when they set themselves up as judges of the Inca Atahualpa. If that prince had violated the law of nations with respect to *them*, they would have had a right to punish him. But they accused him of having put some of *his subjects* to death . . . for which he was not at all accountable to them.”) (emphasis added).

<sup>210</sup> See, e.g., Randall, *supra* note 9, at 794 & n.51. Randall cites only one case that denounces piracy as heinous. That opinion does not state that piracy is *particularly* or *uniquely* heinous, only that it is heinous, which is just another way of saying it is a serious offense. But the heinousness theory does not posit that piracy was made universally cognizable because it was a serious offense; rather, it contends that pirates transgressed internationally accepted mores more grossly than other criminals. Thus the case cited by Randall, and other cases that simply observe piracy to be “heinous” do not prove the heinousness theory.

<sup>211</sup> One judge observed that the universal condemnation of piracy arose from the gravity of the offense by remarking that it belongs “*among* the highest crimes,” which shows that it did not hold pride of place among heinous crimes, and that many equally or more heinous crimes were not subject to universal jurisdiction. *The Ambrose Light*, 25 F. 408 at 417 (emphasis added).

<sup>212</sup> *Davis v. United States*, 160 U.S. 469, 484 (1895) (Harlan, J.) (describing murder as the “most heinous crime”).

<sup>213</sup> *Hanauer v. Doane*, 79 U.S. 342, 347 (1870) (“No crime is greater than treason.”).

an act not heinous to some degree, it would scarcely be a felony: criminality implies a degree of heinousness, and thus discussing the heinousness of the offense need be nothing more than rather obvious rhetoric. Consider the variety of offenses that federal appellate judges have condemned as “heinous”: attempted murder,<sup>214</sup> rape,<sup>215</sup> kidnapping,<sup>216</sup> fomenting communist insurrection,<sup>217</sup> jury-tampering,<sup>218</sup> and pandering.<sup>219</sup> While international consensus might only exist as to the first two of those offenses, the list does illustrate the problems of drawing inferences from adjectives. And the inference would be weakest with piracy, a capital offense; judges would suffer severe cognitive dissonance if they condemned men to death for innocuous offenses; thus it means little when we see the judges describe the crime as heinous.<sup>220</sup> This could be as much a justification for the inevitable punishment as for an exercise of universal jurisdiction.

The ominous-sounding epithet *hostis humani generis* also seem, at first blush, to suggest that it was the unchecked promiscuity of piratical attacks, the general bloody-mindedness of pirates, that made the offense universally cognizable. But the *hostis* rhetoric also fails to establish a basis for the analogy between piracy and the NUJ. The Latin phrase does not give a *reason* for the assertion of universal jurisdiction over pirates; it merely states the *legal conclusion* that any nation can prosecute the pirate. Indeed, “*hostis*” means enemy in the sense of a wartime foe; the phrase was originally used to describe sea raiders with a substantial degree of political organization who literally warred with all their neighbors. It was then appropriated to a completely different context, that of ordinary robbers plying their trade at sea.<sup>221</sup>

Thus it says nothing about the concerns and policies that motivate universal jurisdiction. No one supposed the pirate to *actually* be the enemy of all mankind;<sup>222</sup> it was a legal fiction, a “mere embellishment, and no part of the legal definition.”<sup>223</sup> Indeed, if pirates were literally antagonistic to all mankind, any nation could prosecute them without resort to “universal jurisdiction,” since standard jurisdictional concepts allow a state to prosecute those who attack its

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<sup>214</sup> United States *ex rel.* Villa v. Fairman, 810 F.2d 715, 717 (7th Cir. 1987) (Easterbrook, J.) (“Attempted murder in the course of another felony is a heinous crime.”).

<sup>215</sup> United States v. Quiver, 241 U.S. 602, 605 (1916) (“Rape also is concededly an offense against the person, and is generally regarded as among the most heinous, so much so that death is often prescribed as the punishment.”).

<sup>216</sup> Bates v. Johnston, 111 F.2d 966, 967 (9th Cir. 1940) (“Kidnapping is a heinous offense.”), quoting Bailey v. United States, 74 F.2d 451, 453 (10th Cir. 1934).

<sup>217</sup> United States v. Dennis, 183 F.2d 201, 215 (2d Cir. 1950) (L. Hand, J.).

<sup>218</sup> Creekmore v. United States, 237 F. 743, 747 (8th Cir. 1916) (“one of the most heinous offenses known to the law, that of ‘jury fixing.’”).

<sup>219</sup> Johnson v. United States, 260 F. 783, 786 (9th Cir. 1919) (condemning the “most heinous offense of a husband willfully permitting his wife to practice prostitution”).

<sup>220</sup> See, e.g., Quiver, 241 U.S. at 605.

<sup>221</sup> See RUBIN, PIRACY, *supra* note 30, at 84-85.

<sup>222</sup> The Ambrose Light, 25 F. at 423 (“It is doubtful whether any pirates ever really practiced, or intended to practice, indiscriminate robbery upon all vessels alike; and it is far from true that no acts are piratical by the law of nations except as are of such description.”).

<sup>223</sup> *Id.*

interests. At most, the phrase means the pirate will be treated *as if* he were the enemy of all mankind.

The *hostis* criterion simply restates another element of the piracy offense – attacking commerce without writ of marque. Those commissions precluded the bearer from attacking ships of the issuing state and its allies; thus the privateer was at most the enemy of *some or much* of mankind. But the fact of his writ of marque proved that he was not against *all* mankind; he had a patron. The pirate, by refusing to obtain a writ, which would have been easy to secure, indicated his *willingness* to attack any targets of opportunity regardless of their flag – though in practice they would prey on the shipping of one or a few states. Seen this way, *hostis* just stands in for the need for commerce raiders to obtain sovereign protection;<sup>224</sup> again it is a criterion that deals with regulatory formalities, and says nothing about the substantive conduct of pirates.

Furthermore, courts rejected the idea that actual hostility to the whole world was what made piracy universally cognizable; contemporaries understood the phrase could not be taken at face value. Indeed, the specific claim that it was the promiscuity of piratical attacks that defined that offense was raised and rejected in one of leading American piracy cases, *The Ambrose Light*, a prize proceeding. The claimant’s ship, *The Ambrose Light*, belonged to the fleet of Columbian rebel group engaged in the blockade of the government-held port of Cartagena. The evidence in the case showed that the vessel, carrying rebel soldiers, only sought action against the recognized government of Columbia, in furtherance of the insurgency.<sup>225</sup> Thus the claimants argued that since their only enemies were their rivals for control of Columbia, they could not be, literally, enemies of all mankind, and thus the New York prize court had neither jurisdiction nor a basis for condemnation.

The court rejected this view.<sup>226</sup> For while some pirates might have practiced “indiscriminate violence and robbery” of the kind that might *literally* make them enemies of all mankind, most pirates were much more focused or restrained in their depredations. While universal jurisdiction would extend to both types of pirates, the latter class of offenders would be *hostis humani generis* “only in the general sense signifying a willful disregard of the essential order and

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<sup>224</sup> See *The Malek Adhel*, 43 U.S. 210, 232 (1844) (Story, J.) (“A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Be cause he commits hostilities upon the subjects and property of any *or* all nations, *without . . . any pretence of public authority.*”) (emphasis added).

<sup>225</sup> *The Ambrose Light*, 25 F. at 411.

<sup>226</sup> This entire discussion is obiter, though ostensibly directed at a “holding” in the case. *Id.* at 443. Later in the opinion, the court concludes that the United States government had implicitly recognized the Columbian rebels as belligerents in a civil war, giving them the right to commission vessels to cruise against their enemy. Thus *The Ambrose Light*’s commission from a rebel commander received full effect, preventing the condemnation of the ship piratical. *Id.* Since the ship had a valid authorization to cruise, there was no need to consider whether, had its expedition in fact been piratical, it would have found a defense in its lack of universal hostility. The court should first have determined whether the rebels had any recognition – implicit or not – that would make the ship a man-of-war and not a pirate, and upon finding such authorization (albeit through some forced reasoning), the opinion should have proceeded no further.

welfare of human society, such as characterizes *all other high crimes*.<sup>227</sup> This belies the contention that the concept of *hostis humani generis* can be used to explain why piracy was treated differently than other offenses with respect to jurisdiction.

## V. CONCLUSIONS AND SOLUTIONS

This Article has shown that the new universal jurisdiction (“NUJ”) has relied heavily on the false premise that piracy was universally cognizable because of its heinousness. This Part concludes by considering the implications of this lesson. Subpart A discusses the implications of the invalidity of the piracy analogy for the NUJ. It concludes that most current NUJ jurisprudence, and particularly the United States cases adopting NUJ, are called into substantial doubt, since they had built their jurisdictional structure on the shaky foundation of piracy. Subpart B considers whether the NUJ might not be salvaged at least in part. It examines what actually did motivate piracy’s unique jurisdictional status, and then discusses whether those rationales can be extended into the present day to support universal jurisdiction over crimes other than piracy. This analysis tentatively suggests that universal jurisdiction today would work best as applied to terrorists with a transnational support structure, or to offenses occurring in nations where sovereign authority has for practical purposes collapsed.

### A) Modern universal jurisdiction needs a new rationale.

This Article has shown that universal jurisdiction over piracy had nothing to do with the heinousness or gravity of the offense. Indeed, since piracy was not regarded as particularly heinous at all, heinousness could not possibly have motivated universal jurisdiction. And heinousness aside, nothing connects piracy to the offenses of the NUJ.<sup>228</sup> Heinousness is certainly the unifying principle of NUJ, but it is a remarkably new and untested principle. This means that the NUJ cannot be sustained through the rationale that has brought it wide acceptance in the past decade. This has several important implications for human rights litigation in domestic tribunals, especially United States courts, and for the future of international criminal tribunals.

The novelty of the NUJ means that its compatibility with the system of sovereign states has not been tested. It remains to be seen whether nations will tolerate such encroachments on their traditional areas of jurisdiction. This Article shows that there is no historical evidence that states will countenance diminutions of their sovereignty in the name of universal jurisdiction over offenses that shock

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<sup>227</sup> *Id.* at 424 (emphasis added). *The Ambrose Light* observes that judges also use the term *hostis humani generis* to describe serious but not-piratical crimes. Thus Lord Hale also denounced murders as “*hostis humani generis*,” much as courts denounced both murder and piracy as heinous crimes, although universal jurisdiction only existed for the latter offense. *See id.* These were both terms of opprobrium, and not reasons for exercising universal jurisdiction.

<sup>228</sup> Orentlicher, *supra* note 95, at 2557 n.78 (enumerating differences between piracy and new universal offenses).

the conscience of humanity. Perhaps this will come to pass: this Article does not demonstrate that universal jurisdiction over the most depraved crimes is not the way of the future, only that it has never been the way of the past.

The fallacy of the piracy analogy casts into doubt the soundness of the lines of cases that used the analogy to justify their adoption of NUJ. Courts that have treated piracy as a precedent for the new universal jurisdiction may choose to reconsider the wisdom of those decisions given that piracy turns out to be no precedent at all. This is particularly significant in the United States, where the courts of appeals remain divided on whether NUJ provides a basis for federal jurisdiction under the ATCA. The evidence presented in this Article lends support to the courts that have rejected NUJ, and suggests that courts of appeals that have not taken a position on the matter would be ill-advised to adopt the reasoning of the *Filartiga* line of cases for two reasons. Firstly, the Second Circuit and other courts that have embrace NUJ rely on inapposite precedent. Secondly, this Article has shown that the generation that produced both the Constitution and the ATCA probably rejected heinousness-based universal jurisdiction, as did the Supreme Court in the early nineteenth century. Especially given the background presumption against interpreting statutes to apply extraterritorially,<sup>229</sup> this evidence strongly suggests that both as a constitutional and statutory matter, federal courts do not currently have the power to exercise NUJ.<sup>230</sup>

This Article also has implications for current, and particularly future international tribunals that might seek to exercise NUJ, such as the International Criminal Court. The I.C.C.'s jurisdiction is ambiguous. The failure of the piracy analogy shows that there is not a longstanding agreement among nations to make heinous offenses universally cognizable, and thus attempting to do so will entail significant political risks, and may even lead to violence. And this applies *a fortiori* to exercises of universal criminal jurisdiction by national courts in Europe, as the unilateral exercise of jurisdiction by a particular state bears an even lighter patina of international approval than when such jurisdiction is exercised by an international tribunal.

Finally, this Article does not suggest that the NUJ is normatively undesirable. Nor does it dispute the strong moral appeal of NUJ, or question the revulsion at human rights offenses that inspires efforts to expand NUJ. There may

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<sup>229</sup> See *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”), quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). See also William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998) (“Early in the 19th Century, the Supreme Court applied the presumption to limit the reach of federal customs and piracy laws.”).

<sup>230</sup> This Article does not establish this point, but only provides some evidence for it. It shows that it is highly unlikely that the drafters of the Constitution and ATCA intended either to allow for universal jurisdiction over crimes simply on the basis of their heinousness. Original intent need not be dispositive in interpretation, and this Article takes no position on that long-contested issue. It only points out that to the extent the text of these documents is ambiguous on the issue of NUJ (a form of pure alien diversity), intent may be a useful tool, and the evidence of intent is fairly one-sided. This Article also takes no position on the view the Framers might have taken on some form of universal jurisdiction premised on something other than heinousness, such as statelessness.

well be another case to be made for NUJ that does not rely on the jurisdictional treatment of piracy.<sup>231</sup> But that case has not yet been made. Until it has, the decisions, laws and scholarship that rely on the piracy analogy must be critically reexamined.

### **B) A proposal for reinventing modern universal jurisdiction.**

This Article has focused on examining the validity of the analogy currently drawn between piracy and the NUJ, both because this is what sustains the NUJ, and because heinousness is in fact the ratio of the NUJ, if not of historic universal jurisdiction. While this Article has shown that piracy law offers no support for universal jurisdiction premised on heinousness, the question naturally arises – why did piracy become a universal offense if not for its heinousness? Debunking the heinousness theory does not require answering this question. As will be seen below, it is a rather involved historical question, and beyond the scope of this Article.<sup>232</sup> But isolating the real reasons for piracy’s universal status may help show whether piracy can provide other principles to guide universal jurisdiction in the present day, and thus a brief consideration of the possibilities is worthwhile.

Firstly, universal jurisdiction may well have been a historical accident. Related and contemporaneous legal rules also reflect no coherent rationale, but rather a haphazard development to an unusual but stable equilibrium. For example, prize law allowed naval officers to pocket the value of seized enemy commerce and military hardware; yet army officers could not seize and convert any kind of enemy property – that would be looting.<sup>233</sup> And universal jurisdiction is at least partly a consequence of the commentator’s phrase *hostis humani generis* being interpreted too literally, and out of context, by subsequent generations of jurists.<sup>234</sup>

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<sup>231</sup> For example, one might think that universal jurisdiction is valuable in that a country exercising such jurisdiction is more detached from the dispute, and thus more impartial, than a nation with the traditional jurisdictional connections. Anderson, *supra* note 67, at 594 (describing the views of “liberal internationalist” supporters of international tribunals). Of course, greater detachment may lead to greater irresponsibility. In a more fanciful justification of universal jurisdiction, a few commentators have suggested that the presence of human rights offender within a nation’s territory causes a kind of aesthetic harm to that nation’s inhabitants. See *Final Report*, INT’L L. ASS’N, *supra* note 3 (“[In] the smaller world in which we live . . . people feel affronted not merely by crimes committed in their own territories or against their fellow citizens but also by heinous crimes perpetrated in distant states against others.”); Blum & Steinhardt, *supra* note 9, at 86. The offender commits a kind of moral pollution that injures the sensibilities of the inhabitants of any nation he sets foot in. Thus when such a nation exercises universal jurisdiction over the offender, it redresses an injury it has directly suffered. Of course, this view implies that there is no such thing as universal jurisdiction. Whether its theory of injury is accurate as a positive matter is highly debatable. In any case, the harm to the prosecuting nation in this account is purely an aesthetic one, and law does not normally redress such intangible injuries.

<sup>232</sup> A positive theory of universal jurisdiction will be elaborated in Eugene Kontorovich, *Universal Jurisdiction as Evidentiary Rule* (in progress).

<sup>233</sup> See PETRIE, *supra* note 125, at 12-14 (discussing the historical peculiarity of the “land-sea anomaly”).

<sup>234</sup> RUBIN, PIRACY, *supra* note 30, at 307.

It may be that universal jurisdiction over piracy was a historical accident – supported by no good reasons – because the rule was so rarely tested in the cauldron of practice. As Professor Rubin has demonstrated, universal jurisdiction existed mostly in the realm of theory;<sup>235</sup> very few times was it ever translated into practice. In those instances, the jurisdiction was usually asserted by a powerful nation over the citizens of a weak one that could not meaningfully object. Thus for several hundred years – indeed, until the rise of the NUJ – there was no real reason for anyone to question or explore universal piracy jurisdiction. And there was little factual context in which to test competing claims about the effects and implications of universal jurisdiction. In such circumstances, even a rule unsupported by any substantive reason could easily be parroted uncritically by courts and commentators for centuries.

Still, certain aspects of piracy differentiate it from other crimes in ways that might be relevant to jurisdiction. Some combination of these features likely made the universal jurisdiction rule seem plausible enough to be echoed by jurists for hundreds of years. The crime occurs on the high seas, a kind of global commons and thus under-policed. One would expect sovereign states to invest less than an optimum degree of effort in apprehending pirates, since each could hope to free-ride of the enforcement efforts of other nations. Clearly no nation had reason to favor rules that would limit the number of states that could deal with pirates, as each would be happy to have another take care of the matter. This explanation has appeal because it accounts for why sea-robbery and not land-robbery would become universally cognizable. However, the international commons explanation proves unsatisfactory. The commons problem is one of free-ridership: each nation would hope that other deal with brigandry on the high seas; and since no nation internalizes the full benefits of doing so, there will be little enforcement. But it is hard to see how expanding the roster of nations that can punish piracy to those with no connection *at all* to the offense could ever be thought to ameliorate the commons problem.<sup>236</sup>

Second, the perpetrators act without state authority and in contempt of the procedures for obtaining such authority, making it unlikely that their home nation will be overly solicitous of them and take offense at their prosecution by any other nation. Since the potential for conflict between nations is perhaps the strongest argument against universal jurisdiction, the reduced probability of such conflict in the case of piracy might help support universal jurisdiction. Even this explanation does not satisfy. While the pirates may not have been protected by a sovereign nation, their victims certainly were. Universal jurisdiction would allow, say, France, to prosecute pirates that had exclusively attacked British shipping, even if the British preferred to prosecute themselves. It is hard to see anything about piracy that would prevent such a situation from turning into an international incident.

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<sup>235</sup> *Id.* at 302 & n.50.

<sup>236</sup> Subtler variations on the commons explanation of universal jurisdiction, and the problems with these accounts, will be discussed in a subsequent paper, Eugene Kontorovich, *Universal Jurisdiction as Evidentiary Rule* (in progress).

Finally, perpetrators and victims alike come from a variety of nations, making it likely that many nations will have overlapping jurisdiction,<sup>237</sup> and yet the nationality of many parties involved may be difficult to establish, thus casting a cloud over any nation's jurisdiction. Universal jurisdiction might have been in essence a jurisdictional presumption, to eliminate the burden of proving jurisdiction in complex cases.

These observations could be useful for rebuilding a modern universal jurisdiction, but it would be a more modest version of universal jurisdiction quite different from the now-dominant NUJ. It would see stateless actors operating in the interstices of official power as the primary subject of its regulation. Gangs and militias in nations where sovereign authority has collapsed, like Somalia, Rwanda, and Afghanistan in the early 1990s would be one example. Terrorist groups that lack clear ties with any government would be another timely example of the kind of international criminals whose prosecution raises the same kind of problems that seem to have motivated universal jurisdiction over piracy.<sup>238</sup> Lack of state protection on the perpetrator's side would be a necessary, but not sufficient criterion for the proposed model of universal jurisdiction. The victims would also have to come from a wide variety of nations, such that disentangling jurisdictional priorities would be difficult, and universal jurisdiction could be a useful short-cut through the jurisdictional maze.

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<sup>237</sup> See Orentlicher, *supra* note 95, at 2557 n.78 (citations omitted):

Many of the justifications for establishing universal jurisdiction over piracy are absent in the case of human rights violations. Those rationales include the fact that pirates' victims were genuinely international, lending many states a legitimate interest in prosecuting pirates . . . and the fact that piracy could disrupt international commerce, giving states generally a direct interest in deterring the crime through prosecution.

<sup>238</sup> See Abrams, *supra* note 96 ("There are true, modern-day analogues of pirates--that is to say, evildoers who are beyond the control of any government. I am referring of course to international terrorists").