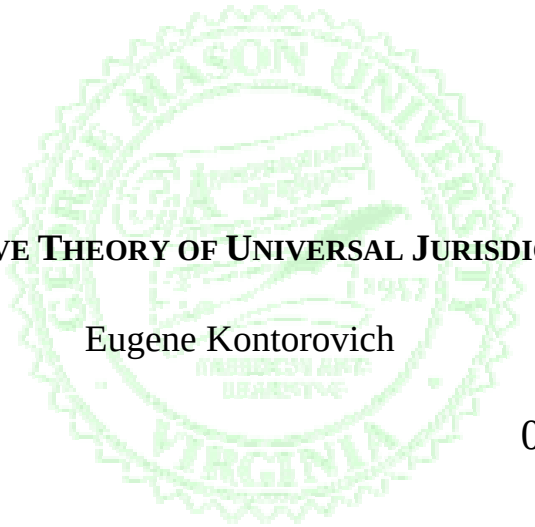

A POSITIVE THEORY OF UNIVERSAL JURISDICTION

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ABSTRACT

Discussions of universal jurisdiction ("UJ") have been mostly normative, focusing on what UJ "should" be in an ideal world. This Article analyzes UJ from a positive perspective. It explains UJ in a way that is consistent with its historic origins, major cases, and with the incentives of rational, self-interested states. This provides a better understanding of what UJ has been in the past, as well as its limits and potential for the future..

Piracy was for centuries the only UJ offense. This Article begins by isolating the characteristics of piracy that made it uniquely suitable for UJ. While these characteristics show why UJ over piracy would cause fewer problems than UJ over other crimes, they do not explain why nations would actually exercise UJ. Rational choice models of state behavior suggest nations would have no interest in exercising UJ. All that UJ adds to conventional categories of international jurisdiction is the ability of unaffected *nations to prosecute. Given that prosecution is costly, rational, self-interested states would not expend scarce resources to punish crimes that did not directly harm them. Nations using UJ would bear all of the costs of enforcement while receiving none or little of the benefits. UJ is a public good, and thus it would be provided at suboptimally low levels, if at all.*

Yet the rational choice prediction appears inconsistent with UJ over piracy. This Article presents a new explanation of the function served by the universal principle. This explanation reconciles the historic evidence and the major cases with the rational choice model. Universal jurisdiction over piracy was useful to nations as a legal fiction rather than as a substantive expansion of jurisdiction. It was an evidentiary rule, a presumption designed to facilitate the proof of traditional territorial or national jurisdiction in cases where such jurisdiction probably existed but would be difficult to prove.

Current efforts to broaden UJ invoke piracy as a precedent and a model. However, the new universal jurisdiction represents an entirely different phenomenon, one that does not share the characteristics that were necessary to piracy becoming universally cognizable, and that does not accord with the incentives of self-interested states. Thus the positive account of UJ suggests that the current efforts to expand it to human rights offenses will not succeed in improving enforcement or deterrence.

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INTRODUCTION

In international law, a country's jurisdiction is based on and congruent with the scope of its sovereign power. Thus states have jurisdiction over crimes committed within their territory (know as territorial jurisdiction), or by or against their nationals (nationality and passive personality jurisdiction).[1] Universal

[1] *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183, 188-89 (2004) (explaining the different categories of jurisdiction in international law). This Article will refer to all of these traditional bases of jurisdiction as "traditional," "sovereignty-based," or "Westphalian" jurisdiction; these terms are used interchangeably.

Courts and commentators also sometimes invoke the "protective principle," under which states can punish activities committed by foreigners abroad that cause serious harm in the prosecuting state. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 307 (5th ed. 1998); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 238-39 (1995). The scope of the protective principle is uncertain and controversial because under loose notions of harm and

jurisdiction is an exception to these sovereignty-based principles of international jurisdiction. Universal jurisdiction crimes can be prosecuted by any nation, even if the forum state has no connection with the offense.[2] Since the end of the Cold War, several national courts and international tribunals have exercised or claimed the right to exercise universal jurisdiction over human rights offenses such as war crimes, genocide and torture. The new universal jurisdiction ("NUJ") [3] is perhaps

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causation, the protective principle could encompass a vast degree of extraterritorial conduct, and ultimately shade into universal jurisdiction. *See* Kontorovich, *supra*, at 190. Nonetheless, U.S. courts have sustained some exercises of the protective principle, particularly in antitrust and drug trafficking cases. *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987) ("The protective principle of international law permits a nation to assert subject matter criminal jurisdiction over a person whose conduct outside the nation's territory threatens the national interest. Thus, under international law the United States could exercise criminal subject matter jurisdiction over foreign nationals for possession of large quantities of narcotics on foreign vessels upon the high seas, even in the absence of a treaty or arrangement."). One possible limitation on the protective principle involves the gravity or nature of the harm – the prosecuting nation's "security" must be at stake. *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) ("Yousef's prosecution [for planning to blow up commercial airliner] by the United States *is* consistent with the 'protective principle' of international law. The protective (or 'security') principle permits a State to assume jurisdiction over non-nationals for acts done abroad that affect the security of the State."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3), cmnt. f (1987) (suggesting that protective principle applies only to conduct "directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems").However, "security" also proves to be an elastic concept that has been held to encompass extraterritorial drug trafficking. *United States v. Gonzalez*, 311 F.3d 440, 446 (1st Cir. 2002) (citation omitted) ("Congress obtains authority to regulate drug trafficking on the high seas under the 'protective principle' of international law, which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security.").

[2] *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))); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 323–24 (2001) (describing universal jurisdiction as jurisdiction with no "nexus between the regulating nation and the conduct, offender, or victim").

[3] Throughout this Article, UJ will be used as shorthand for the general principle of universal jurisdiction. To distinguish between universal jurisdiction as it existed for hundreds of years – a *sui generis* rule for piracy – and the modern universal jurisdiction that concerns itself primarily with human rights violations, this Article will refer to the latter as "modern universal jurisdiction," "new universal jurisdiction" or simply "NUJ," and the former as traditional or piracy UJ. *See* Kontorovich, *supra* note 1, at 184 n.9 (introducing the term "new universal jurisdiction" and explaining its relation to the "new customary international law" that began to develop after the Second World War).

the most controversial development in contemporary international law, precisely because it encroaches on or qualifies nations' jurisdictional sovereignty.

For hundreds of years before the emergence of NUJ, piracy was the only universal crime in international law.[4] Not surprisingly, proponents of expanding universal jurisdiction to human rights offenses claim piracy UJ as a precedent and model.[5] However, scholarly discussions of UJ have been mostly normative and aspirational in character. They have not looked closely at the reasons why piracy succeeded as a UJ offense. Nor have scholars considered the implications of rational choice models of state behavior. These models raise the crucial question of why rational, self-interested states would ever exercise UJ when doing so is costly and by definition does not directly benefit the prosecuting state.

This Article takes a different course. It draws on the piracy example and rational choice models to develop a positive understanding of universal jurisdiction. The Article begins by exploring the characteristics that made piracy a

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[4] *See* Kontorovich, *supra* note 1, at 190; Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 80-81 (2001) ("The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.").

[5] *See* Kontorovich, *supra* note 1, at 184-85 & nn.10-16, 203 & nn.117-18 (explaining the importance of the "piracy analogy" to modern universal jurisdiction and citing cases and commentary analogizing new universal offenses to piracy). As Judge Michael Kirby of the Australian Supreme Court put it recently:

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

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

universal offense. By doing so, this Article identifies what have long been the necessary conditions for universal jurisdiction itself – because until recently piracy has been the *only* universal offense. However, in developing a positive understanding of what made piracy suitable for UJ, a second, and more fundamental set of questions arises. While the unique characteristics of piracy suggest that UJ over it would result in *fewer* problems than UJ over other offenses, they do not explain why nations would affirmatively exercise UJ in the first place. A nation exercising UJ expends scarce resources to punish crimes that have not injured it; thus it bears all the costs of enforcement while the benefits are enjoyed primarily by other nations. Rational choice models of state behavior suggest that nations will generally not undertake such activities. Yet this raises another set of questions, addressed in Part III of this paper – how can the long-term stability of the piracy UJ norm be explained given the lack of incentives for states to exercise such a jurisdiction?

Part I begins by identifying six characteristics of piracy that explain why it was singled out for universal jurisdiction. Piracy was committed by private actors, not public officials. Moreover, pirates were a subset of private actors who had intentionally foregone the protection of sovereign states, and thus were particularly unlikely to have the solicitude of their home states. Second, piracy took place on the high seas. This did not render traditional jurisdictional concepts moot, as commentators often mistakenly assert. It did however make enforcement particularly difficult. Third, by preying on maritime commerce, which was implicated the economic interests of many states, pirates were likely to affect

many nations -- not in the sense of an abstract injury to their moral sensibilities, but in the sense of actual and tangible injury to their ships, nationals or trade. Fourth, piracy was recognized as wrongful and criminal (but not extraordinarily heinous) by all nations. Fifth, all nations prescribed the same punishment for the offense. This is crucial because under UJ, prosecution by one nation acts as a double jeopardy bar to subsequent prosecution of the same offense, and thus disparities in punishment would result in forum shopping, unequal sentencing, and conflict among nations. Finally, piracy was a narrowly and precisely defined offense. Thus UJ would have relatively little opportunity to expand to other offenses or be used outside its intended domain for political reasons.

Part II explains that rational choice models of state behavior show that states have no incentives to exercise UJ. All that UJ adds to traditional bases of jurisdiction is the ability of nations *without* any stake in the matter to prosecute. Expanding jurisdictional possibilities to nations that have not been harmed by the universal crime, and thus do not stand to directly benefit from enforcement, should not be expected to result in increase enforcement. Moreover, by allowing all nations to prosecute, UJ could create a collective action/free rider problem among nations where no state would have the incentive to be the first to prosecute. The evidence supports the rational choice predictions. Historically, there were almost no piracy prosecutions that could not have been sustained on sovereignty-based theories of jurisdiction such as territoriality or nationality.[6] Even today, with piracy a serious problem in Southeast Asia, UJ has not been

[6] *See* ALFRED P. RUBIN, THE LAW OF PIRACY 348 n.50 (2d ed. 1998) (concluding that universal jurisdiction over piracy has been applied "very few times," and enumerating fewer than five cases in the past 300 years). *See also* Kontorovich, *supra* note 1, at 192.

used against the pirates. Thus this Part shows that UJ is paradoxical: it allows for enforcement by all nations, but does not create the incentives that would lead unaffected states to do so. This begs of the question of why UJ over piracy has existed for so long and with such general approval.

Part III attempts to solve this puzzle by presenting a new explanation of the function of universal jurisdiction that is consistent with the piracy experience and with the behavior of self-interested states. When UJ concepts were invoked in piracy cases, it was not to expand the frontiers of jurisdiction. Instead, the concept was used as an evidentiary rule to facilitate the *proof* of jurisdiction in cases where the forum state had substantial connection to the offense, but that connection that could not be easily established in court due to the particular characteristics of piracy.

Part IV considers the implications of this positive account for current attempts to expand UJ to human rights offenses by comparing NUJ offenses to piracy. It finds that NUJ offenses do not have many or all of the characteristics that made piracy amenable to UJ. Nor does NUJ change the incentives of nations not directly injured by a crime in a way that would lead self-interested states to enforce universal norms when doing so is costly. To the extent that piracy used UJ as an evidentiary presumption to facilitate the proof of traditional jurisdiction -- and not a real expansion of jurisdiction – NUJ differs form it significantly. In NUJ cases, there is most definitely no connection between the forum state and the conduct, and thus the universal principle is used as more than a mere evidentiary rule. All this suggests that NUJ prosecutions will remain infrequent. When they

do occur, they will continue to cause conflict between the forum state and states with traditional jurisdictional ties to the offense.

I. PIRACY AND THE CHARACTERISTICS OF UNIVERSAL JURISDICTION CRIMES

Piracy is a natural place to begin an inquiry into UJ's nature and limits. Universal jurisdiction arose in the context of piracy, and it remains the most longstanding and uncontroversial UJ crime.[7] However, scholars have not closely examined the many factors that combined to make piracy universally cognizable. Most discussions of UJ have uncritically accepted the theory that piracy was universally cognizable because of its extraordinary heinousness.[8] This explanation is convenient for proponents of NUJ, because the current roster of UJ offenses – genocide, war crimes, torture and so forth – are expressly selected based on their intrinsic heinousness. If UJ over piracy was also based on heinousness, it would provide a venerable and solid precedent for NUJ.[9]

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[7] See United Nations Convention on the Law of the Sea, Art. 105, U.N. A/CONF. 62/122 (1982) (authorizing "every State" to "seize a pirate ship" on the high seas, and to punish the pirates in their municipal courts).

[8] *See* Kontorovich, *supra* note 1, at 205-06 ("The modern argument for universal jurisdiction sees the historic treatment of piracy as evidence of an exception to standard jurisdictional limitations based on the "outrageousness" or "heinousness" of the crime."). *See also id.* at 205-06 nn.125-28, 130-32 (citing cases and commentary asserting that the substantive heinousness of the conduct is the common rationale for universal jurisdiction from piracy onwards). *See, e.g.*, Scharf, *supra* note 4, at 80-81 ("Many of the crimes subject to the universality principle are *so heinous in scope* and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. . . .Piracy's *fundamental nature* and consequences explained why it was subject to universal jurisdiction. Piracy often consists of *heinous acts of violence or depredation*.") (emphasis added).

[9] *See* Kontorovich, *supra* note 1, at 208. *See, e.g.*, Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 166-67 (1996) (arguing that piracy provides a precedent under which war crimes and similar human rights offenses should also be universally cognizable because "[s]uch crimes are far more serious than piracy or slave trading, the oldest offenses subjected to universal jurisdiction").

However, the heinousness explanation does not fit the historical facts, as shown in previous article, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*. The heinousness account begins with what many international lawyers believe *should* be the proper model of universal jurisdiction – the moral enormity of the offense.[10] Defining NUJ in relation to heinousness, it then anachronistically shoehorns piracy UJ into that model.[11] *The Piracy Analogy* demonstrated that piracy was *not* subject to UJ because of the substantive heinousness of the piratical conduct.[12] This conclusion raises an obvious question – if not heinousness, what explains piracy's special jurisdictional status?

This Part picks up where *The Piracy Analogy* left off by identifying the characteristics of piracy that made it the only universal offense.[13] Understanding

[10] *See, e.g.*, Leila Nadya Sadat, *Redefining Universal Jurisdiction,* 35 NEW ENG. L. REV. 241, 244 (2001) (arguing that human rights offenses are universally cognizable because they are "so heinous"); Joyner, *supra* note 9, at 164-65 (explaining that the "universality principle . . .holds that some crimes are so universally abhorrent . . . that jurisdiction may be based solely on securing custody of the perpetrator"). *Cf.* Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts,* 21 BERKELEY J. INT'L L. 111, 127 (2003) ("Many commentators and jurists incorrectly seek to divorce the assertion of universal jurisdiction from principles of states sovereignty. They assert that the basis of universal jurisdiction arises from the 'heinous' nature of the crime itself.").

[11] *See, e.g.*, Joyner, *supra* note 9, at 165 n.48 ("Piratical acts were made subject to universal jurisdiction . . . because they were considered particularly heinous and wicked acts of violence and depredation."); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (arguing that the "rationale" for universal jurisdiction over piracy was that the "fundamental nature" of the offense consisted of "particularly heinous and wicked acts").

[12] *See generally* Kontorovich, *supra* note 1. The full proof cannot be reprised here, but the basic outlines can be sketched. First, the exact same behavior engaged in by pirates was perfectly legal, and certainly not universally cognizable, when committed with sovereign authorization – the letter of marque issued to privateers. *Id.* Privateers were simply licensed pirates, yet all maritime nations issued licenses authorizing the former to attack and plunder civilian shipping, and respected the licenses issued by other nations. *Id.* By contrast, heinousness as understood by NUJ refers to conduct that is so horrible that its character could not be mitigated by sovereign authorization; indeed the prototypical NUJ offenses of war crimes and genocide presuppose such authorization. *Id.* Second, *The Piracy Analogy* shows that piracy was a form of robbery and understood to be not significantly more heinous than robbery in general; in other words, it was regarded as culpable conduct but was not regarded among the most reprehensible crimes. *Id.*

[13] Commentators have noticed the importance of some of these characteristics, such as piracy's occurrence on the high seas and commission by private actors, in explaining the crime's universal

these characteristics is crucial to appreciating the limits of UJ, because they all coincided un the case of piracy, the offense that gave rise to the concept of UJ. While numerous other offenses shared *some* of these characteristics, none was subject to universal jurisdiction. This suggests that these characteristics in effect describe the longstanding limits on UJ itself.

A. Private actors who eschew state protection.

Piracy consisted of purely non-governmental action – action by private parties without the blessing or support of any sovereign state. Pirates by definition acted without any state sponsorship. From the 17th through early nineteenth centuries, all maritime states issued licenses, called letters of marque and reprisal to merchant ships known as privateers. A letter of marque authorized its bearer to attack and seize civilian ships on the high seas -- essentially the same conduct that constituted piracy.[14] Yet the privateer was not only free from universal jurisdiction, he committed of no crime.[15] The only difference between a lawful privateer and an outlaw pirate was the latter's lack of sovereign authorization.[16]

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status. Other characteristics, like the uniformity of punishment meted out to pirates by various nations, have been overlooked. Moreover, no one has looked simultaneously at *all* of the defining characteristics of piracy relevant to its universal status.

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

[15] *See* DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES, at xvii-xviii (1995).

[16] *See* John C. Yoo, *Kosovo, War Powers, and the Multilateral Future,* 148 U. PA. L. REV. 1673, 1731 n. 67 (2000) ("Without a letter, such actions would constitute piracy; with one, military actions became a legitimate form of privateering under international law.").

The limitation of UJ to those commerce-raiders who acted purely on private initiative served two interrelated ends. First, it lessened the chances that UJ would cause hostilities between nations. Indicting a foreign official will be perceived as a grave insult by the government of the nation, and an interference with its self-government.[17] Indeed, it can set the stage for war -- consider the U.S. invasion of Panama to arrest its president, Manuel Noriega for trial in American courts. Second, official conduct is political conduct. Keeping political conduct outside the scope of UJ reduces the opportunities for UJ itself to become a tool of international politics and keeps judges focused on their traditional task of righting retail wrongs rather than matters bearing closely on foreign policy.[18] The new universal offenses, on the other hand -- such as war crimes and genocide -- invariably involve state action.[19] As a result, some critics of NUJ argue that piracy is no precedent, and is particularly inapposite to the contentious question of universal jurisdiction over heads of state.[20]

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[17] For example, the Spanish indictment and request for extradition of Gen. Augustus Pinochet, a senator and former dictator of Chile, strained relations between Santiago and Madrid and London, which faced a Spanish extradition request. *See* Regina v. Bartle, 1 A.C. 61, 89 (H.L. 2000) (Lloyd, L.):

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

[18] The limitation of UJ to private actors does not entirely purge the question of political considerations because private parties can act with political ends. During civil wars, insurrections and secession, the question of whether someone *is* a private actor can require, or at least imply, judgments about political legitimacy. *See* Kontorovich, *supra* note 1, at 222.

[19] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 236 (5th ed. 1998) ("The essential feature of the definition [of piracy] is that the acts must be committed for private ends.").

[20] *See* Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 75 & n.25 (2004) ("There was no state responsibility implicated by pirate offenses."); Curtis A. Bradley & Jack L. Goldsmith, IV, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 361 n.230 (1997) (observing that 19th

However, while it is true that pirates were private actors and thus unlike most potential NUJ defendants, this still does not explain why nations would allow UJ over pirates. A state is likely to have some interest in the fate of its citizens not just its officials. Thus it while it is true that UJ over governmental actors would be more objectionable than over private ones, it is not clear why UJ over private parties would not be at least somewhat objectionable. Countries often object when their nationals are prosecuted by the states where or against whom they committed their crimes – witness the solicitude Britain, France, Australia and other Western nations for their nationals held as enemy combatants in the United States, or the concern states show over the extension of consular rights to their nationals charged with crimes abroad. It could be even more obnoxious if, as with UJ, the prosecuting state has not even been injured by the defendant.

On closer examination, pirates were well suited for UJ because they were not *simply* private parties. Rather, they were private parties who often acted *against the interest of their home state* and who had intentionally *waived their home state's protection.* Recall that piracy existed side-by-side with privateering. The sole difference between the two was that the privateer obtained a license to capture prizes, while the pirate did not bother with licensing. Obtaining a writ of marque was notoriously easy – it was not a licensing system that required any demonstration of nautical prowess or moral probity.[21] The writ of marque had two principal advantages for the issuing state First, the writ limited the bearer to

century piracy jurisdiction "cannot be invoked as a basis to construe the original understanding of the [Alien Tort Statute] to extend to the acts of a foreign sovereign and its agents committed on foreign soil in violation" of international law).

[21] *See id.* at 211-12 (describing procedures for securing a writ of marque).

preying on ships of hostile nations. States that issued writs of marque wanted to channel commerce-raiding to where they regarded it most useful to them. At the same time, they did not want their nationals to embroil them in disputes and potential hostilities with neutral nations. Second, letters of marque usually required privateers to split the proceeds of their captures – typically ten percent – with the licensing power.[22] Thus pirates were those commerce-raiders who refused to share their earnings with any government. Moreover, the directly competed for prizes with licensed privateers, thus reducing potential revenues for the licensing state. Pirates acted *against* the interests of their home state. Thus they could expect little succor from it.

This explains the legal fiction of *statelessness* famously articulated by Blackstone[23] and subsequently by Chief Justice Marshall in *United States v. Klintock*.[24] In a case decided two years before *Klintock*, Marshall had held that the federal piracy statute,[25] which banned criminalized piracy committed by "any person," did not apply to piracies by foreigners against foreigners.[26] Marshall

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[22] *See id.* at 214.

[23] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (Chicago 1879) (1769) (explaining that pirates were universally punishable because they "renounced all the benefits of society and government").

[24] 18 U.S. (5 Wheat.) 144 (1820).

[25] Act of Apr. 30, 1790, ch. 36, § 8.

[26] *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633-34 (1818). Marshall wrote:

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

Id. Quite unnecessarily, Marshall opined in unsupported dicta that Congress *could have* chosen to punish foreigners for piracies against foreigners, under the universal jurisdiction principle. *Id.* at 630 ("[T]here can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the

recognized that such universal jurisdiction could result in judicial interference with other nations' sovereign prerogatives.[27] In *Klintock,* Marshall appended an odd qualification to *Palmer*: the statute does apply to piracies by those who are not nationals of any state.[28] The Certificate upheld the indictment of because the defendants had "throw[n] off their national character by cruising piratically."[29]

Marshall's entire discussion of statelessness may have been unnecessary because, as the Attorney General stressed, Klintock was a citizen of the United States;[30] no special jurisdictional theory was needed. It is not clear why Marshall did not simply look to Klintock's citizenship. It may be because in the previous case, *Palmer,* he supported his holding that Congress had not intend to create universal jurisdiction by citing the statute's title -- "an act for the punishment of certain crimes *against the United States*."[31] Klintock had seized a Danish vessel,[32] and if the title of the act had the legal effect Marshall suggested in *Palmer*, it might also be thought to exclude crimes by Americans against foreigners. So to sustain jurisdiction over the crime committed by a U.S. national, the Chief Justice

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United States."). However, he interpreted the statute on the assumption that Congress had not *intended* to authorize universal jurisdiction. *Id.*

[27] *Id.* at 632-33.

[28] Klintock, 18 U.S. at 152. Speaking for the Court, Marshall opined:

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

Id.

[29] *Id.* at 153.

[30] *Id.* at 143, 147.

[31] Palmer, 16 U.S. at 631 (emphasis added).

[32] Klintock, 18 U.S. at 145.

shoe-horned the case into the universal theory by arguing that the defendant was stateless, and that the statute allowed jurisdiction over any stateless person.

The statelessness criterion is a obvious fiction, though one that continues to confuse accounts of the reasons for universal jurisdiction over piracy.[33] There is nothing magical about piracy that destroys its perpetrators' national connection. Modern piracy law is more positivist, recognizing that whether a pirate throws off his national character is a matter for his home state to decide.[34] This is consistent with the facts of *Klintock*, where the high court of the home state, the U.S., deemed him stateless, though it could have reached the same result by treating him as an American national.

Marshall's holding that universal jurisdiction could only extend to those who "acknowledge the authority of no state" is simply a shorthand for the idea that UJ only applies when it will not lead to conflict with foreign states because the foreign state will not be interested in standing up for the defendants. Pirates rejected the licensing scheme of their home states by refusing to become privateers; thus they also rejected the protection by the of their home state and

[33] *See, e.*g, United States v. Yousef, 327 F.3d 56, 105 (2003) (stating that "States and legal scholars have acknowledged for at least 500 years" that piracy is a universal offense in part "because the crime occurs statelessly on the high seas").

[34] Convention on the Law of the Sea, Art. 104 ("A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived."). Current U.S. law allows for the prosecution of "stateless" drug smugglers seized on the high seas (however, unlike in Marshall's view, the mere act of engaging in the prohibited activity does not make the vessels stateless). The "statelessness" of the current U.S. statute is also a patent fiction – a ship can be treated as stateless despite being registered by a foreign state, so long as that state explicitly or implicitly disavows a connection with the vessel. *See* Maritime Drug Law Enforcement Act, 46 U.S.C. app. § 1903 (c)(2)(A),(C) (2003) (defining "vessel without nationality" as being one whose claim of registry is "denied by the flag nation whose registry is claimed" or simply not affirmatively and unequivocally" confirmed by the registering ship when queried by U.S. officials). Thus the MDLEA's statelessness inquiry, like Marshall's, focuses on whether the foreign state is prepared to stand up for the defendant.

went against its interests. As Justice Story put it, pirates were "not under the acknowledged authority, or *deriving protection* from the flag or commission of any government."[35] Prosecutions of such offenders would be unlikely to cause friction with the foreign state -- unlike prosecutions of the foreign state's officials, its nationals acting under color of its law, or its nationals acting in violation of its laws but still of concern to their home state.

B. *Locus delecti* makes enforcement difficult.

Many modern discussions stress the importance of the high seas *locus delecti* in establishing universal jurisdiction over piracy.[36] The high seas locus was certainly crucial to piracy's universal status. The same conduct occurring on land would be robbery, and not subject to universal jurisdiction. (But while necessary, the high seas locus is far from sufficient for universal jurisdiction: murder or any other offense was not universally cognizable even when committed on the high seas.[37]) However, commentators misunderstand both the significance and the importance of the high seas locus.

Many believe that because no state has jurisdiction over international waters, traditional notions of jurisdiction simply did not apply and UJ was needed to fill in a jurisdictional lacunae. The flaw in this account is that piracy did not

[35] United States v. Smith, 18 U.S. (5 Wheat.) 153, 163(1820) (emphasis added). Yet in another purported universal jurisdiction case, the objections of the ship's home state did object to U.S. jurisdiction led Judge Story to yield to the foreign interest and refused to exercise jurisdiction. Though Story thought universal jurisdiction was available in the case, the concern over conflict with a foreign state trumped. United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C. Mass. 1822) (No. 15,551).

[36] *See, .e.g.,*.

[37] *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197-99 (1820).

simply take place on the high seas – it occurred on *ships* sailing the high seas. Ships have always been considered within the territorial jurisdiction of their flag state.[38] Ships that fell victim to pirates were within the territorial jurisdiction of the nation whose flag they flew, and the same was true of the pirate vessels themselves. Moreover, both the pirates and their victims came from somewhere; thus they could have been within the jurisdiction of their home states. In short, traditional jurisdictional concepts appear adequate to deal with piracy without recourse to universality.[39]

The real problem was not the formal jurisdictional status of the high seas but the practical problem of enforcement.[40] There was almost no governmental control over the seas and no "on the spot" enforcement system, as there would be for crimes within the body of a nation.[41] Maintaining a navy was among the most expensive activities a nation could engage in; the high cost of arming ships, and the need to employ them against foreign navies, made piracy perhaps the most expensive of crimes to police. Because of the vastness of seas, pirates could easily commit their crimes undetected. Moreover, the open seas made escape easy

[38] *See* S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10; OLIVER SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 250–52 (1991).

[39] *See* M. Cherif Bassiouni, *The History of Universal Jurisdiction, in* DEFINING THE LIMITS: UNIVERSAL JURISDICTION AND NATIONAL COURTS, *supra* note 5, at 47 (explaining that "early modern thinking about piracy was not linked to universal jurisdiction," but rather to views such as Grotius' that "ships on the high seas were an extension of the flag state's territoriality" and thus, the flag state – and the flag state only – should be able to punish non-nationals for piracy against national ships).

[40] *See* Slaughter, *supra* note __, at 169 ("The principle of universality . . . is the way in which international law has responded to the pragmatic difficulties . . . of prosecuting offenses recognized as illegal in domestic legal systems around the world.").

[41] Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 193-94 (1945).

and apprehension difficult.[42] The many largely uninhabited islands of the Caribbean, replete with unmapped coves and harbors, afforded perfect hideouts for pirates in between cruises. These difficulties were stressed by Adam Smith in explaining why piracy, unlike simple robbery, was a capital offense.[43]

At this point a paradox emerges in the locus/enforcement difficulty account. Given that piracy's occurrence on the high seas made enforcement particularly costly, why would universal jurisdiction – which merely allows nations to punish conduct that had *not injured* them – make the piracy problem any more tractable? After all, if punishing piracy is to much of a bother for the directly injured states, it is not obvious why unaffected states would shoulder the burden. The same paradox has been observed with regards to today's universal jurisdiction. The extension of the universal principle to war crimes and genocide is motivated at least partly by the difficulty of preventing such conduct.[44] But precisely because stopping such atrocities is expensive and risky, the extension of universal jurisdiction to these offenses has done next to nothing to encourage

[42] *See* Scharf, *supra* note 4, at 81 ("[P]irates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult."); Osofsky, *supra* note 5, at 194 n.18 ("If the nation owning the ship were the only one that could assume jurisdiction, pirates could easily escape capture and prosecution by boarding ships far from their home ports and keeping them beyond the reach of the home navies.").

[43] *See* ADAM SMITH, LECTURES ON JURISPRUDENCE 131 (Oxford 1978) (1762) (observing that piracy "requires a severe punishment" because of the "great opportunities there are of committing it"). Just as traditional jurisdictional rules were not useless in the face of priacy, the enforcement difficulties should not be overstated. The high seas are vast, but merchant ships generally traveled in known sea-lanes defined by wind and tide and commercial opportunity, and pirates would be found there, too. See CORDINGLY, *supra* note 15, at 88-89. Nations could and did police against pirates that threatened their commerce. During outbreaks of piracy they would sometimes dispatch vessels with specific instructions to hunt down the offenders. *See* Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529 (1911).

[44] *See* Cowles, *supra* note 41, at 194 (observing that "war crimes are very similar to piratical acts" in that there is no on-the-spot judicial system to punish it, and arguing that war crimes should thus also be universally cognizable).

nations unharmed by the conduct to intervene.[45] Thus the conventional explanation for the importance of the high seas locus raises more questions than it resolves, because the central feature of this explanation –high enforcement costs – also suggests that making piracy subject to UJ would do nothing to encourage unaffected states to actually *use* universal jurisdiction. Part II will explore this paradox further, and Part III will suggests a new account of the function served by UJ, an account that makes sense of why the high seas locus was necessary.

C. Threatens or harms many nations.

Piracy imperiled international commerce and navigation, which many states had an interest in protecting.[46] The promiscuous nature of piratical attacks was always been associated with universal jurisdiction. Pirates were famously denounced as "*hostis humani generis*," and this term has come to be nearly

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[45] *See* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 152 & n. 274 (2004) ("[I]n reality states have proven unwilling to touch these [NUJ] cases with a ten-foot pole," and citing failure of US to get nations with UJ states to prosecute Pol Pot as an example); Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003) (observing that international war crimes tribunals have little effect). Goldsmith explains that:

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

Id.

[46] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 105 (2003) (observing that piracy has long been subject to UJ in part "because of the threat that piracy poses to orderly transport and commerce between nations"); Sammons, *supra* note 10, at 126 ("[P]irates launched attacks . . . against the vessels and citizens of many nations. . . The transnational aspect of piracy is the most significant factor in justifying the exercise of universal jurisdiction over it."); Randall, *supra* note 11, at 795 (noting that since "intercourse among states occurred primarily by way of the high seas," and because piracy was indiscriminate in its targets, it was a matter of "concern to all states.").*Universality – Piracy*, *supra* note __, at 566 (suggesting that piracy was universally cognizable because "all [states] have an interest in the safety of commerce").

synonymous with universal jurisdiction itself.[47] If the harm is not primarily directed at one nation, it may be less likely that an injured nation would see an exercise of UJ as an usurpation of its exclusive sovereign prerogatives.

This still does not explain why affecting many nations justifies would lead to truly *universal* jurisdiction. States do not have an interest in the safety of commerce and navigation in general; they have an interest in the safety of *their own* commerce and navigation. Moreover, to the extent that piracy did ramify broadly, the harm to individual nations would not be uniform. A nation would be affected by piracy in rough proportion to its share of international shipping, and these shares were far from uniform across nations.[48] Because piracy hurts some states more than others, one would expect a corresponding disparity in nations' willingness to prosecute piracy regardless of the applicable jurisdictional theory. Indeed, because enforcement was expensive, it was almost always done for parochial rather than universal ends. For example, Britain, the principal maritime power of the 18th and 19th centuries, would dispatch ships to hunt down pirates that preyed on British ships, or pirates of British nationality who, by attacking neutral vessels had complicated the Crown's foreign relations. Even when Britain did prosecute pirates under the universal principle, it did so with pirates that

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[47] *See* Randall, *supra* note 11, at 794 & n. 51. However, modern courts and commentators have misunderstood the significance of the "*hostis humani generis*" characterization. The term has sometimes been regarded as one of opprobrium – pirates are so bad that they are everyone's enemy. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate . . . before him— *hostis humani generis*, an enemy of all mankind."). This understanding of *hostis humani generis* proceeds from the assumption that piracy was, like NUJ offenses, universally cognizable because of its heinousness, and finds in that term evidence that it was regarded as uniquely heinous. The deficiencies of this account have been described in a previous article. *See* Kontorovich, *supra* note 1.

[48] *Cf.* Kirby, *supra* note 5, at 250 ("The international crime of piracy may be easy to justify as a crime of universal jurisdiction in a maritime, trading country such as the United States or Australia. But it may be less easy in other parts of the world.").

threatened trade near Hong Kong, an area under British control and filled with British ships.[49] Britain was not in the habit of humanitarian anti-piracy expeditions: it did not dispatch ships to hunt down pirates against the French.

As with the related characteristic of *locus delecti*, it is not self-evident what the multinational threat posed by pirates facilitates universal jurisdiction.[50] The high seas have been described as a global commons. To pursue the analogy, pirates are weeds or pests infesting the commons.[51] However, in the absence of centralized government, commons *do not* get policed – thus the problem of the commons.[52] Self-interested states would not be expected to police a commons any more than self-interested private individuals would, without compensation, mow the town square's lawn. Yet as the emphasis on *hostis humani generis* shows, the multinational nature of the problem was considered relevant to UJ -- the question is why and how much.[53]

D. Uniform condemnation.

The broad international condemnation of piracy was relevant to its universal status. As well as being a crime under the law of nations, it was also a crime under the municipal laws of every nation. There was no disagreement among states over whether piratical conduct should be punishable. This was obviously necessary to piracy's undisputed status as a universal offense, though it

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[50] In other words, it is not clear why, as some commentators have suggested, UJ would make it easier for "nations to cooperate in fighting this common scourge," Osofsky, *supra* note 5, at 194 n.18.

[51] *See* Abbot, *supra* note 86, at 380.

[52] *See* Abbot, *supra* note 86, at 378-79 (describing commons problem in the international law context).

[53] An answer to this question is presented in Part III.

clearly would not be a sufficient condition – countless offenses were crimes in all countries, from murder to coining, but no other was universally cognizable.[54] There can be no universal consensus to make an offense universally punishable if there is not even universal agreement that it the conduct is wrongful. This is not to say that piracy was universally cognizable because it was thought to be particularly heinousness.[55] Piracy was not thought to be particularly heinous, but clearly it could not have been a universal offense it some states thought it innocent or praiseworthy.

E. Uniform punishment and double jeopardy.

A related but less obvious aspect of piracy that facilitated universal jurisdiction is that all nations provided for the same punishment for the offense – death.[56] The uniformity of punishment reduces the possibility that UJ prosecutions would result in one nation substituting its judgment about proper punishment over another's. When punishments for the same offense vary across nations, it leads to forum shopping, undermines deterrence, and can lead to conflict betweens states that proscribe different penalties. The uniformity of punishment for piracy facilitated its universal cognizability by reducing the likelihood that a prosecution by one state would have different consequences than the prosecution by another. For example, if Britain had some interest in

[54] *See* Yousef, 327 F.3d at 105 ("The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where crimes . . . are universally condemned by the community of nations.").

[55] *See* Kontorovich, *supra* note 1, at 223-26.

[56] *See* SMITH, *supra* note 43, at 181.

prosecuting pirates that attacked its ships, but the United States seized them first, Britain would not have to worry that U.S. courts would let them off easy – or punish them too severely.

The problem of differential penalties is made acute due to the ban on double jeopardy, which in international law goes by the civil law term *non bis in idem*,[57] the first nation to prosecute gets to determine the penalties. Put simply, under *non bis in idem,* subsequent prosecutions of a defendant for a given universal offense by other nations or tribunals would be precluded as surely as multiple prosecutions of the same conduct by a single state.[58] This amplifies the importance of uniform punishment for universal offenses. The possibility that ineffective or lenient universal jurisdiction prosecutions will operate as a double jeopardy bar will make nations reluctant to subscribe to UJ principles when penalties vary from nation to nation, and nations that provide for more stringent punishment will be the most opposed to UJ.[59] In *United States v. Furlong*, Justice Johnson described the bar on multiple prosecutions as a defining feature of universal jurisdiction over piracy:

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[57] The term literally means "not twice for the same." *See* BLACK'S LAW DICTIONARY 1665 (7th ed., 1999).

[58] The Princeton Principles agree that a nation's "good faith" exercise of universal jurisdiction should be recognized as final and binding on all subsequent nations. *See* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (Stephen Macedo ed., 2001), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf. [hereinafter PRINCETON PRINCIPLES] (Principle 9). However, several participants in the project "questioned whether the prohibition on double jeopardy . . . was a recognized principle of international law." *Id.* at 34, *available at* http://www.princeton.edu/~lapa/unive_jur.pdf.

[59] *See, e.g.*, Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT'L L. & POL'Y 317, 357-58 & n.266 (1994) ("The United States is concerned that the court will develop an unacceptable interpretation of crimes and that risk of double jeopardy problems will preclude national courts from prosecuting individuals acquitted by a politicized international court.") (citing a 1991 letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Vice President Dan Quayle).

> Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.[60]

Crucially, in international law *non bis in idem* only applies to *universal* crimes – it is thus a significant exception to the standard practice regarding prior foreign prosecution. Most nations adhere to some version of what the U.S. Supreme Court calls the "the multiple sovereignties principle." If a single act violates the laws of multiple nations and each nation has jurisdiction over the offender, each nation can prosecute in sequence – double jeopardy does not bar subsequent prosecutions.[61] Violating the laws of each sovereign is a separate offence.[62] Such multiple prosecutions do not violate the Fifth Amendment's double jeopardy clause – the defendant is not being put in jeopardy twice for violating the same law, but merely being prosecuted for all the laws broken by a given conduct. As the Supreme Court has observed, the multiple sovereignties

[60] 18 U.S. 184, 197 (1820). Justice Johnson's statement in *Furlong* remains the leading authority for the principle, at least in the United States. However, like most judicial pronouncements on universal jurisdiction over piracy, this one was dicta of the grossest sort. *Furlong* did not involve piracy; thus it did not present the issue of universal jurisdiction, let alone the implications of such jurisdiction for successive prosecutions by different sovereigns.

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

[62] U.S. courts have consistently held that the United States can prosecute defendants for conduct that has resulted in foreign convictions. *See id.* at 1279-81 (citing federal cases allowing for prosecution of defendants previously convicted in foreign nations). While the Fifth, Ninth and Eleventh Circuits, and district courts elsewhere, have consistently applied the multiple sovereignties principle to foreign prosecutions, the Supreme Court has only addressed the issue in the federal-state context. *See id.* at 1279 n.118. The multiple sovereignties doctrine has frequent application within the United States, where the federal government can prosecute a defendant based on the same conduct that has already resulted in state charges, and vice versa, without running afoul of the Double Jeopardy Clause. United States v. Lanza, 260 U.S. 377, 382 (1920).

doctrine is most important when there is considerable variation between the penalties the different sovereigns provide for the offense.[63] The reasoning behind the multiple sovereignties principle is inapplicable to UJ cases, which are exceptions to sovereignty-based jurisdiction. Under UJ, states exercise a single shared jurisdiction. UJ treats "the community of nations . . . as a juristic community."[64] Each nation's courts act as agents for the world.[65] Thus a second nation prosecuting the same offense would be just like a U.S. district court prosecuting a crime already adjudicated in another district court.[66]

Further confirmation of the view that nations prosecuting piracy do not act as sovereigns asserting their several jurisdiction but rather as agents of the international order can be found in a pair of 19th century British extradition cases

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

[64] Quincy Wright, *War Criminals*, 39 AM. J. INT'L. L. 257, 282 (1945).

[65] *See* Joyner, *supra* note 9, at 165 (arguing that the "only basis" for exercising universal jurisdiction is "the assumption that the prosecuting state is acting on behalf of all states"); Wright, *supra* note 64, at 280 (arguing that 19th century courts exercising UJ over pirates were acting as agents of the world community).

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

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

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

– which also suggest the abuses that could result from treating crimes as within a single universal jurisdiction. In In re *Tivan,* Britain arrested American pirates but refused to extradite them. The relevant treaty required rendering of defendants belonging to "each nation's jurisdiction." The British courts upheld the refusal to extradite. Since piracy was a *universal* offense, the pirates were not particularly with the jurisdiction of the United States. The treaty meant only parochial U.S. jurisdiction and not "the jurisdiction which the whole world shares with them."[67] Similarly, *Attorney-General v. Kwok-A-Sing* involved a Chinese pirate who attacked French shipping in international waters and fled to Hong Kong.[68] China requested his extradition under a treaty that allowed rendition of those who had committed "any crime or offence against the laws of *China*." The Council held that "if he is punishable by the law of *China*, it is only because he committed an act of piracy which . . . is justiciable everywhere," and the treaty did not contemplate extradition in such circumstances.[69]

F. Well-defined offense.

For hundreds of years, piracy had a narrow and precise definition that all nations agreed on:[70] robbery on the high seas without state authorization.[71] Tying

[67] *In re* Tivnan, 5 Eng. Rep. 645 (Q.B. 1864) (Crompton, J.) ("Is this a piracy within the words of the statute? It is to be within the jurisdiction of the United States; but does that mean within the jurisdiction which the whole world shares with them.") (quoted in *In re Stupp*, 23 F. Cas. 281, 291-92 (C.C.N.Y. 1873) (No. 13,562)).

[68] 5 L.R.- P.C. 179 (Q.B. 1873) (emphasis added).

[69] *Id.* at 200 (emphasis added).

[70] Dole v. New Eng. Mut. Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3966) ("[R]obbery 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."); HM Advocate v. Cameron, 1971 S.L.T. 202, 205 (H.C.J. 1971) ("The essential elements of this crime are no more and no lessthan those which are requisite to a relevant charge of robbery

the definition to the well-understood crime of robbery made it particularly tractable. In the seminal piracy case of *United States v. Smith*, Justice Story inquired "whether the crime of piracy is defined by the law of nations with reasonable certainty."[72] He quickly concluded that "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . all writers concur, in holding, that robbery. . . upon the sea, *animo furandi*, is piracy."[73]

Without universal agreement about the defining elements of an offense, it would be easy for nations to exercise UJ opportunistically for political ends.[74] This would undermine the legitimacy of the UJ norm and could lead to international conflict. Furthermore, like any other customary international law

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where that crime is committed in respect of property on land and within the ordinary jurisdiction of the High Court."); BLACKSTONE, *supra* note 23, at 72 ("The offence of piracy . . . consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there."); James Kent, *Commentaries*, *in* 3 THE FOUNDERS' CONSTITUTION 87 (Phillip B. Kurland & Ralph Lerner eds., 1987) ("Piracy . . . is the same offense at sea with robbery on land; and all the writers on the law of nations, and on maritime law of Europe, agree in this definition of piracy.").

[71] The more recent Convention on the Law of the Sea defines piracy much more broadly, calling piracy "any . . . acts of violence or detention. . . committed for private ends." Art. 101(a). This would encompass not just robbery, but assault, rape, murder and so forth. It is important to note that there appear to be no instances of UJ under this broader definition of piracy. The indeterminacy of the Convention's definition has been powerfully criticized; it may be close to useless. See Rubin, at 333; See also, Samuel Pyeatt Menefee, *The Case of The Castle John, Or Greenbeard The Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L. J. 1, 4 (1993).

[72] 18 U.S. 153, 160 (1820).

[73] *Id.* at 161.

[74] *See* United States v. Yousef, 327 F.3d 56, 106 (2003) (holding that terrorism is not subject to UJ because "[u]nlike those offenses supporting universal jurisdiction under customary international law–that is, piracy, war crimes, and crimes against humanity–that now *have fairly precise definitions* . . . 'terrorism' is a term as loosely deployed as it is powerfully charged".) (emphasis added). *Cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir.1984) (Edwards, J., concurring) (arguing that "the nations of the world are so divisively split on the legitimacy of such [terrorist] aggression as to make it impossible to pinpoint an area of harmony or consensus"); *Id.* at 806-07 (Bork, J., concurring) (arguing that acceptability of terrorism is a question as to which there is "little or no consensus and in which the disagreements concern *politically sensitive issues*") (emphasis added).

norm, UJ requires that all nations consent to it. The greater the precision of an offense's definition, the easier it is to determine whether nations have in fact consented to its universal cognizablity.

However, some commentators argue that piracy lacked an "authoritative definition," and thus "disagreement over the scope or contours of a universal crime does not deprive the offense of its universal character."[75] The alleged definitional uncertainty concerns whether pirates had to operate from purely larcenous motives, or *animo furandi*.[76] It is true that *animo furandi* was discussed in some piracy cases. However, the suggestion that the somewhat unsettled role of *animo furandi* in piracy law makes the offense vague misapprehends the point of the discussions of *animo furandi*. It was never used as a separate *mens rea* element of the offense, but rather as a test for the existence an undisputed element, namely, the absence of state sponsorship.[77]

Piracy had to be committed without sovereign authorization; otherwise it would simply be legal privateering. *Animo furandi* operated as a proxy for sovereign authorization in situations like civil wars and insurrections, where the

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[75] Scharf, *supra* note __, at 80-81. **CITE RUBIN ALSO**

[76] *See id. See also*, Randall, *supra* note __, at 66 Tex. L. Rev. at 795 ("While universal jurisdiction over piracy has existed for centuries, international law was slow to define the exact meaning and scope of 'piracy.' Less than sixty years ago, scholars noted a 'great variety in opinions as to the scope of the term,' and concluded that ' t here is no authoritative definition.'"), citing Harvard Research in Int'l Law, Draft Convention and Comment on Piracy, 26 AM. J. INT'L L. 739, 749-65(Supp. 1932).

[77] *The Malek Adhel*, 43 U.S. 210, 232 (1844) (holding that "*animo furandi"* requirement simply refers to the basic element of piracy under the "general law of nations" that the conduct be committed "without any sanction from any public authority or sovereign power."). See also, Samuel Pyeatt Menefee, *The Case of The Castle John, Or Greenbeard The Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L. J. 1, 4 (1993) (describing "animo furandi" as an element that simply excludes privateers and others authorized by "recognized powers"); Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 142-43 (1990).

identity or existence of the relevant sovereign was unclear.[78] There was never any suggestion, however, that sea robbers operating out of motives other than greed would be beyond the reach of piracy law and universal jurisdiction.[79] Nor does there appear to be any piracy case where the defendant, though not in the service of an established or putative state, was acquitted for lack of *animo furandi*. Moreover, the lack substantial dispute over the *animo furandi* requirement can also be inferred from the fact that many pirates operated from political motives, or at least some mix of politics and profit.[80]

In contrast, the definitions of most of the human rights offenses nominated for NUJ are at extraordinarily broad and indeterminate, as even supporters of NUJ concede.[81] In the same vein, the Second Circuit recently rejected the contention that UJ applies to international terrorism because there is no precise or neutral definition of the crime. As a positive matter, "one man's terrorist is another man's

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[78] *See* Rubin, *supra* note __, at 82; Menefee, *supra* note __, at 4-5 (noting that the principle focus of *animo furandi* requirement was "the legitimacy of the power granting the commission"). The Convention on the Law of the Sea does not require pirates to have *animo furandi* or any other specific motive, makes clear that the real inquiry is into sovereign authorization. Under the Convention, the crime must be committed by a "private ship" for "private ends," of which greed is only one. Art. 101(a). A ship sailing under a writ of marque authorizing it to attack other vessels would not be serving "private ends," but a ship without a commission that attacks vessels for political purposes would still be seeking "private ends," i.e., ends not established or endorsed by a sovereign state. *See* Menefee, 6 Conn. J. Int'l L. at 142-43.

[79] The Supreme Court rejected the notion than an attack by a private vessel apparently attributable to the Captain's insanity would not be piracy for lack of *animo furandi:* such conduct is piracy "whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power." *Malekh Adhel*, 43 U.S. at 232.

[80] *See* Kontorovich, *supra* note 1, at 217; Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 142-43 (1990).

[81] *See* Kirby, *supra* note 5, at 250 (suggesting that judges should be cautious about accepting universal jurisdiction because "the crimes propounded may be ill-defined"); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 426-27 (2002) ("Defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law. Indeed, of the several definitions that have been 'promulgated,' no two are alike.").

freedom fighter."[82] To be sure, there are sound, narrow definitions of terrorism, such as violence committed by irregular combatants against civilian populations to change the policy of a government. The Second Circuit's point was not that "terrorism" is a term that cannot be narrowly defined in principle, but rather that no precise definition has won general acceptance.

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

Of course, definitional precision is a matter of degree and there will always be gray areas in the definition of *any* crime. All that is argued here is that what was contemplated by piracy was much better understood than what is contemplated by NUJ offenses such as against crimes against humanity, war crimes, and even torture. At the very least the latter offenses simply cover more varied conduct and thus have a broader surface area over which friction can arise.

II. THE RATIONAL CHOICE PARADOX OF UNIVERSAL JURISDICTION

This Part shows a fundamental problem of UJ – why would states not directly affected by a crime prosecute it? The primary function of NUJ is instrumental. It aims to deter violations of the relevant international human rights

[82] Yousef, 327 F.3d at 107-08.

norms.[83] Extending jurisdiction to every nation in the world will, NUJ advocates contend, increase *ex post* enforcement and thereby improve *ex ante* deterrence. At first glance, the increased deterrence prediction seems plausible: more possible prosecutors means less crime.[84] The problem is that there is no strong reason for rational, self-interested states to exercise universal jurisdiction.[85] Using NUJ to

[83] *See, e.g.*, Joyner, *supra* note 9, at 166 (explaining "the necessity of extending universal jurisdiction" to war crimes to create a "viable means for deterring similar crimes in the future"); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION 20-21 (2001) (speculating that "the exercise of universal jurisdiction is likely to act as a general deterrent, at least to some extent, to crimes under international law" and observing that deterrence is "the most frequently cited grounds" for exercising universal jurisdiction).

[84] Some commentators do posit non-instrumental goals for NUJ – various advocates stress different ones – but the deterrence rationale dominates. *See supra* note 83. *See also* AMNESTY INTERNATIONAL, *supra* note 83, at 20 (observing that deterrence is "the most frequently cited grounds" for exercising universal jurisdiction). Some advocate UJ for purely retributive or expressive purposes. In the retributive view, punishment is a worthy end in itself – offenders deserve punishment and victims have "a right to justice." *Id.* at 13; *see also* PRINCETON PRINCIPLES, *supra* note 58, at 25, *available at* http://www.princeton.edu/~lapa/unive_jur.pdf. (noting that drafters of Princeton Principles were "united in their desire to promote greater legal accountability for those accused of committing serious crimes under international law"). A related purpose of universal jurisdiction is expressive: by elevating certain crimes above the standard rules of international jurisdiction, nations demonstrate their deep repugnance at such crimes. Other commentators assign essentially aesthetic purposes to universal jurisdiction: they argue that it is simply unseemly for NUJ over heinous offenses *not* to exist. A positive analysis such as this one cannot meet such inherently normative visions on their own territory. However, even for those who favor universal jurisdiction for its own sake, rather than to alter the behavior of real actors, it would seem that nations would have to actually exercise NUJ for these non-instrumental purposes to be satisfied.

[85] There are reasons to doubt that NUJ would increase deterrence even if states did put it into practice. Human rights violators do not expect to come to justice at all. They know that if they fall into the hands of their victims they will be called to account, perhaps brutally and summarily. That they carry out their crimes anyway suggests that they either do not expect to lose power, or that the prospect of defeat and apprehension is outweighed by the current benefits of their actions. The exercise of NUJ over war criminals in the Yugoslav civil war did nothing to deter them, or to deter subsequent offenses in Kosovo by some of the same actors. This is a powerful criticism of NUJ, but NUJ is new enough to be able to insulate itself from empirical criticism with the argument that deterrence will only be established if and when it becomes more widespread and institutionalized; it may currently be implemented too sporadically to affect incentives.

But even a well-established and regularly implemented NUJ could *reduce* the level of deterrence. The NUJ tribunal will likely treat the offender far better, and impose a much lower punishment, than the tribunal with traditional jurisdictional links. In particular, no courts that have exercised NUJ impose the death penalty, while the victims' or offenders' states do have capital punishment. (These problems stem in part from the existence of different punishments for the same NUJ offense. *See* Part I.E., *supra*. and **cite Rwanda tribunal discussion infra at conclusion**). Furthermore, the European and international tribunals that use NUJ are more scrupulous about due

punish human rights offenses may be normatively attractive, but that alone cannot does not mean states would actually do so.

A. The rational choice model of state behavior.

This Part looks at both the old and new UJ from a rational choice perspective. Rational choice models assume that states act to further their own interests (whatever those may be), and that they seek to achieve these goals in a economically rational manner.[86] This approach has long been a staple of both international relations scholarship and economic analysis of law. But public international law scholarship has, at least until recently, ignored this methodology.[87] However, the rational choice approach has been gaining currency among an influential minority of international law scholars[88] who recognize that without the admittedly simplifying assumptions of the model one cannot have "a workable, let alone parsimonious, tool for explanation and prediction."[89]

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process protections than most nations' courts. On the other hand, some NUJ offenders may not be prosecuted at all in the absence of NUJ. But on balance, it may be that the prospect of a NUJ prosecution will reduce for human rights offenders the expected costs of their actions.

[86] Fuller accounts of the rational choice model of state behavior, and its applicability to international law scholarship can be found in a pair of articles advocating the use of law and economics and international relations models. *See* Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 20-21 (1999); Kenneth W. Abbot, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 348-50 (1989).

[87] *See* Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2056 (2003) ("The systematic application of rational choice theory to international law–as opposed to international relations–is a recent phenomenon. . . . Although the number of international law scholars doing interdisciplinary work is expanding, scholars applying rational choice theory remain relatively few in number.").

[88] *See, e.g.*, Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 573-621 (2002) (using rational choice theory to explain customary international law); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Symposium, *Rational Choice and International Law*, 31. J. LEG. STUD. 1 (2002).

[89] Abbot, *supra* note 86, at 351.

Advocates of NUJ, in contrast, do not specify any model of state behavior; they do not provide explain linked to real costs and benefits of why nations would systematically enforce NUJ.[90] This Article, however, seeks to provide a positive explanation of UJ that is consistent with historical evidence. Universal jurisdiction seeks to affect, and thus depends, on assumptions about the behavior of the states and other actors; understanding these requires a model of state behavior. Rational choice theory provides the most plausible model.

A model that generates a theory consistent with observed data can then be used to make predictions and not just normative recommendations about whether ongoing efforts to expand NUJ would be expected to succeed (i.e., increase deterrence for the relevant international law norms), and whether such success would cause conflict between nations.

B. The paradox.

1. The public goods problem.

[90] This is in part a consequence of international law scholarship's focus on developing and articulating norms rather than positive and predictive accounts of conduct connected to the incentives faced by states. *See generally* Swaine, *supra* note 88, at 561 ("Rational choice theory may be considered alien to international law's norm-laden nature, but perhaps the critical perspective is needed."); Dunoff & Trachtman, *supra* note 86, at 3 ("[I]nternational legal scholarship too often combines careful doctrinal description–here is what the law is–with unfounded prescription–here is what the law should be. This scholarship often lacks any persuasively articulated connection between description and prescription, undermining the prescription."); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 663 (2000):

> The main problem with international law scholarship, however, is that it is too normative. International law scholars spend too much time proclaiming the value of international law and bemoaning its many "violations," and too little time understanding how international law actually works. In our view the latter inquiry is more fruitful, and international law scholarship would do well to follow the example of international relations theory in political science and focus on positive rather than normative inquiries.

Id.

In the rational choice model of state behavior, universal jurisdiction appears to be a mirage, an empty set. Exercising universal jurisdiction is costly for the forum state.[91] This is why even directly-injured nations sometimes fail to prosecute. But UJ supposes that nations that have *not* been directly injured will also incur these costs, despite the absence of a tangible benefit. Gary Bass described the problem well:

> The exercise of universal jurisdiction is politically costly for a state. It means embroiling one's diplomatic apparatus in an imbroglio, and, quite likely, a confrontation with one or more states . . . it means burdening one's court system with what will probably be an incredibly complex and problematic case; and it almost certainly means a great deal of domestic turmoil and controversy. Why would a country bother?[92]

The standard sovereignty-based varieties of international jurisdiction already allow states to punish crimes that affect the interests of the forum state in a direct and material way. All that UJ adds is authorization for states that have not been materially harmed by the conduct to prosecute it. But while UJ gives unaffected states the right to prosecute, it provides no incentives to do so.

A nation exercising NUJ bears all the costs of prosecution while reaping none of the benefits; at best, it incurs real costs for inchoate benefits. Nations have scarce prosecutorial and judicial resources. Given that universal jurisdiction is

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[91] *See* REYDAMS, *supra* note **__Error! Bookmark not defined.**, at 222 (observing that because exercising UJ is costly, it is a jurisdictional luxury only the wealthiest states can afford); PRINCETON PRINCIPLES, *supra* note 58, at 27, *available at* http://www.princeton.edu/~lapa/unive_jur.pdf ("The assembly recognizes that a scarcity of resources, time and attention may impose practical limitations on the quest for perfect justice.").

[92] Garry J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES 77-78, *supra* note 5 (suggesting that *Eichmann* suggests one reason a nation might exercise "universal jurisdiction" – namely, it feels directly and distinguishably injured by the offense). This describes Israel's position in *Eichmann* quite well, but it also explains why *Eichmann* was *not* an exercise of UJ.

costly, one would expect it to at best be a last priority for self-interested states.[93] While one might imagine nations exercising UJ when the costs are close to zero, this is not the situation in which UJ usually presents itself. Opportunities for UJ usually arise when the directly affected nations have chosen not to incur the costs of enforcement, even though they would reap most of the benefits. Of course this can be because the directly-affected nations are incapable of prosecuting, but it also suggest that potential UJ cases involve more than *de minimus* enforcement costs. (And while foreign nations may have more resources to prosecute human rights offenses than the directly affected state, the absolute costs of doing so will probably be higher, given problems of access to witnesses and evidence, political obstruction, language barriers and so forth.) Thus as a rough approximation, one would expect to see no universal prosecutions, or very few.

In other words, exercising UJ entails the provision of a public good. A public good is one that is non-rivalrous – consumption of the good by one state does not reduce its availability for others, and that is non-excludable – nations that do not contribute to the provision of the good cannot be barred from sharing in its benefits. The production of public goods is thus undermined by free-rider problems, and thus they will be supplied at "less than optimal levels, if at all."[94] The provision of security on either a domestic or international level is a prototypical public good. International relations ("IR") scholars have observed

[93] *See* Kirby, *supra* note 5, at 256 (observing that judges with already heavy case loads could be expected to be hostile to claims of universal jurisdiction).

[94] Abbot, *supra* note 86, at 378.

that international regimes that seek to produce public goods inevitably fail.[95] *Successful* international regimes create methods of excluding non-contributing states,[96] compensating contributing states, and otherwise altering real incentives. By contrast, UJ does nothing to change the incentives facing nations.

2) The coordination problem.

The rational choice model reveals a related difficulty with UJ-based deterrence – a coordination or first-mover problem. The set of nations directly injured by a given international crime is small and defined; it may be just one nation. Under traditional theories of international jurisdiction, the directly affected nations have proper incentives to prosecute, because if they do not no one will. Thus they must weigh the costs and the benefits of prosecution and act when the latter outweigh the former. Universal jurisdiction authorizes every nation in the world to prosecute, but does not affirmatively put the responsibility on any particular state. Thus no nation has any obvious reason to step in front and assume the burden; rather all would be expected to wait for another to step forward and act in the name of the "international community."

Worse still, even the nations that have been directly injured by an international crime would have their incentive to take action diminished by the possibility of universal jurisdiction. The nominal possibility that other nations will shoulder the enforcement burden may make it more likely that the injured nation

[95] *See id.* at 379 (describing the collective sanctions regime generally of the U.N. Charter's Article VII and the Nuclear-Nonproliferation Treaty as examples of failed international efforts to produce the public good of security).

[96] Regional defense alliances, like NATO, do produce security because they can exclude non-producers from the benefits. Similarly, the ability of nations to withdraw from such treaties when they suspect the others of free-riding, as the United States did when it exited the ANZUS treaty, also "functions as a form of exclusion." *See id.* at 387.

save itself the burden of prosecution in the hopes that some other state would launch a UJ prosecution. Of course, UJ will only create this moral hazard if the directly injured nation believes that UJ may be exercised by another nation, and it is not clear why such unrealistic expectations would arise. But in situations where the benefits of prosecution only slightly outweigh the costs, even a small perceived probability that another state would assert UJ may deter prosecution by the state with traditional jurisdiction.

3) General vs. local injury.

As this Part has shown, when an injury is borne by many states, the incentives for all of them to deal with the conduct are reduced because enforcement is a public good. But NUJ offenses, unlike piracy, do not cause real harm to multiple nations. They are usually purely internal human rights abuses, or in the case of war crimes, human rights abuses in a single neighboring state. When the conduct does not harm other nations at all, it becomes even more unlikely that they would exercise UJ. Of course, proponents of NUJ sometimes contend that massive human rights offenses hurt all nations by weakening respect for international norms. But this purported "universal injury" argument is purely metaphorical. It is completely abstract and inchoate; it is at best a "words" rather than a "sticks and stones" injury.

To be sure, conduct can have remote and indirect consequences; how general an injury is is a matter of degree. Even purely internal conduct can have spillover effects. But piracy, directed against the ships of many nations and immediately harming the economic interests of even more nations, is clearly far

removed on this continuum from genocide, torture, war crimes, and even the general-sounding "crimes against humanity." These NUJ offenses are committed against specific internal populations. Spillover consequences are largely inchoate, moral or aesthetic. For example, the Rwandan genocide was a tremendous calamity for the inhabitants of that nation. And it outraged many who read about it outside of Rwanda. But this is not a direct or concrete injury, as evidenced by the fact that those foreign observers who were thus injured did not feel badly enough about it to stop the atrocities. Of course, if conduct harms many nations, free rider problems may exist regardless of the jurisdictional rule.

4) The externalities problem.

There is also the opposite of the public good problem: while nations that exercise UJ do not internalize the benefits of their actions, they may also not internalize the full cost. This is the problem that arises when a UJ prosecution threatens to disrupt a post-conflict national amnesty or reconciliation program. These programs are like settlements of lawsuits: one side waives its claims against the other in exchange for some consideration, such as an admission of wrongdoing or a promise to not participate in politics. Settlements are designed, among other things, to reduce the volatility of outcomes for both sides. For one side, the release of claims accomplishes this. But UJ vests claims in all nations, making a release secured from a new regime worth much less as an inducement to members of the former regime. Thus UJ may make a peaceful resolution of internal conflicts more difficult. Also, as discussed herein,[97] UJ may reduce the

[97] *See supra* note 81.

deterrent effect of domestic punishment. These are all real costs of UJ, but none of them are internalized by the prosecuting nation.

The non-internalization of some costs by a nation asserting UJ does not eliminate the original paradox. So long as costs are positive and direct benefits non-existent (which again is the definition of UJ), then one would not predict regular enforcement. However, the lack of full cost internalization gives reason to be concerned about any observed UJ cases. There may be occasional situations where the cost of exercising UJ to the prosecuting state will be sufficiently close to zero. For example, the defendant may have been apprehended in the nation's territory on other charges; proof of his guilt is well documented and thus the administrative costs of prosecution are low; and his home nation is weak and far away, and thus incapable of creating problems for the prosecuting nation. Prosecution may occur in such situations even though it would not be optimal from a "global" perspective because the prosecuting nation makes the enforcement decision without internalizing the full costs. Put differently, a prosecuting nation may be *externalizing* costs onto the nations with traditional jurisdiction, such as the costs of disrupting amnesty and reconciliation processes.

C. Altruism and hegemony: rational choice explanations for UJ.

To be sure, there are gaps in the rational choice/self-interested state account of universal jurisdiction. Some nations with a direct stake may fail to prosecute not because it would not be worth their while, but because they are incapable of doing so due to lack of judicial resources, insufficient security, or general political instability in the wake of a ruinous war. While the rational choice

model posits that nations act to advance their interests, like other economic models it does not stipulate what those interests are. Rather, it takes preferences as exogenous. Sometimes nations undertake costly actions for altruistic reasons, out of magnanimity and moral impulses.[98] Disaster relief, foreign aid, and humanitarian military interventions are examples. NUJ can be seen as authorizing a kind of *ex post* humanitarian intervention. But such analogs also tell us about the limits of altruism-based NUJ. It will only be exercised when the costs are small, and when it coincides with other national interests[99] – i.e., with a strong preference for helping friends and allies, or otherwise concurrently serving a nation's foreign policy goals. Humanitarian intervention, after all, is quite rare, especially in proportion to the occasions for it.

Thus a finer estimate of states' willingness to exercise UJ would predict rare and aberrant prosecution of offenders, limited to cases where the costs of doing so are particularly low (perhaps when there is strong political or public support for it, guilt is easy to prove, and the offender is already in custody). Such prosecutions would remain exceptional, and thus add little deterrent power to international norms. This prediction is consistent with the evidence. Over several hundred years, there were only a few UJ prosecutions of pirates. There is little historical evidence for the view that nations thought piracy so harmful to world order that they would set aside their parochial interests to punish it. Indeed, not only did nations almost never pursue pirates that had not directly wronged them,

[98] *See* Abbot, *supra* note 86, at 352 n.93 (observing that "states infrequently act in ways that even *appear* altruistic) (emphasis added).

[99] *See id.* at 352.

they often openly tolerated pirates that preyed on rival nations.[100] And despite the growth of the concept in recent decades, actual exercises of UJ remain rare. Moreover, with both piracy and NUJ offenses, jurisdiction is exclusively exercised by wealthy and powerful industrialized states over defendants from poor and powerless states, precisely because such prosecutions are the least costly. In such cases there is little danger of international conflict over assertions of NUJ because weak nations cannot effectively defend against perceived incursions on their sovereignty, the political and military costs for powerful nations of exercising NUJ are relatively low.

Moreover, the few instances where UJ over pirates was put into practice fit the rational choice model -- not as examples of altruism, but rather as examples of "hegemonic stability." Britain was invariably the nation exercising UJ.[101] Britain also accounted for a vast proportion of the world's maritime trade. Generally, nations will not provide public goods because they receive only a fraction of the benefits but pay all the costs. However, when a nation or its interests is "large enough to realize benefits from production of a good greater than its total costs [it] should be willing to bear those costs itself, providing the [public good] for the entire beneficiary group."[102] (This is a general economic phenomenon: the larger an actor's stake in something, the more likely they are to provide related public goods or not succumb to the tragedy of the commons.) Appropriately enough, one of the most famous examples of "hegemonic stability"

[100] *See* Barbour, *supra* note __, at 545-56 (describing English tolerance of piracy against the Spanish).

[101] *See* Rubin, *supra* note 6.

[102] Abbot, *supra* note 86, at 383.

in international relations theory involves the related phenomenon of Britain's sponsorship of liberal trade regimes in the 19th century.[103] It made sense for Britain to impose this unilaterally on other nations because Britain had such a large share of world trade.[104]

D. Modern piracy and the futility of universal jurisdiction.

The predictions of the rational choice model are supported not just by the historical lack of UJ prosecutions of piracy,[105] but also by the failure of piracy to generate a universal response in the 20th century and up through to the present day, when UJ supposedly enjoys its greatest acceptance.

1) Piracy today.

Piracy remains a problem today – a problem unmitigated by the availability of universal jurisdiction. A substantial portion of piratical attacks take place in Southeast Asian waters. These pirates threaten the commerce of many nations. Fifty-thousand large ships carrying one-fourth of world trade and one-third of oil shipping travels through the pirate-infested Straits of Malacca, between Indonesia and Malaysia.[106] Despite the severity of the piracy problem, there have until this year been no efforts to bring universal jurisdiction to bear against the pirates. While Indonesia and Malaysia are ill-equipped to deal with the

[103] *See id.* at 384.

[104] *Id.* at 384-85.

[105] *See* Rubin, *supra* note __, at 302, 348 n.50. The paucity of UJ prosecutions in the 18th and 19th centuries could at least partially be explained by irregular court reporting and summary execution of pirates at sea. *See* Kontorovich, *supra* note 1, at 192 n.51.

[106] *See* Ellen Nakashima and Alan Sipress, *Singapore Goes It Alone In Maritime Security Drill*, Wash. Post A12 (June 2, 2004).

pirates, other nearby states like China, Japan and South Korea – which depend on the Straits traffic for 80% of their oil consumption – have not sent their ships to combat the pirates, despite clear authority under international law to do so.[107]

In 2004, as attacks increased in the area, concerns mounted that Islamic terrorists would turn to piracy, perhaps closing off the Straits by detonating a tanker.[108] This new threat lead the United States to propose sending its forces in high-speed patrol vessels to police the waters and hunt down the pirates. Given that this would help Indonesia and Malaysia, the U.S. did not expect opposition to the plan. As Admiral Thomas Fargo, commander of U.S. forces in the Pacific said, "All of the countries are concerned about the transnational threat. This is a pretty vast space and no country can do this by themselves. So it's going to be a multinational, multilateral effort, if you will, to deal with this particular problem."[109] However, Indonesia and Malaysia rejected the U.S. anti-piracy patrols, citing concerns about having their sovereignty eroded and the offense to local sensibilities that would arise from a foreign naval presence.[110]

The failure of UJ to anything about the growing problem of piracy today carries a strong cautionary message for modern efforts to expand UJ to human rights offenses. Piracy is the paradigmatic UJ offense in international law; nations have for hundreds of years agreed on the *principle* that any nation can hunt down pirates. And the theory of universal jurisdiction is now more popular than it has

[107] *See* Convention on the High Seas, Art. 100 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas."); Art. 105 (authorizing "every State" to seize and punish pirates on the high seas).
[108] *See* Ellen Nakashima and Alan Sipress, *Singapore Goes It Alone In Maritime Security Drill*, Wash. Post A12 (June 2, 2004).
[109] Marcus Hand, *Malaysia rejects US marine squad plan for Malacca Strait*, Lloyd's List 12 (April 6, 2004).
[110] *Id.*; Nakashima and Cipress, *supra* note __.

ever been. Yet this principle has not been translated into practice. First, the nations with the means to do so have proven unwilling to use their naval power to combat piracy, despite the serious and growing threat it presents. This is entirely consistent with the predictions of rational choice theory. A nation that sends its vessels against the pirates would incur all the costs of enforcement but enjoy only a pro rata share of the benefits. The vigorous denunciation of pirates as *hostis humani generis* has not motivated nations to hunt them down because such expressions of sentiment do not affect real incentives. Moreover, when a hegemonic power like the United States comes along, willing to deal with the pirates – because it can do so at relatively little cost, and yet might benefit significantly given the global scope of its economic and strategic interests – the nations in the area resist and undermine the efforts at universal enforcement.

All this suggests that the still controversial NUJ will make not be implemented in practice, at least not in any regular fashion. Indeed, NUJ seems less likely to result in enforcement than piracy UJ. NUJ offenses affect third-party nations much less than Southeast Asian piracy, which has global economic consequences. Moreover, NUJ has not even won the broad acceptance that piracy UJ enjoys, and there is much dispute as to what specific conduct it applies to. Thus there is little reason to believe unaffected nations will expend efforts to enforce NUJ norms, or that directly-affected states will accept even a perceived encroachment on their sovereignty, regardless of the international law norm.

2) Early 20th century piracy.

A an episode involving Chinese pirates illustrates the high costs of enforcement and the unwillingness of nations to incur such costs when much of the benefits would redound to other states. In the early 20th century, both the South China Sea and the Yangtze River had long been infested with pirates (the former remains among the most dangerous waters in the world). British shipping companies owned many vessels that carried passengers and goods, primarily Chinese, in these waters. The British ships were regularly attacked by pirates.[111] The cost of protecting these vessels in far-off waters was quite high, and the British government finally decided that it did not want to bear it. So the government required the British ship-owners themselves to pay the Crown for the cost of protection; otherwise, the forces would be withdrawn and the companies left to fend for themselves.[112] In other words, Britain – at the time the world's mightiest naval power, with considerable economic interests in China – did not want to bear the costs of protecting its *own* ships from pirates. If powerful nations were reluctant to expend resources on enforcement when they were directly harmed because they would not recoup the full benefits, this suggests at the very least that there was nothing about piracy that would inspire *disinterested* or tangentially affected nations to punish out of a general solicitude for the sanctity of international law.

The shipping companies filed suit for a refund of the monies paid to the government for their protection, arguing that the Crown was obligated to provide

[111] *See* China Navigation Co. v. Attorney-General, [1932] 2 K.B. 197 (Eng. C.A.).

[112] *Id.* at 198, 210.

this service free of charge.[113] The suit failed on what amounted to standing grounds; the King's decisions about the deployment of his forces are entirely discretionary and not subject to judicial challenge, much like prosecutorial discretion. However, in affirming this conclusion, the Court of Appeal made two observations quite relevant to the rational choice paradox of universal jurisdiction.

First, the justices noted that the ships belonged to commercial enterprises that internalize all the benefits of their journeys but seek to externalize the enforcement costs. The profits went to the companies but the costs were borne by the Crown.[114] The Court thought it reasonable to require those who obtain the benefit from the suppression of piracy to foot the bill.[115] Second, while the ships were British, the judgments repeatedly noted that the primary character of their commerce was Chinese – the vessels carried Chinese nationals and Chinese-owned cargo from one place in China to another.[116] Thus a large portion of positive externalities or surplus created by these activities was enjoyed by China, giving the Crown even less reason to expend its resources on the piracy problem. And one justice noted that need for British forces arose from the commerce taking

[113] *Id.* at 220-21.

[114] *See id.* at 212 (Scrutton, L.J.) ("A shipowner, *without the assent of the Crown,* trades *for purposes of his own profit*. . . . Has the Crown a legal duty to protect the shipowner against the criminal action of the passengers whom the shipowner himself has invited aboard?") (emphasis added); *id.* at 223 (Lawrence, L.J.) ("[T]he plaintiff company . . has asked the Crown by means of its armed forces to assist it to continue its Chinese passenger traffic with more safety and thus *enable it to earn the resulting profit*.") (emphasis added).

[115] *Id.* at 223 (Lawrence, L.J.) ("I entirely agree with the view expressed by the Crown to the shipowners that the provision of preventive measures against internal piracy is *essentially a matter for the owners* and forms no part of the duty of the Crown.") (emphasis added).

[116] *Id.* (noting repeatedly that ships were engaged in "Chinese passenger traffic"); *id.* at 212 (observing that the plaintiff "for his profit . . . takes on board large numbers of *foreign passengers* . . . to a *foreign port*") (emphasis added).

place "in neighborhoods inefficiently policed by foreign Governments"[117] -- implying that a better solution would be for China itself to reign in its pirates.

III. RESOLVING THE PARADOX: UNIVERSAL JURISDICTION AS AN EVIDENTIARY RULE

As shown in Part II, making an offense universally cognizable will not significantly increase enforcement or deterrence. Yet this begs the question of why self-interested nations so consistently paid lip service to UJ for piracy. A good positive account of piracy should explain why states treated it as a UJ offense – and at the same time almost never actually put that jurisdiction into practice. This Part presents a new explanation of UJ over piracy, one that is both consistent with rational choice predictions about the behavior of self-interested states and with the historical facts. This new account suggests that the universal status of piracy was not so much about expanding jurisdiction as it was about facilitating the proof of jurisdiction.

A. *Hostis humani generis* as an evidentiary presumption.

Universal jurisdiction over piracy is best understood as an evidentiary rule. It facilitated the prosecution of the crime in cases where traditional territorial or nationality jurisdiction existed but would be very difficult to affirmatively prove. Thus UJ should was not primarily employed to suspend or limit the traditional sovereignty-based rules of international jurisdiction, but rather as a

[117] *Id.* at 212 (Scrutton, L.J.).

judicial presumption in aid of traditional, Westphalian jurisdiction.[118] As an evidentiary rule, UJ can have value even if it does not result in additional enforcement by non-affected states because it encourages enforcement by states that already have some incentive to do so. By reducing the cost of proving jurisdiction (by removing one of the elements the prosecution would normally have to establish), it lowers the costs of enforcement precisely in those cases where the benefits of enforcement to the forum state are positive. Thus it could in fact result in increased enforcement against piracy, but not by unaffected states.

The evidentiary account of UJ over piracy manages to resolve the rational choice paradox by showing how even purely self-interested states could find the concept of UJ over piracy useful. At the same time, it is also consistent with the near absence of any "true" UJ prosecutions, and with the fact that at least in U.S. courts, universal jurisdiction principles were often resorted to in cases involving U.S. nationals or vessels. While the new explanation presented here makes UJ over piracy far less mysterious as a positive phenomenon. It also shows that piracy UJ has nothing in common with NUJ. In NUJ cases, there is truly no connection between the prosecuting state and the defendant; the universal principle is invoked to create jurisdiction, not to prove it. Thus if UJ over piracy was used as an evidentiary rule, then NUJ appears to be a unprecedented and

[118] The evidentiary rule does not explain all observed uses of UJ over piracy. Some may be products of altruism or hegemonic stability, as explained in Part II.D. But altruism and hegemony are not sufficient to account for the broad and longstanding *acceptance* that piracy UJ enjoyed. U.S. courts endorsed the doctrine at a time when America was neither hegemonic nor altruistic. The doctrine must have had some other use to these nations, namely, its value as an evidentiary rule.

ambitious jurisdictional experiment untethered to the historical experience of piracy from which it claims to draw its inspiration.

B. Difficulties in proving jurisdiction over pirates.

As Part I showed, one of the outstanding characteristics of piracy was its multinational character. Maritime commerce itself had a "peculiarly multinational complexion."[119] Ships, even men-of-war, were routinely crewed by sailors of different nationalities. A pirate ship – crewed by outlaws, refugees, exiles, deserters, escaped slaves and other outcasts -- was at least as cosmopolitan as the typical merchantman.[120] Moreover, the pirate ship could be owned by nationals of various states, and flagged by yet another state.[121] The international character of pirates' victims added a further layer to the transnational character of the crime.[122] Because the ships of many nations plied the sea routes, and because pirates were generally (but not always) politically neutral, they could be expected to attack the ships of many different maritime states.[123]

Because pirates injured many nations, many nations could exercise jurisdiction under traditional rules. However, proving the existence of jurisdiction in any specific cases could be very difficult. Pirate ships were almost never caught

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[119] Henry J. Steiner, Book Review, 76 HARV. L. REV. 1710 (1963).

[120] *See* CORDINGLY, *supra* note 15, at 12, 14-15 (describing multinational character of pirate crews in 17th and 18th centuries); Cowles, *supra* note 41, at 185-87 (explaining universal jurisdiction over piracy by reference to the criminal groups being "made up of members of more than one nationality").

[121] *See* Steiner, *supra* note 119, at 1710.

[122] *See* Part I.C.

[123] *See generally,* CORDINGLY, *supra* note 15, at 88 (describing cruising grounds of pirates).

in the act; rather, they were apprehended when they returned to port and attempted to sell their booty. Unless the pirate ship was caught red-handed, the forum state might have little evidence as to *what particular* nations' ships the pirate had attacked. This again is a consequence of the locus of the crime. By the time the pirate has been apprehended, the victim ships could be on the other side of the world. There could be witnesses able to identify the pirate crew or their ships but these witnesses would also be in parts unknown, their testimony expensive or impossible to secure. Thus a nation could have an obviously piratical vessel in custody, and as an abstract matter have jurisdiction over it under national or territorial principles of jurisdiction, but yet have no way of proving jurisdiction.

Even establishing the actual nationality of a piratical defendant or pirate ship – which could be a basis for municipal jurisdiction – would be very difficult as well. Indeed, pirates adopted numerous ruses to obscure their true nationality. A pirate ship carried the flags of many nations, flying each when it most suited its purposes,[124] and often carried registration papers (sometimes forged) identifying it as a ship of different states.[125] Pirates frequently repainted, refitted and changed their vessels to avoid identification. The nationality of the pirates themselves could be obscure – they were a nomadic lot, who had often long since abandoned their native land.[126] Moreover, in the age of sail nations did not issue passports or

[124] *See* CORDINGLY, *supra* note 15, at 114-15.

[125] *Cf.* Mathew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 342 (1996) (describing "commonly-used ruses" used by privateers and merchant vessels to obscure their national origin during Revolutionary, such as "carrying double papers, flying the wrong flag, or clearing for one port while actually sailing for another," and discussing the confusion these ruses wrought in courts). Pirates were if anything more devious in their use of ruses to obscure their nationality.

[126] *See id.* at 89 (explaining seasonal migration of pirates).

otherwise keep any accounts of their nationals. Especially when the defendant's purported home state is across the sea, determining his true nationality could be nearly impossible.

C. Presumptions and burden-shifting.

The previous section showed that even though pirates injured multiple nations and were thus within the traditional jurisdiction of those nations, it might be impossible for any nation to prove in court that it had jurisdiction over them. The pirates would benefit from the very nature of their crime. It is not surprising that no legal system found this result attractive or tolerable, and that the law devised tools to ensure pirates could be prosecuted despite a lack of evidence of jurisdiction. Universal jurisdiction was a legal fiction, reflected in the phrase *hostis humani generis* that was invoked to prevent those who hurt many from not being able to be punished by anyone.

Universal jurisdiction as an evidentiary rule in effect assumes that any nation wishing to exercise jurisdiction in fact has Westphalian (national or territorial) jurisdiction. Like many evidentiary presumptions, it is based on an assessment of probabilities.[127] A pirate apprehended by a nation might be thought to be likely to have committed offenses against the forum state's vessels, or to

[127] *See* 2 MCCORMICK ON EVIDENCE § 343 (4th ed. 1992) ("Generally ... the most important consideration in the creation of presumptions is probability."); *id.* § 337, ("Perhaps a more frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation."); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12-13 (1959) (observing that presumptions are often determined by "a judicial, i.e., wholly nonstatistical, estimate of the probabilities of the situation"); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911 (1931).

have been prepared to do so but for his apprehension. While this likelihood would not necessarily arise to a greater-than-not level, the difficulty in many cases of establishing jurisdiction through evidence could leave impunity as the only alternative to the presumption. In a somewhat weaker form, the presumption would be rebutable. It would shift the burden to the defendant to prove the *lack* of proper jurisdiction under the sovereignty-based models. Such burden shifting makes sense, and is quite common, when the relevant knowledge is in the particular possession of the defendant.[128] Before the rise of the 20th century bureaucratic state, the defendant would have had the best access to proof of his nationality (family witnesses, baptismal certificates and so forth). And the pirates would often be the only ones who knew the nationality of the ships they attacked. Thus universal jurisdiction could be seen not as a suspension of traditional sovereignty-based jurisdiction, but rather as a pragmatic adoption of a *probabilistic* approach to Westphalian jurisdiction.

D. Illustrations from leading cases.

Illustrations of both the problems of proof to which universal jurisdiction responded and its actual use as an evidentiary rule can be found in some of the leading American cases on universal jurisdiction over piracy. *United States v. Holmes*[129] was the last of a trilogy of important piracy cases decided during the Supreme Court's 1820 term; the Court's main pronouncements about universal

[128] *See* Cleary, *supra* note 127, at 12 (suggesting that the burden of proof is often allocated to the party who controls the evidence relating to that element); Morgan, *supra* note 127, at 929-30.

[129] 18 U.S. (5 Wheat.) 412, 418-19 (1820).

jurisdiction over the crime comes from these cases.[130] The multinational character of piracy is evident in *Holmes.* The ship captured by the defendants was "apparently Spanish," but there was neither documentary nor testimonial evidence establishing this basic jurisdictional fact.[131] Nor was there any evidence of the flag which the capturing vessels flew. They carried no documents, and it was not clear who owned them. The ships had sailed out of Buenos Aires, where they had taken on a diverse crew of Frenchmen, Englishmen and Americans.[132] Thus while there were no facts with which to prove establish jurisdiction, it did appear that the charged conduct directly implicated American interests and involved American nationals. One of the two captains was an American, and the ship had been built in Baltimore. While there was no proof the attacking vessels were American, the Court also found that it "did not appear by any legal proof" that they were flagged by any *other* nation;[133] their voyage to Buenos Aires appears to have been for piratical purposes and not to change nationality.

Thus the Court was faced with what appeared to be a piratical attack by a U.S. vessel and a U.S. defendant on a foreign ship, but the rootlessness and ruses of the pirates meant that U.S. jurisdiction could only be *inferred* from the *absence* of evidence to the contrary. The admissible evidence did not establish the ship to be within U.S. territorial jurisdiction, and yet the fact that the captains and the

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[130] The other cases were United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820); United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820). *Cf.* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

[131] Holmes, 18 U.S. at 414 (reporting that the vessel's "national character . . . was not distinctly proved by any documentary evidence, or by the testimony of any person").

[132] *Id.*

[133] *Id.* at 418.

ship both came from America suggested that it was. The Court had to choose between crafting a jurisdictional fiction that would allow these "non-national" pirates to be punished, or to allow them to go free. It chose the former course and upheld the indictments. Drawing on *Palmer,* which had established a quasi-universal jurisdiction over "stateless" vessels, the Court held that lack of proof of jurisdiction would not bar a piracy prosecution.[134]

While the Certificate of the Court looks like it affirms under a universal jurisdiction principle, UJ only exists when there is no other ground for jurisdiction; the real problem in *Holmes* was not a lack of territorial jurisdiction but rather the inability to prove it. The Court explicitly established a burden-shifting evidentiary presumption: "Under these circumstances, the Court is of opinion, that the burthen of proof of the national character of the vessel on board of which the offence was committed, was on the prisoners."[135] Presumably, if the ship-owners could prove that they *were* French or Spanish, the indictment would be dismissed.

Similarly, Justice Story's dizzying opinion in *La Jeune Eugenie*[136] has been embraced by modern commentators as an endorsement of universal jurisdiction based on the heinousness of the offense,[137] and of the view that new

[134] *Id.* at 420 ("That the said Circuit Court had jurisdiction of the offence charged in the indictment, although the vessel on board of which the offence was committed was not, at the time, owned by a citizen, or citizens of the United States, and was not lawfully sailing under its flag.").

[135] *Id.* at 419.

[136] United States v. La Jeune Eugenie, 26 F. Cas. 832, 840-42 (C.C. Mass. 1822) (No. 15,551).

[137] *See, e.g.,* Randall, *supra* note 11, at 791 & n.29 (citing *La Juene Eugenie* as establishing federal court jurisdiction under UJ principles over pirates with no connection to the United States). *See also* Ralph G. Steinhardt, *Fulfilling the Promise of* Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos,* 20 YALE J. INT'L L. 65, 75 & n. 49 (1995) (citing *La*

offenses can become universally cognizable by analogy to piracy as the conscience of the world develops. In fact it stands for none of these propositions, because it was not in substance a universal jurisdiction case. Rather, it stands for the proposition that when there is an ample jurisdictional nexus between the United States and the offense, courts will ignore defects in the proof of jurisdiction by invoking the principle of universality.

La Jeune Eugenie stemmed from the seizure by a U.S. warship of a slave-trading ship off the coast of Africa. The ship was libeled in Boston, where its owners demanded its return. The captured vessel flew the French flag and carried proper French papers. It sailed from Basseterre to Africa, crewed by Spaniards and Italians. The claimants and French diplomats also protested the assertion of U.S. jurisdiction.[138]

This lead Justice Story to his labyrinthine consideration of whether slave trading, being morally repugnant and having been condemned by many (but not all) nations had become universally cognizable along the lines of piracy.[139] But this famous portion of the opinion is purely dicta for two reasons. First, after arguing that he would have universal jurisdiction, Story ultimately refused to entertain the case, and instead ordered the vessel returned to the French to avoid aggravating America's foreign relations. Second, and what is relevant for the present discussion, *La Jeune Eugenie* was not a true universal jurisdiction case.

Jeune Eugenie as evidence that federal courts can hold individuals accountable for violations of international law even absent congressional provision of a private right of action).

[138] *Id.* at 840 (noting that "there is also a protest filed by the French consul against the jurisdiction of the court, upon the ground that this is a French vessel, owned by French subjects, and, as such, exclusively liable to the jurisdiction of the French tribunals.").

[139] *Id.* at 846-50.

As in *Holmes*, the ship was an *American* one, but had resorted to a variety of subterfuges to hide from American jurisdiction. This was the primary argument of Blake and Webster in defending jurisdiction, and it was the first issue Story decided. The American character of the ship was clearly sufficient for jurisdiction,[140] and the subsequent discussion of universal jurisdiction involved an admittedly counterfactual assumption about the vessel's nationality.[141]

> From the outset, Story suggests that the vessel's French character is a ruse:
>
> In respect to the ownership, it has been already stated, that the vessel was sailing under the customary documents of France, as a French vessel; and certainly in ordinary cases these would furnish prima facie a sufficient proof that the vessel was really owned by the persons, whose names appear upon the papers. In ordinary times, and under ordinary circumstances, *when disguises are not necessary or important to cloak an illegal enterprise, or conceal a real ownership, the ship's papers are admitted to import, if not an absolute verity, at least such proof, as throws it upon persons, asserting a right in contradiction to them, to make out a clear title establishing their falsity*. But if the trade is such, that disguises and frauds are common; if it can be carried on only under certain flags with safety or success; it is certainly true, that *the mere fact of regular ship's papers cannot be deemed entirely satisfactory to any court accustomed to know, how easily they are procured by fraud and imposition upon public officers*, and how eagerly they are sought by those, whose cupidity for wealth is stimulated and schooled by temptations of profit, to all manner of shifts and contrivances.[142]

Story found ample evidence that the vessel was really an American one: "this schooner is American built, and was American owned, and that within about two years she was naturalized in the French marine in the port of her

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[140] *Id.* at 841 (holding that regardless of other jurisdictional "difficulties," American ownership of a vessel is sufficient to defeat the claimant's request).

[141] *Id.* at 842 (beginning discussion of universal jurisdiction over slave trading with "*supposing* the vessel to be established to be French") (emphasis added).

[142] *Id.* at 840-41 (emphasis added).

departure."[143] The French ownership was merely "nominal," a "disguise" adopted by "American citizens" to "facilitate . . . their escape from punishment."[144]

The ease of masking national identity in an enterprise that takes place across the seas, among foreigners and with foreign crews, required courts to be particularly vigilant to the substance of jurisdiction rather than its form. Story announced that he would not "shut his eyes" to the real jurisdiction; he will penetrate beyond "the surface of causes" and deal with things as everyone knows them to be, rather than as they superficially appear. Despite his fondness for natural law and formalism, Story wrote that "I should manifest a false delicacy and unjustifiable tenderness for abstract maxims" if he ignored the substantial American connection to the vessel.

Yet he could not establish the American involvement through proof either, and thus he *reversed* the burden of proof, which normally lies on those wishing to invoke a federal court's jurisdiction.[145] The ship is be treated as an American one *unless* the "ostensible" foreign owners "should give affirmative evidence" that their title is not pretextual. Story suggests claimants must produce a bill of sale that establishes the transfer of title from the American owners was for "valuable consideration." In other words, the case will be presumed to be within territorial

[143] *Id.* at 841.

[144] *Id.*

[145] *See* Hogan v. Foison, 35 U.S. 160 (1836) (Story, J.) (holding that the plaintiff-in-error bears the burden of proof on facts necessary to establish the Court's subject matter jurisdiction). Note that in *La Jeune Eugenie*, the government was the appellant, as the claimants had won a pro forma decree from the district court in an unreported decision. *See* La Jeune Eugenie, 13 F. Cas. 579 (No. 7301) (1821).

U.S. jurisdiction unless those opposing jurisdiction prove that the case "has no admixture of American interests."

IV. IMPLICATIONS FOR MODERN UNIVERSAL JURISDICTON

This Article has presented a positive account of universal jurisdiction that is consistent with the historical evidence from piracy and with rational choice theory. It shows that UJ has substantial limitations and problems. Indeed, even under the most auspicious circumstances, self-interested nations cannot be expected to exercise UJ with any regularity. But this Article has also shown that UJ has a previously unappreciated function as an evidentiary rule that facilitates the proof of territorial or national jurisdiction.

This improved understanding of UJ has cautionary implications for current efforts to expand it beyond piracy to a broad range of human rights offenses. Part I discussed several characteristics of piracy that were either necessary or helpful to its universal status. Modern human rights offenses do not share of these characteristics. To be sure, all nations regarded piracy to be a crime, and the same can surely be said about the NUJ offenses genocide, war crimes and so forth. But on the whole, while NUJ claims 18th and 19th century universal jurisdiction over piracy as a precedent and inspiration, it disregards the safeguards and limitations that made piracy UJ unproblematic and uncontroversial.

Piracy was not only committed exclusively by private actors, it was committed by private actors who had turned their backs on their home state and thus would not likely receive any protection from it. NUJ offenses on the other

hand, are almost invariably committed by people acting under color of state law. From Sharon to Pinochet to Milosevic, the principal NUJ cases involve not just state actors, but the political or military leaders of nations. Quite unlike pirates, these are people that their home state would be expected to have great solicitude for, and thus resist assertions of UJ. Indeed, the home states of all those defendants did resist foreign jurisdiction.

Furthermore, pirates attacked ships of many nations, and by disrupting international commerce injured the economic interests of many more. Human rights offenses, on the other hand, are almost always committed against a single population, often within the offender's own states. The crimes do not directly injure many nations,[146] and it is thus unclear why the unaffected nations would have any interest in prosecution. Piracy has a precise definition; this is lacking for NUJ offenses.[147] This raises the possibility that universal prosecutions would be determined by the political inclinations of the prosecutors and judges.[148]

Piracy was everywhere punished by death, and thus UJ did not create forum-shopping possibilities, double jeopardy problems, or set up potential conflicts between the laws of prosecuting states. Yet there is little international consensus about appropriate penalties for the severe human rights offenses of NUJ. For example, the ICTY has thus far only imposed a life sentence on a single

[146] *See* Part II.B.3, *infra.*

[147] *See* text accompanying notes 81-148, 70-73, *infra.*

[148] *See* E.V. Kontorovich, *The ICC – Open and Shut,* JERUSALEM POST, May 10, 2002, at B8 (arguing that Israel would be subject to politicized prosecutions or politicized rulings because "the Rome Convention creates such vague offenses as 'persecution,' which involves violating 'fundamental rights.'. .[T]here is vast disagreement over what rights are 'fundamental, and which of these rights are legally enforceable").

defendant, though the conduct for which others have been convicted would certainly have resulted in multiple life sentences under, say, the U.S. approach to punishment.[149] Punishment for human rights offenses varies greatly from one tribunal to another and this has already emerged as a serious obstacle to implementing NUJ.

For example, the Rwandan government originally acquiesced to the exercise universal jurisdiction over the Rwandan *genocidaires* byan international court sitting in Sierra Leone. The International Criminal Tribunal for Rwanda does not impose capital punishment, while Rwandan courts routinely imposed the death penalty on participants in the genocide. So when the ICTR takes jurisdiction over a defendant, it saves him from the death penalty, creating obvious opportunities for forum shopping by defendants.[150] Indeed, the worst offenders turned themselves in to the international tribunal, sparing themselves the death penalty, while lower-level perpetrators in the hands of Rwanda were executed.[151] The disparity in punishment infuriated the Rwandan government, leading it to break off its relations with the ICTR and actively interfere with its operations. Similarly, the International Criminal Tribunal for Yugoslavia originally sought to track the sentencing practices of the former Yugoslavia, but the Tribunal

[149] *See* Ambrose Evans-Pritchard, *Founder of Death Camps in Bosnia is Jailed for Life*, DAILY TELEGRAPH, August 1, 2003, at 18. Of the remaining 25 defendants before the ICTY who have received final sentences, only two have been sentenced to terms in excess of 20 years, and ten have been given terms of ten years or less. *See The ICTY at a Glance*, *at* http://www.un.org/icty/glance/index.htm (last visited March 22, 2004).

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

[151] *See id.* at 274 & n.44.

abandoned this approach when it became clear it would require imposing the death penalty.[152] Different approaches to punishment will continue to pose serious problems for NUJ. European nations are the most vigorous proponents of expanding universal jurisdiction to heinous human rights offenses, but at the same time are adamantly opposed to the death penalty. By contrast, while the U.S. opposes universal jurisdiction, it supports the death penalty.

Part II has shown that rational, self-interested states would not exercise universal jurisdiction because of free rider and coordination problems. Enforcing universal norms amounts to providing a public good, and economically rational actors do not do this. Supporters of NUJ argue that human rights offenses, like piracy, take place in situations where municipal enforcement is unlikely – for example, in "failed states" where government has broken down and there is no "on the spot" enforcement mechanism.[153] But the absence of municipal enforcement does not magically translate into universal enforcement.

The few instances in which actual UJ can be observed may be explained either as nations acting on altruistic preferences, or as products of hegemonic stability.[154] Hegemony and altruism are sufficiently marginal phenomenon that they cannot be counted on to support a robust NUJ regime. To the extent piracy UJ was enforced by a global hegemon, this has rather grim implications for the success of NUJ. If there is a global hegemon today, it is the United States. Yet the U.S. is the nation most opposed to expanding UJ beyond piracy to the NUJ human

[152] *See id.* at 273-74.

[153] *See* Cowles, *supra* note 41, at 193-94.

[154] *See* Part II.D.

rights offenses. The American reluctance suggests that the benefits of NUJ are diffuse enough, or the costs of production high enough, that the latter would exceed the former despite the broad scale and scope of U.S. global interests.

The hegemony explanation of universal jurisdiction does suggest that international tribunals may be more successful than national ones at prosecuting NUJ offenses. An international tribunal, like a hegemon, has global interests and thus would be willing to pursue NUJ cases more than an unaffected state would. However, international tribunals ultimately rely on nations for funding their funding and military support, and thus the tribunals merely push the incentives question back one level. However, an international tribunal of sufficient independence could be expected to exercise NUJ, at least up to such point where it would cost it the support of powerful nations.

This Article has shown how UJ over piracy was a useful concept despite the lack of incentives for states to engage in UJ prosecutions because it was used as an evidentiary rule to facilitate the proof of territorial and national jurisdiction. Many classic U.S. piracy cases that are often thought to stand for UJ only used the universal principal as an evidentiary rule; territorial or national jurisdiction existed in those cases. Yet NUJ does not use the universal principle as merely an evidentiary rule; NUJ seeks to apply it specifically in those cases where there is no nexus between the forum state and the crime. And yet it does so in cases that do not share the characteristics that made piracy suitable for UJ. This suggests assertions of NUJ will remain both rare and controversial.

If there is a modern offense for which the evidentiary function served by UJ would be useful, it would be international terrorism. Like pirates, terrorist groups have members of many different nationalities, and target victims of varied nationalities. Attacking a commercial airliner or office building, like attacking a merchant vessel, will harm the nationals (and economic interests) of many nations. Like pirates, terrorists often carry false papers, use aliases, and carry on activities in many different places. It may be difficult for a nation to connect a particular terrorist to a particular injury it has suffered, despite a significant probability that such a connection in fact exists.

While this would may UJ useful as a jurisdictional presumption in terrorism cases, there are significant obstacles. There is little international agreement as to what constitutes terrorism. Many terrorists have explicit or implicit support from sovereign states, and thus may not be purely private actors like pirates are. Moreover, some nations, like the United States, would punish terrorists with the death penalty. This would be opposed by other nations that do not allow the death penalty. Indeed, this problem has already arise in connection to the detainees held at Guantanomo Bay and elsewhere in connection with the Sept. 11th attacks and the war in Afghanistan. Thus while the evidentiary function of UJ suggests terrorism may be the best candidate for status as a NUJ offense, the necessary conditions for this transpiring do not appear to all be in place.