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AT SEA WITH UNIVERSAL JURISDICTION

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Good afternoon. It is a pleasure and honor to be here this afternoon among so many friends and colleagues, and particularly at a conference jointly sponsored by an organization to which I belonged when I was in private practice back in the 20th century.

Because most of us are lawyers in this room, and lawyers are accustomed to disclaimers, I don't think I need to apologize for commencing my remarks with a legalese disclaimer. Nevertheless, just so there are no misconceptions and no one suffers from misapprehensions from my remarks this afternoon; I need to say that the opinions that I express here today are strictly my own, and that, of course, I reserve the right to change them in other settings if convinced of my errors. So don't go citing what I say here today the next time I see you in court.

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The subject which I will talk about this afternoon, "universal jurisdiction," is not one often discussed outside academic circles. But I believe it is relevant to our present state of legal affairs. Although I will discuss the definition of universal jurisdiction in more detail later, for now let me begin with a basic summary of the subject of today's discussion. Universal jurisdiction is the acquisition of personal jurisdiction by a national court over a person or persons in a case or

controversy in which there is no connection between the state exercising jurisdiction and the individual haled into court. As is obvious, under certain circumstances the exercise of universal jurisdiction by one nation can negatively impact the sovereignty of another nation and, in a related maritime subject, may affect the accepted tenet of freedom of the seas.[1]

Universal jurisdiction is a subject that concerns the United States both domestically, in its application of its municipal law, and internationally, as regards its intercourse with other nations. The constraints imposed by the Constitution of the United States on its actions in its exercise of universal jurisdiction, as well as the international effects of this policy, will be the main focus of my presentation today. Specifically, I intend to comment on how the U.S., through its statutory law,[2] and subsequent judicial interpretations of that law,[3] conceives of universal jurisdiction in a manner that may negatively affect the international maritime community.

Although these issues most often come before the courts of the U.S. in a criminal law context, we cannot totally ignore their application in a civil setting as well, as seen in ***Kiobel v. Royal Dutch Petroleum Co.***, decided by the Supreme Court on April 17, 2013, which is a case that

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[1] United Nations Convention on the Law of the Sea, art. 87 ("The high seas are open to all States . . . . These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of freedom of the high seas . . . ."), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Although the U.S. and several other maritime nations have not ratified this treaty, many of its provisions are treated as customary international law. *See, e.g.*, *United States v. Alaska,* 503 U.S. 569, 588 n.10 (1992).

[2] *See* Alien Tort Statute, 28 U.S.C. §1350 ("ATS"); Drug Trafficking Vessel Interdiction Act ("DTVIA"), 18 U.S.C § 2285 (2011); Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§70501-70507 (2006); Marihuana on the High Seas Act "(MHSA"), Pub. L. No. 96-350, 94 Stat. 1159 (1980).

[3] *See Kiobel v. Royal Dutch Petroleum,* 133 S. Ct. 1659, __ U.S. ___ (April 17, 2013); *Cardales-Luna v. U.S.,* 632 F.3d 731 (1st Cir. 2011); *Angulo-Hernandez v. U.S.,* 565 F.3d 2 (1st Cir. 2009).

undoubtedly will have an impact far beyond its limited holding.

I chose to title this presentation "At Sea with Universal Jurisdiction," not only as a play on words - gathered as we are to discuss issues related to the sea - but also to forecast my concern with the United States' treatment of universal jurisdiction. Its application of this doctrine is a course of action that is out of step - or figuratively speaking "at sea" without a working compass - with much of the international community.

I believe that the United States' treatment of universal jurisdiction results from more than just a difference of legal philosophies to be commented upon by academics in law review articles. Indeed I believe they reflect long-seated policy determinations about the role the U.S. seeks to play in the international arena. Nonetheless, as many such reasons reach far beyond the confines of my presentation today,[4] I will limit our discussion to how, in my opinion, the U.S. is on the wrong side of customary international law - which is the binding law of the land in the U.S. by virtue of the Supremacy Clause[5] - in its application of the doctrine of universal jurisdiction.

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[4] As stated in a dissent that I authored, in a phrase that is hardly original with me, and which I believe has relevance beyond today's remarks,"[t]he United States cannot be the world's policeman." *Angulo-Hernandez*, 565 F3d at 20 (Torruella, J., concurring in part and dissenting in part).

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., Art. VI, § 1, cl. 2; *see Kiobel*, 133 S.Ct. 1659, _U.S._ (2013); *Sosa v. Alvarez-Machin*, 542 U.S. 692, 729-30 (2004) (holding that customary international law is federal law pursuant to the Supremacy Clause); *Ali v. Rumsfeld*, 649 F.3d 762, 788-89 (D.C. Cir. 2011) ("As Judge William A. Fletcher has noted, "[t]he Court's decision [in *Sosa*] . . . necessarily implies that the federal common law of customary international law is federal law in the supremacy-clause sense." (citing William A. Fletcher, *International Human Rights in American Courts,* 93 VA. L. REV. 653, 665 (2007))).

Under U.S. law, and I suspect under most legal systems represented in this audience, jurisdiction is the legal right by which courts exercise the authority of the state over persons, in criminal matters, and controversies, in civil cases. It is the competence of a court of law to decide judicial issues in a binding manner, when it has cognizance of the class of cases to be heard, when proper parties are before it personally or by virtue of recognized substitute procedures that comply with due process, and when the questions to be decided are within the powers that have been authorized by the legislative branch, or by the constitution or fundamental document of the state exercising jurisdiction.

Although perhaps there are other variations of this definition, the one underlying and controlling axiom to all concepts of jurisdiction (and for that matter of all legislation), is that the body executing the grant of power to the court, that is, the legislative body of the particular state purporting to give jurisdiction to the court, ***must itself*** have the authority to make the grant of jurisdiction in question.

In the U.S. we look to the Constitution to determine whether Congress has the authority to legislate over any particular subject.[6] This means, in short, that all legislation must be ***directly*** related to conduct, subject matter, or actions within or regarding the United States' territory, national interests, or its citizens or persons subject to its jurisdiction.

I will argue to you that under the Constitution there is a fundamental absence of power in Congress to legislatively grant U.S. courts universal jurisdiction in the manner seen in certain

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[6] *Cf. United States v. Lopez,* 514 U.S. 548, (1995) (holding the Gun-Free School Act unconstitutional as exceeding Congress' authority to legislate under Art.1, §8, cl. 1 of the Constitution); *Rivard v. U.S.,* 375 F.2d 882 (5th Cir. 1967), *cert den. sub. nom. Groleau v. U.S.* 389 U.S. 884 (1967); *U.S. v. Keller,* 451 F. Supp. 631, 634-35 (D.P.R. 1978), *aff'd sub nom United States v. Arra*, 630 F.2d 836 (1st Cir. 1980).

provisions of the nation's drug interdiction statutes. Although I am cognizant of the fact that this legislation has been validated by some courts of the U.S., in my view, these decisions err on two grounds. First, there is a basic absence of authority under Article I of the Constitution to extend the jurisdiction of the U.S. courts to cases that have no nexus to the U.S., its territory or its citizens. Second, even if there is such power, the specific legislation in question attempts to exercise universal jurisdiction over crimes that are not recognized by customary international law as appropriate for the exercise of such jurisdiction, making it necessarily unconstitutional and invalid.

Before proceeding, I must make a brief comment regarding a subject that, although related and sometimes confused or conflated with universal jurisdiction, is distinct from it. That is the subject of extraterritoriality, which is the application of municipal legislation beyond the legislating nation's territorial boundaries. The giving of extraterritorial effect to legislation is not favored in the U.S., and in fact, is not presumed.[7] The intent of Congress to apply legislation extraterritorially must be both clearly established and within those exceptions recognized by international law as allowing municipal law to have extraterritorial effect. These exceptions include situations where the extraterritorial conduct or controversy involves or affects the citizens or the territory of the legislating state, or in which, pursuant to the law of nations, the particular matter is accepted as permitting extraterritorial application.

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To begin our discussion in earnest, we must now unpack jurisdiction into its three basic elements, as defined in international law: (1) prescriptive jurisdiction, which is the authority to apply

[7] *See, Kiobel*, slip op. at 3-6; *Morrison v. National Australia Bank,* 130 S. Ct. 2869 (2010), slip op. at 6.

a law to particular conduct or individual, (2) enforcement jurisdiction, which is the authority to compel compliance with the law, and (3) adjudicative jurisdiction, which is the authority to subject an individual to a state's judicial system.

Recognizing these elements, the law of nations permits the exercise of jurisdiction by a nation - that is, it recognizes a nation's *competence* to enact and enforce the nation's laws - in accordance with any of the following theories of jurisdiction:[8] (1) territorial jurisdiction, wherein jurisdiction is based on the place where the offense or controversy has taken place; (2) national jurisdiction, in which jurisdiction is based on the nationality or national character of the offender or parties; (3) protective jurisdiction, where jurisdiction is based on whether national interests are compromised; (4) passive personal jurisdiction, in which jurisdiction is based on the nationality or national character of the victim or prejudiced party. In all of these types of jurisdiction, the individual prescriptive, enforcement, and adjudicative elements may be met through a specific nexus between the conduct, its location, and its impact on the territory or citizens of a particular state.

Universal jurisdiction is the fifth type of jurisdiction, which, ***in some limited circumstances***, allows jurisdiction even in situations in which there is no direct connection with the prosecuting nation, its territory, or its citizens and in which the nation may or may not have actual physical custody over the alleged civil or criminal offender. Thus in universal jurisdiction the prescriptive, enforcement and adjudicatory functions of jurisdiction are conflated.

In addition to these general classifications, there is one more specific jurisdictional regime,

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[8] *See Keller,* 451 F.Supp. at 634-35*; see also,* The scope and application of the principle of universal jurisdiction, *Report of the Secretary-General prepared on the basis of comments and observations of Governments*(hereinafter Report of the General-Secretary), July 29. 2010, General Assembly, United Nations, 65th Session, Item 88 of the provisional agenda, A/65/181, at 3.

which in many respects is not just jurisdictional but is also a choice of law rule, and which is undoubtedly well-known to this audience of admiralty lawyers. This is the so-called "law of the flag" doctrine. Pursuant to a well-established legal fiction, a vessel is considered territory of the nation whose flag it carries, allowing that state to exercise exclusive jurisdiction over that ship and to apply its national laws to that vessel, its crew, and its passengers at all times, including while on the high seas, and even while in the territorial waters of other nations.[9] This principle, which is part of customary international law, was incorporated into Article 9 of the United Nations Convention on the Law of the Sea, which as you are aware was not joined by the United States. The United States, however, does recognize and enforce the principle of the "law of the flag."[10]

Having defined the various types of jurisdiction, I want to now call greater attention to what makes universal jurisdiction unique. In all other modalities of jurisdiction, there is some concrete, identifiable nexus between the state that claims jurisdiction and the conduct and/or person over which it that jurisdiction is asserted. This nexus is absent in universal jurisdiction. Rather, universal jurisdiction is available based on the nature of the offense or tort. That is, it is the existence of a crime or tort that has been recognized by customary international law as a sufficiently "heinous" (namely, piracy, slave trade, crimes against humanity, and genocide), which validates the invocation of the unusual jurisdictional process that is universal jurisdiction.

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[9] *Lauritzen v. Larsen,* 345 U.S. 921, 929 (1953) (finding that Danish law applied to accident aboard a Danish ship in Havana harbor because "[p]erhaps the most venerable and universal rule of maritime law relevant to [the choice of law] problem is that which gives cardinal importance to the law of the flag."); *United States v. Flores,* 289 U.S. 137, 155-56 (1933) (holding that the criminal law of the United States applied to a murder committed aboard a U.S. flag vessel up the Congo River in the Belgian Congo).

[10] *See,* UNCLOS, art. 9.

The so-called Princeton Principles, which deal exclusively with universal jurisdiction, thus define this form of jurisdiction as follows: "criminal jurisdiction based solely on the nature of the crime, ***without regard*** to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[11] Pursuant to these precepts, universal jurisdiction "may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law, . . . Provided the person is present before such judicial body."[12] A "serious crime under international law" is then defined as including "(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture."[13]

The report of the International Law Section of the American Bar Association on universal jurisdiction[14] largely agrees with the Princeton Principles' definition and commentary,[15] but lists only piracy, slavery, and slave trading - along with the "more recent[]" addition of genocide - as crimes

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[11] Princeton University Program in Law & Pub. Affairs, *The Princeton Principles on Universal Jurisdiction* (2001), Principle I (1) [hereinafter "Princeton Principles"], reproduced in Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004). The Princeton Principles are the product of meetings of the world's leading scholars and jurists at Princeton University in 2000-01, for the purpose of reaching a consensus on the principles that define the subject of universal jurisdiction. *See also,* Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 438 (2012).

[12] *Id.* Principle 1(2).

[13] *Id.* Principle 2(1).

[14] American Bar Association, Report to the House of Delegates on Universal Criminal Jurisdiction (2004), *available at* http://apps.americanbar.org/intlaw/policy/crimeextradition/ universal jurisdiction.pdf [hereinafter ABA Report].

[15] *Id.* at 1.

permitting the application of universal jurisdiction under customary international law.[16] Under either definition, the universality principle is an "exceptional jurisdictional doctrine" because it "holds that the very commission of certain "universal crimes"engenders jurisdiction for all states, irrespective of where the crime is committed or which state's nationals were involved."[17]

Academically speaking, there are three different modalities of universal jurisdiction, although in practice they are lumped together as one. If we choose to distinguish between them, however, the first can be called "pure" universal jurisdiction, which is where jurisdiction is exercised by a state solely on the basis of the gravity of the international crime or tort. Under this modality of universal jurisdiction, there is no connection whatsoever to the adjudicating state: the culpable act takes place outside its territory, the perpetrator and victim(s) are not its citizens or residents; and the act has no special effect on its important sovereign interests. Moreover, the suspect or defendant is not physically present in the territory of the adjudicating state at the time the criminal or civil proceeding is initiated.

A number of nations have ambiguous legislation that appears to authorize the exercise of this type of jurisdiction. Except for Belgium and Spain, however, few of those states have actually exercised it. In the case of Belgium, from the mid-1990s until 2003, numerous criminal investigations were initiated, and some arrest warrants issued involving high-ranking U.S. and Israeli officials for alleged war crimes and crimes against humanity in the Middle-East. This Belgian action, and its underlying jurisdictional legislation was quashed in 2003, reportedly as a result of diplomatic

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[16] *Id.* at 2.

[17] *See,* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law,* 48 HARV. INT'L L.J. 121,130 (2007).

pressures brought upon it by the United States.

In Spain's case, largely through the impetus of Spanish Judge Garzón, an attempt was made in the late 1990s to proceed against several U.S. high officials under this modality of universal jurisdiction. Nevertheless, in 2009 these processes suffered the same fate as the similar actions in Belgium. Perhaps not coincidentally, Judge Garzón was himself later charged by the Spanish government with exceeding his authority.

Professor Doug Cassel of the Notre Dame Law School, from whom I have borrowed some of the views that I make known today, proposes a sub-modality of the "pure" universal jurisdiction that he calls "custodial" universal jurisdiction. Custodial jurisdiction has the same components as its "pure" counterpart which I have just covered, except that the accused is in actual physical custody of the charging nation. Although many nations have legislation authorizing this form of universal jurisdiction, in practice only a handful of states, mainly European, have actually exercised it, and then only infrequently.

The third modality of universal jurisdiction is treaty based. This form of universal jurisdiction derives from an agreement in which one state establishes to the satisfaction of another harboring state, that there is reason to believe a person allegedly responsible for the commission of a specified international crime or tort is physically present in the territory of the latter, harboring state. Once so notified, the harboring state is required to either prosecute the person or extradite him/her to another state that will prosecute. Treaty-based universal jurisdiction, also referred to as *aut dedere aut judicare*, is found in the United Nations Convention Against Torture[18] as well as a dozen or so

[18] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art.7.4.

other U.N. treaties[19] that concern particular forms of terrorism and terrorist-related activities (e.g., aircraft highjacking,[20] terrorist bombings,[21] and financing of terrorism[22]).

Before moving forward, let me summarize the limits of universal jurisdiction in customary international law. Namely, except where the exercise of universal jurisdiction is treaty based, the prevailing international view is that states may not exercise universal jurisdiction unless it involves crimes affirmatively sanctioned by customary international law. Customary international law, of course, is defined as law derived from the widespread, uniform practice of states, carried out based on their belief that the practice is legally binding (something I call the "common law of international relations"). Under customary international law, as I have mentioned previously, universal jurisdiction is only authorised with regard to crimes which have been internationally accepted as sufficiently heinous: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.

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Now, as my introduction foretold, I would like to discuss the United States' unique and, in my view, incorrect, treatment of universal jurisdiction. As a starting point, the U.S. has numerous

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[19] *E.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 2, 1949, art. 146; Protocol Additional to the Geneva Conventions of August 2, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, art. 85.1.

[20] Convention for the Suppression of Unlawful Seizure of Aircraft, adopted June 16, 1970, 22UST 1641, art. 4.2

[21] International Convention for the Suppression of Terrorist Bombings, adopted Jan. 9, 1998, 37 I.L.M. 249 (1998).

[22] International Convention for the Suppression of Financing of Terrorism, adopted Dec. 9, 1999, 39 I.L.M. 270 (2000), art. 7.4.

statutes that appear to grant its courts universal criminal jurisdiction, and one statute, the Alien Tort Statute ("ATS"),[23] which is unique in the world insofar as it grants its courts universal jurisdiction to redress grave international torts ***civilly***. Among the statutes that give universal ***criminal*** jurisdiction to U.S. federal courts are ones dealing with piracy,[24] a crime which is also proscribed by Clause 10, Section 8 of Article I of the U.S. Constitution.

The language of this constitutional provision is relevant to the issue of universal jurisdiction beyond the subject of piracy, as it is the original source of the incorporation of international law into U.S. municipal law. Often referred to as the "Define and Punish Clause," it grants Congress the power: "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[25]

Strictly speaking there is a distinction between statutory piracy, the legislative power of which is based on Congress's general authority to enact legislation authorized by the Constitution, and piracy as found in Article 1, Section 8, which is referred to as piracy *jure gentium*, which emanates from the Constitution's adoption of that crime pursuant to customary international law.[26] Thus, in theory, even if Congress had not enacted a piracy statute as a law of the United States, the U.S. would still have universal jurisdiction to capture, try, and punish piracy as an offense against the law of nations.

Although this may seem to be an issue much like the proverbial argument about the number

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[23] 28 U.S.C. § 1350.

[24] 18 U.S.C. §§1651, 1653.

[25] U.S. CONST., art. I, § 8., cl 10.

[26] GERHARD VON GLAHN, LAW AMONG NATIONS 326 (3d ed., 1976).

of angels on a pin head - there existing no practical difference between both kinds of piracy charges - this theoretical difference is important when considering other crimes or actions over which the United States attempts to exercise universal jurisdiction. These include torture,[27] air high-jacking, destruction of aircraft, and violence at international airports;[28] violence against foreign officials, official guests, and internationally protected persons;[29] hostage taking,[30] violence against ships, or fixed maritime platforms;[31] financing of terrorism; terrorist bombings;[32] and, most important to my presentation today, the interdiction of illegal drugs.[33] It is the expansion of this list by Congress, particularly when dealing with drug trafficking, which runs into constitutional problems.

To clarify the problem with this expansion, we may look to the case of *United States v. Furlong*,[34] which involved a charge of piracy. In *Furlong*, which was coincidentally the first U.S. case to use the term "universal jurisdiction," the court considered whether Congress, pursuant to the Define and Punish Clause, could include the crime of murder within the ***constitutional*** crime of piracy, thus allowing for universal jurisdiction to attach. The court flatly rejected this proposition:

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[27] 18 U.S.C. § 2340 A (b) (2).

[28] *Id.* U.S.C. §§32(b)(4), 37(b)(2); 49 U.S.C.§ 46502 (b)(2)(C).

[29] *Id.* §§112(e)(3), 878(d) and 1116(c).

[30] *Id.* §1203(b)(1)(B).

[31] *Id.* §§2280 (b)(1) and 2281(b)(3).

[32] *Id.* § 2332f(b)(2)(C)(2003).

[33] *See supra* note 1 (DTVA, MDLEA, and MOHSA).

[34] 18 U.S. (5 Wheat.) 184 (1820).

> Robbery on the seas [i.e., piracy] is considered an offense within the criminal jurisdiction of all nations . . . . Not so with the crime of murder . . . . [P]unishing it within the jurisdiction . . . of another nation, has not been acknowledged as a right of [other nations].[35]

The court concluded that the Define and Punish Clause made international law the outer limit of congressional authority: Congress could not seize jurisdiction over conduct simply by dubbing it "piracy" if that conduct clearly did not involve piracy of the kind contemplated by the Law of Nations, which is strictly defined piracy as ***robbery*** on the seas.[36] Thus, if *Furlong* is still valid law - and I see no evidence of it not having such a status - it stands for the proposition that Congress cannot unilaterally convert the trafficking of drugs into a crime subject to universal jurisdiction. Although drug trafficking is a serious crime, it is simply not a crime that has been accepted under customary international law as of the seriousness or, as used in the trade, the "heinousness," of such crimes as piracy, slave trade, crimes against humanity, and the like.

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Ultimately, the problematic nature of the United States' treatment of universal jurisdiction relates to the principle of legality, a principle long accepted in customary international law. Legality is also one of three safeguards, along with necessity and due process, proposed by the American Bar Association's report on universal jurisdiction as necessary to prevent abuse by governments.[37]

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[35] *Id.* at 196-97.

[36] *Id.* at 198.

[37] Similar safeguards have been proposed by three of the judges of the International Court of Justice in the case of *Democratic Republic of Congo v. Belgium*, ICJ General List No. 121, Judgment of February 2002, Separate Opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal, paras. 59 and 60.

As applied to universal jurisdiction, legality requires that no person be criminally prosecuted pursuant to universal jurisdiction except for in cases of serious international crimes that are clearly recognized by treaty or by customary international law as authorizing such jurisdiction.[38] As such, it presents a serious obstacle to the United States' attempts to allow interdiction, in international waters, of non-U.S. flag vessels that are not destined for United States' territory, and aboard which there are no citizens of the U.S. (i.e., with which there is no nexus to the United States).

In 1986, Congress passed the Maritime Drug Law Enforcement Act (or "MDLEA") which expanded the jurisdictional provisions of the Marihuana On The High Seas Act (or "MHSA"). Previously, the MHSA's grant of jurisdiction had applied only to vessels with some connection to the United States and to stateless vessels.[39] The MDLEA, in contrast, allows the United States to exercise universal jurisdiction and apply U.S. ***substantive*** law to foreign flag ships with foreign crews so long as the flag state consents.[40] The MDLEA further lowers its jurisdictional hook by broadening the definition of stateless vessels to include vessels that do not produce evidence of registry upon request and those whose asserted flag state does not "affirmatively and unequivocally" confirm their registration.[41]

This extension of universal jurisdiction has been challenged in U.S. court as violating due process. Some courts have rejected these challenges by relying on the protective principle of

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[38] *E.g.*, International Covenant on Civil and Political Rights, art. 15, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[39] *See,* MHSA, P.L. No. 96-350, § 2.

[40] MDLEA, 46 U.S.C. §§70503-07.

[41] *Id.* at § 70502 (d)(1)(c).

jurisdiction, ruling that drugs threaten the integrity of the United States.[42] Others have done so based on the territoriality principal, reasoning that drug trafficking outside the United States' borders has effects within those borders.[43] Others have anchored their approval of this extension based on the universality principle, sustaining their exercise of jurisdiction on their view that drug smuggling is a universal crime.[44]

The Ninth Circuit is alone in requiring that there be a sufficient nexus between the U.S. and the drugs or drug traffickers involved in any case where the traffickers are aboard a vessel that has nationality.[45] If it is a stateless vessel, however, the Ninth Circuit - in line with all the other courts that have considered this issue - have found such a nexus to be unnecessary.[46] This latter view is not without support in customary and treaty law. As expressed by the Eleventh Circuit,[47] for example, it is a view in agreement with the English case of *Molvan v. Attorney-General of Israel*. In that

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[42] *See, United States v. Siniestra,* No.06-15824, 2007 WL 1695698, at 3 (11th Cir. 2007) ("'Congress under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'" (quoting *United States v. Tinoco,* 304 F.3d 1088, 1108 (11th Cir. 2002))); *United States v. Bravo,* 489 F.3d 1, 7 (1st Cir. 2007) ("The extra-territorial jurisdiction authorized in the MDLEA is consistent with the 'protective principle' of international law..."); *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (same).

[43] *United States v. Cardales,*168 F.3d 548, 553 (1st Cir. 1999); *United States v. Suerte,* 291 F.3rd 366, 370 (5th Cir. 2002) (citing *Cardales* with approval).

[44] *See, United States v. Salcedo-Ibarra,* 2009 WL 1953399 (M.D. Fla. July 6, 2009).

[45] *See, United States v. Davis,* 905 F. 2d 245, 248-49 (9th Cir. 1990).

[46] *See, United States v. Caicedo,* 47 F.3d 370,372 (9th Cir. 1995) (quoting *United States v. Marino-García,* 679 F.2d 1373, 1382 (11th Cir. 1982)).

[47] *Marino-Garcia,* 679 F.3d at 1382.

case, the court stated:

> [t]he freedom of the seas, whatever those words may connote, is freedom of ships that fly, and are entitled to fly, a flag of a state which is within the comity of nations.[48]

Because, according to these jurisdictions, the freedom of the seas belongs only to states, not individual vessels, meaning that ships without nationality are not free to sail upon the high seas, any state is entitled to exercise jurisdiction over the stateless (non-flag flying vessel). Norway, another maritime nation that has problems with stateless ships invading its fisheries, has viewed the problem in a similar fashion.[49]

A far as the United States exercise of universal jurisdiction is concerned, the issue is exacerbated when universal jurisdiction is carried one step further and attaches, as the United States claims, to foreign vessels flying their own national flag, employing foreign crews, and heading for non-U.S. territories, based on the foreign nation's grant of permission for the United States to apply U.S. criminal law to those aboard. This was the factual situation underlying *United States v. Angulo-Hernandez*[50] and *United States v. Cardales-Luna*,[51] two cases decided by the U.S. Court of Appeals for the First Circuit.

A U.S. Coast Guard vessel observed a Bolivian-flag vessel sitting dead in the water, approximately 100 miles north of the South American shoreline in international waters. The ship

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[48] *Molvan v. Attorney Gen. for Palestine (The Asya)* [1948] A.C. 351 (P.C.),

[49] *Norwegian Measures Taken Against Stateless Vessels Conducting Unauthorized Fishing on the High Seas*, 76 NORDIC J. INT'L L. 301, 302 (2007).

[50] 565 F.3d 2 (1st Cir. 2009)

[51] 632 F.3d (1st Cir. 2011).

was en route from Columbia to the Dominican Republic and was crewed by non-U.S. citizens. The vessel's captain accepted help from the Coast Guard, which additionally obtained permission from the Bolivian government, under the provisions of the MDLEA, to board and search the vessel.

Once on board, the Coast Guard team performed an initial safety inspection and, upon finding no safety hazards, proceeded to conduct an at-sea space accountability assessment of the vessel in order to ensure that there were no hidden spaces that could contain contraband or firearms. During the contraband search the boarding party found powders that they thought were cocaine and heroin, a conclusion that eventually proved to be erroneous. By that time, however, the Coast Guard had proceeded to arrest the crew and to tow the vessel to U.S. territory where the search continued over the course of six days, eventually yielding a substantial amount of contraband in a hidden compartment deep in the innards of the vessel's hold. The crew was then indicted, tried, convicted, and sentenced pursuant to U.S. criminal law. They are presently detained in U.S. prisons serving substantial sentences.

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In my opinion, this case is emblematic of the constitutional issue at the heart of the MDLEA. The attempt by Congress to extend its Article I legislative powers regarding illegal drug trafficking to foreign nationals and/or activities in foreign territory in which there is no nexus with the U.S. constitutes an invalid attempt to exercise universal jurisdiction in violation of customary international law (which, again, is binding Law of the Land in the U.S.). Furthermore, the legislation in question presents issues beyond the issue of customary international law. It presents a structural problem that goes to Congress's ***power to legislate*** under Article I that cannot be waived by any individual, and, certainly, it is not a power that can be granted to Congress by any foreign nation by

virtue of any treaty or international compact.

I will not complicate this problem further, but let me detour briefly just say that there is also a serious question of the legality of applying U.S. law retroactively to these foreign defendants under the facts previously described. That is, the crew was ultimately tried for an alleged violation of U.S. law based on conduct that was not subject to U.S. law at the time of its occurrence, but instead only until after consent by the Bolivian government. While worthy of note, this is ultimately an issue for another day's discussion. For now, we will return to the jurisdictional problems evident in *Angulo-Hernandez* and *Cardales-Luna*.

In enacting the MDLEA, Congress attempted to rely on Article I, Section 8, Clause 10 as its source of authority.[52] This provision, however, does not authorize the regulation of purely foreign conduct, except in regards to piracy on the high seas and other crimes that have been added by general consensus of customary international law (for example, slavery, genocide, and crimes against humanity).[53] Simply put, Congress lacks the general authority to regulate criminal - and, as we shall later see, civil - conduct that does not have a demonstrable connection to the United States' territory, citizens, or national interests.

As a learned scholar on this subject sardonically has commented, "Congress cannot punish dog-fighting by Indonesians in Java because Congress has not been authorized by the Constitution

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[52] Art. I, §8, cl. 10 grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nation."

[53] *See generally,* Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction,* 103 NW. U.L. REV. 149 (*2009*).

to make such laws."[54] Perhaps an even more relevant example would be if Congress passed legislation attempting to apply the criminal laws of the United States, with the Bolivian government's consent, to the conduct of Bolivian nationals traveling over the mountain roads of Bolivia with a load of cocoa leaves destined for Peru. The power of Congress in such a case cannot be countenanced even with Bolivia's consent. In fact, that consent is ultimately irrelevant; Bolivia cannot grant Congress powers beyond those allotted to it by the Constitution.

This limit was originally recognized by Congress itself. During the legislative process leading to the enactment of the MDLEA's predecessor, the Marijuana on the High Seas Act of 1980, an attempt was made to include a provision that would have allowed the application of U.S. drug laws to foreign vessels, irrespective of a U.S. nexus, provided the U.S. received prior approval to exercise universal jurisdiction from the flag nation of the vessel in question.[55] This proposal was rejected by the Committee on Merchant Marine and Fisheries based on "'[v]arious jurisdictional and constitutional' objections to using a state's 'prior consent' as a basis for . . . domestic criminal jurisdiction.'"[56] Additionally, the opponents of the provision expressed the view that "as a matter of international law, flag state consent would still be an inadequate basis [for jurisdiction to attach] given that drug trafficking is not generally accepted as an international crime."[57]

These concerns were soon forgotten or overridden in the zeal and frenzy of the so-called War

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[54] Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Un iversal Jurisdiction over Drug Crimes,* 93 MINN. L. REV. 1191, 1194 (2009) (emphasis in original).

[55] *Id.* at 1198 (citing H.R. Rep. 96-323 (1979), at 7).

[56] H.R. Rep. 96-323 (1979), at 7.

[57] *Id.* at 20.

on Drugs, and there arose a need to plug what were deemed to be "legal technicalities" in the MHSA.[58] Thus the MDLEA was enacted, expanding the application of U.S. drug laws to any foreign vessel on the high seas, or even in foreign territorial waters, so long as the relevant foreign nation consented to the application of U.S. criminal laws in those situations.[59] Under the provisions of MDLEA this consent can be given in any form, including "by radio, telephone, or similar oral or electronic means,"[60] and it may be "proved conclusively by certification of the Secretary of State or the Secretary of State's designee."[61] Further, the MDLEA brushes aside any presumption against extraterritoriality,[62] barring any challenge based on jurisdictional or substantive defenses that the United States has failed to comply with international law.[63]

Under international law, pursuant to the U.N. Convention on the Law of the Sea - signed by 161 nations, but not the United States - the Coast Guard cannot stop and board foreign vessels on the high seas or in foreign waters.[64] Nonetheless, since the enactment of MDLEA, the U.S. has negotiated twenty-six bilateral agreements with Caribbean and Latin American counties,[65]

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[58] *See* S.Rep. 95-797 at 15 (1986). *reprinted in* 1986 U.S.C.C.A.N.5986,5993.

[59] 46 U.S.C. §70502(c)(1)(C).

[60] *Id.* § 70502(c)(2)(A),

[61] *Id.* § 70502(c)(2)(B).

[62] *Id.* § 70503(b).

[63] *Id.*§ 70505.

[64] UNCLOS, art. 110.

[65] *See,* U.S. Dep.'t of State, Bureau of Int.'l Narcotics and Enforcement Affairs, Narcotics Control Strategy Report, March 2007, *available at* http://www.state.gov/p/inl/rls/nrcpt/ 2007/vol1/html/80853.htm.

implementing the MDLEA in various degrees and forms so as to allow the enforcement of U.S. criminal laws aboard foreign vessels, with the prior approval of the national governments in question. It was one such agreement that was at play in *Hernandez-Angulo* and *Cardales-Luna*.

Now to be clear, Congress has the power to override international law by either passing legislation to said effect (i.e., the MDLEA) or by entering into treaties that modify or reject international laws (i.e., the 26 treaties).[66] So, although the U.S. is the only nation that asserts universal criminal jurisdiction for drug trafficking violations (as it does under MDLEA) and is thus in contravention of customary international law, that conflict does not lie at the root of the problem I seek to address here.

Rather, the problem is, that in legislating or in entering into treaties, Congress cannot exceed its Article I legislative powers. Where it does exceed those powers, as it has in its attempt to extend criminal jurisdiction to cases that have no nexus to the United States, a structural question is presented which, as I have previously mentioned, cannot be waived or overcome by the consent of a foreign nation. That is, a foreign nation clearly cannot expand Congress's Article I power.

Chief Justice John Marshall, while a member of Congress, offered a relevant rhetorical question as part of his argument in opposition to a proposed bill that included murder on the high seas within the universal jurisdiction of the U.S. courts. He stated: "[c]ould the United States punish desertion by British seamen from a British vessel to a French one, or pick-pocketing among British sailors [aboard a British ship]? If the text [of the Constitution] does not expressly forbid [universal jurisdiction in such circumstances] it is only because it was too silly for the framers to have

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[66] *See, United States v. Martinez-Hidalgo,* 993 F.2d 1052, 1056 (3d Cir. 1993) ("Congress may override international law by clearly expressing its intent to do so.").

contemplated it."[67]

Much the same view was judicially confirmed in two Supreme Court cases early in the 19th century - close in time to what the Framers were thinking in enacting the Punish and Define Clause. In *United States v. Palmer*,[68] the court ruled that although Congress could constitutionally extend universal jurisdiction to ***genuine*** piracies,. but the act being considered had not done so. In fact, the U.S. Attorney conceded that Congress could not constitutionally expand universal jurisdiction to non-piratical offenses.[69]

The second case - which I have already discussed - is *United States v. Furlong*,[70] which was decided just two years after *Palmer*. In *Furlong*, a unanimous court reaffirmed its holding that Congress could not punish the murder of a foreigner by a foreigner on a foreign vessel, because this was clearly "beyond [Congress's] punishing power."[71] Genuine piracy, which was at that time the only universal crime accepted by customary international law, the court said, includes "[acts] so essentially different in nature [from murder], that not even the omnipotence of legislative power can confound or identify them."[72] And of course, drug trafficking is exponentially more removed from piracy than murder.

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[67] 4 THE PAPERS OF THE JOHN MARSHALL 102 (Charles T. Cullen & Leslie Tobias eds., 1984).

[68] 16 U.S. (Wheat.) 610 (1818).

[69] *Id.* at 618.

[70] 18 U.S. (5 Wheat.) 184 (1820).

[71] *Id.* at 196.

[72] *Id.* at 198.

This scene started to change shortly after the cases just described were decided, beginning with the 1820 enactment of a statute by Congress that declared the slave trade as a form of piracy punishable by death.[73] Nonetheless, this act stopped short of extending universal jurisdiction and required a demonstrable nexus between the U.S. and the crime. The House Committee on the Slave Trade explained that "the constitutional power of the government had already been exercised . . . [d]efining the crime of piracy," but as to the slave trade, it had yet to become a crime that was universally cognizable. At that time, therefore, the committee held that "[t]he definition and punishment [of the slave trade] can bind only the United States."[74] As we know, however, the slave trade is now also recognized by customary international law as within universal jurisdiction's coverage.

Against this background, we may return to the MDLEA, asking whether Congress's attempt to interject drug offenses within the "piracy" or "felonies" language of Article I, Section 8, Clause 10 saves this statute from a challenge to its extension of universal jurisdiction? The answer is clearly "no," and the fact that Congress believes otherwise shows it has learned little from jurisprudential history. As we have seen, drug offenses are clearly not piracy and, equally pellucid, *Furlong* prohibits Congress from attaching universal jurisdiction reach to run-of-the- mill "felonies." Although drug trafficking is a serious national crime, it is not the type of "heinous" international crime contemplated buy customary international law as justifying the use of universal jurisdiction. Thus, a grant of universal jurisdiction through the "piracy" and "other felonies" avenue is simply not available.

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[73] Ch. 113, §§4-5, 3 Stat.600-600-01 (1820).

[74] 36 Annals of Congress 2210 (1820).

Although Article I allows expansion of jurisdiction to "offenses against the Law of Nations,"[75] that is not a blank check either. The "Law of Nations" has been generally understood as the 18th and 19th centuries' term for "customary international law."[76] As consistently reiterated, drug trafficking is not, and never has been, accepted in customary international law as universally cognizable offense. This fact has been recognized by all the U.S. courts who have considered this issue.[77] Although under the principle of protective jurisdiction a state may punish a limited number of offenses ***directed against the security of the state*** or other offenses ***threatening the integrity*** of its governmental functions,[78] the conduct must in fact be "***directed*** against the [forum] state . . . ."[79]

Notwithstanding that the legislative findings of the MDLEA conclude that drug trafficking "presents a specific threat to the security and societal well-being of the United States,"[80] it is difficult to see - except through total speculation - how this finding can apply to a Bolivian vessel, with a non-U.S. crew, headed from Columbia to the Dominican Republic.

In fact, to illustrate just how beyond the pale the United States' approach to universal jurisdiction is, it should be noted that in drafting the United Nations Convention Against Illicit

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[75] U.S. CONST. ART. I §8 cl.10.

[76] *See Flores v. S. Peru Copper Corp.,* 414 F.3d 233, 237 n.2 (2d Cir. 2003) ("[W]e have consistently used the term "'customary international law' as a synonym for the term the 'law of nations.'").

[77] *See United States v. Perlaza*, 439 F.3d 1149, 1162 -63 (9th Cir. 2006) (rejecting universal jurisdiction as a jurisdictional basis for the MDLEA); *United States v, Wright-Barker,* 784 F.2d 161, 168 n.5 (3d Cir. 1986).

[78] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987).

[79] *Id.* at §403(3).

[80] *See,* 46 U.S.C. § 70501.

Traffic in Narcotics and Psychotropic Substances ("UNCAITNPS") [81] a proposal by Canada to extend universal jurisdiction to drug trafficking was considered., but soundly rejected.[82] That treaty has been signed by more than 150 states, including the United States.

It is no coincidence that Congress has not attempted to exercise universal jurisdiction over any crime (except for piracy, slavery, and crimes occurring on flagless vessels) since 1820, when its attempt to do so with the crime of murder was soundly rejected by the Supreme Court in a unanimous opinion. Time has not helped expand Congress's Article I power. In fact, a recent case in the Supreme Court - to which I will now turn - confirms the conclusion that its scope has remained the same and that the extension of universal jurisdiction by the MDLEA may be in jeopardy.

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In ***Kiobel v. Royal Dutch Petroleum Co.***, "[t]he [original] question presented [was] whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute [ATS] for violations of the law of nations occurring within the territory of a sovereign other than the United States."[83] the ATS, passed as part of the Judiciary Act of 1789,[84] was invoked twice in the late

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[81] Adopted Dec. 19, 1988, S. Doc. No. 101-4 (1989), 1582 U.N.T.S 165.

[82] *See,* Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,* 35 DENV. J. INT'L. L. & POL'Y 287,304 (2007).

[83] *Kiobel, supra*, Slip Op. at 1.

[84] Act of Sept. 24, 1789, §9, 1 Stat. 77.

18th century,[85] but thereafter only twice in the next 167 years before gaining prominence in the last several decades as a means to combat, civilly, grave international crimes. [86]

The plaintiffs in *Kiobel* were the residents of an area in Nigeria where the defendant oil companies were engaged in petroleum exploration and production. Residents of these areas began protesting these activities, whereupon it was alleged that the defendant entities sought the aid of the Nigerian authorities to violently suppress these actions. This resulted in the "beating, raping, killing, and arresting of residents and destroying or the looting of property." It was further alleged that the defendant companies aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military forces to use their property as a staging ground for the attacks.

Plaintiffs moved to the U.S. where they were granted asylum and resided here as legal residents. Thereafter, they filed a suit pursuant to the ATS, which provides that "[t]the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[87]

Plaintiffs claimed that defendants violated the law of nations by aiding and abetting the Nigerian government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrests and detentions; (5) violations of the right to life; (6) forced exile; and (7) property destruction. The district court dismissed the first, fifth, sixth, and

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[85] *Moxon v. The Fanny*, 17 F. Cas. 942 (No. 9,895) (D.C. Pa. 1793); *Bolchos v. Darrel,* 3 F. Cas. 810 (No. 1,607) (DC SC 1795).

[86] *O'Reilly de Camara v. Brooke,* 209 U.S. 45 (1908); *Khedivivial Line S.A.E. v. Seafarer's Int'l Union,* 278 F.2d 49, 51-52 (CA 2 1960).

[87] 28 U.S.C. §1350.

seventh claims, reasoning that the facts alleged in this respect did not give rise to a violation of the law of nations. The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability.

After oral argument, the Supreme Court asked for supplemental briefing on an additional question: "whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[88] In this respect, the court went on to say that "[t]he question here is not whether the [plaintiffs] have a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."[89]

In a mistake commonly made when discussing issues of extraterritoriality and universal jurisdiction, the court throughout its opinion intermittently appears to use "extraterritoriality" when it is in fact speaking of either "universal jurisdiction" or Article I power. It thus appears to be referring to extraterritoriality when it states that the presumption is "'that the United States law governs domestically but does not rule the world.'"[90] This subtle confusion is later clarified, when the opinion affirms that a question of extraterritoriality is a "merits question" (i.e., refers to whether the substantive law of the United States applies outside its borders), while "[t]he ATS . . . is strictly jurisdictional . . . [i.e.,] does not regulate conduct or afford relief."[91] Thus, the question was whether

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[88] *Kiobel, supra,* Slip Op. at 3.

[89] *Id.* at 4.

[90] *Id.* (citation omitted).

[91] *Id.* at 5 (citation omitted).

a cause of action under the ATS reaches conduct within the territory of another sovereign.[92] In expounding on the reach of customary international law as applied to the ATS - and enforcement of the same in U.S. courts - the court reminds us that "*Sosa* [a watershed ATS case] limited federal courts to recognizing causes of action only for alleged violations of international law norms that are 'specific, universal, and obligatory.'"[93] In language that I find relevant to the question under discussion today, the court further states:

> The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.
> . . . .
> We explained in *Sosa* that when Congress passed the ATS, "three principle offenses against the law of nations had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy . . . . The first two offenses have no necessary extraterritorial application.
> . . . .
> Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. . . . This court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. . . . [Plaintiffs] contend that because Congress surely intended the ATS provide jurisdiction against, it necessarily anticipated the statute would apply to conduct occurring abroad. [But] applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States unto conduct occurring within the territorial jurisdiction of another sovereign. . . . Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. We do not think that the existence of a cause of action against them is sufficient basis for concluding that other causes of action under ATS reach conduct that does occur within the territory

[92] *Id.* at 6.

[93] *Id.* at 6 (citing *Sosa v. Alvarez-Machain,* 542 U.S. 692, 732 (2004)) (emphasis supplied).

> of another sovereign: pirates may well be a category unto themselves.[94]

Lastly, the Court reminds us of the sage words of Justice Story when he wrote: "no nation has ever yet pretended to be the *custos morum* of the whole world."[95] to which the Court added further: "[a]ccepting [plaintiff's] view would imply that other nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[96] We have already seen attempts to do just this by Belgium and Spain, so this is not as far-fetched as it sounds.

The judgment dismissing plaintiffs' claims under the ATS was affirmed, because "[o]n these facts, all the relevant conduct took place outside the United States."[97]

I believe that *Kiobel* forecasts the future of universal jurisdiction in U.S. courts, both in the civil and criminal contexts. Further, I believe it will bear directly on the future of the MDLEA and the, in my opinion, wrongful extension of jurisdiction to drug interdiction on the high seas absent any U.S. nexus. It is only a matter of time before we get a definitive answer from the Supreme Court on this question.

Thank you for your patience and for you invitation to participate in this gathering of sea lawyers.

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[94] *Id.* at 8-11 (citations omitted).

[95] *Id*. at 12 (citation omitted).

[96] *Id.* at 13.

[97] *Id.* at 14.