INTERNATIONAL LAW — UNIVERSAL JURISDICTION — D.C. CIRCUIT UPHOLDS CHARGES FOR FACILITATOR OF PIRACY UNDER UNIVERSAL JURISDICTION. — *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013).

Piracy has long been considered the paradigmatic crime subject to universal jurisdiction, the principle that some crimes are so universally condemned that any nation may prosecute their perpetrators.[1] Yet prosecutors have been reluctant to exercise universal jurisdiction in piracy cases, almost never pursuing a case without some nexus to the prosecuting state.[2] Recently, in *United States v. Ali*,[3] the D.C. Circuit invoked universal jurisdiction to uphold charges against a Somali national for aiding and abetting piracy and hostage taking, even though the crimes lacked a nexus to the United States. *Ali* came in the wake of the Supreme Court's decisions in *Kiobel v. Royal Dutch Petroleum Co.*[4] and *Morrison v. National Australia Bank*,[5] which reinforced the presumption against extraterritorial application of domestic statutes in civil cases. Though the D.C. Circuit relied primarily on treaty interpretation, it could have strengthened its holding by situating itself within a line of precedent suggesting a lower bar for overcoming the presumption against extraterritoriality for criminal statutes. By potentially increasing U.S. courts' exercise of jurisdiction in criminal cases, the disparity between the presumption as applied in civil and criminal contexts shifts enforcement of international norms from private actors to state actors and perhaps better allows the United States to comply with its foreign policy obligations.

On November 7, 2008, a gang of Somali pirates launched an attack on the *CEC Future*, a Danish-owned merchant vessel flying a Bahamian flag, as it sailed the high seas between Somalia and Yemen.[6] Ali Mohamed Ali, a Somali citizen, was not among the group who hijacked the ship.[7] Instead, he boarded two days later off the Somali coast at Point Ras Binna.[8] With Ali aboard to act as interpreter, the pirates rerouted the *Future* to an area near the port of Eyl, where it remained an-

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[1] *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 183–84 (2004).

[2] *See id.* at 192; Michael P. Scharf & Thomas C. Fischer, Foreword, 35 NEW ENG. L. REV. 227, 228 (2001) ("[T]here has never been a successful prosecution in any country for piracy without the prosecuting state's jurisdiction being based on the nationality of the offender, the nationality of the victims, the nationality of the victim ship, or the territory where the act occurred.").

[3] 718 F.3d 929 (D.C. Cir. 2013).

[4] 133 S. Ct. 1659 (2013).

[5] 130 S. Ct. 2869 (2010).

[6] *Ali*, 718 F.3d at 933.

[7] *See id.*

[8] *Id.*

chored for the next sixty-nine days while Ali negotiated the pirates' demands with the ship's owners.[9] He obtained a $1.7 million ransom and left the *Future* with the rest of the pirates after they received the money on January 14, 2009.[10] Ali's share totaled $16,500, and he exacted an additional $75,000 from the shipowners as payment for his "services."[11]

In 2011, Ali came to the United States in his capacity as Minister of Education for the Republic of Somaliland[12] to attend what he believed to be an education conference in North Carolina.[13] In reality, federal prosecutors working on the case had fabricated the conference to lure Ali into the United States, and he was arrested on arrival.[14] Ali was indicted in the U.S. District Court for the District of Columbia for conspiracy to commit piracy as defined by the law of nations under 18 U.S.C. §§ 371 and 1651, aiding and abetting piracy as defined by the law of nations under 18 U.S.C. §§ 2 and 1651, and hostage taking through both conspiracy liability and aiding and abetting liability under 18 U.S.C. §§ 2 and 1203.[15]

Ali moved to dismiss the indictment for failure to state an offense, alleging defects relating to international law and the extraterritorial application of U.S. statutes.[16] In assessing the government's charges, the district court had to contend with two substantive canons: the presumption against extraterritorial application of U.S. statutes and the so-called *Charming Betsy* canon (named for *Murray v. Schooner Charming Betsy*[17]). The presumption against extraterritoriality cautions judges against applying U.S. statutes on foreign soil absent clearly expressed congressional intent.[18] The *Charming Betsy* canon counsels judges that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[19] The district court ultimately held that, pursuant to the international definition of piracy, jurisdiction over the aiding and abetting charge was proper only if the prosecution could prove that Ali's aiding and abetting occurred on the high seas.[20] It then dismissed the conspiracy charge entirely[21] and, on reconsideration, dismissed the hostage-taking charge as well.[22]

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9 *Id.*; United States v. Ali (*Ali I*), 870 F. Supp. 2d 10, 16 (D.D.C. 2012).
10 *Ali*, 718 F.3d at 933.
11 *Id.*
12 Somaliland is a self-proclaimed sovereign state within Somalia. *See id.*
13 *Id.*
14 *Id.*
15 United States v. Ali (*Ali II*), 885 F. Supp. 2d 17, 21 (D.D.C. 2012).
16 *Id.* at 22.
17 6 U.S. (2 Cranch) 64, 118 (1804).
18 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).
19 *Charming Betsy*, 6 U.S. (2 Cranch) at 118.
20 *Ali II*, 885 F. Supp. 2d at 32.
21 *Id.* at 35.
22 United States v. Ali (*Ali III*), 885 F. Supp. 2d 55, 62 (D.D.C. 2012).

The D.C. Circuit affirmed the dismissal of the conspiracy charge but reversed the limitation of aiding and abetting to the high seas and the dismissal of the hostage-taking charge.[23] Writing for a unanimous panel, Judge Brown[24] (1) held that the aiding and abetting statute applied extraterritorially even outside the high seas, (2) reasoned that the hostage-taking charge did not raise due process concerns, and (3) rejected the conspiracy charge altogether.[25] Though piracy is a recognized universal jurisdiction offense, Ali's indictment contained "no straightforward charge of piracy,"[26] and so the government had to prosecute him under statutes prohibiting aiding and abetting, conspiracy to commit an offense against the United States, and hostage taking. Accordingly, the court had to consider each statute as it related to international law.

First, the court discussed the aiding and abetting charge and its relation to both the *Charming Betsy* canon and the presumption against extraterritoriality. The court concluded that "*Charming Betsy* pose[d] no problems"[27] for the aiding and abetting charge since it found international support for the domestic statute in the U.N. Convention on the Law of the Sea[28] (UNCLOS). Article 101(c) sweeps into the definition of piracy "any act of inciting or of intentionally facilitating an act"[29] described in its preceding provisions, including "any illegal acts of violence or detention . . . on the high seas,"[30] and the court equated such facilitation with aiding and abetting. The court then turned to the presumption against extraterritoriality. Piracy is considered the paradigmatic universal jurisdiction crime because the pirate occupies a unique place in international law as *hostis humani generis*, "enem[y] of the human race."[31] The court found that universal jurisdiction could also apply to aiding and abetting piracy since generally "the extraterritorial reach of an ancillary offense like aiding and abetting . . . is coterminous with that of the underlying criminal statute."[32] While Ali did not dispute the extraterritorial reach of the statute, he cited *Kiobel* to suggest that the aiding and abetting charge should be limited by the terms of the piracy statute to the "high seas."[33] The court rejected his argument because

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[23] *Ali*, 718 F.3d at 932.

[24] Judge Brown was joined by Judges Edwards and Silberman.

[25] *Ali*, 718 F.3d at 932.

[26] *Id.* at 935.

[27] *Id.*

[28] *Opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

[29] *Id.* art. 101(c).

[30] *Id.* art. 101(a).

[31] *E.g.*, M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION 39, 47 (Stephen Macedo ed., 2004) (internal quotation marks omitted).

[32] *Ali*, 718 F.3d at 939 (citing United States v. Yakou, 428 F.3d 241, 252 (D.C. Cir. 2005)).

[33] *See id.* at 940.

the domestic piracy statute incorporates an accepted international law understanding of piracy under UNCLOS, which clearly includes facilitative acts within the crime of piracy.[34] Further, the court noted, the facilitation provision of UNCLOS Article 101(c), unlike 101(a)–(b), does not refer to a geographical limitation and so extending aiding and abetting liability even to facilitators who avoided the high seas was consistent with "the goal of deterring piracy on the high seas."[35]

Next, the court turned to the conspiracy charge and concluded that both *Charming Betsy* and the presumption against extraterritoriality counseled against upholding the charge. Neither UNCLOS nor other international law sources support criminalization of conspiracy or conspiratorial liability, the court noted, and employing universal jurisdiction generally requires a basis in "norms *firmly* grounded in international law."[36] Though the domestic conspiracy statute ostensibly encompasses "any offense against the United States,"[37] the court required clearer congressional intent to apply the statute extraterritorially.[38]

Lastly, the court assessed and ultimately upheld the hostage-taking charges against Ali. The court noted that the U.S. hostage-taking statute was clearly intended to operate abroad, allowing for an override of the presumption against extraterritoriality; the court further determined that the statute "unambiguously criminalizes" Ali's conduct, satisfying the conflict-avoidance dictate of *Charming Betsy*.[39] The court also rejected Ali's claim that the lack of a U.S. nexus to the hostage-taking charges created a due process violation. The court reasoned that if the nexus requirement was meant to serve as "a proxy for due process,"[40] it ensured that the government would assert jurisdiction only where a defendant could "reasonably anticipate being haled"[41] into the country. Application of the statute was not unfair, despite the lack of nexus, because hostage taking was condemned by the International Convention Against the Taking of Hostages,[42] providing "global notice" that violators can be prosecuted by any party to the treaty even when the violator's home state is not a party.[43]

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[34] *See id.* at 940–41.

[35] *Id.* at 940.

[36] *Id.* at 942 (quoting Hamdan v. United States, 696 F.3d 1238, 1250 n.10 (D.C. Cir. 2012) (emphasis added)).

[37] *Id.* (quoting 18 U.S.C. § 371 (2012)).

[38] *See id.* The court invoked *Kiobel* to show that language of general application, like "any offense," does not generally rebut the presumption against extraterritoriality. *Id.*

[39] *Id.* at 943.

[40] *Id.* at 944.

[41] *Id.* (quoting United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998)).

[42] *Adopted* Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

[43] *Ali*, 718 F.3d at 944.

More than merely representing the first universal jurisdiction prosecution of a Somali pirate,[44] *Ali* is notable for how it fits with other extraterritoriality cases. While *Ali* seems to go against the "judicial reluctance"[45] of *Kiobel* and *Morrison*, in reality it remains consistent with them and with *United States v. Bowman*,[46] a case that suggests a continued willingness to hear international criminal claims. The D.C. Circuit grounded its holding in careful statutory analysis, but might have strengthened it further by relying on *Bowman*. The recent limitations on international civil suits and the persistence of international criminal suits portend a shift in future international litigation and perhaps more effective enforcement of international norms.

Ali comes shortly after *Morrison* and *Kiobel*, two recent Supreme Court decisions that seemed to fortify the presumption against extraterritoriality. In *Morrison*, the Court rejected extraterritorial application of a U.S. securities law. In attempting to provide a "stable background"[47] against which Congress could legislate predictably, *Morrison* used expansive language that requires applying the presumption in all cases where there is no clear congressional intent regarding extraterritorial application.[48] In *Kiobel*, the Court refused to apply the Alien Tort Statute[49] (ATS) extraterritorially in the case of two Nigerian nationals who brought suit against foreign corporations for the corporations' brutal response to local resistance against a new oil development in the region.[50] The ATS, originally passed as part of the Judiciary Act of 1789, provides that "[t]he 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."[51] *Kiobel*, however, did not find support for the ATS's extraterritorial application in the overly general language of the statute ("any civil action") or in its analysis of the historical crimes, including piracy, intended to be covered at the ATS's inception.[52]

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[44] Eugene Volokh, *From Prof. Eugene Kontorovich, About Today's Piracy Decision*, VOLOKH CONSPIRACY (July 13, 2012, 5:50 PM), http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/.

[45] Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points," in* UNIVERSAL JURISDICTION, *supra* note 31, at 240.

[46] 260 U.S. 94 (1922).

[47] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010).

[48] *See id. See generally* Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011) (*Morrison* "instruct[ed] lower courts to turn a deaf ear to indications of congressional intent any subtler than the proverbial meat axe." *Id.* at 655.).

[49] 28 U.S.C. § 1350 (2006).

[50] *See* Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1662 (2013).

[51] 28 U.S.C. § 1350.

[52] *Kiobel*, 133 S. Ct. at 1665–66.

In the aftermath of these two cases, *Ali* might have been strengthened by reference to *Bowman*, which seems to suggest a less stringent application of the presumption against extraterritoriality in criminal cases.[53] *Bowman* found that criminal statutes can apply extraterritorially if "not logically dependent on their locality for the Government's jurisdiction, but . . . enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents."[54] Though there was a U.S. connection in *Bowman*, it has been cited as the basis for extraterritorial application in criminal cases, even against non-U.S. citizens and even under different sets of facts.[55]

Some courts invoking *Bowman* interpret it to extend their jurisdictional reach beyond crimes with direct effects on the United States to crimes whose nature involves a cross-border element or to crimes the United States may have an interest in deterring.[56] *Ali* never once mentioned *Bowman*, but implicitly accepted its logic in determining the court's ability to exercise jurisdiction. The court stated that its exercise of jurisdiction over the aiding and abetting statute "furthers the goal of deterring piracy on the high seas — even when the facilitator stays close to shore."[57] Piracy enjoys universal jurisdiction recognition in part because of global condemnation resulting from its otherwise jurisdictionless nature, its threat to international commerce, and the difficulty of policing it.[58] Had *Ali* explicitly acknowledged *Bowman*, it would have positioned itself within case law in the criminal realm that survives, and indeed operates alongside, recent Supreme Court cases

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[53] *See, e.g.*, Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 137–39 (2011) ("[T]hese courts have tended to expand the extraterritorial application of U.S. criminal law, in contrast to the trend of Supreme Court decisions in civil cases." *Id.* at 139.); Ryan Walsh, Note, *Extraterritorial Confusion: The Complex Relationship Between* Bowman *and* Morrison *and a Revised Approach to Extraterritoriality*, 47 VAL. U. L. REV. 627, 644–50 (2013) ("While *Bowman* permits a broader interpretation of statutes that allow for an assumption of Congress's intent, *Morrison* requires Congress's affirmative intent to be clearly expressed." *Id.* at 647.). For a recent circuit case analyzing *Bowman* and ultimately rejecting the argument that it makes the presumption against extraterritoriality wholly irrelevant in criminal contexts, see *United States v. Vilar*, 729 F.3d 62, 72–74 (2d Cir. 2013).

[54] United States v. Bowman, 260 U.S. 94, 98 (1922).

[55] Clopton, *supra* note 53, at 137–38 (collecting cases). Many courts, including the district court in *Ali*, have cited *Bowman* for the proposition that extraterritorial application is especially appropriate where some U.S. interest is involved. *See, e.g.*, *Ali II*, 885 F. Supp. 2d 17, 22–23 (D.D.C. 2012). A recent case involving foreign drug traffickers whose vessels were seized in Colombian territorial waters cited *Bowman* to allow jurisdiction. United States v. Carvajal, 924 F. Supp. 2d 219, 240 (D.D.C. 2013) (citing *Bowman*, 260 U.S. at 98–99).

[56] *See* Clopton, *supra* note 53, at 169–71.

[57] *Ali*, 718 F.3d at 940.

[58] *See id.*

demanding a seemingly higher bar to overcome the presumption against extraterritoriality in civil cases.

The disparity between *Ali*'s ruling on piracy and *Kiobel*'s description of piracy[59] is itself evidence of the different ways federal courts treat foreign civil cases and foreign criminal cases. In *Kiobel*, Chief Justice Roberts distinguished piracy from ordinary crimes committed on foreign soil by noting that piracy "does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign" and "d[oes] not operate within any jurisdiction."[60] Though he did not foreclose the possibility that piracy could occur outside the high seas, he was careful to limit piracy's definitional scope in order to limit the exercise of universal jurisdiction by analogy.[61] *Ali* presents an inverse situation where Ali's actions occurred almost exclusively in territorial waters yet facilitation outside the high seas served to expand rather than limit the class of behavior to which the designation of piracy, and therefore jurisdiction, could apply. *Kiobel*'s discussion of piracy as an analogue for other civil offenses shows the Supreme Court's inclination to curtail in the civil context what *Ali* expanded in the criminal context.

Bowman's continued viability in the criminal sphere is sensible even as civil extraterritorial application has contracted. Despite the general foreign relations issues involved in criminalizing conduct abroad, rigid use of the presumption against extraterritoriality in the criminal sphere — especially when norms are developed through multilateral treaties[62] — could actually "stunt[] the ability of the United States to fulfill its international obligations."[63] Piracy is considered a universal jurisdiction crime in part because of the difficulty of enforcement and because an attack on one nation's ship was historically viewed as a threat against all.[64] Similarly, many crimes to which

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[59] Significantly, the Chief Justice's discussion of the nature of piracy purported to analyze the offense only at the time of the ATS's passage in 1789 to divine the intent of the First Congress regarding extraterritorial application. Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1667 (2013). However, while he largely confined himself to the past tense and historical examples in discussing the two other historical ATS crimes, his discussion of piracy switched from past to present tense, seemingly encapsulating modern piracy as well. *See id.* at 1666–67.

[60] *Id.* at 1667.

[61] Piracy has been used by analogy to justify invocation of universal jurisdiction. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind."); Kontorovich, *supra* note 1, at 184–85; Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 370–71 (2001).

[62] *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1034 (2011).

[63] *Id.* at 1024.

[64] *See* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 114–15 (2004).

Bowman can apply involve violations of shared norms requiring international cooperation for enforcement.[65]

Kiobel and *Morrison*'s higher presumption for civil claims may lead to increased enforcement by state actors relative to nonstate actors. Placing the onus of litigation on state actors ensures that the body bringing the proceeding is more sensitive to the international issues than a private party more likely motivated by private interests. As Justice Stevens noted in *Morrison*, a government enforcement proceeding would "pose a lesser threat to international comity" than a private action.[66] Increased enforcement by state actors still allows a large role for nonstate actors who, in place of bringing private suits themselves, may turn their attentions to putting political pressure on state actors to prosecute claims.[67] The change would parallel the evolution of human rights litigation in other countries already dependent on multilateral treaties as the bases of prosecutions.[68] The charges of torture and crimes against humanity alleged in *Kiobel* are also well recognized under customary international law, multilateral treaties, and domestic statutes.[69] It is plausible that if the U.S. government had brought the suit in *Kiobel* under a criminal statute pursuant to a treaty, the case would not have been dismissed.

The D.C. Circuit did not seem troubled by the restraints of *Morrison* and *Kiobel* when exposing Ali, an unusual sort of pirate, to charges that carried a mandatory life sentence.[70] Despite the novelty of relying solely on universal jurisdiction, *Ali* is perhaps more significant for the fact that the court persisted in its use of universal jurisdiction despite the atypical circumstances of the case. Its finding comports with *Bowman*'s tradition of applying the presumption against extraterritoriality less stringently in criminal suits even while *Kiobel* and *Morrison* represent a significant limit in extraterritorial application in civil suits. By failing to incorporate *Bowman* in its analysis, however, the D.C. Circuit missed an opportunity to strengthen its reasoning and add to case law ensuring *Bowman*'s continued viability.

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[65] *See, e.g.*, Clopton, *supra* note 53, at 137–38 (cataloging applications of *Bowman* to transnational organized crime, child pornography, and price-fixing, among others).

[66] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894 n.12 (2010) (Stevens, J., concurring in the judgment) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." (quoting F. Hoffman-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 171 (2004) (alteration in original)) (internal quotation marks omitted)).

[67] *See* Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, *in* UNIVERSAL JURISDICTION, *supra* note 31, at 229–31.

[68] *See* A. Hays Butler, *The Growing Support for Universal Jurisdiction in National Legislation*, *in* UNIVERSAL JURISDICTION, *supra* note 31, at 73–74.

[69] *See, e.g.*, Scharf, *supra* note 61, at 363–65.

[70] *Ali*, 718 F.3d at 933–34.