

# THE PAROCHIAL USES OF UNIVERSAL JURISDICTION

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*This Article presents a new account of the function served by universal jurisdiction (UJ). This doctrine—one of the most diplomatically controversial in modern international law—allows states to prosecute certain grave international crimes, even committed abroad, and with no connection to the prosecuting state.*

*This Article shows that, far from being used as a tool of global policing, the UJ doctrine is, in practice, used to protect the parochial domestic interests of the prosecuting state. In showing this, this Article reconciles several paradoxes related to UJ—its broad and longstanding normative acceptance by states contrasted with its extremely rare application; and its tension with a rational model of state action contrasted with its apparent embrace by states. Unlike the numerous normative or aspirational theories of UJ, this account builds up from a comprehensive review of almost all UJ cases over the past two hundred years.*

*It finds a surprising common element among them. In the overwhelming majority of UJ cases, both over piracy and human rights offenses, the forum state actually has a direct, differentiable, parochial connection with the offense. While the nominal purpose of UJ is to allow states to prosecute crimes without any nexus to the offense—to enforce a global legal order—in practice it is almost exclusively used by states in precisely the cases where such a nexus exists.*

*Universal jurisdiction is useful in cases where, despite a concrete link between the forum state and the defendant, prosecution under traditional jurisdictional theories would be impossible due to other legal or practical impediments. In short, UJ is, in practice, a kind of catchall or safety net that facilitates dealing with extraterritorial crimes with a strong domestic nexus, when the standard legal tools for such prosecutions prove inadequate. It is not, however, used by states to enforce broad notions of global justice and the prevention of impunity.*

*The specific “parochial” uses of UJ have changed over time. For piracy, UJ was a shortcut designed to facilitate the proof of traditional territorial or national jurisdiction in cases where such a nexus with the forum state probably existed but would be difficult to prove. Such problems of jurisdictional proof were commonplace in piracy, where a variety of ruses adopted by pirates, and other circumstances, often made establishing the nationality of vessels or victims difficult.*

*In the recent boom in universal piracy prosecutions, the doctrine again served parochial state interests by allowing for prosecutions in cases with a clear domestic nexus that would not be covered by other jurisdictional grounds. The rise of flags of convenience severed the formal jurisdictional links between nations with shipping companies and the vessels they own and operate. UJ allowed maritime nations to prosecute attacks on vessels owned by their nationals, but flagged*

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elsewhere. An examination of Somali piracy cases shows that in almost all such prosecutions where UJ was invoked, a direct state interest was nonetheless involved.

Finally, the practical understanding of UJ helps explain the current pattern of its use, and more frequently disuse, to punish human rights offenses. The exercise of UJ over war crimes and human rights offenses has been exclusively confined to Western European states. In recent years, all such cases have involved migrants and asylum seekers who committed grave international crimes in their home countries. Traditionally, they would be subject to extradition, but human rights rules now prohibit returning them. In such circumstances, UJ provides a tool by which countries can protect themselves from becoming a refuge for perpetrators of atrocities.

This Article also has a theoretical agenda. It casts light on the debate about how states relate to international law: merely as self-interested utility maximizers, for whom international law means nothing outside of the concrete costs it can impose, or parts of a global normative community that internalizes such legal values. This Article shows how UJ, which on its face seems inconsistent with the self-interested state model, is, in practice, entirely consistent with it.

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#### INTRODUCTION

This Article presents a new account of the international law doctrine of universal jurisdiction (UJ), which allows states to prosecute certain crimes—such as piracy, torture, and genocide—despite lacking any jurisdictional nexus with the offense. Most scholars regard UJ as the paradigm of an international legal regime that transcends state sovereign interests. Prosecutions of universal offenses, in the standard view, involve countries acting on behalf of abstract international legal order.

UJ has existed for centuries, but was first limited to maritime piracy, and later the slave trade. The last decades of the twentieth century saw a significant expansion of the doctrine to human rights offenses. Numerous states passed statutes to implement UJ over such crimes, and several high-profile

prosecutions were launched against world leaders like Chile's Augusto Pinochet.<sup>1</sup>

The use of UJ as the cornerstone in a new international order based on law became a major initiative for nongovernmental organizations ("NGOs") and international organizations. However, actual prosecutions brought under UJ, whether for piracy or atrocity crimes, are vanishingly rare.

This Article presents a new account of UJ that explains it in light of the actual patterns of its use. It suggests that universal jurisdiction emerged, and is primarily used, not to allow states to mete out abstract justice, but to prosecute cases that directly and particularly affect their national interests, which they might not otherwise be able to deal with due to the operation of various other legal rules. Both historically and today, both for piracy and for human rights offenses, UJ has been overwhelmingly used against defendants who have caused a particular injury to the prosecuting state. UJ in practice is a pragmatic, technical tool of state self-interest. It serves as a kind of "catchall" backup doctrine for cases that fall through the cracks of other international jurisdictional categories.

This Article also sheds light on broader theoretical debates on how international law affects state behavior. Most current international law scholarship can, very crudely, be divided into two general methodological approaches.<sup>2</sup> One approach, borrowed from economics and international relations (IR) theory, assumes that states rationally pursue their own interests.<sup>3</sup> Their specific preferences may vary, but they are exogenous and stable. States will, in their interactions with other states, do what leaves them better off. They will only comply with or seek to further international law—which often seeks to facilitate cooperation, and increasingly, to protect absolute values such as human rights—when the benefits exceed the costs, in terms of their own objective function.

While rational choice theory does not precommit one to a view on what a state's objective function looks like, most IR theorists treat a state's security, territorial integrity, and wealth as key and typically determinative components. Rational choice theorists are typically skeptical of ambitious normative agendas for international law, like advancing human rights. In their view, states will advance human rights when the net costs of doing so are

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1 See, e.g., *How General Pinochet's Detention Changed the Meaning of Justice*, AMNESTY INT'L (Oct. 16, 2013), <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/>.

2 This framework is a simplification of the tripartite distinction sketched by Professor David Sloss. David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)). These taxonomies are of course quite crude. Many scholars take approaches that straddle these divides. See, e.g., Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015). Moreover, each of these rough camps contains multiple competing "schools" and approaches.

3 Beth Simmons, *International Law and International Relations*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 187 (Keith E. Whittington et al. eds., 2008).

negative.<sup>4</sup> Thus, international law will only affect state decisionmaking to the extent it can create real costs and benefits, and not because it is “law.”

An alternate group of approaches can be called the “liberal” or “norms-oriented” school,<sup>5</sup> which also includes a variety of theories, such as the constructivist and transnational legal process approaches. Overall, these approaches do not take state interests as exogenous. How a state—or according to the liberal approach, influential substate actors, such as diplomats and NGOs—define their interests is itself a function of the normative environment, interactions with other actors, and even moral values and “the power of principled ideas.”<sup>6</sup> These approaches emphasize how the existence of legal rules and processes can change a state’s utility function through processes like socialization and “compliance pull.”<sup>7</sup> These theories often see international law as a system evolving toward greater international cooperation, and, ever so slightly pulling countries along.

Universal jurisdiction poses challenges to both the rational choice and liberal/constructivist theories of international law. The existence of a doctrine of UJ would seem difficult to reconcile with rational choice predictions; the way the doctrine has manifested itself in actual state behavior fits less well with the competing view. This Article presents a new account of actual universal jurisdiction cases that straddles the competing understandings of international law and state behavior. This Article shows that UJ is overwhelmingly used and instrumental in cases where it promotes the most narrow and traditional notions of state self-interest. At the same time, the reasons UJ is a useful tool reflect the importance of international law in shaping state behavior, as these reasons arise from legal doctrine itself.

This Article closely examines all actual UJ cases involving piracy, the most longstanding UJ offense. It finds that a detailed examination of the context in which piracy occurred, and the particular facts of UJ cases, shed light on how the paradox of UJ can be resolved. In short, despite its internationalist rhetoric, UJ provides states with practical legal tools to respond to *parochial* problems—to advance their state interest, narrowly conceived. Thus, the (limited) success and significant persistence of UJ over piracy can be attributed primarily to its lending itself to the needs of rational state actors. This understanding of UJ can help predict and explain the situations in which we will continue to see UJ applied for human rights offenses.

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4 For the defining work in this vein, see GOLDSMITH & POSNER, *supra* note 2.

5 See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481-83 (2005).

6 *Id.* at 481.

7 See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 26 (1990) (“[L]egitimacy exerts a pull to compliance which is powered by the quality of the rule or of the rule-making institution and not by coercive authority.”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-46 (1997) (book review) (claiming that “the key to better compliance is more internalized compliance,” and that norm internalization is the product of a transnational legal process (emphasis omitted)).

This Article has a doctrinal and theoretical agenda. It seeks to provide an account of the functions UJ serves, not in the rhetoric of international law, but in the practice of states. It thus seeks to provide a new explanation for certain common themes in universal jurisdiction cases that helps explain both the cases in which it is used and the overwhelming number in which it is not. It also seeks to use this understanding to reflect on the competing theories of international law's effect on state behavior.

Primarily, it shows how universal jurisdiction has a role that is entirely consistent with rational state interest, and this role accounts for almost all piracy prosecutions that invoke the principle. The practical uses of UJ also both help explain the rarity and the persistence of UJ over human rights offenses, and explain, both retrospectively and predictively, important factors in case selection. But while showing how UJ is not only consistent with, but in fact an instrument of, state self-interest, it also shows that even the most parochial state interests, such as protecting the state's commercial interests abroad or deterring immigration by major criminals, are themselves framed in a context of international legal rules. The practical uses of universal jurisdiction illustrate the importance of both state interest and liberal/constructivist theories of international law.

To be sure, the view of universal jurisdiction as a tool of global justice is not inconsistent with its use in furtherance of state interests. Many adherents of the global justice view acknowledge that state uses of UJ may often be aligned with their interests, and certainly that universal jurisdiction will not be exercised when there are high diplomatic costs of doing so. Conversely, this Article does not show or suggest that all uses of UJ are inconsistent with the global justice model. This Article, however, suggests that UJ is overwhelmingly used, in underappreciated ways, as a solution to other legal barriers to the prosecution of crimes with which the forum state has a nexus. Emphasizing universal jurisdiction as a practical tool of domestic law enforcement policy should not be taken as minimizing the importance or international normativity of the doctrine. Rather, it helps to better understand the pattern of its use, and predict its future development.

Part I sets out the paradox of UJ. It sketches the history of the doctrine, from piracy to human rights offenses. It outlines recent research that reveals the extreme rarity of the exercise of UJ over any crime. This is juxtaposed by repeated judicial assertions of the doctrine's vitality and scattered cases in which it is in fact used. Part I goes on to explain why UJ would appear difficult to account for in a rational interest model of state behavior. It illustrates the high costs of exercising UJ, costs that states have generally regarded as prohibitive, given the lack of any directly conferred benefit on themselves. Part II presents an account of the practical function UJ historically served over piracy—an account that reconciles the longstanding and widespread acceptance of the doctrine with its extremely rare use, and that helps explain why it evolved specifically in the context of piracy, despite the broad recognition that it was not the most serious or heinous crime of international con-

cern.<sup>8</sup> It then illustrates this account via two of the most prominent cases discussing UJ in the nineteenth century. The concept was used as an evidentiary rule to facilitate the *proof* of jurisdiction in cases where the forum state had a substantial connection to the offense, but where the connection could not be easily established in court due to the particular characteristics of piracy.

Part III shows that the recent revival of UJ to respond to contemporary piracy—which has seen dozens of cases in which courts in numerous nations around the world invoked the doctrine, often for the first time ever—can also largely be explained as a response to concrete links between the forum state and the crimes in question. While the precise doctrinal gap-filling function of UJ has changed in relation to new maritime and legal developments, it is still largely a shortcut for establishing jurisdiction.

Part IV extends the analysis to UJ over other crimes, in particular the human rights offenses that have become the most visible and contentious aspects of the doctrine in recent decades. It finds that almost all UJ convictions in recent years—all in Western Europe—have involved crimes committed abroad by asylum seekers and other migrants. Due to other developments in human rights and refugee law, such criminals cannot be sent back to the locus of their offenses. With traditional methods of dealing with criminal migrants unavailable, UJ has once again stepped in to fill a gap created by other legal doctrines. But its use is thus limited to states' interest in not becoming havens for migrants suspected of serious crimes. This is consistent with the practical account of UJ that emerges from historic and contemporary piracy cases. It also shows, in a different context, how UJ is used to advance parochial state interests, but in a context where states do appear to regard themselves as constrained by other international law rules.

## I. UNIVERSAL JURISDICTION AND STATE SELF-INTEREST

### A. *The Paradox of Universal Jurisdiction*

In international law, a country's jurisdiction derives from, and is largely congruent with, the scope of its sovereign power. States have jurisdiction over crimes committed within their territory (known as territorial jurisdiction), or by or against their nationals (nationality and passive personality jurisdiction).<sup>9</sup> Universal jurisdiction is an exception to these sovereignty-based principles of international jurisdiction. It allows states to prosecute

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8 See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 186 (2004).

9 See *id.* at 188–90 (explaining the different categories of jurisdiction in international law). Courts in a few countries also sometimes invoke the “protective principle,” under which states can punish activities, such as counterfeiting or espionage, committed by foreigners abroad that cause serious harm to the core security interests of 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

crimes with which they have absolutely no connection—offenses involving only foreigners, committed abroad.<sup>10</sup> For hundreds of years—until the twentieth century<sup>11</sup>—piracy was the only universal crime in international law.<sup>12</sup>

In the wake of the Nuremberg Trials and the adoption of certain post–World War II treaties, the notion of UJ expanded to certain human rights offenses, such as torture and genocide. Not surprisingly, proponents of expanding universal jurisdiction to human rights offenses claim piracy as a precedent and model.<sup>13</sup> The extension of UJ to such offenses, which unlike piracy are typically committed by persons cloaked with state authority, is one of the most controversial developments in contemporary international law, precisely because it encroaches on or qualifies nations’ sovereignty.

UJ poses both theoretical and empirical paradoxes, which this Article seeks to jointly address. The theoretical paradox, in short, is why self-interested states would agree to a doctrine that yields their own core sovereign

and causation, the protective principle could encompass a vast degree of extraterritorial conduct, and ultimately shade into UJ. See Kontorovich, *supra* note 8, at 190.

10 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.” (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a (AM. LAW INST. 1987))), *aff’d*, 197 F.3d 161 (5th Cir. 1999); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323–24 (describing UJ as jurisdiction with no “nexus between the regulating nation and the conduct, offender, or victim”).

11 The mid-nineteenth century saw a diplomatic effort by Great Britain to extend the customary norm of UJ to the transatlantic slave trade, but it did not attain that status until much later, though it is impossible to put a precise date on the development. See Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39 (2009).

12 See Kontorovich, *supra* note 8, 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, 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.”).

13 See Kontorovich, *supra* note 8, at 184–86 nn.10–16, 203 nn.117–18 (explaining the importance of the “piracy analogy” to modern UJ and citing cases and commentary analogizing new universal offenses to piracy). As Justice Michael Kirby of the High Court of Australia put it:

[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 all humanity. To this extent the notion of universal jurisdiction is not entirely novel nor extralegal. What is new is the expansion of the 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 UNDER INTERNATIONAL LAW 240, 258 (Stephen Macedo ed., 2004); see also, 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.”).

prerogatives and potentially exposes their officials to foreign prosecutions, while authorizing them to take costly action in matters that, by definition, they have no stake in. UJ essentially contemplates nations, faced with scarce prosecutorial resources domestically, providing law enforcement services that do not benefit the prosecuting state. UJ can be thought of as a judicial public good—not the kind of thing states are generally in the business of providing. Moreover, since one prosecution per crime suffices, the emergence of a UJ custom would have to overcome significant free-rider and coordination problems.

Empirical evidence about the use of UJ for both piracy and human rights offenses seems largely consistent with the rational choice account—but not entirely. Indeed, the current state of UJ is not fully consistent with the predictions of either view of state behavior. The empirical paradox is that the existence of a customary international law norm of UJ that applies to both piracy and certain grave human rights offenses is undeniable. The universal status of these crimes has been affirmed in innumerable national court decisions across many countries, and codified in treaties and a large number of domestic statutes. Yet actual exercises of UJ are exceedingly rare, both as a fraction of possible cases, and even in absolute terms.

Historically, as Professor Alfred Rubin has shown, the doctrine of universality over piracy emerged and persisted despite the almost complete lack of any such prosecutions.<sup>14</sup> This begs the question of why UJ over piracy has existed for so long and with such general approval. Recent empirical scholarship has extended these findings about the paucity of UJ in practice to contemporary contexts. Professors Eugene Kontorovich and Steven Art have shown that UJ over piracy remains extremely rare.<sup>15</sup> In the period between 1998 and 2007, less than one percent of high seas piracy incidents resulted in UJ prosecution.<sup>16</sup> During the Somali piracy crisis that began in 2008, the rate was somewhat higher, but still less than four percent of piratical incidents<sup>17</sup>—despite the concerted international policing effort and the political and military powerlessness of the pirates.

Consistent with these findings, Professor Máximo Langer has confirmed that UJ is even more exceptional for human rights offenses.<sup>18</sup> Examining all complaints filed with or brought by national public authorities for UJ crimes since the Eichmann trial,<sup>19</sup> Langer finds that of 1051 possible defendants, less than three percent were brought to trial, in thirty-two separate proceed-

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14 See ALFRED P. RUBIN, *THE LAW OF PIRACY* 317 n.13, 326 & n.50 (2d ed. 1998) (concluding that UJ over piracy has been applied “very few times,” and enumerating fewer than five cases in the past 300 years); see also Kontorovich, *supra* note 8, at 192.

15 Eugene Kontorovich & Steven Art, Essay, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT’L L. 436, 452 (2010).

16 *Id.* at 445 tbl.4.

17 *Id.*

18 Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1 (2011).

19 Attorney-Gen. v. Eichmann, 36 I.L.R. 5 (DC Jer 1961) (Isr.).

ings.<sup>20</sup> As Langer notes, even this estimate considerably overstates the rate of prosecution of UJ complaints, as many complaints would not result in publicly discoverable records.<sup>21</sup> Moreover, Langer's study, unlike Kontorovich and Art's, uses complaints, not actual crimes, as the denominator.<sup>22</sup> This is because of the "denominator problem"—the near impossibility of determining the number of underlying UJ crimes outside the piracy context, where reporting is quite good and reliable records are kept by maritime organizations. Given this, as a percentage of actual occurrences of universally cognizable crimes, the prosecution rate approaches zero. Langer also finds that a plurality of UJ cases involved Nazi war criminals—that is, trials for decades-old offenses of a nonexistent regime.<sup>23</sup> All but eight involved trials of Nazis, Rwandans, or former Yugoslavs.<sup>24</sup> As with piracy, UJ over other offenses is not only vanishingly rare in its application, but also far from universal.

Yet despite its unicorn-like existence, UJ over at least certain core human rights offenses has certainly emerged as a customary international law norm. This is quite exceptional, as the process for the creation of a customary international law is fairly demanding, requiring both state practice and near-universal international legal agreement. Few norms ever meet this test. Moreover, while being rare, UJ is not chimerical. Despite the significant diplomatic<sup>25</sup> and legal criticisms of the doctrine,<sup>26</sup> UJ for both piracy and human rights offenses has remained an established part of international law. Unlike some doctrines that fail to achieve acceptance or outlive their usefulness, reports of what Antonio Cassese<sup>27</sup> lamented as the "end of universal[ ]" jurisdiction has been exaggerated.<sup>28</sup> Moreover, the years since the Kontorovich and Art study of piracy prosecutions and the Langer study of

20 Langer, *supra* note 18, at 7–8 n.23, 8 tbl.1.

21 *Id.* at 7–8 n.23.

22 *Id.* at 7.

23 *Id.* at 8 tbl.1.

24 *Id.* at 8 tbl.1, 9.

25 Harmen van der Wilt, *Universal Jurisdiction Under Attack: An Assessment of African Misgivings Towards International Criminal Justice as Administered by Western States*, 9 J. INT'L CRIM. JUST. 1043 (2011); Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF. (July/Aug. 2011), <https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction>; Press Release, Gen. Assembly, Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission, U.N. Press Release GA/L/3415 (Oct. 12, 2011), <https://www.un.org/press/en/2011/gal3415.doc.htm>.

26 ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 259–63 (2016); George P. Fletcher, Editorial Comment, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580 (2003); Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389; Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337 (2001).

27 Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589 (2003).

28 *Id.* at 590. Compare Luc Reydams, *The Rise and Fall of Universal Jurisdiction*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337 (William A. Schabas & Nadia Bernaz eds., 2011), with Máximo Langer, *Universal Jurisdiction Is Not Disappearing: The Shift*

human rights prosecutions have witnessed a small but significant uptick in such cases.<sup>29</sup> In short, despite the rarity of UJ in practice (consistent with rational choice predictions), the doctrine appears a small but stable part of the international legal landscape. This Article seeks to explain why, while providing a new account of the role UJ serves for states.

### B. *Universal Jurisdiction as a Judicial Public Good*

The primary goal of UJ is to deter violations of the relevant international norms.<sup>30</sup> Extending jurisdiction to every nation in the world will, UJ 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. The problem is that there is no strong reason for rational, self-interested states to exercise UJ. Exercising UJ is costly for the forum state.<sup>31</sup> As Professor Gary Bass put it:

[T]he 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?<sup>32</sup>

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from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction, 13 J. INT'L CRIM. JUST. 245 (2015).

29 See TRIAL INT'L, MAKE WAY FOR JUSTICE #3: UNIVERSAL JURISDICTION ANNUAL REVIEW 2017, at 3 (2017), [https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP\\_A4\\_012.pdf](https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf) ("In 2016, 13 countries . . . opened 47 cases based on the principle—7 more than the previous year, and 10 more than in 2014.")

30 See, e.g., AMNESTY INT'L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION 24 (2001), <https://www.amnesty.org/en/documents/ior53/002/2001/en/> (speculating that "[t]he 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 "one of the most frequently cited grounds" for exercising universal jurisdiction); Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 166 (1996) (explaining "the necessity of extending universal jurisdiction" to war crimes to create a "viable means for deterring similar crimes in the future").

31 See PROGRAM IN LAW & PUB. AFFAIRS & WOODROW WILSON SCH. OF PUB. & INT'L AFFAIRS, PRINCETON UNIV. ET AL., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 27 (2001) ("[T]he assembly recognizes that a scarcity of resources, time, and attention may impose practical limitations on the quest for perfect justice . . ."); Reydams, *supra* note 28, at 348 (observing that because exercising UJ is costly, it is a jurisdictional luxury only the wealthiest states can afford).

32 Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 13, at 77, 78 (noting that *Eichmann* suggests one reason a nation might exercise universal jurisdiction—namely, it feels directly and distinguishably injured by the offense, but in a manner not captured through existing international jurisdictional categories). This describes Israel's position in *Eichmann* quite well, and shows

While UJ gives unaffected states the right to prosecute, it provides no material incentives to do so. A nation exercising UJ 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, and typically cannot prosecute even all domestic crimes. Given that universal jurisdiction is costly, one would expect it to at best be a last priority for self-interested states.<sup>33</sup> Exercising UJ entails the provision of a judicial public good, and thus can be expected to be produced at “less than optimal levels, if at all.”<sup>34</sup> The provision of security on either a domestic or international level is a prototypical public good. International relations scholars have observed that international regimes that seek to produce public goods inevitably fail.<sup>35</sup> Successful international regimes create methods of excluding noncontributing states,<sup>36</sup> compensating contributing states, and otherwise altering real incentives. By contrast, UJ does nothing to change the incentives facing nations.

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. Universal jurisdiction authorizes every nation in the world to prosecute, but does not affirmatively put the responsibility on any particular state. 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.”

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 because of preferences for altruism.<sup>37</sup> Disaster relief and foreign aid, often not in the service of clear diplomatic agendas, are examples. But such analogies also tell us about the limits of altruism-based

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why *Eichmann* need not be viewed as an exercise of pure UJ. See Kontorovich, *supra* note 8, at 196–97.

33 See Kirby, *supra* note 13, at 256 (observing that judges with already heavy caseloads could be expected to be hostile to claims of UJ).

34 Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 378 (1989).

35 See *id.* at 379 (describing the collective sanctions regime generally of the Charter of the United Nations' Chapter VII and the Treaty on the Non-Proliferation of Nuclear Weapons as examples of failed international efforts to produce the public good of security).

36 See *id.* at 386. Regional defense alliances, like the North Atlantic Treaty Organization, do produce security because they can exclude nonmembers 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 Australian, New Zealand, United States Security Treaty, also “functions as a form of exclusion.” See *id.* at 387.

37 See *id.* at 352 n.93 (observing that “states infrequently act in ways that even *appear* altruistic” (emphasis added)).

UJ. It will only be exercised when the costs are small, and when it coincides with other national interests.<sup>38</sup> This helps explain why efforts to bring senior foreign officials or members of incumbent regimes to justice through UJ have failed: such actions face high diplomatic costs. It also explains why the UJ docket instead consists mostly of very low-ranking war criminals and why piracy UJ prosecutions outnumber those for all other crimes combined, despite the far lower incidence of piracy.

Indeed, the Nazi prosecutions that gave impetus to broadening universal jurisdiction—which in retrospect were unusual in the high rank of the defendants—illustrate the importance of state interest. The prosecuting powers at Nuremberg had a direct connection with the defendants—by having fought a six-year war against the defendants’ regime and occupying their country. To be sure, these interests were distinct from those embodied in the criminal charges, but nonetheless this nexus was emphasized in the prosecutions.<sup>39</sup>

### C. *The Costs of Exercising Universal Jurisdiction*

The recent counterpiracy efforts in the Gulf of Aden illustrate this point. The rise of Somali piracy led to the deployment of an unprecedented multinational naval force to interdict the criminals. The navies were successful in stopping many pirate attacks. Yet vessels that encountered and apprehended pirates systematically refused to prosecute, routinely citing the cost of trial and incarceration: most of the evidence would lie outside of the forum state, there would be an extensive need for interpreters and translators, and so forth.<sup>40</sup> Access to foreign witnesses is difficult, and a reluctance to testify cannot be overcome through a compulsory process.

A recent study based on a survey of thirty-three officials of national prosecution services and international organizations involved in antipiracy efforts reported:

[N]o particular country . . . has any real appetite for prosecuting pirate cases unless there is a strong national nexus and a perception of significant pressure or a particular need to do so, usually, if not only, in response to a specific incident. A large number of those surveyed indicated that in this fundamental respect there has been only modest progress from five or six years ago, with the first question concerning virtually every pirate incident today still being “Is anyone interested in prosecuting this attack, or willing

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38 See *id.* at 352.

39 See, e.g., Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 103 (1947) (basing jurisdiction on the grounds that, *inter alia*, “the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy”); see also Attorney-Gen. v. Eichmann, 36 I.L.R. 5 (DC Jer 1961) (Isr.) (discussing the connections between the defendant, his crimes, the Jewish people, and the state of Israel).

40 See Eugene Kontorovich, Essay, “A *Guantánamo on the Sea*”: The Difficulty of Prosecuting Pirates and Terrorists, 98 CALIF. L. REV. 243, 265–66 (2010).

to?” with the frequent answer being “No.” . . . While not employing the same words, many of those surveyed said that, in some significant sense, a country must almost be “forced” to bring a case by either its own perceived interests or in response to external pressures of one sort or another.<sup>41</sup>

Notably, these costs are sufficient to deter universal prosecution for pirates already in custody, where there is no additional enforcement cost. Indeed, the overall approach to suspected pirates has widely been described as “catch and release.”<sup>42</sup>

This reluctance to incur costs in the service of UJ appears to be as old as UJ over pirates, as two historical cases, both involving the then-hegemonic Royal Navy, powerfully illustrate.

In the early twentieth 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).<sup>43</sup> British shipping companies owned many vessels that carried passengers and goods, primarily Chinese, in these waters. The British ships were regularly attacked by pirates.<sup>44</sup> 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 shipowners themselves to pay the Crown for the cost of protection; otherwise, the forces would be withdrawn and the companies left to fend for themselves.<sup>45</sup> 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. (Conversely, Britain historically openly tolerated pirates that preyed on rival nations.)<sup>46</sup>

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 this service free of charge.<sup>47</sup> The suit failed on what amounted to political question grounds. However, in affirming this conclusion, the court of appeal made an observation quite relevant to the rational choice paradox of UJ. While the victim vessels were British, the judges repeatedly noted that

41 KENNETH SCOTT, PROSECUTING PIRATES: LESSONS LEARNED AND CONTINUING CHALLENGES 15 (2014).

42 See, e.g., Kontorovich, *supra* note 40, at 264–65; see also Kees Thompson, Ending the “Catch and Release” Game: Enhancing International Efforts to Prosecute Somali Pirates Under Universal Jurisdiction (Apr. 3, 2013) (unpublished B.A. thesis, Woodrow Wilson School of Public and International Affairs, Princeton University), <http://nationalstrategicnarrative.org/wp-content/uploads/2013/07/Kees-Thompson-Senior-Thesis.pdf>.

43 Cf. *Pirates’ Strategies and Countermeasures in the South China Sea*, EPOCH TIMES (June 18, 2018), [https://www.theepochtimes.com/pirates-strategies-and-countermeasures-in-the-south-china-sea\\_2562419.html](https://www.theepochtimes.com/pirates-strategies-and-countermeasures-in-the-south-china-sea_2562419.html); *Welcome to China! The Yangtze Patrol*, HISTORYNET (May 7, 2013), <http://www.historynet.com/welcome-to-china-the-yangtze-patrol.htm>.

44 See *China Navigation Co. v. Attorney-Gen.* [1932] 2 KB 197 (Eng.).

45 *Id.* at 198, 210.

46 See Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529, 545–56 (1911) (describing British tolerance of piracy against the Spanish).

47 *China Navigation*, [1932] 2 KB at 220–21.

the primary character of their commerce was Chinese—the vessels carried Chinese nationals and Chinese-owned cargo from one place in China to another.<sup>48</sup> Thus a large portion of benefits created by these activities was enjoyed by China, giving the Crown even less reason to expend its resources on the piracy problem. One justice noted that need for British forces arose from the commerce taking place “in neighbourhoods inefficiently policed by foreign Governments”<sup>49</sup>—implying that a better solution would be for China itself to reign in its pirates.

A similar case involved the capture by the Royal Navy of a group of pirates wanted on suspicion of an attack on an American vessel.<sup>50</sup> The British declined to exercise UJ, and instead sent the suspects to the United States for trial.<sup>51</sup> But the fact that the British had arrested a vessel for piracy against an *American* ship was seen as so remarkable that the defense counsel speculated about the “mysterious” motives of the British captain in pursuing the pirates.<sup>52</sup> Indeed, the exercise of universal enforcement jurisdiction was apparently so remarkable that Justice Joseph Story felt compelled to both praise and justify it to the jury:

Let us look, too, at the conduct of Captain Trotter. He was an officer of the British navy . . . discharging the particular duty, which had been assigned to him, and was under no obligation to trouble himself about pirates. But he receives information of the robbery of the American brig and that the pirate is supposed to be on the African coast, and immediately goes in quest of her. What motive could this gallant officer have had to interfere in this matter, but a sense of justice, and a desire to protect the rights of the whole world? He had nothing to gain, and he might encounter a great deal of peril, obloquy, and responsibility. . . . Now what inducement had Captain Trotter to encounter all this, but a high sense of public duty, not merely to his own country, but to the commercial world.<sup>53</sup>

Captain Trotter’s sense of duty was apparently quite exceptional—Story himself notes that this was the “first” such seizure by the British of pirates against Americans, and this is what lead him to his high praise of the capturing captain.<sup>54</sup>

National unwillingness to use UJ against pirates is almost as old as piracy itself. This encapsulates the paradox: if states have a systematic disinterest in such jurisdiction, how did an exceptional doctrine, modifying otherwise general rules of international law, evolve to allow for such prosecutions?

48 *Id.* at 223 (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)).

49 *Id.* at 212 (Scrutton, L.J.).

50 *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204).

51 *Id.* at 1289 n.2.

52 *Id.* at 1289–90 n.2. The improper motive defense counsel was trying to imply was a desire for financial reward that would blind the captor to questions of guilt or innocence. *Id.*

53 *Id.*

54 *Id.*

## II. PIRACY AND THE PRACTICAL USES OF UNIVERSAL JURISDICTION

Historically, while UJ over piracy was rarely invoked, it was nonetheless accepted as a legal reality. While Story may have marveled at Britain's exercise of UJ,<sup>55</sup> he assumed that it was internationally lawful. Indeed, on rare occasions, courts would decide cases under a UJ theory, and those decisions were entirely uncontroversial. This Part suggests how universal jurisdiction over piracy could help states advance their interests by facilitating the prosecution of *nonuniversal* crimes. UJ served as a kind of backstop for cases that directly bore on national interests but could not easily be prosecuted otherwise. UJ gave states a tool to prevent such cases from slipping through the cracks.

Various unique features of piracy—in particular, its locus in areas where details about the jurisdictional particulars of specific incidents could be hard to come by—help explain why a doctrine of UJ would be of particular value to states in regard to this crime. This Part then shows how some of the classic UJ cases of the nineteenth century in fact illustrate these practical functions of UJ. But given the lack of any significant number of well-documented UJ piracy cases before the twentieth century, the analysis can only be suggestive. However, this Part then goes on to examine the relatively large number of UJ piracy cases that have arisen in the past decade. These cases, despite their invocation of UJ over international crimes, almost inevitably involve a direct jurisdictional link with the prosecuting state. They also provide further illustration of the practical uses of UJ, and how those practical uses can change over time.

### A. *The Evidentiary Uses of Piracy Universal Jurisdiction*

This Section provides a theory for why UJ over piracy might emerge that is consistent with both self-interested state behavior and the near total lack of reported UJ cases. Section II.B will illustrate the plausibility of the theory by considering it in relation to some of the leading nineteenth-century cases in which UJ was in fact discussed.

UJ over piracy is best understood as a kind of jurisdictional presumption or shortcut. It allowed states to round the corners of certain doctrinal and practical problems involved with prosecuting crimes involving their nationals abroad. The first problem was doctrinal. Until at least the late nineteenth century, international law did not recognize a country's jurisdiction over crimes against its nationals committed abroad.<sup>56</sup> Moreover, nationality jurisdiction (over crimes committed by nationals abroad) was not clearly estab-

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<sup>55</sup> See *supra* notes 53–54 and accompanying text.

<sup>56</sup> See, e.g., *United States v. Davis*, 25 F. Cas. 786, 787 (C.C.D. Mass. 1837) (No. 14,932) (asserting that the United States would lack jurisdiction over the murder of a United States national by a foreigner on a foreign vessel on the high seas); see also 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 228–42 (1906) (discussing *Cutting's Case* and recounting the conflict between United States and Mexico over Mexico's use of such jurisdiction); Letter from Thomas F. Bayard, U.S. Ambassador to the U.K., to U.S. Dep't of

lished. At the same time, serious crimes involving a country's nationals, either as victims or perpetrators, clearly implicate that country's interests in a direct and differentiable way. UJ allowed a country to, if it wished, reach such cases without generally altering the international rules of jurisdiction. Moreover, piracy cases are ones in which states could be more likely to seek prosecution for crimes involving nationals committed on foreign vessels, because of the great uncertainty that the flag state would do so.

A related function of UJ over piracy was evidentiary. It facilitated the prosecution of crimes in cases where it was likely that traditional territorial or nationality-based jurisdiction existed but would be very difficult for a prosecuting state to affirmatively prove. As a presumption that allows for prosecution in cases with a concrete but hard-to-prove nexus with the forum state, UJ would have value even if it does not result in additional enforcement by nonaffected states. This is because this function of UJ would encourage enforcement by *interested* states. By reducing the costs of difficult jurisdictional determinations, it lowers the costs of enforcement precisely in those cases where the benefits of enforcement to the forum state are positive.

One of the outstanding characteristics of piracy has always been its multinational character.<sup>57</sup> Maritime commerce itself had a "peculiarly multinational complexion."<sup>58</sup> Ships, even man-of-war ships, were and are routinely crewed by sailors of different nationalities. Historically, pirate ships—crewed by outlaws, refugees, exiles, deserters, escaped slaves, and other outcasts—were at least as cosmopolitan as the typical merchantman.<sup>59</sup> The international character of pirates' victims added a further layer to the transnational character of the crime.<sup>60</sup> 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.<sup>61</sup>

Because pirates injured many nations, many nations would have a jurisdictional nexus with the offenses. In particular, the home state of the pirate vessel and its victims would have a strong nexus. However, proving the existence of jurisdiction in any specific case could be very difficult. Pirate ships were almost never caught in the act; rather, they were apprehended when

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State (Nov. 1, 1887), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1887, at 751 (Washington, Gov't Printing Office 1888) (same).

57 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 (2004).

58 Henry J. Steiner, Book Review, 76 HARV. L. REV. 1695, 1710 (1963).

59 See DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 12, 14–15 (1995) (describing the multinational character of pirate crews in the seventeenth and eighteenth centuries); Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 185–87 (1945) (explaining UJ over piracy by reference to the criminal groups being "made up of members of more than one nationality").

60 See Kontorovich, *supra* note 57, at 151.

61 See generally CORDINGLY, *supra* note 59, at 88 (describing cruising grounds of pirates).

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 a particular pirate crew had attacked. This again is a consequence of the locus of the crime. By the time a pirate vessel 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.<sup>62</sup> 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.

Indeed, pirates adopted numerous ruses to obscure their true nationality. A pirate ship carried the flags and registration papers (sometimes forged) of many nations, flying each when it most suited its purposes.<sup>63</sup> (One reason for the push by Great Britain to extend UJ to slave trading was that prosecutions frequently collapsed because of the difficulty of proving the defendant's or vessel's nationality in court, despite it being fairly apparent from the facts.)<sup>64</sup>

Pirates frequently repainted, refitted, and changed their vessels to avoid identification.<sup>65</sup> The logbooks and charts that ships were required to carry to document their journeys often went missing when a vessel was arrested by naval forces.<sup>66</sup> Even simply determining the true nationality of suspect pirates was difficult in an era before passports and other government-issued identification.<sup>67</sup> A state that captured a pirate vessel would have difficulty making the basic determination of whether any of the crew were its citizens or subjects. Before the rise of the twentieth-century bureaucratic state, proof of nationality (in the form of witness testimony or baptismal certificates) was often difficult to produce, and completely inaccessible on the high seas.

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62 *United States v. Gibert*, 25 F. Cas. 1287, 1289 n.2, 1313 (C.C.D. Mass. 1834) (No. 15,204) (observing that the crew of an American pirated vessel was not available to testify in British court against their attackers, who had been captured by the Royal Navy).

63 See CORDINGLY, *supra* note 59, at 114–15.

64 See, e.g., *United States v. Brune*, 24 F. Cas. 1280, 1281 (C.C.E.D. Pa. 1852) (No. 14,677) (holding that a ship's registry was not conclusive proof of American nationality to establish proof of jurisdiction in a slave trading case); see also *United States v. Darnaud*, 25 F. Cas. 754, 755 n.2, 758 (C.C.E.D. Pa. 1855) (No. 14,918) (involving slave traders that defeated national jurisdiction by having not only multiple flags on board, but multiple "captains," to help convince different navies that they had no authority over the ship).

65 For an example of a complex series of leases and other contractual agreements to obscure the national character of an American vessel, see *United States v. The Catharine*, 25 F. Cas. 332 (C.C.D.N.Y. 1840) (No. 14,755) (involving the libel of a vessel engaged in the slave trade).

66 *Gibert*, 25 F. Cas. at 1308.

67 See CORDINGLY, *supra* note 59, at 89 (explaining seasonal migration of pirates).

Like many legal presumptions, this use of UJ is based on an assessment of probabilities.<sup>68</sup> A pirate apprehended by a nation might be thought to be likely to have committed offenses against the forum state's vessels, or to have been prepared to do so but for his apprehension. While this likelihood would not necessarily arise to a more-likely-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 rebuttable. 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.<sup>69</sup> And the pirates would often be the only ones who knew the nationalities of the ships they attacked.

### B. *Universal Jurisdiction in Nonuniversal Cases*

The history of UJ over piracy is one of "rhetoric, not of application."<sup>70</sup> An examination of the two cases in which U.S. courts purported to rely on UJ reveals, and the two in which British courts did so, shows that the universality principle was invoked by courts *in cases with a direct and concrete domestic nexus*. There is a fairly apparent connection with the forum state, but one that cannot be clearly proven due to the machinations of pirates and the confusion of the seas, or that did not satisfy the much more restrictive nineteenth-century rules of territorial jurisdiction. A close reading of the facts of these cases shows that UJ is not used as a tool of international justice, but as a tool of domestic criminal prosecution.

*United States v. Holmes*<sup>71</sup> was the last of a trilogy of important piracy cases decided during the Supreme Court's 1820 term; the Court's main pronouncements about UJ over the crime come from these cases.<sup>72</sup> However, a close examination of the facts of these cases shows they apparently involved either American vessels or pirates, albeit amidst considerable evidentiary con-

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68 See McCORMICK ON EVIDENCE § 343, at 580 (John William Strong ed., 4th ed. 1992) ("Generally . . . the most important consideration in the creation of presumptions is probability."); *id.* § 337, at 570 ("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, Essay, *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).

69 See Cleary, *supra* note 68, 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 68, at 929–30.

70 Jeffrey T. Tirshfield, *The Socio-Historical Case for the Existence of a Nexus Requirement in the Application of Universal Jurisdiction to Maritime Piracy*, 19 J. HIST. INT'L L. 467, 473 (2017).

71 18 U.S. (5 Wheat.) 412 (1820).

72 The other cases were *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144 (1820), and *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). *Cf.* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

fusion. Thus, the leading UJ decisions of the nineteenth century were not universal, strictly speaking, but demonstrate the utility of the principle as a practical tool for establishing jurisdiction over a situation with a domestic nexus.

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.<sup>73</sup> Nor was there any evidence of the flag that the capturing vessels flew.<sup>74</sup> They carried no documents and it was not clear who owned them.<sup>75</sup> The ships had sailed out of Buenos Aires, where they had taken on a diverse crew of Frenchmen, Englishmen, and Americans.<sup>76</sup> Thus, while there were no facts with which to 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.<sup>77</sup> 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.<sup>78</sup> The ship’s 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 ship both came from America suggested that it was. The Court had to choose between endorsing a jurisdictional fiction that would allow these “nonnational” pirates to be punished, or to allow them to go free. It chose the former course and upheld the indictments. Drawing on *United States v. Palmer*, which had established a quasi-universal jurisdiction over “stateless” vessels,<sup>79</sup> the Court held that lack of proof of jurisdiction would not bar a piracy prosecution.<sup>80</sup>

While the Court’s holding looks like it affirms a UJ principle, 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 evi-

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73 *Holmes*, 18 U.S. (5 Wheat.) at 414 (reporting that the vessel’s “national character . . . was not distinctly proved by any documentary evidence, or by the testimony of any person”).

74 *Id.* at 417.

75 *Id.* at 414.

76 *Id.* at 414–15.

77 *Id.* at 415.

78 *Id.* at 418.

79 *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 620 (1818).

80 *Holmes*, 18 U.S. (5 Wheat.) at 419–20 (“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.”).

dentiary presumption: “Under these circumstances, the Court is of [the] opinion, that the bur[d]en of proof of the national character of the vessel on board of which the offence was committed, was on the prisoners.”<sup>81</sup> Presumably, if the shipowners could prove that they *were* French or Spanish, the indictment would be dismissed.

Similarly, Justice Story’s famous opinion in *United States v. La Jeune Eugenie*<sup>82</sup> has been embraced by modern commentators as an endorsement of UJ based on human rights considerations.<sup>83</sup> In that case, Story held that slave trading was, like piracy, universally cognizable,<sup>84</sup> marking a significant judicial expansion of the doctrine from what had thus far been its limits. However, on closer examination, the case stands for neither of these propositions because it was not in substance a UJ 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.<sup>85</sup> The ship was libeled in Boston, where its owners demanded its return.<sup>86</sup> The captured vessel flew the French flag and carried proper French papers.<sup>87</sup> It sailed from Basseterre to Africa, crewed by Spaniards and Italians.<sup>88</sup> The claimants and French diplomats also protested the assertion of U.S. jurisdiction.<sup>89</sup>

This led 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.<sup>90</sup> But this famous portion of the opinion is purely dicta for two reasons. First, after arguing that the court would have UJ, Story ultimately refused to entertain the case, and instead ordered the vessel returned to the French to avoid aggravating America’s foreign relations.<sup>91</sup> Second, and rele-

81 *Id.* at 419.

82 26 F. Cas. 832, 840–42 (C.C.D. Mass. 1822) (No. 15,551).

83 *See, e.g.*, Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791 & n.29 (1988) (citing *La Jeune Eugenie*, 26 F. Cas. 832, 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 Jeune Eugenie*, 26 F. Cas. 832, as evidence that federal courts can hold individuals accountable for violations of international law even absent congressional provision of a private right of action).

84 *La Jeune Eugenie*, 26 F. Cas. at 846.

85 *Id.* at 833.

86 *Id.*

87 *Id.*

88 *Id.*

89 *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”).

90 *Id.* at 846–50.

91 *Id.* at 850–51.

vant for the present discussion, *La Jeune Eugenie* was not a true UJ case. 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, who represented the United States, in defending jurisdiction,<sup>92</sup> and it was the first issue Story decided. The American character of the ship was clearly sufficient for jurisdiction,<sup>93</sup> and the subsequent discussion of UJ involved an admittedly counterfactual assumption about the vessel's nationality.<sup>94</sup> From the outset, Story suggested that the vessel's French character was 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.*<sup>95</sup>

Story found ample evidence that the vessel was really an American one: “[T]his 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 departure.”<sup>96</sup> The French ownership was merely “nominal,” a “disguise [ ]” adopted by “American citizens” to “facilitate . . . their escape from punishment.”<sup>97</sup>

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 form. Story announced that he would not “shut [his] eyes” to the real jurisdiction; he would penetrate beyond “the surface of causes” and deal with things as everyone knows them to be, rather than as they superficially appear.<sup>98</sup> Despite his fondness for natural law and formalism, Story wrote that “I

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92 *Id.* at 834.

93 *Id.* at 841 (holding that regardless of other jurisdictional “difficulties,” American ownership of a vessel was sufficient to defeat the claimant’s request).

94 *Id.* at 842 (beginning discussion of UJ over slave trading with “*supposing* the vessel to be established to be French” (emphasis added)).

95 *Id.* at 840–41 (emphases added).

96 *Id.* at 841.

97 *Id.*

98 *Id.*

should manifest a false delicacy and unjustifiable tenderness for abstract maxims” if he ignored the substantial American connection to the vessel.<sup>99</sup>

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.<sup>100</sup> The ship was to be treated as an American one *unless* the “ostensible foreign owners” “should give affirmative evidence” that their title was not pretextual.<sup>101</sup> Story suggested that claimants must produce a bill of sale that established the transfer of title from the American owners was for “valuable consideration.”<sup>102</sup> In other words, the case was presumed to be within territorial U.S. jurisdiction unless those opposing jurisdiction could prove that the case “ha[d] no admixture of American interests.”<sup>103</sup>

Consistent with this, a recent study of British cases invoking UJ over piracy finds that only two cases were decided on that basis from 1704 to the present day.<sup>104</sup> Moreover, one of them clearly did not in fact involve UJ.<sup>105</sup> The case of Thomas Green was a trial before the High Court of Admiralty in Scotland in 1705.<sup>106</sup> It involved a British privateer that attacked a Scottish vessel, crewed by Scots and carrying a Scottish cargo.<sup>107</sup> While Green’s vessel itself sailed from England, the matter of its nationality appears to have been somewhat confused due to his efforts to destroy relevant evidence.<sup>108</sup> The court bypassed these difficulties, and the complex division between Scottish and English jurisdictions at the time, by invoking the universal status of piracy.<sup>109</sup>

99 *Id.*

100 *See Hagan v. Foison*, 35 U.S. (10 Pet.) 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 (C.C.D. Mass. 1821) (No. 7301).

101 *La Jeune Eugenie*, 26 F. Cas. at 841.

102 *Id.*

103 *Id.*

104 *See Tirshfield*, *supra* note 70.

105 The only clear British UJ case has an amazingly late date. *In re Piracy Jure Gentium* [1934] AC 586 (PC) at 587 (Eng.). The case involved attacks on Chinese shipping of Hong Kong by Chinese pirates, and was tried in Hong Kong. Of course, the problem of Chinese pirates was one that at the time greatly vexed British merchants. *See supra* notes 44–49 and accompanying text.

106 THE CASE OF CAPTAIN THOMAS GREEN, COMMANDER OF THE SHIP *WORCESTER*, AND HIS CREW, TRIED AND CONDEMNED FOR PIRACY & MURTHUR, IN THE HIGH COURT OF ADMIRALTY OF SCOTLAND 1 (London, John Nutt 1705).

107 *Id.* at 14.

108 *Id.* at 8, 28.

109 *Id.* at 5.

### III. NONUNIVERSAL UNIVERSALITY IN MODERN PIRACY CASES

Piracy, the original and paradigmatic UJ offense, has reemerged as a serious threat to global commerce. Maritime piracy mostly occurs in a few “hot spots,” where a large volume of traffic passes by areas with weak coastal state law enforcement. For decades, a substantial portion of piratical attacks have taken place in Southeast Asian waters, in particular the Straits of Malacca, between Indonesia and Malaysia, through which one-fourth of the world’s shipping passes.<sup>110</sup> In recent years, the Gulf of Guinea, off the coast of Nigeria, has emerged as a pirate hazard, due to the large numbers of high-value oil vessels in the area.<sup>111</sup> In both these contexts, prosecutions of pirates have almost never needed to rely on the universality because they were undertaken by the littoral state itself.

The past decade has seen an unparalleled surge in prosecutions for piracy against the law of nations. The sudden spike in attacks by Somali pirates in the Gulf of Aden and Indian Ocean in 2008 led to an international effort to suppress this international problem. Dozens of nations coordinated naval enforcement efforts, United Nations (U.N.) agencies provided logistical support with prosecution,<sup>112</sup> and the U.N. Security Council provided further legal authorization for interdiction.<sup>113</sup> The antipiracy campaign resulted in the prosecution of over 400 pirates in at least fifteen different countries in the past decade.<sup>114</sup>

Yet even with Somali piracy, prosecution remained the exception rather than the rule. Indeed, states with naval resources dedicated to suppressing Somali piracy adopted express policies against arresting pirates, to avoid the high cost of trial.<sup>115</sup> Yet these states invariably made exceptions when their own national vessels were attacked. As a result, most piracy cases have not involved UJ, but were rather based on the territorial principle—attacks on ships flying the forum state’s flag. This is entirely consistent with what the rational choice model of state behavior would suggest.

Nonetheless, there have also been a large number of cases—involving hundreds of defendants—that have invoked UJ. This makes piracy prosecutions the most salient part of the universal jurisdiction docket. It also sug-

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110 See Ellen Nakashima & Alan Sipress, *Singapore Goes It Alone in Maritime Security Drill*, WASH. POST (June 2, 2004), [https://www.washingtonpost.com/archive/politics/2004/06/02/singapore-goes-it-alone-in-maritime-security-drill/2dd18721-c5b1-417c-bb6b-4c7813731551/?utm\\_term=.9a70206f5a39](https://www.washingtonpost.com/archive/politics/2004/06/02/singapore-goes-it-alone-in-maritime-security-drill/2dd18721-c5b1-417c-bb6b-4c7813731551/?utm_term=.9a70206f5a39).

111 See EOS RISK GRP., NIGERIAN PIRACY IN THE GULF OF GUINEA 2018 H1 REVIEW (2018), <https://www.eosrisk.com/uploaded/files/EOS%20Risk%20Group%20Nigerian%20Piracy%20in%20the%20GoG%202018%20H1%20Review.pdf>.

112 See JAMES KRASKA, CONTEMPORARY MARITIME PIRACY 171–72 (2011).

113 See S.C. Res. 1918 (Apr. 27, 2010) (encouraging piracy prosecutions and welcoming implementation of Djibouti Code of Conduct); S.C. Res. 1816 (June 2, 2008) (authorizing naval forces to pursue pirates in Somali territorial waters).

114 See Eugene Kontorovich, *The Problems of Pirate Punishment*, in PROSECUTING MARITIME PIRACY: DOMESTIC SOLUTIONS TO INTERNATIONAL CRIMES 299, 299–300 (Michael P. Scharf et al. eds., 2015).

115 Cf. *supra* note 42 and accompanying text.

gests states are willing to exercise UJ under certain circumstances, despite the high costs and diffuse benefits.

Building on a comprehensive database of piracy prosecutions,<sup>116</sup> this Part examines those in which prosecution was undertaken by a nonflag state. It finds that almost all these cases, on closer examination, betray a significant nexus between the forum state and the crime, albeit a nexus that does not easily fit into standard categories of international jurisdiction.

### A. *Flags of Convenience and Third-Party Operators*

In the post–World War II era, many shipowners began registering their vessels in foreign countries. The vessels fly the flag of, and are subject to the regulation of, the registering state. Under the U.N. Convention on the Law of the Sea (III), any country, including landlocked countries,<sup>117</sup> can register vessels.<sup>118</sup> Shipping companies seek such “flags of convenience” primarily to avoid domestic regulation on matters such as labor and safety. Today, Panama, Liberia, and the Marshall Islands are the most common open-registry flag states, with Malta, the Bahamas, and Cyprus also widely used.<sup>119</sup> Under international law, the ship itself is considered part of the territory of the flag state, and only that country can lawfully exercise jurisdiction over crimes committed there under most circumstances.<sup>120</sup>

Thus, the structure of the modern shipping industry makes it even more international than in prior centuries. Not only do ships’ crews come from many different countries, but a vessel is typically owned by a company based in one country, operated by a firm based in another, and flagged in a third. Such arrangements are deeply entrenched but subject to significant criticism.<sup>121</sup> One consequence is to divorce protection from underlying nationality. Traditionally, navies have sought to protect ships that fly their flag; now, most ships are registered in nations without any blue-water naval force whatsoever. Nor are the registry states in any way positioned to prosecute crimes against their flagged vessels.<sup>122</sup> At the same time, some political solicitude remains for shipping interests based in a country but flying a foreign

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116 See *id.* at 300.

117 For example, the fast-growing Mongolian merchant fleet has over 168 registered vessels. Graham Alexander, *Mongolia’s Dubious Merchant Navy: The Country Risks Serious Damage to Its Reputation with Its Questionable Maritime Activities*, DIPLOMAT (Mar. 20, 2015), <https://thediplomat.com/2015/03/mongolias-dubious-merchant-navy/>.

118 United Nations Convention on the Law of the Sea, art. 91(1), Dec. 10, 1982, 1833 U.N.T.S. 397.

119 *Top 10 Flag States 2017*, LLOYD’S LIST (Dec. 8, 2017), <https://lloydslist.maritimeintel.ligence.informa.com/LL1120177/Top-10-flag-states-2017>.

120 United Nations Convention on the Law of the Sea, *supra* note 118, at art. 92(1).

121 See generally JOHN J. PITNEY, JR. & JOHN-CLARK LEVIN, PRIVATE ANTI-PIRACY NAVIES: HOW WARSHIPS FOR HIRE ARE CHANGING MARITIME SECURITY (2013); Rose George, *Flying the Flag, Fleeing the State*, N.Y. TIMES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/opinion/25george.html>.

122 I ROBIN GEIß & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 159 (2011).

flag.<sup>123</sup> Thus, while typically attacks against off-flagged ships will go unprosecuted, a significant number of UJ cases have arisen in situations in which the state of the owner/operator chooses to prosecute. In these cases, UJ provides a necessary jurisdictional gap filler for directly affected states. Thus, what have been described as the first UJ piracy prosecutions in several countries—South Korea, Germany, Japan, and the United Arab Emirates—are in fact examples of the practical uses of UJ. This Section will describe these cases, demonstrating the prevalence of the flag-of-convenience theme in UJ piracy prosecutions.

South Korea has prosecuted four Somali pirates, captured in an incident that shows how globalization obscures genuine jurisdictional links, and how UJ allows states to exercise their authority in matters closely connected to them. On January 15, 2011, Somali pirates seized the *MV Samho Jewelby*, a Norwegian-owned, Maltese-flagged chemical tanker 350 miles off the coast of Oman.<sup>124</sup> The vessel was recaptured after a daring raid and prolonged firefight by South Korean commandos five days later.<sup>125</sup> The surviving pirates were brought to Korea for trial under UJ.<sup>126</sup> The incident seemingly had no connection with South Korea, and the trial thus appeared to be a significant and costly contribution to international justice by Seoul. In fact, the ship was operated by Samho Shipping Company, a major Korean firm, which faced ruinous losses over the incident.<sup>127</sup> (It was the second Samho ship taken by pirates.)<sup>128</sup> Moreover, Koreans formed the plurality of the crew and their plight attracted significant attention.

In the most ordinary sense, the ship was in reality more “Korean” than anything else. Indeed, the complex operation to recapture the ship was explicitly ordered by Korea’s president.<sup>129</sup> Nonetheless, despite the purely parochial interests of Korea in this case, the capture of the pirates and their subsequent trial were made possible through UJ, as Korea has no jurisdiction over Maltese vessels and does not recognize passive personality jurisdic-

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123 David Knight, ‘Protection from Piracy Comes at a Price,’ SPIEGEL ONLINE (Aug. 26, 2011), <http://www.spiegel.de/international/germany/the-world-from-berlin-protection-from-piracy-comes-at-a-price-a-782661.html>.

124 *MV Samho Jewelby Pirated in the Indian Ocean*, EU NAVFOR (Jan. 15, 2011), <https://eu.navfor.eu/mv-samho-jewelby-pirated-in-the-indian-ocean/>.

125 *That’s How to Deal with Pirates: South Korean Commandos Storm Hijacked Tanker and Rescue All Crew Alive*, DAILY MAIL (Jan. 21, 2011), <http://www.dailymail.co.uk/news/article-1349192/Somali-pirates-South-Korean-commandos-storm-hijacked-tanker-rescue-crew.html>.

126 See SEOKWOO LEE & HEE EUN LEE, *THE MAKING OF INTERNATIONAL LAW IN KOREA* 269–71 (2016).

127 See Paul Yoon, *Samho Shipping Files for Court Receivership*, MARITIME PRESS (Apr. 28, 2011), <http://eng.maritimepress.com/news/articleView.html?idxno=698>.

128 See *id.*

129 *That’s How to Deal with Pirates: South Korean Commandos Storm Hijacked Tanker and Rescue All Crew Alive*, *supra* note 125.

tion.<sup>130</sup> Thus the significant de facto but not de jure Korean connection to the incident was clearly necessary to Korea's decision to exercise UJ, but even then it was not sufficient. After capturing the pirates, Korea tried to arrange their transfer for trial to Oman or another regional state, due to the high cost of bringing them to Korea for trial.<sup>131</sup> At trial, the pirates received fairly severe sentences between twelve and fifteen years, with the judge invoking decidedly nonuniversal considerations, such as the growing threat pirates posed to shipping "in waters where Korean ships navigate frequently," and their violent resistance to arrest by Korean sailors.<sup>132</sup>

Similarly, in 2014, Germany tried and convicted a Somali for the hijacking and ransom of a Marshall Islands-flagged cargo tanker in 2010.<sup>133</sup> There were no Germans among the crew, but the ship was owned and operated by a German company.<sup>134</sup> The defendant had come to Germany as an asylum seeker.<sup>135</sup> Again, UJ authorized a prosecution where the forum state had the dominant factual interest and connection to the case, but would otherwise lack jurisdiction in international law.

One group of Somali pirates was prosecuted in Japan, in another first-of-its-kind case in that country. In March 2011, a Bahamas-registered oil tanker headed from Ukraine to China was seized by pirates off the coast of Oman.<sup>136</sup> The vessel had a multinational crew, but no crewman was Japanese.<sup>137</sup> Again, on its face it appears to be a purely UJ matter, and was prosecuted under a statute recently adopted by the Diet, Japan's legislature, specifically to respond to such crimes.<sup>138</sup> Indeed, in upholding the conviction of the pirates, the Tokyo High Court emphasized the international-law basis for its jurisdiction and the universality of the crime.<sup>139</sup> But again, in this case, universality was enlisted in the service of domestic interests. The ship was operated by a Japanese company, and thus the crime was declared by Tokyo to be a "Japanese interest."<sup>140</sup>

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130 Seokwoo Lee & Young Kil Park, *Korea's Trial of Somali Pirates*, in *THE LIMITS OF MARITIME JURISDICTION* 373, 376, 386 (Clive Schofield et al. eds., 2014).

131 *Id.* at 379.

132 *Id.* at 385.

133 *German Court Jails Somali Pirate*, DEUTSCHE WELLE (Apr. 17, 2014), <http://www.dw.com/en/german-court-jails-somali-pirate/a-17576518>. This was Germany's second piracy prosecution in hundreds of years; the first, a few years earlier, involved an attack on a German-owned, German-flagged ship.

134 *See id.*

135 *See id.*

136 Kentaro Furuya, *Japanese Anti-Piracy Law: Protection of Flagged-Out Ships*, in *PIRACY AT SEA* 81, 98 (Maximo Q. Mejia, Jr. et al. eds., 2013).

137 *Id.*

138 *Id.* at 100–01.

139 Yurika Ishii, *M/V Guanabara: Japan's First Trial on Piracy Under the Anti-Piracy Act*, 1 *MAR. SAFETY & SECURITY* L.J. 45 (2015).

140 Furuya, *supra* note 136, at 98. The Japanese government also sought and obtained permission from the flag state for the prosecution, though such authorization was not needed as a matter of international law. *Id.* at 100.

Another one of the apparently UJ piracy cases was tried by the United Arab Emirates. The *MV Arrilah-I*, a bulk carrier flagged like many ships in Monrovia, was attacked off the coast of Oman in April 2011.<sup>141</sup> Multinational naval forces in the area responded, leading to the rescue of the vessel by United Arab Emirates commandos in a helicopter-borne landing.<sup>142</sup> The pirates were not released, but rather taken to the United Arab Emirates for trial, where they were ultimately convicted.<sup>143</sup> Again, the vessel was owned and operated by a United Arab Emirates state-owned company, despite its foreign flag and crew.<sup>144</sup>

### B. Policing by Naval Vessels

In international law, enforcement jurisdiction is distinguished from adjudicative jurisdiction. The former refers to the authority to arrest and investigate, and the latter to prosecute. Typically, the two go together. UJ as it has been discussed in this Article is purely adjudicative—it does not carry with it any enforcement powers in foreign territory. Piracy is a special case because the law of the sea authorizes naval vessels some enforcement powers on the high seas even outside the context of UJ. The maritime “right of visit” gives warships the right to stop foreign-flagged vessels on the high seas and investigate possible criminal activity. The suspected conduct that can trigger a right of visit is broader than the activities that could subsequently be prosecuted (only piracy).<sup>145</sup> In other words, the U.N. Convention on the Law of the Sea authorizes investigation but not prosecution of certain crimes—only piracy is both universally enforceable and prosecutable. However, the right of visit often sets up a dynamic that results in the visiting ship’s country acquiring territorial jurisdiction over the suspect vessel.

Exercising the right of visit, naval forces seek to disrupt pirate attacks to provide safety for merchant shipping, absent any consideration of prosecution. Many nations with an official “catch and release” policy would still seek to disrupt pirate attacks when responding to distress calls, and even to arrest pirates merely to temporarily incapacitate and disarm them.<sup>146</sup> Yet pirates do not always take well to such interference. While many flee at the sight of much better armed naval forces, others have responded with force against naval vessels seeking to arrest them. Despite a zero success rate in repelling professional naval or coast guard forces, Somali pirates have repeatedly tried

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141 Adam Schreck, *Ship Rescued by UAE Forces Returns with 10 Pirates*, SAN DIEGO UNION-TRIB. (Apr. 6, 2011), <http://www.sandiegouniontribune.com/sdut-ship-rescued-by-uae-forces-returns-with-10-pirates-2011apr06-story.html>.

142 *Id.*

143 *See id.*; *see also* Ayesha Al Khoori, *Somali Pirates Have Life Sentences Upheld by Federal Supreme Court*, NATIONAL (Dec. 19, 2013), <https://www.thenational.ae/uae/somali-pirates-have-life-sentences-upheld-by-federal-supreme-court-1.288203>.

144 Schreck, *supra* note 141.

145 United Nations Convention on the Law of the Sea, *supra* note 118, at arts. 109–110(1).

146 *Cf.* Kontorovich, *supra* note 40.

to do so. When apprehended, the capturing state in such cases prosecutes, because its own forces have been attacked. In other words, nations that have no intention of prosecuting pirates they come across on UJ grounds will nonetheless prosecute if the pirates fire on their naval vessels. In these cases, the pirates are being stopped for attacking a foreign vessel, but prosecuted for attacking a domestic one. In these cases, UJ provides for a kind of prosecutorial safety net around maritime policing operations, making subsequent prosecution not dependent on the scope of a state's default provisions on the extraterritoriality of crime.<sup>147</sup> Such "defensive" UJ has been used in the convictions of over 100 pirates in several cases in the Seychelles<sup>148</sup> and India.<sup>149</sup>

### C. Supplemental/Ancillary UJ

The United States has prosecuted twenty-eight Somali pirates in cases arising out of several distinct incidents.<sup>150</sup> However, only one faced UJ charges, with the rest being charged for attacks on U.S. vessels (which the pirates had mistaken for merchant vessels).<sup>151</sup> These cases illustrate how territorial and universal jurisdiction often overlap in piracy cases, because of the promiscuous nature of pirate attacks in international waters.

The sole completed UJ case involved one member of a crew of six pirates that were apprehended and brought to the United States for trial after an unsuccessful attack on the *USS Ashland*. After being indicted, several of the

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147 For example, the Supreme Court of Seychelles, in an internationally noted case, asserted a robust understanding of universal jurisdiction over piracy in asserting its authority over its first piracy case. While the case involved an attack on a Coast Guard vessel, the extraterritorial jurisdiction of the Seychellois courts absent UJ was unclear from existing statutes. See *Republic v. Dahir* [2010] SCSC 81 (Sey.), <https://seylii.org/sc/judgment/supreme-court/2010/81-0>.

148 See *Republic v. Aden* [2011] SCSC 100 (Sey.), <https://seylii.org/sc/judgment/supreme-court/2011/100-0>; *Republic v. Ali* [2010] SCSC 99 (Sey.), <https://seylii.org/sc/judgment/supreme-court/2010/99-0>; *Dahir*, [2010] SCSC at § 11–12 (describing hour-long exchange of gunfire between the defendants and Seychelles Coast Guard, which was responding to a distress call from fishing vessels under attack by pirates).

149 See 'Stupid' Pirates Caught After Targeting Coast Guard Ship by Mistake, *MUMBAI MIRROR* (Feb. 7, 2011), <https://mumbaimirror.indiatimes.com/mumbai/cover-story//article-show/16099697.cms>; Vidya, *Mumbai Court Sentences 16 Somalian Pirates to 7 Years in Jail*, *INDIA TODAY* (Aug. 7, 2017), <http://indiatoday.intoday.in/story/somalian-pirates-mumbai-court-ins-suvarna/1/1021001.html>.

150 See Mazin Sidahmed, *How the US War on Piracy Brought One Somali to a West Virginia Prison*, *GUARDIAN* (Jan. 1, 2017), <https://www.theguardian.com/world/2017/jan/01/us-navy-piracy-somali-west-virginia-prison>.

151 Charges in one other American UJ case were ultimately dropped, and it is unclear whether the alleged crime—which took place entirely on land—fell within the international law definition of piracy. Associated Press, *U.S. to Drop Piracy Case*, *POLITICO* (Jan. 18, 2014), <https://www.politico.com/story/2014/01/us-to-drop-case-against-man-accused-of-piracy-102356>; Carrie Johnson, *For Pirates, U.S. Courts Offer No Safe Harbor*, *NPR* (July 18, 2012), <https://www.npr.org/2012/07/18/156913982/for-pirates-u-s-courts-offer-no-safe-harbor>.

defendants admitted to a prior attack on the *M/V CEC Future*, a Bahamas-registered, Danish-owned ship carrying American cargo.<sup>152</sup> Illustrating the probabilistic nature of UJ, pirates who attacked U.S. vessels would also attack those of other nations and vice versa; the only question is when they were caught in the process.<sup>153</sup> The lead pirate was charged with the *CEC Future* attack as well, but in this case, the universal jurisdiction charge was merely pendent to a case with a direct territorial (U.S. vessel) connection.<sup>154</sup> The marginal cost of prosecution in this case was close to zero, as the pirates had confessed and the leader accepted a plea deal, which was served concurrently.<sup>155</sup>

One can think of this as “ancillary” or “supplemental” UJ, a doctrine that allows U.S. courts to act in matters over which they would not independently have jurisdiction, but are closely related to incidents or defendants properly before the court.<sup>156</sup> Such jurisdiction is justified on practical considerations, where the court has traditional jurisdiction over a defendant, or a group of defendants.<sup>157</sup> Ancillary UJ can be described as a situation where UJ is used merely to add charges or codefendants already in the jurisdiction of the forum state, to allow for a more complete adjudication of a pattern of events. This is also largely congruent with the uses of UJ by the Allied war crimes tribunals. As the courts repeatedly insisted, Nazi war crimes were perpetrated in or against Allied nations. The principal exception that raised jurisdictional questions was the crimes in Germany itself, or those predating the war.<sup>158</sup> The prosecution of these crimes can be seen as “ancillary” to the broader Nuremberg and Allied adjudication of Nazi-era offenses.

#### D. *Universality for Hire*

The rise of Somali piracy resulted in true UJ prosecutions in three regional states—Kenya, Seychelles, and Mauritius. Kenya in particular tried 164 pirates in seventeen UJ cases; Mauritius tried twelve pirates in a single

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152 Press Release, U.S. Attorney’s Office, E. Dist. of Va., Somali Pleads Guilty to Acts of Piracy Against USS Ashland (Aug. 27, 2010), <https://archives.fbi.gov/archives/norfolk/press-releases/2010/nf082710.htm>.

153 Similarly, a pirate ringleader convicted in Belgium for hijacking a Belgian dredging vessel had also been suspected to attacks on seven other vessels from an array of other nations, though he was not tried for those incidents. James M. Bridger, *The Rise and Fall of Somalia’s Pirate King*, FOREIGN POL’Y (Nov. 4, 2013), <https://foreignpolicy.com/2013/11/04/the-rise-and-fall-of-somalias-pirate-king/>.

154 Press Release, U.S. Attorney’s Office, E. Dist. of Va., *supra* note 152.

155 Press Release, U.S. Attorney’s Office, D.C., Somali Sentenced to 25-Year Prison Term for Armed Piracy in Attack on Merchant Ship (Apr. 7, 2011), <https://archives.fbi.gov/archives/washingtondc/press-releases/2011/somali-sentenced-to-25-year-prison-term-for-armed-piracy-in-attack-on-merchant-ship>.

156 See Robert G. Morvillo & Robert J. Anello, *Ancillary Jurisdiction in Criminal Cases*, N.Y.L.J., June 5, 2007, at 3.

157 See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

158 See Kontorovich, *supra* note 8, at 195.

case; the Seychelles tried 152 in thirteen separate cases.<sup>159</sup> These trials represented an entirely new approach to UJ. The multinational coalition protecting shipping in the Gulf of Aden and the Indian Ocean was largely unwilling to prosecute the pirates they came across or arrested, leading to the notorious “catch and release” policy. This led the United States, European Union, and others to negotiate transfer arrangements with several regional states, whereby pirates captured by one party would be sent to the other for trial and incarceration.<sup>160</sup>

If wealthy Western nations refused to prosecute pirates without a national nexus, what could explain the willingness to do so by much poorer states, such as Seychelles? Under these arrangements, the transferring nations and the United Nations Office on Drugs and Crime agreed to provide significant financial and in-kind support to the prosecuting states, including building new modern courtrooms and prisons, as well as providing judicial training programs, coast guard upgrades, and other incentives. Even thus, arrangements with Kenya broke down in 2010 amid complaints from Nairobi that it was being insufficiently compensated and shouldering “more than its fair share of the burden.”<sup>161</sup>

These cases present a unique model of UJ—prosecution for hire, where jurisdictions are essentially rented out specifically because of their relatively low cost of trial. But it is also relevant that the prosecuting countries were all in maritime regions most affected by the crime. Mauritius, which only accepted one group of pirates under its transfer agreements, primarily characterized its prosecutions as upholding action on behalf of “the international community and the rule of law.”<sup>162</sup> Seychellois courts strongly emphasized the direct impact the spike in pirate attacks had on its critical industries of tourism and fishing.

#### IV. UNIVERSAL JURISDICTION, EXTRADITION, AND IMMIGRATION

Understanding UJ as a practical tool can help one to understand the current state of UJ over human rights offenses.

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159 See UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL MARITIME CRIME PROGRAMME: ANNUAL REPORT 2016, at 2 (2017), [https://www.unodc.org/documents/Reports/GlobalMaritimeCrimeProgramme\\_AnnualReport2016.pdf](https://www.unodc.org/documents/Reports/GlobalMaritimeCrimeProgramme_AnnualReport2016.pdf). The Kenyan and Seychellois appellate courts both subsequently acquitted seventeen of the pirates tried in each country. See Matt Glenn, *Kenya Court Acquits 17 on Piracy Charges*, JURIST (Nov. 5, 2010), <https://www.jurist.org/news/2010/11/kenya-court-acquits-17-on-piracy-charges/>; *Secretary-General Visits UNODC-Built Courtroom in Seychelles*, UNITED NATIONS OFFICE ON DRUGS & CRIME (May 11, 2016), <https://www.unodc.org/unodc/en/frontpage/2016/May/secretary-general-visits-unodc-built-courtroom-in-seychelles.html>.

160 James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416, 416 (2010).

161 Gathii, *supra* note 160, at 435.

162 *Twelve Pirates Convicted in Mauritius*, SAFETY4SEA (July 18, 2016), <https://www.safety4sea.com/twelve-pirates-convicted-in-mauritius/> (quoting comments of Satyajit Boolell SC, Mauritian Director of Public Prosecution).

In the 1990s, numerous European states passed far-reaching UJ statutes and used them to initiate proceedings against senior foreign government figures.<sup>163</sup> Numerous diplomatic incidents arose around arrest warrants for travelling world leaders. All this gave rise to a hope that, with the aid of international criminal law, the post-Cold War world was taking steps to end impunity and substantially deter atrocity crimes. This robust vision of UJ was heavily promoted by NGOs and academics.<sup>164</sup> The high point came with the House of Lords' decision in the *Pinochet* case, holding that international law allowed the arrest of a former head of state for torture.<sup>165</sup>

However, *Pinochet* was not in fact tried, and the diplomatic backlash from this and other prominent cases led Spain, Belgium, and the United Kingdom to greatly scale back their UJ statutes.<sup>166</sup> Heads of state, or even senior leaders, did not face prosecution. At the same time, a large opening for *civil* UJ cases in U.S. courts had been fashioned by judicial decision in 1980<sup>167</sup> and served as a major front for human rights litigation, as well as a forum for developing international norms in this area. But this docket was shut down by the U.S. Supreme Court in a series of decisions that ultimately required a clear U.S. nexus.<sup>168</sup> Given all this, "postmortems" for UJ began to appear.<sup>169</sup>

But UJ did not go away. As Langer showed in a 2011 paper, the number of UJ trials has remained constant before and after the statutory retrenchment of the early 2000s, though the defendants tend to be very low-rung perpetrators.<sup>170</sup> In the past few years, the number of UJ statutes and trials has somewhat increased, with a new wave of prosecutions involving atrocities arising from the conflicts unleashed by the Arab Spring. Still, the rate of UJ invocations as a proportion of possible cases in which it could be used remains miniscule, and may have decreased, as the influx of migrants has also led to an exponential increase in complaints filed with European national authorities concerning extraterritorial crimes.<sup>171</sup>

A close examination of recent UJ cases shows that they are entirely consistent with what one would expect from the piracy precedent. States have

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163 See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

164 See Harmen van der Wilt, 'Sadder but Wiser?': NGOs and Universal Jurisdiction for International Crimes, 13 J. INT'L CRIM. JUST. 237 (2015). Van der Wilt notes that NGOs were not only unduly optimistic about the potential of UJ, but also greatly overstated its substantive scope. *Id.*

165 *In re Pinochet*, 38 I.L.M. 430, 437(1999).

166 See Kontorovich, *supra* note 8, at 189–91.

167 See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

168 See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

169 See Reydam, *supra* note 28.

170 See Langer, *supra* note 18, at 5.

171 See HUMAN RIGHTS WATCH, "THESE ARE THE CRIMES WE ARE FLEEING": JUSTICE FOR SYRIA IN SWEDISH AND GERMAN COURTS 45 (2017), [https://www.hrw.org/sites/default/files/report\\_pdf/ijysyria1017\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/ijysyria1017_web.pdf).

come to use UJ as a practical tool, in a manner that directly serves their particular interests. As with piracy, UJ is being used to solve problems created by other legal doctrines.

The current UJ docket comes at a time when European states are dealing with an unprecedented wave of migration. Much of this is fueled by people fleeing bloody civil wars in Syria, Iraq, Afghanistan, and elsewhere. Because of the prevalence of atrocious crimes by all sides in these conflicts, it is not surprising that a nontrivial number of those fleeing violence are themselves perpetrators of crimes.

This returns us to the paradox of UJ—the ongoing acceptance of occasional application of the doctrine, coupled with states clearly being uninterested in using it in what Langer describes as “global policeman” contexts that have significant diplomatic repercussions. An examination of the circumstances of all UJ prosecutions for serious international crimes in the past five years<sup>172</sup> shows a clear common element. With the exception of a few “legacy” Yugoslav and Rwandan cases, in every UJ case in Europe in recent years, the defendant has been a migrant who has sought, and sometimes obtained, asylum or residency in the prosecuting country.<sup>173</sup> These are not cases of transitory “tag” jurisdiction, or in absentia proceedings, but rather cases of policing migrant populations from war-torn areas.

States have a well-recognized interest in not becoming safe havens for criminals, and all the more so for perpetrators of mass atrocities. This is particularly true when perpetrators come as refugees. In these situations, the forum state is likely to also be home to many refugee-victims of the perpetrator, creating further instability. Moreover, such perpetrators are not eligible for refugee status under international law, and the prosecuting state has no obligation to take them in.

International law has long recognized a state’s interest in not attracting felons from other countries.<sup>174</sup> The traditional answer for this was extradition—the ability of the receiving state to return a suspect to the state where his crimes were committed. But in the current European context, extradition is typically not an option because of another set of international law rules—*nonrefoulement*, which bans the return of individuals to countries where they are likely to face persecution.<sup>175</sup> European courts have interpreted the nonrefoulement rules particularly broadly. Moreover, various provisions of the European Convention on Human Rights may block extradi-

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172 The author relied on reports from TRIAL INT’L, *supra* note 29, HUMAN RIGHTS WATCH, *supra* note 172, and Langer, *supra* note 18, to identify the relevant prosecutions.

173 Numerous prosecutions involving migrants that received citizenship in the forum country are not considered universal because they fall under the nationality principle of UJ.

174 See IVAN ANTHONY SHEARER, EXTRADITION IN INTERNATIONAL LAW 12 (1971) (“A State which did not take effective measures against the incursion of foreign criminals would quickly find itself a seething haven for the undesirables from other lands.”).

175 SIBYLLE KAPFERER, UNITED NATIONS HIGH COMM’R FOR REFUGEES, THE INTERFACE BETWEEN EXTRADITION AND ASYLUM (2003), <http://www.unhcr.org/3fe84fad4.pdf>.

tion. For example, an English court recently blocked the return of suspected *génocidaires* to Rwanda on the grounds that it would violate their right to a fair trial.<sup>176</sup> Indeed, the judges noted that their holding creates an urgent imperative for the UK government to prosecute the suspects under UJ.<sup>177</sup> Several other countries have prosecuted Rwandan asylum seekers<sup>178</sup> or immigrants<sup>179</sup> only after concluding that they could not be returned to their home country.<sup>180</sup> It goes almost without saying that returns to Syria or Iraq would be broadly prohibited by these norms.<sup>181</sup>

Nonrefoulement rules prevent the repatriation of international criminals among the migrants coming to Europe in the past decade, as they come from nations where the justice system does not meet European standards and the nature of their crimes makes political retaliation likely.<sup>182</sup> Indeed, almost all current European UJ cases involve defendants who themselves claim asylum from their home country on grounds of likely political persecution.<sup>183</sup> Ironically, the greater the crimes of a war criminal-migrant, the more *likely he will in fact have a valid claim of nonrefoulement*.<sup>184</sup>

The combination of a large wave of migration from areas witnessing mass atrocities in the context of a multisided sectarian conflict and new human rights limitations on the removal of such aliens means that migrant-attracting countries find themselves with a small but highly undesirable group of criminals.<sup>185</sup>

176 See *Rwanda v. Nteziriyayo* [2017] EWHC (Admin) 1912 (Eng.), <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/rwanda-v-nteziriyayo-and-others-judgment-20170728.pdf>.

177 See *id.*

178 See *Prosecutor v. Bazaramba*, No. R 09/404 (Porvoo Dist. Ct. 2010) (Fin.), <http://www.internationalcrimesdatabase.org/Case/973>.

179 See *Kumar Lama*, TRIAL INT'L (Apr. 14, 2016), <https://trialinternational.org/latest-post/kumar-lama/> (involving UK trial of Nepalese colonel granted residence status).

180 See *Onesphore Rwabukombe*, TRIAL INT'L (Mar. 24, 2013), <https://trialinternational.org/latest-post/onesphore-rwabukombe/> (involving Rwandan-granted refugee status in Germany).

181 See *L.M. v. Russia*, HUDOC (Oct. 15, 2015), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%7B%2240081/14%22%7D> (noting the European countries do not return migrants to Syria and that such return would be unlawful under the circumstances of the case).

182 For a general overview of the problem, see Geoff Gilbert, *Undesirable but Unreturnable*, 15 J. INT'L CRIM. JUST. 55 (2017), as well as other papers in a symposium on the topic published in the same volume.

183 See, e.g., Agence France-Presse, *Second Iraqi Found Guilty of War Crime in Finnish Court*, JUSTICEINFO (Mar. 22, 2016), <http://www.justiceinfo.net/en/live-feed/26473.html>.

184 Mark Kersten, *How Should Canada Handle Criminals Cloaked as Refugees?*, GLOBE & MAIL (Nov. 19, 2017) <https://www.theglobeandmail.com/opinion/how-should-canada-handle-criminals-cloaked-as-refugees/article37019987/> ("It is not uncommon for perpetrators of atrocities to cloak themselves among refugees.").

185 For example, figures from the British Home Office suggest that in recent years it has rejected roughly 100 citizenship applications each year because of credible information about the applicant's involvement in war crimes. These numbers do not include asylum seekers or migrants without any legal status. See Tom Bateman, *Suspected Foreign War Criminals 'Able to Stay in UK'*, BBC News (Feb. 13, 2014), <http://www.bbc.co.uk/news/uk>

UJ has become a substitute for extradition or other forms of rendition. The current European UJ proceedings are almost all related to the ongoing wave of migration. For example, Finland recently convicted two Iraqis for war crimes committed in the conflict with ISIS—both had recently arrived as migrants.<sup>186</sup> Similar prosecutions have taken place in Sweden, Germany, and other states with large migrant populations. Several countries, such as Germany and Holland, have improved their enforcement capacity by creating dedicated international crimes investigative and prosecutorial units.

Seen this way, the fact that prosecutions are entirely in Western Europe is not a bug but a feature. If the goal of such a UJ regime is to deter criminal migrants, it only makes sense when it is exercised particularly by the countries that attract migrant flows. To put it differently, if all countries had such prosecutorial policies, Western European states would benefit less from their prosecutions.

This is a new practical use of UJ—serving as a potential disincentive for migration by perpetrators from countries wracked by mass atrocities. Here, states invoke UJ to solve legal gaps created by refugee and human rights norms. Unlike with other models of UJ, such cases are not merely (or primarily) creating global judicial public goods. The deterrent effect on migrants will be primarily internalized by the forum state, in some proportion to its willingness to launch such prosecutions and invest resources in them.

While all new UJ cases in recent years have involved migrants, such cases involve only a small percentage of undesirable migrants. It seems likely that “as a result of the legal and factual complexity of these trials, this approach does not provide a feasible answer to the problem it seeks to address.”<sup>187</sup> It does, however, help shed light on the nature and purpose of UJ by states. Consistent with the historical and contemporary experience with piracy, UJ has become a tool for states to prosecute cases that directly affect their interests but are not otherwise prosecutable because of other international and domestic legal norms. The persistence of the practical uses of UJ offers a strong basis to predict that cases involving migrants are likely to overwhelmingly dominate UJ prosecutions in coming years, and that such prosecutions will continue to be confined to the European states to which such migrants gravitate.

The actual use of UJ over human rights offenses by states is thus consistent with the rational choice view of state action. But it also shows that states pursue such interests within a framework of international law. The need for UJ over human rights offenses arises only because receiving states take nonrefoulement and related norms seriously. Again, this observation requires qualification. Countries that have been amongst the largest recipients of migrants from Syria and Iraq, such as Jordan and Turkey, have not

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26145293. This suggests that the United Kingdom alone may be home to over 1000 perpetrators of serious international crimes. *Id.*

<sup>186</sup> Agence France-Presse, *supra* note 183.

<sup>187</sup> Joseph Rikhof, *Prosecuting Asylum Seekers Who Cannot Be Removed*, 15 J. INT'L CRIM. JUST. 97, 97 (2017).

availed themselves of UJ to prosecute war criminals among the migrants. This could be because such countries view such persons' presence as less intolerable; it could also be that given their geographical position they regard micromanaging the composition of migrants to be impossible—that is, they have concluded that prosecution would not deter migration.

Recent state practice in responding to maritime piracy offers one possible alternative. In that context, the largely European nations that apprehended pirates were unwilling to prosecute them, but they were also unsatisfied with the alternative of merely releasing them. The capturing nations contracted out prosecution to regional states whose criminal justice systems operated at a lower cost. The doctrine of UJ provided the legal backdrop to such deals. One could imagine, in the context of the European Union–Turkey migrant deal, a parallel arrangement for the prosecution of particular suspected war criminals found in European states. This would certainly require the substantial build-out of investigatory capacities in Turkey, but such investment could be funded by the sending states, as it has been in Seychelles, Kenya, and Mauritius. Such an alternative would be highly controversial, as the European Union–Turkey deal has itself been subject to considerable criticism on nonrefoulement grounds.<sup>188</sup> Moreover, the piracy precedent suggests a very limited appetite among receiving states to such arrangements.

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188 Jacopo Barigazzi, *Human Rights Groups Warn EU and Turkey over Migrant Deal*, POLITICO (Apr. 1, 2016), <https://www.politico.eu/article/human-rights-groups-warn-eu-turkey-migrant-deal-unhcr-refugees-refoulement/>.

