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The Emergence of "Universal Jurisdiction" in Response to Somali Piracy: An Empirically Informed Critique of International Law's "Paradigmatic" Universal Jurisdiction Crime

Matthew Garrod*

Abstract

Since the 1980s, the idea that piracy is the "original" and "paradigmatic" universal jurisdiction crime in customary international law has been increasingly supported by weighty scholarship. In the wake of the unprecedented surge in Somali piracy, this view is gaining ground among various powerful actors in international law. Yet, remarkably little empirically grounded scholarship exists in support of universal jurisdiction. This Article provides the first comprehensive empirical analysis of state practice in response to Somali piracy in a ten-year period since 2006. Additionally, the data on Somali piracy are compared with the empirical findings of state practice regarding international crimes, which are more "heinous" than piracy, since the end of World War II to 2016. In so doing, this Article brings new insight and the first thorough critique of what virtually most scholars, governments, the

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UN and even the International Court of Justice have said on universal jurisdiction, its purpose and the basis for it in international law. In view of inter-state tensions and conflict caused by universal jurisdiction and a move towards law codification, there is now a pressing need for a paradigm shift in the concept of universal jurisdiction for both piracy and international crimes, a step away from conventional scholarly accounts, and the grand narratives from which they proceed, to a position that has a solid basis in the actual practice of states. Empirically and historically informed, it is proposed that "universal jurisdiction" for both categories of crime provides a basis in international law permitting the exercise national criminal jurisdiction over offences involving foreign nationals abroad that have a close nexus between the case over which jurisdiction is asserted and the state asserting jurisdiction. Common and traditionally held assumptions that universal jurisdiction is based solely on the grave nature of crimes and is applied by states absent any nexus to offences and in the interest of the international community are unfounded.

I. Introduction

1. Piracy is the "original" and "paradigmatic" universal jurisdiction crime in customary international law, dating back some 500 years. This account of universal jurisdiction is according to an unproven albeit uncontested prevailing scholarly narrative which has increasingly been given weighty support since the 1980s.[1] In response to the unprecedented surge in Somali

[1] For the starting point of this modern scholarly narrative on the matter, see Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Texas Law Review (1988), 788–91. The lineage of universal jurisdiction's prevailing narrative can be traced back to 1930s scholarship in the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, prepared under the auspices of the Harvard Law School; see Edwin D. Dickinson (Reporter), Jurisdiction with Respect to Crime, 29 AJIL (Supp.) (1935), 435 (Harvard Draft). Few scholars have challenged universal jurisdiction's alleged origins in respect of piracy; see Lauren Benton, Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction, 23 International Journal of Maritime History (2011); Luc Reydams, The Rise

piracy in 2008,[2] a new wave of leading scholars have embraced the prevailing narrative and once again recognized universal jurisdiction as a longstanding rule of customary international law.[3] In contrast to this conventional view, a distinct minority of scholars have cautiously claimed that, regardless of the dearth of evidence supporting universal jurisdiction historically, any gap in custom has been filled by the rapid growth of Somali piracy prosecutions.[4] Yet, remarkably little empirically grounded scholarship exists in support of universal jurisdiction.

2. This Article challenges universal jurisdiction's prevailing narrative and directly addresses an important gap in research by providing the first comprehensive empirical analysis of state practice in response to Somali piracy.[5] In so doing, it brings new insight and much needed clarity to the meaning of "universal jurisdiction", as well as the first thorough critique of what virtually most scholars, governments, the UN and even the International Court of Justice ("ICJ") have said on the concept of universal jurisdiction and

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and Fall of Universal Jurisdiction, Leuven Centre for Global Governance Studies (2010), 10–13; Matthew Garrod, Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law, 25 Dip. & Statecraft (2014), 195; Tamsin P. Paige, Piracy and Universal Jurisdiction, 12 Macquarie Law Journal (2013), 131.

2 International Maritime Organization (IMO), Reports on Acts of Piracy and Armed Robbery Against Ships, 2008 Annual Report, MSC.4/Circ.133, Annex 2, (19 Mar. 2009); IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, 2009 Annual Report, MSC.4/Circ.152, Annex 2 (29 Mar. 2010); IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, 2010, Annexes 2 & 5 (1 Mar. 2012).

3 E.g., see Eugene Kontorovich & Steven Art, An Empirical Examination of Universal Jurisdiction for Piracy, 104 AJIL (2010), 438; Ved P. Nanda, Exercising Universal Jurisdiction Over Piracy, in Michael P. Scharf et al. (eds.), Prosecuting Maritime Piracy: Domestic Solutions to International Crimes (2015), Chapter 3; Roger O'Keefe, International Criminal Law (2015), 17–21.

4 Douglas Guilfoyle, Prosecuting Somali Pirates. A Critical Evaluation of the Options, 10 J. Int'l Crim. J. (2012), 775.

5 For partial analyses of legislative and prosecutorial responses to Somali piracy, see, respectively, Yvonne M. Dutton, Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions, in Michael J. Struett et al. (eds.), Maritime Piracy and the Construction of Global Governance (2013), Chapter 4; Eugene Kontorovich & Steven Art, above n.3.

the basis for it in international law.[6] Its central argument is that the type of jurisdiction which applies to piracy on the high seas—and has done so for the past several hundred years—is more accurately termed "no proof of a nexus jurisdiction". As will be explained in Part II, this type of jurisdiction contrasts markedly with the concept of universal jurisdiction in the account of the prevailing narrative and is at variance with its purpose. States assert jurisdiction and prosecute Somali pirates when either they or their bilateral partners have a close link with the crime at issue and stand to gain the most benefit, usually out of necessity to protect their national interests, as detailed in Part IV. Building on previous empirical work, this practice is identical to what the same and all other states have done regarding international crimes since the Second World War, also examined in Part IV.[7] Accordingly, universal jurisdiction proper—in the account of the prevailing narrative—is non-existent in customary international law for both categories of crime.[8]

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6 See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002. In this case, Judges Higgins et al. state that "[p]iracy is the classical example" of universal jurisdiction's historical roots in customary international law, ibid. 63, paras. 60–61 (joint separate opinion Higgins et al.); President Guillaume asserts that "… international law knows only one true case of universal jurisdiction: piracy", ibid., 35 paras. 5, 12 (separate opinion Guillaume).

7 As a matter of historical record, when the concepts of "war crimes" and individual criminal responsibility in international law first emerged in state practice, in the aftermath of World War I, extraterritorial criminal jurisdiction for international crimes developed based on the requirement of the same close sovereign nexus. See Matthew Garrod, The British Influence on the Development of the Laws of War and the Punishment of War Criminals: From the Grotius Society to the United Nations War Crimes Commission, in Robert McCorquodale & Jean-Pierre Gauci (eds.), British Influences on International Law, 1915–2015 (2016), Chapter 15.

8 See Matthew Garrod, The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality, 12 Int'l Crim. L. Rev. (2012); Matthew Garrod, Unravelling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and "Universal Jurisdiction" in the Light of the Habré Case, 59 Harvard JIL (2018). The lack of universal jurisdiction state practice and non-existence in custom also finds support in judicial opinions in the Arrest Warrant case before the ICJ, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002, 63, para. 44 (joint separate opinion Higgins et al.); ibid., 35 paras. 5, 12–16 (separate opinion Guillaume), and recent scholarship, Luc

These developments in state practice thus necessitate a paradigm shift in the concept of "universal jurisdiction".[9]

3. The concern driving this Article, as explored in Parts II and III, is that states, domestic courts and the UN alike have been influenced by leading scholars and taken shortcuts in the identification of customary international law in response to Somali piracy, leading them to mistakenly believe that universal jurisdiction is time-honoured and therefore its legal status is not in need of further proof.[10] As a result, no proof of a nexus jurisdiction is misunderstood with a well-intentioned but flawed concept created by scholars and subsequently championed by some judges since the 1980s—universal jurisdiction.[11] Nevertheless, as states, including several powerful states, increasingly recognize and invoke so-called "universal jurisdiction" for piracy, it cannot simply be dismissed. Therefore, the aim is to reposition the understanding of the concept of universal jurisdiction, a step away from conventional scholarly accounts, and the grand narratives from which they proceed, to a position that has a solid basis in the actual practice of states.

Historically and empirically informed, this Article proposes that "universal jurisdiction" needs to be reconceived as a basis in customary international law allowing states to prosecute piracy cases with which they have a close nexus, such as the protection of their flag vessels, national security, nationals, economies and overseas trade. However, as piracy involves non-state actors and occurs on the high seas, the existence of such a nexus need not be proven in law in the same way as crimes occurring in the territory of states. A shift in theoretical paradigm for universal jurisdiction in respect of piracy is further corroborated by extraterritorial jurisdiction applicable to international crimes. The argument that, since World War II, universal jurisdiction has been

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Reydams, above n.1, 14–26; Sienho Yee, Universal Jurisdiction: Concept, Logic, and Reality, 10 Chinese JIL (2011).

9 Alex Mills rightly acknowledges that "[i]n law, as in science, a theoretical model may only be stretched so far in response to evidence before a paradigm shift occurs, replacing the basic assumptions of the system with a new set of foundational principles." Alex Mills, Rethinking Jurisdiction in International Law, 84 BYBIL (2014), 237.

10 For the formal criteria on identifying customary international law, see Part IV.B.

11 For the starting point of such judicial activism, see AG of Israel v. Eichmann, 36 ILR 277 (Israel Supreme Court, 1962); Filártiga v. Peña-Irala, 630 F. 2d 876 (US 2nd Cir., 1980).

expanding from piracy and now applies to international crimes occurring in the territory of foreign states is gaining ground in legal doctrine and among various influential actors in the field of international law.[12] However, the empirical record demonstrates that states apply jurisdiction over international crimes involving foreign nationals abroad when either they or their treaty partners have a close link with the crime over which jurisdiction is asserted. This practice, which is far from universal jurisdiction in the sense of the prevailing narrative, is entirely consistent with the application of jurisdiction over Somali piracy.

4. In making this argument, this Article is informed by three main sources of insight. The first is a novel in-depth analysis of the UN Security Council's recognition, for the first time, that piracy is subject to "universal jurisdiction" in resolution 1976.[13] The resolution's *travaux préparatoires* are included in the analysis to show where the Council went wrong in such recognition and what the Council understands the concept to mean is radically different to the prevailing narrative.

Second, it presents the findings of an original empirical analysis of state practice in response to Somali piracy, including the legislation of eighty-five states and prosecutions of 1248 suspects in twenty-three states—the largest recorded number of "piracy" trials in history—during a ten-year period since 2006.[14] These findings show that thirteen "seizing states" deploying warships to the Gulf of Aden to conduct counter-piracy patrols have prosecuted 22% of all pirates when their own flag vessels, warships, nationals or shipping companies are harmed. The majority of suspects, amounting to 78%, are prosecuted in ten "regional states", which are not participating in counter-

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12 See, e.g., American Law Institute, Restatement (Fourth) of The Foreign Relations Law of the United States, Jurisdiction (2016), para. 217 (Fourth Restatement); Christopher Staker, Jurisdiction, in Malcolm Evans (ed.), International Law (2014), 322; Roger O'Keefe, above n.3, 21–25. See further Part IV.E.i. and the references cited therein.

13 SC Res 1976 (11 Apr. 2011), pmbl. para. 8 & para. 14. See further Part III.

14 See further Part IV. The empirical findings relating to Somali piracy prosecutions were submitted, in 2016, as expert evidence to a study of universal jurisdiction commissioned by the European Parliament's Subcommittee on Human Rights (on file with author). See further the expert report compiled by Luc Reydams, The Application of Universal Jurisdiction in the Fight Against Impunity. In-Depth Analysis Reports, European Parliament (14 Mar. 2016) (https://ssrn.com/abstract=2929013).

piracy naval patrols. Of all prosecutions regionally, 43% occur in Somalia—the alleged perpetrators' home state. The remaining 57% of all regional prosecutions occur when the regional state concerned has a close connection or it acts on behalf of particular seizing states pursuant to bilateral Memoranda of Understanding ("piracy prosecution agreements") in return for financial and other incentives.[15] The prosecution of suspected pirates on behalf of seizing states is encouraged, if not demanded, by the UN Security Council.[16]

Lastly, building on previous work the data relating to piracy are compared with the empirical findings of state practice, since the end of World War II to 2016, relating to purported assertions of universal jurisdiction with respect to international crimes.[17] Comparing data allows one to appreciate the incidence of universal jurisdiction prosecutions in absolute terms and state practice relative to both categories of crime. It shows that states actually apply different types of treaty-based jurisdiction in prosecuting international crimes when they have a close link. Unlike jurisdiction for piracy, however, treaty-based jurisdiction for international crimes creates important *de jure* links with a prosecuting state party or one of its treaty partners; moreover, states have an international legal obligation—and not merely a discretionary permission—to assert such jurisdiction and prosecute international crimes on behalf of each other, failing extradition to another competent jurisdiction, pursuant to relevant treaties establishing mandatory extradite or prosecute regimes. Hence, of the thirteen states prosecuting international crimes, five of them combined account for 71% of all such prosecutions but they prosecute less than 7% of all Somali pirates, while a further five of these states have prosecuted 19% of international crimes combined but not a single pirate. The fact that states do not apply universal jurisdiction to crimes graver than piracy, such as torture and genocide, adds further weight to the finding that universal jurisdiction state practice in respect of Somali piracy is non-existent and confirms the need for rethinking the concept of universal jurisdiction.

The argument advanced in this Article is already influencing leading

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15 The Trust Fund to Support Initiatives of States Combating Piracy off the Coast of Somalia was established 27 Jan. 2010 with the principal purpose of meeting expenses associated with the prosecution and detention of suspected pirates in regional states.

16 E.g., SC Res 2020 (22 Nov. 2011), para. 15; SC Res 2077 (21 Nov. 2012), para. 18. See further Part III.

17 Matthew Garrod (2018), above n.8. See further Part IV.

scholars in the field[18] and has been adopted in a study on universal jurisdiction recently published by the European Parliament, following the submission of evidence by the present author.[19] It also builds upon previous work demonstrating that universal jurisdiction rests on false historical legal foundations with regards to piracy and international crimes and has developed as a mythical authority.[20]

5. Abandoning the prevailing narrative and a shift in paradigm, in addition to providing a more accurate description of how the law already works in state practice, is timely and of importance for the following reasons. During the past two decades, the US has unilaterally expanded no proof of a nexus jurisdiction to include the illicit trafficking of drugs by foreign flagged vessels on the high seas,[21] while it is little-known that the UK, more controversially, has unilaterally expanded this type of jurisdiction over acts of "terrorism" occurring in the territory of foreign states.[22]

Second, various actors in international law, not least the ICJ and the International Law Commission ("ILC"), increasingly claim that obligations to extradite or prosecute, which have been included in more than sixty

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18 Eugene Kontorovich, The Parochial uses of Universal Jurisdiction, 94 Notre Dame L. Rev. (2019).

19 Luc Reydams, above n.14.

20 See Matthew Garrod, above n.1; Matthew Garrod (2012), above n.8. The finding regarding the non-existence of universal jurisdiction for piracy and international crimes historically was adopted in the study on universal jurisdiction commissioned and published by the European Parliament in 2016, at the request of the Subcommittee on Human Rights, following the submission of expert evidence by the present author (on file with author). See further Luc Reydams, above n.14.

21 See Efthymios Papastavridis, The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans (2013), Chapter 7.

22 Terrorism Act 2000, c. 11 (UK); R v. Gul [2013] UKSC 64 (UK Supreme Court, 2013), para. 58. According to officials of the British Government's Home Office Ministerial Department, there is not, and never has been, an intention on the part of the British Government of asserting such jurisdiction when acts of terrorism have no legitimate connection to the UK. However, the legislation means that prosecutorial authorities are not required to prove, in law, the existence of a connection with relevant offences (interview on file with author).

multilateral treaties, embody and even mandate universal jurisdiction.[23] This confuses the relationship between types of "treaty-based jurisdiction" arising out of extradite or prosecute obligations and the concept of universal jurisdiction, and is leading to claims by some states that universal jurisdiction applies to a voluminous list of crimes.[24]

Lastly, universal jurisdiction is causing conflict and straining relations among states. In a world of rival jurisdictions international law on jurisdiction seeks to provide for the lawful co-existence of sovereigns by requiring a nexus to the forum state. Unlike all other principles of jurisdiction, which are intended to promote state interests, universal jurisdiction, in the account of the prevailing narrative, in many ways conflicts with sovereignty and creates tensions with international law's role of constraining the regulatory authority of states.[25] As is well known, in the *Arrest Warrant* case before the ICJ, Judge Guillaume warned that, contrary to what is advocated by leading scholars, if international law accepts universal jurisdiction over crimes taking place in the territory of states then this would "risk creating total judicial chaos … [and] encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'."[26] Some six years after Judge Guillaume issued this opinion the African Union accused certain European states of politically abusing universal jurisdiction by unilaterally and selectively targeting African officials.[27] At the request of the African Union, the topic of universal jurisdiction was subsequently elevated to the UN General Assembly and its Sixth Committee in 2009.[28] The conflict generated

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23 Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, ICJ 2012; ILC Report of the Work of Its Sixty-Sixth Session, UN Doc. A/69/10 (2014), 149–50; ILC Report of the Work of Its Seventieth Session, UN Doc. A/73/10 (2018), Annex A, paras. 7, 21 (ILC Report Universal Jurisdiction).

24 Matthew Garrod (2018), above n.8, 127–29.

25 See also Devika Hovell, The Authority of Universal Jurisdiction, 29 EJIL (2018), 435, 441, 443.

26 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002, 35, para. 15 (separate opinion Guillaume).

27 The African Union has adopted several resolutions on the alleged abuse of universal jurisdiction, starting with Assembly/AU/Dec. 199 (XI), Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14 (XI) (1 Jul. 2008).

28 Permanent Representative of Tanzania to the UN, Letter dated 29 June 2009 from the Permanent Representative of Tanzania to the UN Addressed to the

between Africa and Europe over universal jurisdiction is more widespread than regional differences, with the Latin American Group and the Non-Aligned Movement joining the African Group—comprising over 120 states combined—claiming that powerful states selectively target the nationals of less powerful states with universal jurisdiction. Universal jurisdiction has met with fierce opposition and made little meaningful progress during nearly a decade of extensive work in the Sixth Committee, leading to an "apparent impasse",[29] with delegations unable to agree on its definition, purpose and scope, or how to move the topic forward.[30] The reason for this impasse, in part, is that one point of agreement seems to be that, whatever universal jurisdiction is, it has always applied to piracy; and several delegations are seeking to expand jurisdiction for piracy to include diverse crimes occurring in the territory of foreign states; yet, there is uncertainty and little agreement pertaining to the status and content of universal jurisdiction in customary international law.[31]

More recently, the Subcommittee on Human Rights has underlined the European Parliament's commitment to promoting universal jurisdiction,[32] despite the Subcommittee having received strong countervailing expert evidence showing a lack of state and treaty practice since World War II to the present day supporting this type of jurisdiction in international law.[33]

Secretary-General, UN Doc. A/63/237/Rev.1 (23 Jul. 2009). Report of the Sixth Committee, The Scope and Application of the Principle of Universal Jurisdiction, UN Doc. A/64/452 (13 Nov. 2009).

29 Assembly/AU.Dec.665-689(XXX), Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII), Thirtieth Ordinary Session, Addis Abba, Ethiopia (28–29 Jan. 2018).

30 E.g., see GA Res 72/120 (18 Dec. 2017). For the most recent Sixth Committee debates on universal jurisdiction, see UN Docs. A/C.6/72/SR.13 (11 Oct. 2017), A/C.6/72/SR.14 (12 Oct. 2017), A/C.6/72/SR.28 (3 Nov. 2017).

31 The extensive work on universal jurisdiction at the Sixth Committee demonstrates this clearly.

32 Barbara Lochbihler, MEP, Vice-Chair of the Subcommittee on Human Rights, in Julia Krebs, Cedric Ryngaert & Florian Jeßberger, Workshop Report: Universal Jurisdiction and International Crimes: Constraints and Best Practices, European Parliament (17 Sep. 2018), Part A, 7 (http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf).

33 This expert evidence was submitted by the present author to the study of

Moreover, at its seventieth session in 2018, the ILC included "universal criminal jurisdiction" in its long-term program of work due to the "definitional and other ambiguities surrounding the universality principle, which has in its past application strained and today continues to strain relations among States".[34] These considerable developments and the move towards codification provide a unique situation for taking a fresh look at state practice and constructing the first empirically grounded account of "universal jurisdiction" in international law for both piracy and international crimes.

6. A paradigm shift in universal jurisdiction involves high stakes. It requires challenging traditional accounts of universal jurisdiction in the field of international criminal law, which proceed from commonly held assumptions on the part of scholars who have embraced the prevailing narrative rather than a rigorous examination of state practice. These assumptions include the idea that the "distinctive" feature of an international crime is that it is inherently subject to universal jurisdiction; that all states have a shared concern with repressing and deterring piracy and international crimes based on universal jurisdiction; that states are motivated to use universal jurisdiction and prosecute such crimes because of their "heinous" gravity; that universal jurisdiction transcends state interests and piracy and international crimes are prosecuted on behalf of the international community for the protection of international community values; that the international legal foundations of universal jurisdiction rest on the protection of human rights and particularly the individual right of access to justice for victims of international crimes; and that states have an *erga omnes* obligation to establish universal jurisdiction over *jus cogens* violations.[35] But it equally requires (at least

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universal jurisdiction commissioned, in 2016, by the European Parliament's Subcommittee on Human Rights, above n.14 (on file with author). More recently, during the proceedings of a workshop on universal jurisdiction organised by the European Parliament's Subcommittee on Human Rights, June 2018, Professor Cedric Ryngaert similarly acknowledged that "[i]t is not fully clear whether UJ [universal jurisdiction] can be exercised on the basis of customary international law." Cedric Ryngaert, Universal Jurisdiction and International Crimes – Constraints and Best Practices, in Julia Krebs et al., ibid. Pat B, 2.

34 ILC Report Universal Jurisdiction, above n.23, Annex A, para. 2. Remarkably, ILC Member Charles Jalloh's report on "universal criminal jurisdiction" embraces and endorses universal jurisdiction's prevailing narrative, ibid.

35 Davika Hovell, above n.25, 437, 449–55; Fourth Restatement, above n.12;

potentially) a rethinking of public international law's approach to concepts of jurisdiction—rooted in 1930s scholarship that have developed little since then[36]—and the closely related (but perhaps under-appreciated) field of private international law pertaining to universal civil jurisdiction.[37]

7. The Article concludes that universal jurisdiction—in the account of the prevailing narrative—is presently a hollow concept without state practice and is in urgent need of a paradigm shift in respect of both piracy and international crimes to reflect the more complex realities of state practice and to avoid further tensions and disputes. Jurisdiction over piracy on the high seas does not justify assertions of universal jurisdiction for crimes occurring in the territory of states.

Kevin Jon Heller, What Is an International Crime (A Revisionist History), 58 Harvard JIL (2017), 357–59, 400–05; Mads Andenas & Thomas Weatherall, International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012, 62 ICLQ (2013), 762–64; Roger O'Keefe, above n.3, 22–25. See also ILC Report Universal Jurisdiction, ibid., Annex A; Prosecutor v. Furundžija, No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, 1998), para. 156; Jorgić v. Germany, No. 74613/01, Judgment (European Court of Human Rights, 2007), 263, 287.

36 See Harvard Draft, above n.1. Professor Svantesson argues that the Harvard Draft principles are ill-equipped for today's modern society and that a paradigm shift is overdue, Dan Jerker B. Svantesson, A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft, 109 AJIL UNBOUND (2015). See also Daniel Bethlehem, The End of Geography: The Changing Nature of the International System and the Challenge to International Law, 25 EJIL (2014), 22.

37 On arguments rethinking the confluence of rules of jurisdiction in public and private international law, including universal jurisdiction, see Alex Mills, above n.9; Horatia Muir Watt, A Private (International) Law Perspective Comment on "A New Jurisprudential Framework for Jurisdiction", 109 AJIL UNBOUND (2015). In a landmark decision, the US Supreme Court dismissed a claim on the basis of universal civil jurisdiction for alleged crimes under customary international law that occurred overseas, reasoning that the law provides for jurisdiction only for "claims [that] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against [the] extraterritorial application" of US law, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (US Supreme Court, 2013), 1669. See also Nait-Liman v. Switzerland, No. 51357/07, Judgment (European Court of Human Rights, 2016).

II. The concept of universal jurisdiction pre-Somali piracy surge

II.A. Jurisdiction in international law: limited rights of states and the burden of proof

8. It is important at the outset of the analysis to explain how international law traditionally approaches prescriptive jurisdiction.[38] It is important because it illustrates the exceptional and distinctive nature of "no proof of a nexus jurisdiction" in respect of piracy on the high seas and how it may be distinguished from what Professor Mills describes as the "standard" and "ritualized" scholarly account of jurisdiction in public international law and the universal jurisdiction concept specifically.[39]

9. Public international law generally prohibits states from regulating matters outside their territory (including criminal matters) unless the rules of jurisdiction provide for an explicit permission. In this way, the regulatory of authority of states in international law is constrained by rules of jurisdiction which define the limits of the powers of coexisting sovereigns. The burden of proof is of decisive importance. The state asserting the applicability of its domestic law beyond its territory bears the burden of proving, pursuant to one of the limited defined grounds of prescriptive jurisdiction accepted in international law, the existence of a sufficiently close connection that is considered to justify the imposition of a state's regulatory authority.[40] As grounds of jurisdiction are yet to be codified in a multilateral treaty, resort has to be made to customary international law.[41] The grounds of jurisdiction which exist in customary international law were first presented as "general principles" in the Harvard Draft some eighty years ago.[42] It is fair to say that

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38 Jurisdiction to prescribe (legislate) determines the limits on the law-making powers of government—the permissible scope of application of the laws of each state.

39 Alex Mills, above n.9, 188.

40 As was made clear by the Permanent Court of International Justice in the early twentieth century, a state "should not overstep the limits which international law places upon its jurisdiction", S.S. "Lotus" (Fra. v. Turk.), Judgment, PCIJ 1927 (Ser. A) No. 10, 19.

41 International treaty Law also permits and obliges states parties to establish jurisdiction to varying degrees.

42 Harvard Draft, above n.1, 445.

these principles, which include territoriality,[43] nationality[44] and protection,[45] have been subsequently treated by all leading scholars and research institutes, if not most states and courts, as representing public international law's approach to jurisdiction ever since.[46] As such, they have acquired an "almost divine status".[47] Each of these principles of jurisdiction require proof of connecting factors and differ markedly from universal jurisdiction, the most controversial principle identified by the Harvard Draft, which requires no link whatsoever to the state claiming jurisdiction.[48]

II.B. Definition of the universal jurisdiction concept in modern international law

10. The concept of universal jurisdiction in modern international law is controversial, and states currently have widely divergent views regarding what universal jurisdiction means, its legal sources, how it is to be defined and to which crimes it applies.[49] Beneath the welter of opinion, however, virtually all scholars and research institutes, and many states and courts, often define universal jurisdiction by alluding to the absence of any normal jurisdictional link connecting a matter with the regulating state.[50] Put differently, the

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43 Ibid.

44 Ibid.

45 Ibid.

46 Dan Svantesson, above n.36, 69. See further Fourth Restatement, above n.12, paras. 212–17; ILC Report on the Work of Its Fifty-Eighth Session, UN Doc. A/61/10 (2006), Annex E.

47 Dan Jerker B. Svantesson, Solving the Internet Jurisdiction Puzzle (2017), 26.

48 Harvard Draft, above n.1.

49 The ten years of extensive work on universal jurisdiction at the Sixth Committee demonstrates this clearly. Some of these disagreements are summarized in an informal paper developed within the framework of a group of the Sixth Committee, although it does not reflect consensus among delegations; see Sixth Committee of the General Assembly, The Scope and Application of the Principle of Universal Jurisdiction, Informal Working Paper prepared by the Chairperson for discussion in the Working Group (3 Nov. 2017) (https://papersmart.unmeetings.org/media2/16155022/wg-universaljurisdiction_informal-working-paper.pdf) (Informal Working Paper 2017).

50 Sienho Yee, above n.8, para. 3. See also UN Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, UN Doc.

absence of sovereign nexus is inherent in its very definition. According to the Princeton Principles on Universal Jurisdiction:

> universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[51]

The absence of any prescriptive link is justified by universal jurisdiction's purpose, which transcends the interests of states. First, the grave or heinous nature of certain international crimes is widely believed to be at universal jurisdiction's "core".[52] Second, because such crimes are so serious, preventing the impunity of them is the concern of every state. As such, states exercising universal jurisdiction do so as "agents of the international community" to protect exclusively international community values.[53] Universal jurisdiction is therefore a mechanism intended not to promote state interests. The types of values that may be protected by universal jurisdiction are usually left insufficiently explained or unsubstantiated by courts and in scholarship and need to be worked out and agreed upon by states. The Sixth Committee has

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A/65/181 (2010), para. 12 (Secretary-General Report on Universal Jurisdiction); Fourth Restatement, above n.12, para. 217, cmt. a; Roger O'Keefe, Universal Jurisdiction: Clarifying the Basic Concept, 2 J. Int'l Crim. J. (2004), 740, 745; Institute of International Law, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005), para. 1 (http://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf).

51 Stephen Macedo (ed.), The Princeton Principles on Universal Jurisdiction (2001), 28, 43.

52 Informal Chairman of the Working Group for The Scope and Application of the Principle of Universal Jurisdiction, Informal Working Paper (7 Nov. 2014) (https://papersmart.unmeetings.org/media2/4655216/roadmap-en.pdf) (Informal Working Paper 2014). See also ILC Report Universal Jurisdiction, above n.23, Annex A, paras. 1, 4–6; Informal Working Paper 2017, above n.49; Kenneth Randall, above n.1, 788.

53 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002, 137, para. 5 (dissenting opinion van den Wyngaert); ibid., 63, paras. 51, 61, 73, 75 (joint separate opinion Higgins et al.); AG of Israel v. Eichmann, 36 ILR 277 (Israel Supreme Court, 1962), 300; Secretary-General Report on Universal Jurisdiction, above n.50, paras. 10–11.

so far been unable to reach agreement on both the definition of universal jurisdiction and its purpose, including the international community values that may be protected, during its nine years of work on this topic.[54]

II.C. "No proof of a nexus jurisdiction" over piracy: exceptional and distinctive nature

11. At first glance, "no proof of a nexus jurisdiction" and universal jurisdiction appear similar or even the same. In fact, that is not the case. If the unique feature of universal jurisdiction is the absence of any link at all between a crime and the prescribing state, in order that the state is able to take action on behalf of the international community as a whole for the protection of its values, then jurisdiction over piracy on the high seas is its antithesis. It is not the intention here to provide a detailed history of the development of jurisdiction for piracy.[55] No proof of nexus jurisdiction developed over piracy between the seventeenth and nineteenth centuries out of the necessity of maritime powers to protect their national interests, not least their sovereign right to freely navigate the high seas, overseas trade routes, colonial trade and settlements and ultimately their economic interests, from so-called "pirates".[56] The acts of these private armed vessels—or unlicensed privateers—amounted to the waging of unlawful warfare which could not be attributed to any recognized sovereign power.[57] In the words of the US Supreme Court in *The Brig Malek Adhel*, pirates act "without … any pretense of public authority."[58] Therefore, "[t]he law looks to it [piracy] as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare".[59]

12. Unlike the traditional restraints imposed by international law on the

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54 Oral Report by the Chair of the Working Group on the Scope and Application of the Principle of Universal Jurisdiction, UN GAOR, 71st Sess., 31st mtg., UN Doc. A/C.6/71/SR.31 (2 Dec. 2016), para. 26; Informal Working Paper 2017, above n.49.

55 This issue has been examined extensively by the present author elsewhere; see, e.g., Matthew Garrod, above n.1. See also Tamsin Paige, above n.1.

56 Ibid., 202.

57 Ibid.

58 United States v. Brig Malek Adhel, 43 US 210 (US Supreme Court, 1844), 232. See also United States v. Smith, 18 US 153 (US Supreme Court, 1820), 163.

59 Ibid.

exercise of jurisdiction, however, jurisdiction developed over piracy without the legal burden of having to prove the existence of a prescriptive connection with the forum state. As a result, states were not, as a matter of international law, required to establish in their national laws at the time of the commission of a crime, or prove in inter-state disputes, evidence of a prescriptive link with pirates in the same way as crimes occurring in territorial sovereignty. All that had to be proven was that private armed vessels operated without a valid privateering license.[60] As a matter of pragmatism, no proof of a nexus jurisdiction enabled states not only to criminalize, but also enforce their domestic law in remote and distant parts of the colonial world, in order to protect their trade routes and national interests.[61] The absence of an obligation in international law to prove the existence of a jurisdictional nexus with piracy is not the same as not having any link at all under the concept of universal jurisdiction.

13. The development of no proof of a nexus jurisdiction in respect of piracy, as a unique exception to normal rules of jurisdiction, occurred for two main reasons. First, jurisdiction was restricted to what were, in effect, stateless vessels falling outside the protection of any sovereign power. These vessels could be treated under international law as if they "had no national character … [that is] not lawfully sailing under the flag of any foreign nation."[62] Hence, jurisdiction could not be exercised over the acts of warships or any other vessel authorized by a state. It follows that no proof of a nexus jurisdiction did not develop in customary international law over other comparable crimes which might also be committed on the high seas, such as trafficking in slaves,

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60 For historical piracy laws of maritime powers, see Stanley Morrison, A Collection of Piracy Laws of Various Countries, 26 AJIL (Supp.) (1932). See also United States v. The Ambrose Light 25 F. 408 (US SDNY, 1885), 411; Breach of Neutrality, 1 Op. Atty. Gen. 57, in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (US Supreme Court, 2013), 1667.

61 Matthew Garrod, above n.1, 200–01. See also Tamsin Paige, above n.1, 131–32, 142, 144, 148–51.

62 Ibid., 232. See also Le Louis, 2 Dods. Rep. 210 (UK High Court of Admiralty, 1817), 243, 246–48; United States v. Holmes, 18 US (5 Wheat.) 412 (US Supreme Court, 1820), 416–19; United States v. La Jeune Eugenie, 26 F. Cas. 832 (US CCD Mass., 1822) (No. 15, 551), 841; The Antelope, 23 US 66 (US Supreme Court, 1825); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (US Supreme Court, 2013), 1667.

as maritime powers sanctioned such behavior.[63] The second reason rests on the situs of the offence—the high seas—a place where no sovereign rules, which did not cause "offensive interference" with foreign governments.[64] Consequently, no proof of a nexus jurisdiction did not apply to piracy in territorial waters (an area subject to the state's territorial sovereignty), even though the conduct was exactly the same.[65] If no proof of a nexus jurisdiction was not limited to the high seas then it would cause potentially serious conflict with the sovereign rights of the coastal state.

14. The longstanding and exceptional rule of no proof of a nexus jurisdiction in customary international law remains a part of international law today and was not replaced by the UN Law of the Sea Convention (LOSC), which provides in Article 105 that "[o]n the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship".[66] The LOSC's *travaux préparatoires* reveal that the above provision relates specifically to enforcement jurisdiction and there is no evidence based on the sparse amount of drafting material to suggest an intention to codify jurisdiction to prescribe.[67] Even if the LOSC may be interpreted as impliedly or "obliquely" embodying prescriptive jurisdiction, since it would perhaps make little sense to permit every state exercise enforcement jurisdiction and "seize a pirate ship" and prosecute suspects on board and at the same time

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63 Once Britain abolished the trade in slaves in its overseas colonies, the British Government attempted, but ultimately failed, to unilaterally expand no proof of a nexus jurisdiction over piracy to include the overseas trafficking in slaves by other states. The law continues to treat piracy and the trade in slaves on the high seas differently to the present day; see LOSC, n.66, below.

64 United States v. Furlong 18 US (5 Wheat.) 184 (US Supreme Court, 1820), 198.

65 That said, at the height of its maritime power Britain asserted and enforced jurisdiction over alleged "pirates" in territorial waters and on land territory in the colonial world. See 13 & 14 Vict. c. 26 (1850), Section II (UK); Alfred P. Rubin, The Law of Piracy (1998), Chapter 4.

66 UN Convention on the Law of the Sea, 1833 UNTS 397, Article 105. See also ibid., Articles 95, 99, 101, 104, 108, 110.

67 ILC YB 1 [1955], paras. 29–30; ILC YB 2 [1956], 253, 282. See also Robin Churchill, The Piracy Provisions of the UN Convention the Law of the Sea–Fit for Purpose?, in Panos Koutrakos & Achilles Skordas (eds.), The Law and Practice of Piracy at Sea: European and International Perspectives (2014), 23–24.

not to permit every state to criminalize piracy,[68] then such jurisdiction would reflect existing custom. It could be argued that, since the adoption of the LOSC, states have subsequently agreed based upon practice on the interpretation of Article 105 as permitting universal jurisdiction.[69] However, the ICJ's jurisprudence on this issue indicates that the threshold the Court establishes for accepting an agreement of the parties regarding a treaty's interpretation based upon state practice is quite high.[70] As will be shown in Parts III and IV, broad agreement that Article 105 of the LOSC provides a legal basis for universal jurisdiction is lacking. As such, the LOSC should be interpreted in the light of existing customary international law insofar as jurisdiction to prescribe is concerned.

II.D. A "mythical authority": reinventing piracy as evidence of a centuries-old customary rule of universal jurisdiction

II.D.i. False historical foundations

15. The principle of universal jurisdiction identified by the Harvard Draft laid dormant for the best part of fifty years.[71] Since the 1980s, however, there has emerged an unproven prevailing scholarly narrative that universal jurisdiction has deep historical roots in customary international law regarding piracy.[72] Leading scholars consistently claim that piracy exists as the "original"

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68 O'Keefe, above n.3, 17.

69 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, Article 31.

70 See Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999.

71 The concept of universal jurisdiction was proposed lex ferenda by the United Nations War Crimes Commission in the aftermath of World War II as one of several potential jurisdictional grounds on which war crimes and crimes against peace could be prosecuted by Allied powers; however, this proposal was never actually accepted or utilized by states in actual practice; see Garrod (2012), above n.8, 768–69.

72 For a useful (albeit uncritical) rehearsal of the evolution of this narrative, see Ved Nanda, above n.3, 58–62. See also Kenneth Randall, above n.1; Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations, 45 Harvard JIL (2004), 184–86, 190–92; Stephen Macedo, above n.51, 25, 45.

and "paradigmatic" universal jurisdiction crime and that this centuries-old customary rule was codified in the LOSC.[73] The most common rationale underlying the development of universal jurisdiction, according to the prevailing narrative, is the "heinous" nature of piracy, which all states are concerned with suppressing on behalf and in the interest of the international community.[74] As piracy prosecutions were few and far between prior to the surge in Somali piracy, the narrative has not received judicial consideration, although it has been endorsed in areas of international law not relevant to piracy.[75] Similarly, until recently universal jurisdiction has not formed the basis of piracy prosecutions and thus there has been little opportunity for the occasioning of injury to other states, and, hence, for protest. Piracy has therefore obtained a "mythical authority" as the basis for customary international law concerning universal jurisdiction.[76]

16. The alleged historical origins of universal jurisdiction have been subjected to sustained analysis elsewhere.[77] This Article does not traverse this ground again. It suffices to say that the prevailing narrative is at best a serious oversimplification of the law, and at worst involves reinventing history, misinterpretations of primary materials and a disregard for other sources of authority on the subject. It has developed out of a lack of methodological rigor and reliance on a handful of weak sources of evidence.[78] Contrary to what is commonly suggested in scholarship, there is no historical evidence to

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73 Eugene Kontorovich, ibid., 190; Kenneth Randall, ibid., 791; Stephen Macedo, ibid.

74 Kenneth Randall, ibid., 794–95; Stephen Macedo, ibid., 48.

75 AG of Israel v. Eichmann, 36 ILR 5 (Israel District Court, 1962), 18, 26. See also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002, 63, paras. 60–61 (joint separate opinion Higgins et al.); ibid., 35, paras. 5, 12 (separate opinion Guillaume); ibid., 54, para. 61 (declaration Ranjeva); ibid., 59, para. 9 (separate opinion Koroma); United States v. Layton, 509 F. Supp. 212 (US ND Cal., 1981), 223; Demjanjuk v. Petrovsky, 776 F. 2d 571 (US 6th Cir., 1985); United States v. Yousef, 327 F. 3d 56 (US 2nd Cir., 2003), 103–08; United States v. Shi, 525 F. 3d 709 (US 9th Cir., 2008), 722–23.

76 For an analogous example of a historical incident obtaining "mythical authority" in customary international law, see James A. Green, The International Court Justice and Self-Defence in International Law (2009), 67.

77 Matthew Garrod, above n.1.

78 Ibid., 208; Luc Reydams, above n.14, 8.

support the existence of a customary rule of universal jurisdiction for piracy.[79] On closer analysis, universal jurisdiction is contradicted by voluminous evidence of historical state practice and is based on false foundations in customary international law.[80] Similarly, the description of pirates as "heinous" and the "enemy of mankind" had nothing to do with universal jurisdiction; it is thus illogical to say that the heinous nature of piracy gave rise to or provided justification for universal jurisdiction.[81] As such, universal jurisdiction has been developed—out of scholarship rather than in state practice—as a hollow concept.[82]

17. Scholars have overlooked that the source of the prevailing narrative is traceable to the publication of the Harvard Draft.[83] Due to the Harvard Draft's "phenomenal" influence on scholars and other important actors in international law,[84] it is hard to find any commentator challenging the universal principle as applied to piracy.[85] And yet, the preparatory work for the Harvard Draft reveals that the rapporteur was unable to evidence state practice supporting universal jurisdiction's existence in international law with respect to piracy.[86] Nonetheless, the Harvard Draft treated universal jurisdiction as if it already existed in customary international law, stating that

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79 Matthew Garrod, ibid., 195–96. See also Luc Reydams, ibid.

80 Matthew Garrod, ibid. In fact, maritime powers paid tribute to pirates to secure immunity of their own shipping, while at the same time encouraging pirates to attack the shipping of their rivals. For example, so-called Barbary pirates were state-sponsored directly by the governments of Tunis, Tripoli, Algiers and Salle. European states paid annual sums for the protection of their own commerce and the harassment of that of their rivals. See further Barry Hough, Coleridge in Wig and Gown: The 'Pirates' and the Pelican, 46 Coleridge Bulletin (2015); Robert F Turner, President Thomas Jefferson and the Barbary Pirates, in Bruce A. Ellerman et al. (eds.), Piracy and Maritime Crime: Historical and Modern Case Studies (2011), Chapter 10.

81 Ibid., 199–200. See also United States v. Hasan, 747 F. Supp. 2d 599 (US ED Va., 2010), 611; Eugene Kontorovich, above n.72, 204–236; Tamsin Paige, above n.1.

82 Ibid.

83 Harvard Draft, above n.1.

84 Dan Svantesson, above n.36, 69.

85 See also Dan Svantesson, above n.47, 28.

86 Joseph W. Bingham, Research in International Law IV: Piracy (Draft Convention Prepared for the Codification of International Law), 26 AJIL (Supp.) (1932), 754–64.

the principle "has substantial support in contemporary practice"[87] and is "everywhere recognised".[88] In its true light, the Harvard Draft has severe limitations and does not provide an authoritative source for universal jurisdiction.

II.D.ii. Resurgence of universal jurisdiction's prevailing narrative in response to Somali piracy

18. Although the prevailing narrative is not new, it has been reinvigorated in a wave of scholarship responding to the surge in Somali piracy. The opinions of leading scholars unanimously declare that customary international law has permitted states to exercise universal jurisdiction over piracy for centuries and therefore its application to Somali piracy at present is without question.[89] Yet, in identifying customary international law scholars have taken shortcuts and simply repeated the prevailing narrative rather than conducting broad surveys of state practice and *opinio juris*. The repetition of this narrative is due, once again, to the overreliance on the same weak pieces of evidence, including the Harvard Draft itself.[90]

For example, in one of the leading texts on Somali piracy, Professors Geiss and Petrig assert that "piracy is not only the first, but also the paradigmatic

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87 Harvard Draft, above n.1, 475.

88 Ibid., 445, 563–64.

89 E.g., see Douglas Guilfoyle, above n.4, 774; Roger O'Keefe, above n.3, 17; Ved Nanda, above n.3, 54, 63–65. See also Ashley J. Roach, Countering Piracy off Somalia: International Law and International Institutions, 104 AJIL (2010), 405; Maggie Gardner, Piracy Prosecutions in National Courts, 10 J. Int'l Crim. Just. (2012); Mathilda Twomey, Muddying the Waters of Maritime Piracy or Developing the Customary Law of Piracy? Somali Piracy and Seychelles, 20 Comp. L.J. Pacific (2014), 143, 154–155; Milena Sterio, Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed, 33 Fordham Int'l L.J. (2010), 391; Tullio Treves, Piracy and the International Law of the Sea, in Douglas Guilfoyle (ed.), Modern Piracy: Legal Challenges and Responses (2013), 121–22 Yao Huang, Universal jurisdiction over Piracy and East Asian Practice, 11 Chinese JIL (2012), 624.

90 E.g., Douglas Guilfoyle, ibid.; Maggie Gardner, ibid., 802–05; Yao Huang, ibid., 625. See also James Crawford, Brownlie's Principles of Public International Law (2012), 468; Robin Geiss & Anna Petrig, Piracy & Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (2011), 143–44.

universal jurisdiction crime".[91] In support, the authors rely on the exact same pieces of evidence cited by virtually all other scholars responding to Somali piracy. The strongest piece of evidence—the case most relevant to piracy—is *Re Piracy Jure Gentum*.[92] A close analysis this case shows that the UK Privy Council did not recognize the existence of universal jurisdiction. Rather, the Privy Council quoted the academic commentary of Moore that "[t]he pirate is a sea brigand. He has no right to any flag and is justiciable by all."[93] As established above, in Section C, the right of all states to assert jurisdiction over "pirates" for self-protection, without the legal burden of proving the existence of a connection, is fundamentally different to the idea that all states would prosecute pirates in the absence of any nexus whatsoever, on behalf of the international community, under the concept of universal jurisdiction. This case is not an example of universal jurisdiction either. When viewed in its proper historical and colonial context, the case concerned British warships policing the China Sea off Hong Kong to protect sea lanes used by British traders. Once Britain had ceded Hong Kong and developed trading ports in China by military force, following the Treaty of Nanking in 1842, it was faced with a serious problem of "piracy" in the region.[94] British traders in Hong Kong and the treaty ports made repeated protests to the British Government for protection and only then did it eventually deploy warships to protect British traders and permit the Hong Kong Government to enact counter-piracy laws.[95] British warships operated under the "Act for encouraging the

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91 Robin Geiss & Anna Petrig, ibid., 143, 147, 150.

92 In Re Piracy Jure Gentium [1934] AC 586 (UK Privy Council, 1934).

93 Ibid., 595.

94 Archie D. Blue, Piracy on the China Coast, 5 Journal of the Hong Kong Branch of the Royal Asiatic Society (1965); Robert J. Anthony, Piracy on the South China Coast through Modern Times, in Bruce A. Ellerman et al. (eds.), Piracy and Maritime Crime: Historical and Modern Case Studies (2011), 37; Wensheng Wang, White Lotus Rebels and South China Pirates (2014), 81–109.

95 Archie Blue, ibid., 72; Edward R. Lucas, Junks, Sampans and Stinkpots: The British Experience with Maritime Piracy in 19th Century China, ISSS/ISAC Annual Conference (15 Nov. 2014) (http://web.isanet.org/Web/Conferences/ISSS%20Austin%202014/Archive/8784966a-2f94-4d75-b5f1-5cd05dede492.pdf); Ordinance No. 3 of 1847, An Ordinance for the Prevention of Piracy, 25 Mar. 1847 (UK); Ordinance No. 9 of 1866, An Ordinance to Make Provision for the More Effectual Suppression of Piracy, 16 Aug. 1866 (UK); Ordinance No. 12 of

Capture or Destruction of Piratical Ships and Vessels", which paid a generous bounty for all pirates killed or captured, and they were permitted to attack "pirates" by military force anywhere on the high seas and any survivors could be transferred for trial in Vice Admiralty Courts in any of Britain's Dominions.[96]

19. In sum, piracy is far from being the "original" and "paradigmatic" universal jurisdiction crime. However, scholars have taken shortcuts in the identification of customary international law and misunderstood jurisdiction for piracy. As a result, they have theorized the longstanding rule of no proof of a nexus jurisdiction, detached from both history and the realities of state practice, and misinterpreted it as a concept of "universal jurisdiction". Moreover, scholars have transformed universal jurisdiction, defined by the Harvard Draft, into something it should not be—a rule of customary international law. To quote the words of Professor Svantesson, the time has come to put an end to this "apparent sleepwalking acceptance" of universal jurisdiction based on the Harvard Draft.[97]

20. While scholars do not create customary international law, they greatly influence more powerful actors in international law. For example, domestic courts in Somali piracy trials take shortcuts and rely upon scholars in the task of ascertaining a customary rule of universal jurisdiction. This can be seen, for instance, in *Hasan*—one of the first trials of Somali pirates—in which a US District Court relied on several scholarly works as proof that piracy is "[t]he paradigmatic universal jurisdiction offense, and one that has been familiar to the international community for centuries …".[98] In *Ali*, a US Court

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1867, An Ordinance to Explain Ordinance No. 9 1866, and to Extend the Powers of the Supreme Court for Suppression of Piracy, 10 Sep. 1867 (UK).

96 Blue, ibid.; Act for Encouraging the Capture or Destruction of Piratical Ships and Vessels, 1825 6 Geo. 4 c. 49 (UK); An Act to Repeal an Act of the Sixth Year of King George the Fourth, for Encouraging the Capture or Destruction of Piratical Ships and Vessels; and to Make other Provisions in Lieu Thereof, 1850 13 & 14 Vict. c. 26 (UK). See also Treaty of Nanking, Article 52 (29 Aug. 1842) (permitting British warships to police the territorial waters of and visit any port in China if "coming for no hostile purpose or being engaged in the pursuit of Pirates").

97 Dan Svantesson, above n.47, 29.

98 United States v. Hasan, 747 F. Supp. 2d 599 (US ED Va., 2010), 605–616, 637, 641–42. See also United States v. Dire, 680 F. 3d 446 (US 4th Cir., 2011), 454–55, 469.

of Appeals cited Professor Randall[99]—one of the original proponents of the prevailing narrative—as authority that "piracy is the oldest and most widely acknowledged [universal jurisdiction crime]".[100] Following *Hasan*, the courts of regional states recognized universal jurisdiction and gave the prevailing narrative judicial sanction in a raft of cases.[101] It is thus fair to say that domestic courts are indifferent to the process by which jurisdiction for piracy in customary international law has developed historically and the aggregation of supporting evidence; furthermore, they are willing to take shortcuts in the identification of custom at present.[102] Scholars have also influenced the UN, including the most powerful institutional organization in the inter-state system—the Security Council—in the endorsement of universal jurisdiction's prevailing narrative.

III. UN Security Council "recognises" application of "universal jurisdiction" to Somali piracy: what went wrong?

21. This Part makes an original contribution to existing scholarship by providing an in-depth analysis of the UN Security Council's recognition, for the first time, that piracy is subject to "universal jurisdiction". It shows where the Council went wrong in such recognition—namely, the taking of shortcuts in the identification of customary international law and reliance on weak pieces of evidence. Moreover, the mere recognition of universal jurisdiction is not intended to have legal effects or provide Council authorization to use universal jurisdiction. As a result, the Council refrained from both defining "universal jurisdiction" and explaining its international legal basis and purpose, deliberately leaving the concept ambiguous. The resolution's *travaux préparatoires* and circumstances of adoption, however, suggest that the Council

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99 Kenneth Randall, above n.1.

100 United States v. Ali, 718 F. 3d 929 (US D.C. Cir., 2013).

101 E.g., Hassan M. Ahmed v. Republic, Crim. App. No. 198 (Kenya High Court, 2009), paras. 10–11; AG v. Hashi & Eight Others [2012] eKLR (Kenya Court of Appeal, 2012), paras. 14–17, 31; Republic v. Dahir and Twelve Ors (51 of 2009) [2010] SCSC 81 (Seychelles Supreme Court, 2010), para. 51; R v. Osman & Ors (CO 19/2011) [2011] SCSC 74 (Seychelles Supreme Court, 2011), para. 32.

102 See also Stephen J. Choi & Mitu Gulati, Customary International Law: How Do Courts Do It?, in Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), Chapter 3.

understands the concept of universal jurisdiction to mean the right of seizing states, and bilateral partner states acting on their behalf, to assert jurisdiction over suspected pirates in the specific context of Somalia to protect national interests. If correct, this is radically different to the meaning of universal jurisdiction proper in the account of the prevailing narrative.

III.A. Resolution 1976: "constructive ambiguity"

22. After more than a year of study by the UN of possible ways to effectively prosecute Somali pirates, in 2011 the Security Council adopted resolution 1976, recognizing for the first time that "piracy is a crime subject to universal jurisdiction".[103] At first glance, the Council appears to sanction the existence universal jurisdiction proper in customary international law and legally authorize its application to piracy. This is certainly the interpretation offered by some leading scholars.[104] However, resolution 1976 was not adopted under the Council's Chapter VII powers and therefore may not be legally binding on states or have legal effects. As the brief passage of the ICJ's *Namibia Advisory Opinion* makes clear, it is possible for the provision of a resolution not textually linked to Chapter VII to be legally binding.[105] In this case, the ICJ found to be legally binding an operative paragraph which began with the words "Calls upon all States …", although it recognized that such determinations have to be made in each particular case and "[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made at to its binding effect".[106] Beyond this less than

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103 SC Res 1976 (11 Apr. 2011), para. 14.

104 E.g., Eugene Kontorovich & Steven Art, above n.3, 438; Roger O'Keefe, above n.3, 20; Tullio Treves, above n.89, 122; Yoshifumi Tanka, Jurisdiction of States and the Law of the Sea, in Alexander Orakhelashvili (ed.), Research Handbook on Jurisdiction and Immunities in International Law (2015), 146.

105 Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, paras. 113–114.

106 Ibid., para. 115. Upon this basis, the "calls upon" language in resolutions could therefore have legal nature and effect or may be a mere political recommendation; see Christian Henderson & Noam Lubell, The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions, 26 Leiden J. Int'l L. 369, 382–83 (2013); Dan Joyner, Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular, EJIL: Talk! (9 Jan. 2017).

substantial guidance, however, there is no definitive way of determining the legal nature and effect of resolutions and there is little direct work from the scholarly community.[107] Furthermore, the Council has shown something of a propensity to use certain expressions in resolutions as "code" for legal effects.[108] As such, the question of which words utilized in a resolution's operative paragraphs will indicate the Council's intent to create legal rights or obligations is one that remains controversial in scholarship.

23. In the case of resolution 1976, the Council does not "authorize" the use of universal jurisdiction or "decide" that it shall be used. The Council does not even go so far as to "call upon" states to use universal jurisdiction; rather, it merely "recognises" that piracy is subject to universal jurisdiction. This difference in language itself does not indicate an intention on the part of the Council to create a binding legal obligation for states. Although the Council may contemplate, and perhaps would even welcome, the use of universal jurisdiction against pirates, it does not authorize such action. The same may be said with regard to the Council's use of the language "reiterates its calls on States to favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia" in the same operative provision.[109] Indeed, in a raft of subsequent resolutions the Council changed approach and expressly invoked Chapter VII in utilizing the language of "call upon all States" not only to "criminalize piracy under their domestic law" but also to "favourably consider the prosecution of suspected pirates" apprehended off the Somali coast.[110] The lack of intent on the part of the Council to create legal effects with regard to universal jurisdiction is further supported by the fact that it has on numerous occasions, both prior to the adoption of resolution 1976 and subsequently, acted under Chapter VII and used the expression "calls upon all States" to utilize other types of jurisdiction recognized by international law for combating Somali piracy, including the jurisdiction of "flag, port, and coastal States, States of

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107 Christian Henderson and Noam Lubell, ibid., 372.

108 E.g., it is well known that the expression "all necessary means" when used in Council resolutions is code for the granting of permission to use military force, Dapo Akande & Marko Milanovic, The Constructive Ambiguity of the Security Council's ISIS Resolution, EJIL: Talk! (21 Nov. 2015).

109 SC Res 1976 (Apr. 11, 2011), para. 14.

110 SC Res 1950 (23 Nov. 2010), para. 13. See also SC Res 2020 (22 Nov. 2011), para. 15; SC Res. 2077 (21 Nov. 2012), para. 18; SC Res 2125 (18 Nov. 2013), pmbl. para. 19 & para. 17; SC Res 2383 (7 Nov. 2017), para. 19.

the nationality of victims and perpetrators of piracy".[111]

24. The recognition of universal jurisdiction in an operative paragraph, together with acting under Chapter VII to call upon states to "favourably consider the prosecution of suspected pirates" in a series of subsequent resolutions, is an example of "constructive ambiguity".[112] Such ambiguity lies not only in the fact that it does not legally endorse universal jurisdiction, while appearing to give Council support to the use of such jurisdiction against Somali pirates, particularly by regional states in the prosecution of suspects apprehended by more powerful seizing states, of which the Council's permanent members are included;[113] but also it allows for continuing disagreement among the Council's permanent members, as well as states more generally, as to the legal basis, definition and purpose of universal jurisdiction.[114] As such, the Council's permanent members are allowed to politically move closer together without departing from the legal positions that they had previously adopted, and without compromising their essential interests. The ambiguous nature of universal jurisdiction is perhaps of no surprise, given that the Council is a political organ and resolutions "are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council".[115] Indeed, this "often leads to deliberate ambiguity".[116]

25. The remainder of this Part analyzes the working methods and sources of evidence leading to the adoption of resolution 1976, to show where the Council went wrong in recognizing universal jurisdiction. Thereafter, it examines the resolution's *travaux préparatoires* and circumstances of adoption to shed light on what the Council understands universal jurisdiction to mean

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111 SC Res 1816 (2 Jun. 2008), para. 11; SC Res 1846 (2 Dec. 2008), para. 14; SC Res 1897 (30 Nov. 2009), para. 12; SC Res 2020 (22 Nov. 2011), para. 14; SC Res 2077 (21 Nov. 2012), para. 17; SC Res 2383 (7 Nov. 2017), para. 18.

112 For analysis of the same "constructive ambiguity" with regard to the use of military force against ISIS terrorists in Syria, see Dapo Akande & Marko Milanovic, above n.108.

113 Part IV.

114 The debates on universal jurisdiction at the Sixth Committee show that states, including the Council's permanent members, have radically differing views on universal jurisdiction's legal basis, definition, purpose and scope.

115 Michael C. Wood, The Interpretation of Security Council Resolutions, 2 Max Planck Yearbook of United Nations Law (1998), 82.

116 Ibid.

and why it endorsed the concept with little supporting evidence or apparent scrutiny.

III.B. Working methods and sources of evidence in support of universal jurisdiction

26. Turning to the first issue, the Council took a shortcut in the identification of custom, resulting in the mistaken belief that universal jurisdiction already exists for piracy. The Council's recognition of universal jurisdiction is a process that began, in January 2009, with the formation of the Contact Group on Piracy off the Coast of Somalia ("Contact Group").[117] Proposed by the US, the Contact Group has the purpose of facilitating discussion and coordinating efforts among states that have a common interest in the suppression of Somali piracy and to report its activities to the Council.[118] Realizing the urgent need for legal guidance, Working Group 2 of the Contact Group had the responsibility of examining the legal aspects related to the prosecution of piracy.[119]

27. As is made clear at its first meeting, which focused on "the issue of ensuring the prosecution of suspected pirates", Working Group 2 began from scratch, with all states unsure at the outset, from an international legal perspective, of what "piracy" is and how it could be prosecuted.[120] As regards jurisdiction for piracy, Working Group 2 concluded that "States should—while taking into account their affected interests—consider prosecuting suspected pirates" in the following situations:

> Their national(s) are victims of the offence.
> Their national(s) are suspected of committing the offence.
> The targeted ship(s) was flying their flag.

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117 SC Res 1851 (16 Dec. 2008), para. 4; UN SCOR, 63rd yr., 6046th mtg., UN Doc. S/PV.6046 (16 Dec. 2008), 9 (US).

118 Contact Group, 1st Plen. Sess. (14 Jan. 2009) (http://www.lessonsfrompiracy.net/files/2015/03/Communique_1st_Plenary.pdf).

119 Ibid.

120 Contact Group, Working Group on Legal Issues, 1st mtg., Chairman's Conclusions, Vienna (5 Mar. 2009) (http://www.marad.dot.gov/documents/wg2-Vienna_Meeting-chair-summary-March_5-2009.pdf).

Their ships apprehend pirate ships.[121]

As can be seen, no reference is made to "universal jurisdiction". All of the situations identified by Working Group 2 in which states "should" consider piracy prosecutions have close links to the prescribing state. The first three situations are based on traditional rules of jurisdiction in customary international law, while the fourth situation reflects the text of the LOSC. As established in Part II.C, the LOSC should be interpreted in the light of existing custom.

28. In order to assist states in the prosecution of piracy, Working Group 2 recommended a "compilation of the international legal basis for prosecution of suspected pirates in order to ensure a common understanding of relevant provisions in international law."[122] To that end, Working Group 2 decided to bring in outside legal expertise of one particular scholar, Professor Guilfoyle, to support its work and prepare the above compilation.[123] Professor Guilfoyle presented his findings to Working Group 2 at its third meeting, which delegations agreed provided useful guidance.[124] In turn, the Contact Group was invited to "take note" of the findings and to encourage states to make use of them.[125] Working Group 2 subsequently listed as one if its accomplishments the development of a "legal toolbox" for combatting piracy, which included Professor Guilfoyle's findings.[126] It is useful to consider these findings, as they were adopted by Working Group 2

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121 Ibid.

122 Ibid.

123 Contact Group, Working Group on Legal Issues, 2nd mtg., Chairman's Conclusions, Copenhagen (5–6 May 2009) (http://www.marad.dot.gov/documents/WG2-2nd_Meeting_chair-conclusions-May_5-6-2009-mtg.pdf).

124 Contact Group, Working Group on Legal Issues, 3rd mtg., Chairman's Conclusions, Copenhagen (26–27 Aug. 2009) (http://www.marad.dot.gov/documents/WG2-3rd_Meeting_chair-conclusions-August_26-27-2009-mtg.pdf).

125 Ibid.

126 Contact Group, Working Group 2 on Legal Issues, 4th mtg., Chairman's Conclusions (26–27 Nov. 2009) (http://www.marad.dot.gov/documents/WG2-4th_Meeting_chair-conclusions-November_26-27-2009-mtg.pdf).

and the Contact Group.[127]

According to Professor Guilfoyle, in customary international law every state has jurisdiction to prosecute a pirate subsequently present within their territory based on universal jurisdiction.[128] Professor Guilfoyle clearly endorses the prevailing narrative and cites the same narrow selection of evidence as all other scholars, including the Harvard Draft, in support.[129] Therefore, universal jurisdiction is not only regarded as a customary rule of deep historical roots, but also the singular type of jurisdiction applicable to piracy. Conversely, Professor Guilfoyle leaves unexplained applicable grounds of jurisdiction, if any, under the LOSC as it "refers only to the power of the seizing state to try a seized pirate".[130] Perhaps surprisingly, Working Group 2 and the Contact Group accepted the existence of this alleged customary rule, despite the dearth of supporting evidence, with little apparent scrutiny.[131] Working Group 2 left unexplained why "universal jurisdiction", as opposed to any other type of jurisdiction, exists with respect to piracy, or how the concept and its purpose should be defined. The resulting consequence is that the Contact Group misunderstood jurisdiction for piracy. Nevertheless, it had a potentially large but invisible influence on the UN.

29. Following the initial work of the Contact Group, the Council requested the UN Secretary-General to produce a report on the possible options for the prosecution of suspected Somali pirates capable of achieving substantive results, while taking into account the work of the Contact Group.[132] This report, which duly takes into account the findings of Working Group 2, states

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127 Contact Group, 5th Plen. mtg., New York (28 Jan. 2010) (http://www.lessonsfrompiracy.net/files/2015/03/Communique_5th_Plenary.pdf).

128 Douglas Guilfoyle, Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes, prepared for Working Group 2 on Legal Issues of the Contact Group, 3rd mtg., Copenhagen (2009), para. 18.

129 Part II.D.

130 Douglas Guilfoyle, above n.126, para. 18.

131 Notably, Guilfoyle presented the same view in evidence to the UK House of Commons, which seems to have partly informed the British Government's recognition of "universal jurisdiction" for Somali piracy with little apparent scrutiny; see Dr Douglas Guilfoyle, Written evidence to the House of Commons Foreign Affairs Committee, Piracy off the Coast of Somalia, HC 1318 2010-12 (2012).

132 SC Res 1918 (27 Apr. 2010), para. 4.

that "[t]here is universal jurisdiction over acts of piracy on the high seas".[133] In support of universal jurisdiction, the report takes a shortcut and simply states that the LOSC codifies customary international law. No additional evidence is provided. And yet, Professor Guilfoyle had previously advised the Contact Group that this instrument does not codify universal jurisdiction. The UN Secretary-General's report thus endorses the existence of a customary rule of universal jurisdiction for piracy, as recognized by the Contact Group, and takes it one step further by stating that it is codified in the LOSC.

30. With the Council's consent, the UN Secretary-General appointed Jack Lang as his "Special Adviser on legal issues related to piracy off the coast of Somalia" to identify any additional steps that could be taken to assist states in prosecuting pirates.[134] In his report, Lang proposes that states should ensure that their national laws criminalize piracy and establish jurisdiction over it.[135] Lang asserts that "[t]here is no lack of legal bases allowing states to exercise universal jurisdiction" and that the Council should encourage all states to adopt universal jurisdiction for piracy.[136] And yet, Lang leaves unexplained what these "legal bases" are, whilst unlike the UN Secretary-General's report he seems to regard universal jurisdiction as having its legal basis in customary international law because the LOSC is limited to the "jurisdiction of the state that carried out the seizure".[137] In fact, Lang's finding in respect of universal

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133 UN Secretary-General Report, Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea Off the Coast of Somalia, UN Doc. S/2010/394 (26 Jul. 2010), para. 12 (Secretary-General Report). See also Contact Group, 6th Plen. mtg. New York (10 Jun. 2010) (http://www.lessonsfrompiracy.net/files/2015/03/Communique_6th_Plenary.pdf).

134 UN Doc. S/PRST/2010/16 (25 Aug. 2010).

135 Jack Lang, Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex to Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council, UN Doc. S/2011/30 (25 Jan. 2011) paras. 46–48 (Special Adviser Lang Report).

136 Ibid., para. 48.

137 Ibid. During the debate of the Special Adviser Lang Report at the Council's 6473rd meeting, Stephen Mathias, Assistant Secretary-General for Legal Affairs at the UN, stated that Lang had rightly underlined that the LOSC and customary international law provide for universal jurisdiction over piracy,

jurisdiction appears to be based on little more than observations of the Contact Group. Lang closely cooperated with Working Group 2 and had numerous consultations with its Chairman,[138] while the Contact Group reciprocally agreed that the international community must "actively pursue" Lang's proposals.[139]

III.B.i. Security Council should define "universal jurisdiction"

31. The second issue raised by resolution 1976 is the Council's meaning of "universal jurisdiction" itself, in the absence of a definition, and why it endorsed the concept with little apparent scrutiny. One possible way of interpreting resolutions is to apply the VCLT.[140] In applying the VCLT, the resolution is to be interpreted in accordance with the "ordinary meaning" to be given to its terms in their "context" and in the light of its "object and purpose".[141] As noted above, the meaning of "universal jurisdiction" in the actual text is left unexplained, and the term has not been repeated in subsequent resolutions. The context of the terms of the resolution includes the whole text of the resolution, including its preamble.[142]

32. The preamble to resolution 1976 may assist in the interpretation of both context and the resolution's object and purpose. In the preamble, the Council notes with concern that the domestic law of several states "lack

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UN SCOR, 66th yr., 6473rd mtg., UN Doc. S/PV.6473 (25 Jan. 2011), 9 (Stephen Mathias). However, this is incorrect. The Special Adviser Lang Report made no such a determination in respect of the LOSC.

138 Ibid., paras. 7, 49. See also Contact Group, 7th Plen. mtg., Communique (10 Nov. 2010) (http://www.lessonsfrompiracy.net/files/2015/03/Communique_7th_Plenary.pdf).

139 Contact Group, 8th Plen. mtg., New York (22 Mar. 2011) (http://www.lessonsfrompiracy.net/files/2015/03/Communique_8th_Plenary.pdf).

140 VCLT, above n.69. However, treaties differ in many key respects to resolutions, which means that the direct application of the VCLT to the interpretation of resolutions may not be appropriate in all circumstances; see further Christian Henderson & Noam Lubell, above n.106, 372; Michael Wood, above n.115, 85.

141 Ibid., Article 31(1).

142 Ibid., Article 31(2).

provisions criminalizing piracy and/or procedural provisions for effective prosecution of suspected pirates", which is leading to a "large number" of suspects released and undermines counter piracy efforts by seizing states.[143] Additionally, the Council expresses grave concern over the growing threat to navigation, commercial maritime routes and the nationals of states taken hostage.[144] It is submitted that the meaning of universal jurisdiction, in the opinion of the Council, is the right of powerful seizing states to assert jurisdiction over suspected pirates, in order that prosecutions may be undertaken in their own domestic courts or—more to the point—on their behalf by regional states, for the protection of their use of maritime routes, flag vessels, commerce and nationals. Hence, the preamble commends Kenya, Seychelles and other regional states for criminalizing piracy in their domestic law and prosecuting pirates captured by seizing states in their national courts and expresses determination to "create conditions to ensure that pirates are held accountable".[145] The object and purpose of resolution 1976, in recognizing universal jurisdiction, is thus to encourage regional states to amend their domestic law and thereby facilitate the prosecution of suspected pirates captured by seizing states.

33. This interpretation of the meaning of universal jurisdiction is supported by the actual text of resolution 1976. For example, the operative provisions "urge" all states, particularly "States in the region", to criminalize piracy in their domestic law; "reiterate" the call on states to "favorably consider" the prosecution of suspects; and "request" states and regional organizations to consider the adoption of piracy prosecution agreements, to facilitate the transfer of pirates by seizing states to regional states for trial.[146] Additionally, the Council calls on states to provide all necessary financial support to regional states in prosecuting and imprisoning pirates.[147] The above finding is confirmed by recourse to the resolution's *travaux préparatoires* and the circumstances of its adoption.[148]

III.B.ii. Travaux préparatoires

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143 SC Res 1976 (11 Apr. 2011), pmbl. paras. 11, 14–15.
144 Ibid., pmbl. paras. 2–3.
145 Ibid., pmbl. paras. 12–13, 15.
146 Ibid., paras. 13–14, 20.
147 Ibid., para. 11.
148 VCLT, above n.69, Article 32.

34. In the meeting at which resolution 1976 was adopted there is surprisingly no mention of universal jurisdiction.[149] However, the reports of the UN Secretary-General and his Special Advisor, discussed in Section A.1. above, and the debate of them at Council meetings, can be considered as part of the *travaux préparatoires* of resolution 1976.[150] The UN Secretary-General's report explains that seizing states prosecute suspected pirates on the basis of universal jurisdiction in cases "where they have a strong national interest", for example, when their flag vessels are attacked or their nationals are victims.[151] The same report proposes that the Council consider continuing the role it had already played in its resolutions by encouraging regional states to accept suspects for prosecution on behalf of seizing states. This would require, amongst other things, calling on all states to ensure that they have criminalized piracy and provided for universal jurisdiction in their national laws, and urging states in the region to accept the transfer of suspects from seizing states for prosecution.[152]

35. During discussion of this report at the Council's 6374th meeting, it is likely that delegations, most of whom represented seizing states, appreciated that universal jurisdiction could be used to protect their national interests threatened by acts of piracy thousands of miles away, while legal and evidential problems that may otherwise arise under traditional grounds of jurisdiction, such as proving links with the nationalities of the victims, ship owners, ship operators and cargo owners or the countries of ship registration could simply be bypassed. Equally, seizing states would be able to protect their own use of maritime routes, which would be difficult to justify under traditional grounds of jurisdiction.[153] The Indian delegation was perhaps most vocal in this respect, stating that any state can exercise universal jurisdiction "in cases where they have an interest, for example where their flag vessel has

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149 UN SCOR, 65th yr., 6512th mtg., UN Doc. S/PV.6512 (11 Apr. 2011).

150 The Council welcomed the Secretary-General's Report in UN Doc. S/PRST/2010/16 (25 Aug. 2010), while the Special Adviser Lang Report is subsequently referred to in resolution 1976 itself and at the Council meeting at which the resolution was adopted; see UN SCOR, 65th yr., 6512th mtg., UN Doc. S/PV.6512 (11 Apr. 2011); SC Res 1976 (11 Apr. 2011), para. 1.

151 Secretary-General Report, above n.133, para. 22.

152 Ibid., 2–3, 24, 26–27.

153 Part II.A.

been attacked or their nationals are victims".[154]

36. Delegations equally had in mind that universal jurisdiction could facilitate the transfer of captured suspects to regional states undertaking prosecutions on behalf of seizing states pursuant to piracy prosecution agreements.[155] For example, the Japanese delegation stated that Somali piracy threatens the people and property of Japan and considering that piracy is subject to universal jurisdiction, it is appropriate for regional states to prosecute captured suspects.[156] The French delegation stated that there is a need to "invite States in the region to conclude [piracy] transfer agreements".[157] The Turkish delegation explained that not all seizing states have piracy prosecution agreements and proposed that, in order to standardize this practice, "the United Nations might lead the way … with respect to the transfer of suspects."[158]

37. Similarly, Lang observed that seizing states prosecute Somali pirates, if at all, where there is sufficiently strong evidence of an actual attack against one of its own flag vessels or nationals. Lang proposed that the Council should encourage all states to adopt universal jurisdiction over piracy in order that seizing states would then be able to increase the number of piracy prosecution agreements with regional states.[159] During the discussion of Lang's report at the Council's 6473rd meeting, the US delegation said that it "strongly supported" Lang's recommendation that all states provide for universal jurisdiction over piracy in their national laws.[160] The US delegation expressed that, as piracy is subject to universal jurisdiction, efforts should continue to support states in the region in undertaking piracy prosecutions.[161] At the same time, the US had "long encouraged" states who had "fallen prey"

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154 UN SCOR, 65th yr., 6374th mtg., UN Doc. S/PV.6374 (25 Aug. 2010), 35 (India).

155 Ibid., 8 (China), 9 (US), 10 (Japan), 16 (Turkey), 17 (UK), 18 (Brazil), 19 (France), 22 (Austria), 24 (Russia), 25–26 (Denmark), 27–28 (Norway), 28 (Ukraine), 34–35 (India).

156 Ibid., 10 (Japan).

157 Ibid., 19 (France).

158 Ibid., 16 (Turkey).

159 Special Adviser Lang Report, above n.135, para. 14. See also UN SCOR, 66th yr., 6473rd mtg., UN Doc. S/PV.6473 (25 Jan. 2011), 3 (Jack Lang).

160 UN SCOR, 66th yr., 6473rd mtg., UN Doc. S/PV.6473 (25 Jan. 2011), 9 (US).

161 Ibid.

to piracy to assert universal jurisdiction and pursue prosecutions in their domestic courts and that the US had equally prosecuted suspects on the basis of universal jurisdiction "in cases where American vessels have been attacked".[162] Similarly, the UK delegation suggested that the EU had concluded a piracy prosecution agreement with Mauritius and that a similar agreement may be negotiated with Tanzania; therefore, all states should be encouraged by the Council to adopt national laws providing for universal jurisdiction for piracy.[163] The *travaux préparatoires* thus reveal that states understand universal jurisdiction as the right to prosecute pirates when they have a close link, which may also be used by regional states undertaking prosecutions on behalf of seizing states.

III.B.iii. Circumstances of adoption

38. Consideration of the circumstances of the adoption of resolution 1976 reveals that, both prior to the recognition of universal jurisdiction and subsequently, the Council has been involved in the process of encouraging, and ultimately demanding under Chapter VII, all states, particularly regional states, criminalize piracy in their national law and "favourably consider" the prosecution of suspects captured off the coast of Somalia by seizing states.[164] States present at the Council's meetings, many of whom had deployed warships to protect their flag vessels and overseas trade since 2008, were concerned at the outset with finding a solution to having suspects prosecuted in the region, in particular through the conclusion of piracy prosecution agreements.[165] Thus, in resolution 1851, adopted in 2008, the Council used

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162 Ibid.

163 Ibid., 11 (UK).

164 See SC Res 1897 (30 Nov. 2009), pmbl. paras. 8, 9 & para. 6; SC/Res 1918 (27 Apr. 2010), pmbl. paras. 6, 8, 10, 13–14 & para. 2; UN Doc. S/PRST/2010/16 (25 Aug. 2010); SC Res 1950 (23 Nov. 2010), pmbl. paras. 11, 13 & para. 13; SC Res 2015 (24 Oct. 2011), pmbl. paras. 8–11, 16 & paras. 5, 8–9, 16, 19; SC Res 2020 (22 Nov. 2011), pmbl. paras. 13, 18 & para. 15; SC Res 2077 (21 Nov. 2012), pmbl. paras. 14, 18 & paras. 4, 6, 18; SC Res 2125 (18 Nov. 2013), pmbl. paras. 19, 23 & paras. 4, 5, 17.

165 E.g., SC Res 1816 (2 Jun. 2008), para. 11; SC Res 1846 (2 Dec. 2008), para. 14; SC Res 1897 (30 Nov. 2009), pmbl. paras. 8–9 & para. 12; SC Res 1918 (27 Apr. 2010), pmbl. paras. 9–10, 13 & para. 2; Contact Group, Working Group on Legal Issues, 1st mtg., Chairman's Conclusions, Vienna (5 Mar. 2009) (http://www.marad.dot.gov/documents/wg2-Vienna_Meeting-

its Chapter VII powers in urging seizing states and regional organizations to conclude "special agreements" with regional states to take custody of pirates and facilitate the prosecution of suspects.[166] At the Council meeting at which resolution 1851 was adopted, the US delegation—one of the seizing states sponsoring the draft resolution—stated that the proximity of regional states made them "an obvious choice to cite prosecutions" and called on those states "victimised by Somali piracy" to contribute generously to building the capacity of regional states to prosecute pirates.[167] Similarly, the Danish delegation stated that the conclusion of piracy prosecution agreements with regional states is of key importance.[168] In fact, the impetus behind the Council's initial request to the UN Secretary-General to report on possible options for prosecuting pirates is because Kenya—the only regional state prosecuting Somali pirates at the time—suspended piracy prosecution agreements previously concluded with several seizing states and the EU, including four of the Council's permanent members, due to inadequate financial support received.[169]

39. In sum, both the Council and the UN Secretary-General, as well as the coalition of states in the Contact Group, were willing to take shortcuts in the identification of custom, by relying on the statements of scholars, leading to the mistaken belief that universal jurisdiction already existed in international law prior to the surge in Somali piracy. As a result, the longstanding customary rule of no proof of a nexus jurisdiction is misunderstood as a concept of "universal jurisdiction". Yet, there is no consensus on whether universal jurisdiction's legal basis is customary international law or international treaty, or both, and the concept and its purpose are left undefined. The Council's repeated demand that states favorably consider the prosecution of suspected pirates and the urging of seizing states to conclude piracy prosecution agreements is difficult to reconcile with the concept of universal jurisdiction proper. Based on the above analysis, it is submitted that the meaning of universal jurisdiction for piracy, in the opinion of the Council, is the right of

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chair-summary-March_5-2009.pdf).

166 SC Res 1851 (16 Dec. 2008), para. 3.

167 UN SCOR, 63rd yr., 6046th mtg., UN Doc. S/PV.6046 (16 Dec. 2008), 10 (US).

168 Ibid., 28 (Denmark).

169 James T. Gathii, Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law, 31 Loy. L.A. Int'l & Comp. L. Rev. (2009), 435.

seizing states to protect their affected national interests, either by prosecuting suspects in their own domestic courts or having suspects prosecuted on their behalf by bilateral partners in the region, without the legal burden of having to prove a connection with the crime at issue. From this perspective, the recognition of universal jurisdiction in resolution 1976 is designed to provide legitimacy for the measures taken, and to be taken, against Somali pirates by giving the Council's imprimatur to such measures, not least the Council's permanent members who have taken a leading role in the conclusion of piracy prosecution agreements with regional states.[170] If this meaning of universal jurisdiction is correct, then it is fundamentally different to the concept in the account of the prevailing narrative.

40. It could be argued that, notwithstanding the lack of international legal basis historically, universal jurisdiction exists in customary international law and applies to piracy presently due to its recognition and acceptance as such by the UN and numerous states alike. In the final analysis, whether piracy is subject to universal jurisdiction will ultimately come down, like the answers to all such questions, to state practice and *opinio juris*.

IV. The case against piracy supporting universal jurisdiction: empirical findings of state practice

41. This Part argues that state practice in response to Somali piracy does not support the emergence of a new rule of universal jurisdiction proper—in the account of the prevailing narrative—in customary international law. No state is willing to prosecute piracy based on universal jurisdiction. Rather, states have continued to apply the same longstanding rule of no proof of a nexus jurisdiction, as well as principles of territoriality, nationality and protective jurisdiction, to a new threat. However, states have taken shortcuts in the identification of custom in response to Somali piracy, leading them to mistakenly believe that universal jurisdiction already exists in law and is time-honored and therefore not in need of further proof. As a result, no proof of a nexus jurisdiction is fundamentally misunderstood with a well-intentioned but flawed concept created by scholars and subsequently championed by some judges since the 1980s—universal jurisdiction. Yet, states assert jurisdiction and prosecute pirates when either they or their bilateral partners, pursuant to piracy prosecution agreements, have a close link with the crime

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[170] Piracy prosecutions agreements are discussed in Part IV.D.ii.

at issue and stand to gain the most benefit. This finding corroborates the UN Security Council's understanding of the meaning of universal jurisdiction, as established in Part III. Piracy is thus far from being the "paradigmatic" universal jurisdiction crime. Relatedly, notions that piracy is heinous in gravity and pirates are the enemy of all mankind have no bearing on the use of jurisdiction and the circumstances in which suspects may be prosecuted. This practice with respect to piracy is identical to what the same and all other states have done regarding international crimes for the past sixty years. Accordingly, while states broadly support "universal jurisdiction" in their verbal actions, universal jurisdiction proper is non-existent in actual practice and remains a hollow concept for both categories of crime to the present day. These developments in state practice thus necessitate a paradigm shift in the concept of "universal jurisdiction".

In making this argument, this Part begins by showing that the empirical evidence on which leading scholars rely to substantiate the emergence of a new rule of universal jurisdiction in customary international law in response to Somali piracy, regardless of alleged historical origins, is unsatisfactory. Thereafter, it engages with the broader debate on what the formation of custom actually requires in the modern age, before making an original contribution to existing scholarship by presenting the findings of an empirical analysis of actual state practice (legislation of eighty-five states and trials concerning 1248 suspected Somali pirates) purported to involve universal jurisdiction during a ten-year period since 2006 and compares the data on Somali piracy with the empirical findings of state practice regarding international crimes.

IV.A. Emergence of a "new" customary rule of universal jurisdiction: inadequate empirical evidence

42. Following legal advice submitted to the Contact Group,[171] Professor Guilfoyle subsequently doubted the sources of evidence on which he relied in his report to Working Group 2 and argued that, regardless of the dearth of evidence supporting the existence of universal jurisdiction historically, "any gap in custom would appear to have been filled by the rapid growth of recent state practice, clearly accompanied by opinio juris, given that over 1,000 suspect Somali pirates are either presently before foreign courts or in foreign

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171 Part III.B.

jails".[172] The extent of detained suspected pirates is true. However, aside from bundling all the evidence of state practice and *opinio juris* into a single statement, Professor Guilfoyle does not support this contention with any empirical evidence. But Professor Guilfoyle's argument, by focusing Somali piracy prosecutions in isolation, does not have the power and weight of history on its side. Yet, leading scholars have gone out of their way to invoke historical authority in support of universal jurisdiction, while states and domestic courts believe that universal jurisdiction is anything but new and many believe they are applying the same longstanding rule presently.

43. In a "lessons learned" analysis of the prosecution of Somali pirates on behalf of the Contact Group, informed by interviews with a range of state participants, Scott reports that no state "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".[173] Similarly, Professor Sterio observes that states are not interested in prosecuting pirates under "true universal jurisdiction".[174] Professors Evans and Galani suggest that states are reluctant to prosecute Somali pirates without a jurisdictional nexus; and being an enemy of all mankind does not seem to be enough.[175] Upon this basis, the practice of states requires empirical testing.

44. There is little direct work from the scholarly community examining empirical evidence regarding assertions of extraterritorial jurisdiction for the prosecution of Somali pirates. To date, Professors Kontorovich and Art have undertaken the most comprehensive study.[176] According to the authors,

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172 Douglas Guilfoyle, above n.4, 774.

173 Kenneth Scott, Prosecuting Pirates: Lessons Learned and Continuing Challenges (visited 16 Mar. 2018), 15 (http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital.pdf).

174 Milena Sterio, Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius, 4 Amsterdam Law Forum (2012), 111. See also Mathilda Twomey, above n.89, 172.

175 Malcolm D. Evans & Sofia Galani, Piracy and the Development of International Law, in Panos Koutrakos & Achilles Skordas (eds.), The Law and Practice of Piracy at Sea: European and International Perspectives (2014), 348.

176 Eugene Kontorovich & Steven Art, above n.3, 445–46.

during the period 1998-2009, there were 1,158 reported instances of piracy worldwide and only seventeen of them led to prosecutions based on universal jurisdiction, fourteen of which took place in Kenya and Yemen in response to Somali piracy.[177] These findings, even if they were true, raise uncertainty as to whether the extent of this practice would be sufficiently "widespread and representative" to give rise to a customary rule of universal jurisdiction.[178] Furthermore, they are problematical. The authors adopt universal jurisdiction's prevailing narrative and are clearly of the opinion that universal jurisdiction is far from new. Thus, they assert that "[p]iracy is the original UJ crime" and has an "excellent pedigree"; therefore, the infrequency of current piracy prosecutions "does not mean that universal jurisdiction over this crime has fallen into desuetude or disfavour", as universal jurisdiction "has its origins in centuries-old custom" and was codified in the LOSC.[179] Second, the authors assume that piracy prosecutions are instances of universal jurisdiction unless the prosecuting state's interests are "directly affected".[180]

45. The term "directly affected" has no basis in the rules of jurisdiction in international law and is interpreted narrowly by the authors as states whose flag vessels and/or nationals have been attacked.[181] As will be shown below, states regard Somali piracy as a serious threat to their national interests irrespective of whether their flag vessel or national is attacked.[182] Therefore, counting states prosecuting pirates as examples of universal jurisdiction because the vessel attacked flew a foreign flag is overly simplistic.[183] Relatedly, the authors do not give sufficient consideration to Kenya and Yemen

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177 Ibid.

178 For the constituent elements of rules of customary international law, see Part IV.B.

179 Eugene Kontorovich & Steven Art, above n.3, 437–39.

180 Ibid., 447–49.

181 Ibid., 444, n.38.

182 Part IV.D.i. In this regard, the proliferation of the use of flags of convenience means that Somali piracy may threaten the shipping companies, trade, and economies of certain states, rather than their own flag vessels.

183 Eugene Kontorovich & Steven Art, above n.3, 445. The methodology of Professors Kontorovich and Art in counting universal jurisdiction prosecutions has been used by several other actors; e.g., see Secretary-General Report, above n.133, para. 12; Special Adviser Lang Report, above n.135, para. 50; Douglas Guilfoyle, above n.4, 775; Huang, above n.89, 650; Mathilda Twomey, above n.89, 156, 164.

prosecuting pirates on behalf of powerful seizing states pursuant to piracy prosecution agreements, which should not automatically be counted as examples of universal jurisdiction.[184]

46. These problems with methodology mean that only those prosecutions that are perceived by Professors Kontorovich and Art to result in universal jurisdiction, as opposed to prosecutions premised on "other jurisdictional bases", are counted.[185] It also leads the authors to overstate the use of universal jurisdiction for piracy prosecutions in this period. Thus, they conclude that the piracy boom off the coast of Somali has led to a "notable" and "sharp" increase in the rate of universal jurisdiction prosecutions.[186] Consequently, the empirical case for universal jurisdiction is thoroughly unconvincing. At the same time, no attempt is made to subject these cases to sustained analysis. As it is often difficult to determine whether a rule has attained the status of customary international law and its content, it is useful to engage in the broader debate on how customary rules should be identified before presenting the empirical findings on counter-piracy legislation and Somali piracy prosecutions during the period of the present study.

IV.B. Formation of customary rules in the modern age

47. The verbal actions of numerous states and the conduct of the UN demonstrate broad acceptance that the crime of piracy is now covered by universal jurisdiction.[187] Therefore, the question arises whether such statements are sufficient for universal jurisdiction to exist with respect to piracy, even if states do not exercise such jurisdiction themselves. There are well-known debates on what the formation of custom actually requires in the modern age, as well as growing uncertainty about how, precisely, customary rules should be identified.[188] There are also perhaps few topics in international

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184 Ibid., 437, 445, 449. See further Part IV.D.ii.

185 Ibid., n.38.

186 Ibid., 445, 446, 451 & n.7.

187 The extensive debates at the Sixth Committee demonstrate this clearly.

188 For a thorough discussion of these debates, see, e.g., Anthea E. Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, AJIL (2001), 761–88; Brian D. Leopard, Customary International Law as a Dynamic Process, in Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), Chapter 3.

law that are more over-theorized.[189] For example, in the wake of the ICJ's determination of what customary law provides on self-defense in the *Nicaragua* case,[190] a number of leading scholars, such as Professor Kirgis, rationalized the ICJ's decision by arguing that "modern" custom can be shown by a sufficient high level of *opinio juris* relative to state practice or vice versa–that is, there is a "sliding scale" of proof that applies.[191] This would imply that, even if state practice is scarce or non-existent, customary rules can emerge based wholly, or at least mostly, on general statements expressing *opinio juris*.[192]

48. The idea that *opinio juris* has been substituted for state practice and is sufficient to provide custom is problematic.[193] In *Nicaragua*, the ICJ did not abandon the traditional two-element test of proving custom.[194] Rather (and based on the factual circumstances at hand), the Court introduced a new piece of evidence of *opinio juris*, in the form of "certain General Assembly resolutions", in order to determine the attitude of states as to what the law

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189 Stefan Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, 26 EJIL (2015), 429.

190 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, ICJ Reports 1986.

191 Frederic L. Kirgis, Custom on a Sliding Scale, 81 AJIL (1987), 146–51.

192 The methodology as set out by Professor Kirgis has been occasionally utilized in discovering customary international criminal law; see, e.g., Anthea Roberts, above n.188, 758, 760; Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Austl. Y.B. Int'l L. (1988–89); Prosecutor v. Kupreškić, No. IT-95-16-T, Judgment (Int'l Crim. Trib. For the Former Yugoslavia, 14 Jan. 2000), para. 527.

193 The shortcomings of Professor Kirgis' theory and similar conceptions seeking to explain the formation and operation of customary rules have been subject to various criticisms, see, e.g., Stefan Talmon, above n.189, 431–32; László Blutman, Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail, 25 EJIL (2014), 547.

194 The two-element test refers to the identification of a customary rule based on an assessment of both state practice and opinio juris; Special Rapporteur Michael Wood, Second Rep. on Identification of Customary International Law, UN Doc. A/CN.4/672 (22 May 2014), paras. 21–31.

is.[195] Although several scholars may be right in criticizing the ICJ for having "a marked tendency to assert the existence of a customary rule more than to prove it",[196] in practice the ICJ has ultimately followed a rather "flexible" approach to determine what the law is as it sees fit, based on a selection of state practice and *opinio juris* made by the Court (including the quality of such evidence and the weight placed on it).[197] Therefore, it is inaccurate to identify the *Nicaragua* case as a paradigm shift in the ICJ's approach to evidencing custom.[198]

49. The uncertainty and complexity about how customary rules should be identified resulted in the inclusion of this topic in the ILC's program of work in 2012.[199] In 2018 the ILC adopted a set of draft conclusions providing a methodology on how to identify customary international law.[200] The ILC rejects Professor Kirgis' model and reaffirms the two-element approach for proofing custom as the "better view".[201] According to the ILC, the standard

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195 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, ICJ Reports 1986, paras. 185–88. See also Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, para. 70.

196 Alain Pellet, Shaping the Future of International Law: The Role of the World Court in Law Making, in Mahnoush. H. Arsanjani et al. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (2010), 1076; Jonathan I. Charney, Universal International Law, 87 AJIL (1993), 537–38; Stefan Talmon, above n.189, 434, 441.

197 Special Rapporteur Michael Wood, First Rep. on Formation and Evidence of Customary International Law, UN Doc. A/CN.4/663 (17 May 2013), paras. 62–65; Stefan Talmon, ibid., 432.

198 Peter Tomka, President International Court of Justice, in Council of Europe Committee of Legal Advisors on Public International Law, Conference Proceedings–The Judge and International Custom (20 Mar. 2013), 29 (http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680065d14).

199 There has been a proliferation of scholarly treatment on the identification and determination of customary international law since the ILC's work on this topic began.

200 ILC, Identification of Customary International Law, Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.908 (17 May 2018) (ILC Drafting Committee).

201 Special Rapporteur Michael Wood (Second Rep.), above n.194, paras. 27–28, 31. The ILC has acknowledged that, in reality, the two constituent elements may sometimes be "closely entangled", and that the relative weight

view today is that customary international law requires proof of state practice and *opinio juris*, where the relevant state practice must be "widespread and representative, as well as consistent".[202] However, the draft conclusions remain a work in progress and states continue to having differing views on several issues.[203]

50. Although the ILC proclaims the two-element approach as being "indispensable for any rule of customary international law properly so called",[204] the two-part test for identifying when customary international law may be said to exist has itself faced substantial criticism in scholarship.[205] For example, there has long been doubt that states and national and international courts actually undertake the careful effort to distil evidence of state practice and *opinio juris* of nearly 200 states and that almost all of the time they take shortcuts for assertions of custom.[206] These shortcuts include, for example, reliance on treaties, statements by scholars or other prominent bodies (such as the ILC or UN), or rulings issued by national and international courts. But such shortcuts are not a recent phenomenon; arguably, they have always been deployed.[207] The willingness of states, courts and even the UN to take such

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to be given to each may vary according to the circumstances, ibid., para. 3; Special Rapporteur Michael Wood, Third Rep. on Identification of Customary International Law, UN Doc. A/CN.4/682 (27 Mar. 2015), paras. 12–18.

202 ILC Drafting Committee, above n.200, Conclusion 8.

203 Special Rapporteur Michael Wood, Fifth Rep. on Identification of Customary International Law, UN Doc. A/CN.4/717 (14 Mar. 2018).

204 Special Rapporteur Michael Wood (Second Rep.), above n.194, para. 23.

205 One particularly notable concern is empirical: institutional actors may frequently voice the two-element definition but do not actually follow it in practice. See Curtis A. Bradley, Introduction: Custom's Future, in Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), 2; Stephen Choi & Mitu Gulati, above n.102. For concerns from a third world perspective, see Bhupinder S. Chimni, Customary International Law: A Third World Perspective, 112 AJIL (2018).

206 Stefan Talmon, above n.189, 437–440; Curtis A. Bradley, Customary International Law Adjudication as Common Law Adjudication, in Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), Chapter 2; Stephen Choi & Mitu Gulati, above n.102. Sienho Yee, Report on the ILC Project on "Identification of Customary International Law", 14 Chinese JIL (2015), 382.

207 E.g., the following historical cases illustrate domestic and international courts providing evidence of only a handful of sources for the determination

shortcuts by relying on treaties and statements by scholars is clearly evident in respect of universal jurisdiction for piracy.[208] For instance, in the first and only piracy trial in Japan, the Tokyo High Court held, absent any supporting evidence, that universal jurisdiction in the LOSC has been recognized in customary international law since "ancient times".[209] Moreover, it is not uncommon for powerful states to simply bypass the formal rules on the identification of custom altogether in asserting the existence of customary rules when they see fit.[210]

51. A further—albeit now less controversial—shortcut in the identification of customary rules relates to the constituent element of state practice, which may take the form of "verbal" as well as "physical" acts.[211] The use of verbal practice for proving custom has been described as a

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that a practice had ripened into custom: Schooner Exchange 11 U.S. (7 Cranch) 116 (US Supreme Court, 1812); The Paquete Habana, 175 U.S. 677 (US Supreme Court, 1900); S.S. "Lotus" (Fra. v. Turk.), Judgment, PCIJ 1927 (Ser. A) No. 10, 25–30.

208 Part III. The Kuwaiti delegation, during the work on universal jurisdiction at the Sixth Committee, goes so far as to rely on a UN Security Council resolution as a shortcut for proving universal jurisdiction's application to piracy, despite the said resolution making no reference to universal jurisdiction; Permanent Mission of Kuwait to the UN, Note from the Ministry of Justice to the UN Office of Legal Affairs (2010), para. 9 (https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kuwait_E.pdf (UN Note on Kuwait)).

209 M/V Guanabara case, 66(4) High Court Reporter (Kosai Hanrei Shu) 6 (Tokyo High Court, 2013), reprinted in 1407 Hanrei Taimuzu 234 (www.courts.go.jp/app/files/hanrei_jp/188/084188_hanrei.pdf). The present author would like to thank Professor Yumiko Kita for translating this case.

210 For a recent example regarding the law on the use of self-defensive force against non-state actors, see James A. Green, Initial Thoughts on the UK Attorney-General's Speech, EJIL: Talk! (13 Jan. 2017).

211 ILC Drafting Committee, above n.200, Conclusion 6. Omri Sender & Michael Wood, Custom's Bright Future: The Continuing Importance of Customary International Law, in Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), 360, 368 ("[s]everal long-standing theoretical controversies related to customary international law have by now been put to rest. It is no longer contested, for example, that verbal acts, and not just physical conduct, may count as 'practice.'").

"modern positivist" approach to international law making.[212] This approach places significant weight on verbal statements for the determination of customary rules, especially where physical state practice is scarce.[213] Based upon the propensity for the taking of shortcuts in proving custom, and in view of states' verbal actions, combined with the decisions of national courts and the conduct of the UN accepting universal jurisdiction's application to piracy, it could be argued that a critical mass of state practice accompanied by *opinio juris* has accumulated, and therefore a new rule of universal jurisdiction in custom has thus come into being. This may be the case even if states "mistakenly" believe that universal jurisdiction has deep historical roots and most states do not exercise such jurisdiction themselves.[214]

52. However, relying on verbal actions alone for proving custom is problematic. Caution is needed in assessing what states and international organizations say in proving custom; words cannot always be taken at face value.[215] There is the possibility that verbal statements may be inconsistent with actual practice or *opinio juris*. As such, focus on verbal actions alone risks presenting an incomplete or even distorted picture. Additionally, the ILC has reiterated that practice cannot serve as evidence of both state practice and *opinio juris*.[216] Both constituent elements must be proven and verified separately, which means different evidence for each element.[217] Applying this rule to "non-actual" practice such as verbal acts is also intended to prevent abstract statements, by themselves, creating law.[218] Yet, relying on verbal actions alone risks double-counting such statements as evidence of both state

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212 Bruno Simma & Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, 93 AJIL (1999).

213 The US takes the view that "action-oriented practice" is the most probative form of practice for proving custom; see Special Rapporteur Michael Wood (Fifth Rep.), above n.203, para. 52. However, insofar as universal jurisdiction is concerned, the US appears to pay lip service to the rigorous application of the two-element approach but does not actually apply it in practice.

214 Special Rapporteur Michael Wood (Third Rep.), above n.201, para. 16 & n.28.

215 Special Rapporteur Michael Wood (Second Rep.), above n.194, paras. 30, 37; Curtis Bradley, above n.204, 34, 53; Sienho Yee, above n.206, 385–86.

216 Special Rapporteur Michael Wood (Second Rep.), ibid., paras. 70–80.

217 ILC Drafting Committee, above n.200, Conclusion 3.

218 Special Rapporteur Michael Wood (Second Rep.), above n.194, para. 74.

practice and *opinio juris* in proving custom.[219] In any event, verbal practice provides only one half of the picture and "[a]ccount is to be taken of all available practice of a particular state, which is to be assessed as a whole".[220] It is therefore essential to look at what states actually do and attempt to understand why they do it.[221] In the present context, state practice of particular significance is to be found in the legislation of those states which have enacted statutes criminalizing "piracy", the judgments of national courts faced with the prosecution of suspected pirates and piracy prosecution agreements concluded between seizing and regional states.

53. The sections that follow present the empirical findings of legislation countering piracy and trials purported to involve universal jurisdiction in domestic courts, especially powerful states responding to Somali piracy "whose interests are specially affected", which is an essential requirement for the determination of customary rules.[222] The findings of this analysis reveal that none of the states in the sample provide for clear examples of universal jurisdiction proper in their national laws or assert such jurisdiction in actual trials. Data therefore rebuts the claim that state practice is sufficient to support the emergence of a new rule of universal jurisdiction in customary international law. Rather, states have re-conceptualized no proof of a nexus jurisdiction for piracy as a "universal jurisdiction", which is used when states, or their bilateral partners, have a close nexus and stand to gain the most benefit.

IV.C. National laws criminalizing "piracy"

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219 In this regard, the US suggests that verbal statements are more likely to embody opinio juris, Special Rapporteur Michael Wood (Fifth Rep.), above n.203, para. 52.

220 ILC Drafting Committee, above n.200, Conclusion 7.

221 Special Rapporteur Michael Wood (First Rep.), above n.197, para. 96. See also Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US), Judgment, ICJ Reports 1984, para. 111; Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, paras. 64, 75; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, para. 55.

222 North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment, ICJ Reports 1969, para. 74; Special Rapporteur Michael Wood (Second Rep.), above n.194, paras. 52, 54; Peter Tomka, above n.198, 212.

54. The first type of physical practice considered is legislation.[223] In 2012 the UN Secretary-General compiled national laws used to counter piracy, at the request of the Security Council, based on information received from forty-two states.[224] Additionally, in 2008 the IMO requested states to supply examples of national laws used to "prevent, combat and punish acts of piracy and armed robbery at sea".[225] The state responses contain information on national laws of fifty-four states.[226] Further research of national laws not contained in the above sources (Azerbaijan,[227] Canada,[228] India,[229] Madagascar,[230] Malaysia,[231] Maldives,[232] Paraguay,[233] Seychelles,[234] Somaliland,[235] Switzerland,[236] UK[237] and Yemen[238]) has been undertaken. The total number of states' national laws analyzed for present purposes is therefore eighty-five.[239] Most of these laws predate the surge in Somali piracy,

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223 Special Rapporteur Michael Wood (Second Rep.), ibid., paras. 37, 41, 48.

224 Letter dated 23 March 2012 from the Secretary-General to the President of the Security Council, UN Doc. S/2012/177 (26 Mar. 2012) (Secretary-General Compilation of Legislation).

225 IMO Circular Letter No. 2933 to all IMO Member States (23 Dec. 2008) (http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/CL2933.pdf).

226 UN Division for Ocean Affairs and the Law of the Sea, National Legislation on Piracy (2011) (http://www.un.org/depts/los/piracy/piracy_national_legislation.htm).

227 Criminal Code, Article 12.3.

228 Criminal Code (R.S.C., 1985, c. C-46), Section 74.

229 Penal Code, Act No. 45 of 1860.

230 Loin° 99-028 du 3 février 2000 portant refonte du Code maritime, Article 5.1.05.

231 Courts of Judicature Act 1964, Section 22.

232 Penal Code, Law No 6/2014.

233 Penal Code, Article 8.

234 Penal Code (Amendment) Act 2010.

235 The Law for Combating Piracy Law, Law No. 52/2012.

236 Criminal Code, Article 7(2)(b).

237 Merchant Shipping and Maritime Security Act 1997, Schedule 26(1), Schedule 5.

238 Republican Decree, Law of Criminal Procedures 1994, Article 244.

239 These states are as follows: Argentina, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Comoros, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Grenada,

with some dating back over 100 years,[240] while others have been adopted in response to Somali piracy at the request of the Security Council.[241]

55. It is perhaps surprising that, of all the state responses sent to the UN Secretary-General and IMO, only four states describe their legislation and permitting "universal jurisdiction".[242] Professor Dutton, having examined counter-piracy laws contained in state responses to the above IMO source, found that "few states" actually provide for universal jurisdiction over piracy.[243] On closer analysis, this Article finds insufficient evidence to conclude that any of the states reviewed actually provide for universal jurisdiction in respect of piracy. To demonstrate this finding, legislative practice is organized into the following categories: (i) customary international law and piracy defined "by the law of nations"; (ii) the LOSC as a legal basis for universal jurisdiction; (iii) treaty jurisdiction; and (iv) nexus requirement between a crime and the prescribing state.

IV.C.i. Customary international law and piracy defined "by the Law of Nations"

56. Several states declare that universal jurisdiction is established in customary international law historically and therefore interpret the extraterritorial application of their national legislation based on this rule.[244]

Guatemala, India, Iran, Ireland, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kuwait, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Madagascar, Maldives, Malta, Malaysia, Mauritius, Mexico, Morocco, New Zealand, the Netherlands, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Qatar, Republic of Korea, Republic of Moldova, Russia, Seychelles, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Suriname, Switzerland, Tanzania, Thailand, Togo, Turkey, Ukraine, UAE., UK, US, Uruguay, Yemen, Zambia.

240 Stanley Morrison, above n.60.

241 Part II.C.

242 Cyprus, Germany, the Netherlands, Spain.

243 Yvonne Dutton, above n.5, 72, 78, 88. See also Marta Bo, Piracy at the Intersection Between International and National: Regional Enforcement of a Transnational Crime, in Harmen van der Wilt & Christophe Paulussen (eds.), Legal Responses to Transnational and International Crimes: Towards an Integrative Approach (2017), 84–86.

244 See, e.g., Permanent Mission of UK to the UN Office of Legal Affairs, The Scope and Application of the Principle of Universal Jurisdiction (11 Oct. 2016) (http://statements.unmeetings.org/media2/7661944/uk.pdf (UN

For example, Article 381 of the Dutch Criminal Code, dating to the early nineteenth century when unlawful privateering posed a serious threat to Dutch colonial trade, provides for a type of no proof of a nexus jurisdiction over vessels on the high seas intending to use violence unauthorized by a sovereign power engaged in warfare.[245] In its commentary to the UN Secretary-General, the Netherlands states that the Criminal Code "establishes universal jurisdiction over the crime of piracy".[246] The international legal basis for universal jurisdiction is left unexplained, although presumably it is regarded as custom given that the Criminal Code long-predates the LOSC.[247] And yet, the Dutch Government suggests that pirates will only be prosecuted when there is a specific national interest involved. Such interests include the hijacking of Dutch-flagged vessels, a ship owned by a Dutch shipping company or where Dutch crewmembers are victims.[248] The Netherlands understands universal jurisdiction to mean the assertion of jurisdiction over piracy which has a link with the Netherlands, although actual proof of a Dutch interest threatened by piracy is not required.[249]

57. Closely related to custom, the legislation of several states contain provisions criminalizing piracy as defined "by the law of nations" and, for

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Note on UK)); Permanent Mission of Australia to the UN Office of Legal Affairs, Australian Views on the Scope and Application of the Principle of Universal Jurisdiction (3 May 2016) (http://www.un.org/en/ga/sixth/71/universal_jurisdiction/australia_e.pdf (UN Note on Australia)); Permanent Mission of New Zealand to the UN Office of Legal Affairs, Comments by New Zealand on the Scope and Application of the Principle of Universal Jurisdiction (28 Apr. 2010)) (https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/New%20Zealand.pdf (UN Note on New Zealand)); Cyprus Response to IMO Circular Letter, (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP_piracy.pdf).

245 Criminal Code, Article 381.

246 Secretary-General Compilation of Legislation, above n.224, 66.

247 Nor is the definition of piracy in Article 381 consistent with the LOSC.

248 Kees Homan & Susanne Kamerling, Piraterij Vaart Wel Bij Somalisch Vacuüm: Bestrijdingsnetwerk in de Maak, International Spectator (Sep. 2009), 455–56 (https://spectator.clingendael.org/sites/spectator/files/2017-07/2009-09.pdf).

249 See further below nn.321–27.

historical reasons explained in Part II.C, establish no proof of a nexus jurisdiction over it.[250] For example, the legislation of the US, which has not ratified the LOSC, provides for this type of jurisdiction over piracy "as defined by the law of nations" when the alleged offender is "afterwards brought into or found in the United States".[251] According to the US, piracy is one of "the oldest recognized universal jurisdiction crimes" and is included in its domestic law.[252] However, the "afterwards brought into or found in" provision considerably restricts the scope of prescriptive jurisdiction and presupposes that an offence has a sufficiently close link to the US and the suspect cannot be extradited to the state of nationality. Indeed, the inclusion of no proof of a nexus jurisdiction and the "afterwards brought into or found in" provision in current US legislation can be traced to 1819 in "An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy".[253] The context in which the latter statute was adopted concerned the wars for independence between Spain and its rebellious colonies in South and Central America, with both sides relying heavily on the licensing of privateers,

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250 The establishment of no proof of a nexus jurisdiction over a rather broad and vague crime of piracy under the law of nations has historically been adopted in English common law and subsequently codified in other legal systems based on the English common law; see, e.g., Trial of Joseph Dawson and Others (1696) 13 Howell's St. Tr. 451, Col. 477; The Crimes Act 1914 (Cth), Section 51 (Australia); Criminal Code (RSC, 1985, c. C-46), Section 74 (Canada); Courts of Judicature Act 1964, Section 22 (Malaysia); Crimes Act 1961, Section 92 (New Zealand); Singapore Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SGP_penal_code_maritime_offences.pdf); Cyprus Response to IMO Circular Letter, above n.244; Bahamas Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BHS_penal_code.pdf); Penal Law 1977, Section 169 (Israel).

251 18 USC § 1651; US Response to IMO Circular Letter, (26 Apr. 2011) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_piracy.pdf).

252 Permanent Mission of US to the UN Office of Legal Affairs, Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction (2010) (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf).

253 3 STAT. 513 (1819). See also United States v. Hasan, 747 F. Supp. 2d 599 (US ED Va., 2010), 614.

which posed a serious threat to neutral US merchant shipping. The purpose of this legislation, which has to be viewed in its historical context if properly understood, is to protect US vessels and overseas commerce against "frequent outrages from the vessels of the adverse parties … with doubtful commissions and from pirates who sought to conceal their true character by the use of the flag of one of the belligerents."[254] Spain and the newly independent republics licensing privateers could not be entrusted to undertake prosecutions or provide redress.[255] In the early nineteenth century, the US (and Britain) unilaterally defined "piracy" under the law of nations as they saw fit, in order that pirates would be executed summarily or subject to prosecution if captured alive, their ships sunk or taken as prize and their land bases destroyed, to protect their merchant shipping throughout the colonial world.[256]

58. In recent decades, the "afterwards brought into or found in" provision has been included in numerous US statutes implementing multilateral criminal law treaty obligations to extradite or prosecute relating to acts of terrorism threatening US nationals and national interests. This further suggests that counter-piracy legislation requires a close link with an offence at issue before jurisdiction is actually asserted.[257] Though the US interprets legislation relating to piracy as providing for "universal jurisdiction", the US asserts such jurisdiction when its "people and interests have been attacked".[258]

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254 Report of the Committee of Foreign Relations of the House of Representatives, on Piracy and Outrages on American Commerce by Spanish Privateers, Register of Debates in Congress, Comprising the Leading Debates and Incidents of the Second Session of the Eighteenth Congress (1825), 49.

255 In this regard, Congress also authorized the President to license privateers "in protecting the merchant ships of the United States, and their crews from piratical aggressions"; see 13 STAT. 510 (1819), Section 1.

256 See United States v. Smith, 18 U.S. 153, 162 (US Supreme Court, 1820); Alfred Rubin, above n.65, 265; Bruce A. Elleman et al., Introduction, in Bruce A. Elleman et al. (eds.), Piracy and Maritime Crime: Historical and Modern Case Studies (2010), 1–18.

257 E.g., 18 USC Ch. 113B.

258 Written Testimony of Ambassador Stephen Mull Before the Senate Armed Services Committee on Combating Piracy on the High Seas (2009), 3 (http://www.marad.dot.gov/documents/Mull_-05-05-09.pdf). See also US Department of State, The US Government's Approach to Countering

59. The absence of any link requirement in the legislation of the states falling within this category does not necessarily mean that they embody or even exclusively provide for universal jurisdiction over piracy under the law of nations.[259] In fact, the absence of any nexus requirement in these laws means that the states concerned have discretion to invoke one of several types of jurisdiction recognized in international law. For example, in the first Somali piracy trial in the US, resulting in the first jury conviction for piracy since 1820, a District Court determined that US legislation provides "the ability to invoke universal jurisdiction", a rule of deep historical roots in customary international law, over "piracy as defined by the law of nations".[260] Yet, the court acknowledged that universal jurisdiction does "not need to be invoked in the instant case" as the attack was committed against a US warship.[261] As will be shown in the following section, the states in this category assert jurisdiction over Somali pirates, if at all, where it is necessary to protect their national interests.

IV.C.ii. The LOSC as a legal basis for universal jurisdiction

60. Several states regard the LOSC as the international legal source for universal jurisdiction, in addition to custom.[262] This is illustrated by the practice of Spain—one of the self-acclaimed pioneers of universal jurisdiction. Until recently Spanish legislation, Organic Act No. 6/1985, was purported by Spanish domestic courts to provide for "universal jurisdiction" over a range of crimes, including piracy.[263] This is despite the Penal Code containing no definition of a substantive crime of "piracy". However, in rejecting the Spanish Constitutional Court's ruling that the national law of Spain allowed the prosecution certain crimes committed abroad regardless of proof of their links to Spain, in 2009 the Spanish Government amended the law and abolished so-called "universal jurisdiction". Pursuant to this new

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Somali Piracy (2012) (http://www.state.gov/t/pm/rls/rm/199929.htm).

259 See also Yvonne Dutton, above n.5, 79.

260 United States v. Hasan, 747 F. Supp. 2d 599 (US ED Va., 2010), 605–616, 637, 641–42.

261 Ibid., n.8.

262 E.g., Germany, Kenya, Seychelles, South Africa, Tanzania, Thailand, UK.

263 Judiciary Act, Organic Law 6/1985 (1 Jul. 1985), Article 23(4). See Guatemalan Generals, STC No. 237/2005 (Spain Constitutional Tribunal, 2005), reprinted in 8 YIHL (2005).

legislation, Spanish jurisdiction may be exercised over crimes committed outside national territory, including piracy on the high seas, when a "relevant link to Spain" is established.[264] Prior to the 2009 law coming into force, Spanish courts prosecuted Somali pirates only when Spanish vessels were attacked.[265] Additionally, Organic Act No. 1/2014 amends the 1985 law further and subjects the exercise of jurisdiction over piracy to whenever an international treaty ratified by Spain imposes an "obligation" to exercise such jurisdiction.[266] And yet, the LOSC, which has been ratified by Spain, does not set an obligation to exercise jurisdiction over piracy. As jurisdiction in Spanish legislation is far from universal,[267] it may explain why, in the commentary to the UN Secretary-General, Spain refers to its domestic law as providing for "so called 'universal jurisdiction"'.[268]

61. Conversely, several states have incorporated the LOSC but have not described their national laws as permitting universal jurisdiction. For example, the "Italian Navigation Code", which deals with piracy under the title "On crimes against the State", does not provide for universal jurisdiction.[269] In response to Somali piracy crisis and in light of the conclusion of a piracy prosecution agreement between the EU and Kenya,[270] Italy adopted a new law, in 2008, providing that the crimes set forth in the Italian Navigation Code

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264 Organic Act No. 1/2009. Ministry of Foreign Affairs and Cooperation to the UN Office of Legal Affairs, Contribution of Spain on the Topic "The Scope and Application of the Principle of Universal Jurisdiction" (22 Feb. 2016) (http://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf (UN Note on Spain)).

265 As Spanish law did not, at the time of these trials, provide for a substantive crime of "piracy", the suspects were charged with offences inter alia hijacking and criminal association pursuant to the Penal Code, Articles 164 & 515 respectively.

266 Organic Act No. 1/2014, Article 23(4)(d).

267 See also Marta Bo, above n.243, 84–85.

268 UN Note on Spain, above n.264.

269 Secretary-General Compilation of Legislation, above n.224, 45. See also Brazil Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_maratime_law.pdf).

270 Exchange of Letters between the EU and Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by EUNAVFOR, 2009 OJ (L 79/52).

shall apply to foreigners and nationals abroad, as long as they are committed either in high or territorial seas "covered by the EU ATLANTA mission".[271] As a seizing state and a member of the EU naval force,[272] Italian legislation is intended to apply to acts of piracy specifically in the Somali context when committed against Italy or Italian nationals or their property, in situations where a regional state is unwilling to accept the transfer of suspects pursuant to the EU piracy prosecution agreement.[273]

62. Similarly, in 2011 France updated its legislation in response to the outbreak of Somali piracy, which takes into account piracy prosecution agreements concluded by the EU and regional states.[274] The existing law provided French courts with jurisdiction over piracy "only when the victim was a French national", whereas the new law reflects the wording in Article 105 of the LOSC.[275] France describes this new legislation as providing French courts with "quasi-universal jurisdiction".[276] France understands "quasi-universal jurisdiction" to mean jurisdiction that has a link with France.[277]

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271 Decree-Law No. 209, 30 Dec. 2008.

272 See below, n.311 and accompanying text.

273 Decree-Law No. 209, 30 Dec. 2008, Article 5(4). For Somali piracy trials in Italy, see Tribunale di Roma (Sez. minori), Montecristo (Italy, 16 Jun. 2012); Tribunale di Roma, Montecristo (Italy, 28 Nov. 2012); Tribunale di Roma, Valdarno (Italy, 4 Dec. 2012) (eleven pirates). See also Rachele Cera, The Montecristo Case, 16 YIHL (2013). The requirement of a nexus equally applies to the legislation of Belgium, which created a distinct crime of piracy in 2009 and reflects the wording of the LOSC; see Law on Combating Piracy at Sea 2009; Belgium Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BEL_legislation_to_combat_piracy.pdf).

274 Law No. 2011-13, 5 Jan. 2011. See also Marta Bo, above n.243, 85.

275 Secretary-General Compilation of Legislation, above n.224, 24.

276 Ibid. Similarly, Russia describes its national law criminalizing "piracy", which is regarded as "fully consistent" with the LOSC, as providing for "near-universal jurisdiction" because in practice a link, such as harm to Russian interests or nationals, is required; see Secretary-General Compilation of Legislation, ibid., 76–77; Russia Response to IMO Circular Letter, (http://www.un.org/depts/los/piracy/piracy_national_legislation.htm).

277 Permanent Mission of France to the UN Office of Legal Affairs (27 Apr. 2010), para. 1 (www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf).

Thus, the exercise of jurisdiction is predicated upon the satisfaction of two conditions. The first is that suspects are captured by French naval forces, when it is deemed "necessary", and the suspect is also present in France.[278] However, there is no legal obligation to put suspects on trial in France.[279] In practice, the meaning of "necessary" seems to be where French flag vessels or nationals are attacked.[280] Second, France may discretionally assert jurisdiction "[i]n the absence of any agreement" concerning jurisdiction with another state, be they regional states pursuant to piracy prosecution agreements or seizing states that have a nexus with the crime.[281]

IV.C.iii. Treaty jurisdiction

63. Related to the LOSC, the legislation of several states contain general provisions allowing for the exercise of jurisdiction over crimes committed by foreign nationals abroad where permitted or obliged by a treaty to which the state is a party.[282] These states are of the view that, even though they have no specific piracy laws or reference piracy at all in their legislation, their treaty obligations are part of their national laws and they therefore allow the possibility of asserting universal jurisdiction (or any other type of prescriptive jurisdiction for that matter) where required by a treaty to which the state is a party. Therefore, the legislative basis for the exercise of jurisdiction corresponds with (and goes no further) than the treaties themselves. For example, the domestic law of China provides for extraterritorial jurisdiction

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278 Secretary-General Compilation of Legislation, above n.224, 24.

279 Ibid.

280 Part II.D.i.

281 Law No. 2011-13, 5 Jan. 2011, Article 5.

282 E.g., Secretary-General Compilation of Legislation, above n.224, 9–11 (China); Finland Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_criminaLcode.pdf); Czech Republic Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CZEcriminal_code_2010.pdf); Iran Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN-nationalegislation.pdf). See also Penal Code, Articles 18–21, 321–22 (Panama); Penal Code, Sections 8, 110 (Estonia); Criminal Code, Articles 8, 446 (Ukraine); Penal Code, Article 8 (Greece); Organic Court Code, Article 6 (Chile).

over offences relating to piracy (such as hijacking of vessels, acts of violence and kidnapping), when committed against the state or its citizens or within the scope of obligations prescribed in treaties to which China has acceded.[283] During the work on universal jurisdiction at the Sixth Committee, the Chinese delegation suggests that China has ratified the LOSC, "which clearly provides for universal jurisdiction aimed at acts of piracy".[284] Similar statements are made by Azerbaijan,[285] Bulgaria[286] and Finland.[287] The problem with this interpretation is that no multilateral treaty establishes universal jurisdiction, while the LOSC does not mandate universal or any other type of prescriptive jurisdiction.

IV.C.iv. Nexus requirement between the crime and the prescribing state

64. The national laws of other states expressly require proof of a link with the impugned conduct and/or make the exercise of jurisdiction conditional on authorization by a governmental or state official to ensure that prosecutions are initiated in the interest of the forum state.[288] For example,

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283 Secretary-General Compilation of Legislation, above n.224, 9–10.

284 Government of the People's Republic of China, Information from and Observations by China on the Scope and Application of the Principle of Universal Jurisdiction, UN Doc. 15/19/10 (2010), para. 11 (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf (UN Note on China)).

285 Information submitted by the Azerbaijani Republic on the Scope and Application of the Principle of Universal Jurisdiction (2010) (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Azerbaijan_E.pdf).

286 Permanent Mission of the Republic of Bulgaria to the UN Office of Legal Affairs (2010) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR_penal_code.pdf).

287 Finland Response to IMO Circular Letter (2010) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_criminal_code.pdf).

288 E.g., Secretary-General Compilation of Legislation, above n.224, 11 (Denmark), 85 (Turkey); Denmark Response to IMO Circular Letter (2009) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DNK_national_legislation_piracy.pdf); Turkey Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFF

the Turkish Penal Code provides for jurisdiction over offences committed on the high seas where its flag vessels are attacked or offences committed against a foreign vessel where the victim is a Turkish citizen.[289] Similarly, the legislation of Denmark, which was amended in 2008, provides for jurisdiction over acts related to piracy (as defined in national law) where attacks have been committed against Danish nationals or national interests or if the suspect is subsequently "present" in Denmark.[290] However, in practice the circumstances in which suspects are present in Denmark are where an act of piracy has been committed against a Danish flagged-vessel or a Danish national or resident. Thus, the only occasion that suspects have been "present" in Denmark is when "a small vessel with six persons, a large amount of petrol, possibly weapons and no fishing gear had sailed close to a Danish registered containership of considerable size in the Gulf of Aden" and was captured by a Danish naval vessel.[291] Even then, the investigations were ultimately discontinued "as no specific attack had been launched against the Danish ship".[292] In practice, a close connection is needed for Denmark to assert jurisdiction over piracy.[293]

ILES/TUR.penalcriminaLprocedure.pdf); South Korea Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KORlegislation-piracy.pdf); Norway Response to IMO Circular Letter (2009) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NORpiracy-summary.pdf); Permanent Representative of Norway to the UN (7 May 2010) (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Norway.pdf); Russia Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFLES/RUS-nationaIlegislationpiracypdf); Sri Lanka Response to IMO Circular Letter (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/LKA_national_%20legislation_piracy.pdf); Courts of Judicature Act 1964, Section 22(1)(a)(i)–(iii) (Malaysia).

289 Turkey Response to IMO Circular Letter, ibid.

290 Criminal Code 1992, Sections 6–8.

291 Re MV Elly Mærsk, U.2011.3066H, Tfk2011.923/1 (Denmark Supreme Court, 2 Aug. 2011).

292 Secretary-General Compilation of Legislation, above n.224, 13.

293 Wendy Zeldin, Dutch Requested to Allow Danish Prosecution of Suspected Somali Pirates (12 Jan. 2009) (http://www.loc.gov/law/foreign-

65. The review of legislation countering piracy reveals broad inconsistency from the point of view of both how "piracy" is criminalized (and various other types of conduct where states have not specifically criminalized piracy) and the scope of extraterritorial jurisdiction and other jurisdictional requirements that must be met for the state to prosecute captured pirates.[294] Of the eighty-five states reviewed, the legislation of all but 27% require some form of a link with piracy and crimes relating to piracy for jurisdiction to be established.[295] However, they do not necessarily provide for universal jurisdiction proper. On the contrary, of this 27% the legislation of thirteen states simply contains a general jurisdictional provision incorporating obligations contained in treaties to which they are a party.[296] Relatedly, a further seven states incorporate wording used in the LOSC, which itself does not establish universal prescriptive jurisdiction.[297] For historical reasons, the remaining eleven states provide for a type of no proof of a nexus jurisdiction.[298] However, this type of jurisdiction contains different variations. The Dutch Criminal Code provides for such jurisdiction over unlicensed privateers. Due to the transplantation of English common law, nine of these eleven states provide for this type of jurisdiction over piracy,[299] although the Bahamas, Cyprus and Israel make no reference to piracy "by the law of nations", while Malaysia requires proof of a nexus with the offence before it will prosecute piracy by the law of nations[300] and Singapore does not claim to

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news/article/denmark-dutch-requested-to-allow-danish-prosecution-of-suspected-somali-pirates/).

294 The definition of piracy and other substantive crimes is beyond the scope of this Article, but see Yvonne Dutton, above n.5, 78; Marta Bo, above n.243, 84.

295 Australia, Azerbaijan, Bahamas, Bulgaria, Canada, Chile, China, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Israel, Iran, Japan, Kenya, Kuwait, Liberia, Mauritius, New Zealand, Panama, Paraguay, Seychelles, Singapore, South Africa, Thailand, the Netherlands, UAE, Ukraine, UK, US. See also Yvonne Dutton, ibid., 81–83; Marta Bo, ibid.

296 Azerbaijan, Bulgaria, Chile, China, Czech Republic, Estonia, Finland, Germany, Greece, Iran, Panama, Paraguay, Ukraine.

297 Japan, Kenya, Liberia, Mauritius, Seychelles, Somaliland, South Africa, Thailand.

298 Australia, Bahamas, Canada, Cyprus, Israel, New Zealand, Singapore, the Netherlands, UK, US.

299 Australia, Bahamas, Canada, Cyprus, Israel, New Zealand, Singapore, UK

300 Part IV.C.i.

establish universal jurisdiction over piracy by the law of nations in its commentary to the UN Secretary-General.[301] Whereas the US provides for a similar type of no proof of a nexus jurisdiction over piracy under the law of nations with the additional requirement that a suspect is "brought into or found in the United States". The legislative practice of states clearly undermines the prevailing narrative that universal jurisdiction is well-established in custom. If that were true, a significant number of states would have universal jurisdiction legislation for piracy. Yet none clearly do. Moreover, having a law on the books is quite different to assertions of jurisdiction. Thus, even where national laws do not require proof of a nexus with a prosecuting state, the relevant states require a close link with an offence to actually assert jurisdiction.[302] As legislation constitutes one aspect of physical state practice, it is essential to consider how states utilize their national law and prosecute pirates.

IV.D. Somali piracy prosecutions in domestic courts

66. In the assessment of state practice supporting universal jurisdiction in customary international law, this section presents the findings of every single Somali piracy prosecution from 2006 to 2016, including the "overall context" and "particular circumstances" in which they are undertaken.[303] This period of study captures the height of Somali piracy attacks, between 2008 and 2011.[304] Analyzing the context and circumstances of piracy prosecutions is also useful for identifying potentially important links that may exist with prosecuting states and understanding when extraterritorial jurisdiction is likely to be used.

67. In the ten-year period of study, twenty-three states asserted jurisdiction and initiated prosecutions against 1248 suspected Somali pirates or detained them with a view to prosecution.[305] The data on Somali piracy are presented

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301 Secretary-General Compilation of Legislation, above n.224, 77–78.

302 Part IV.C.

303 According to the ILC, in the assessment of state practice and opinio juris in support of a customary rule, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found"; ILC Drafting Committee, above n.200, Conclusion 3.

304 See sources cited above n.2.

305 The survey was undertaken by examining a range of sources, including:

in Table 1 below.[306] Notwithstanding six desultory prosecutions relating to acts of "piracy" by China and India in the late 1990s and early 2000s,[307] the data compiled in the period of study represents the first concerted effort by any state to suppress and prosecute piracy since the nineteenth century and the largest recorded number of pirate trials in history.[308] The unprecedented number of prosecutions in modern history is further underlined by the fact that piracy has long been a problem both off Somalia and in other parts of the world prior to the period of study.[309] The data on Somali piracy thus provides fertile ground to test the use of universal jurisdiction in actual practice.

TABLE 1. SOMALI PIRACY PROSECUTIONS, 2006 TO 2016
TABLE 1.1. SEIZING STATES

Prosecuting state	Number of suspects prosecuted	Percentage of suspects prosecuted in "seizing" states
Belgium	2	1
Denmark	6	2
France	22	8
Germany	10	4
Italy	23	8
India	120	44

specialized journals; websites; newspaper articles and other media documents; and the Google search engine. The survey was compiled as of October 2016. All the suspects in Table 1 are of Somali nationality.

306 Percentages are rounded to the nearest whole number.

307 None of these prosecutions are examples of universal jurisdiction. For a contrary view, see Eugene Kontorovich & Steven Art, above n.3, 447.

308 In the nineteenth century, maritime powers tended to subject "pirates" to military force and summary execution, rather than subject them to a criminal process; consequently, there is a dearth of recorded trials. See, e.g., Caitlin M. Gale, Barbary's Slow Death: European Attempts to Eradicate North African Piracy in the Early Nineteenth Century, 18 Journal of Maritime Research (2016); James A. Wombwell, The Long War Against Piracy: Historical Trends (2010), 36–55 (http://www.dtic.mil/dtic/tr/fulltext/u2/a522959.pdf).

309 See sources cited above n.2.

Japan	4	1
Malaysia	7	3
The Netherlands	29	11
South Korea	5	2
Spain	8	3
UAE	10	4
US	28	10
Subtotal	274 suspects	

TABLE 1.2. REGIONAL STATES

Prosecuting state	Number of suspects prosecuted	Percentage of suspects prosecuted in "regional" states
Comoros	6	1
Kenya	164	17
Madagascar	12	1
Maldives	41	4
Mauritius	12	1
Oman	32	3
Seychelles	147	15
Somalia	419	43
Tanzania	12	1
Yemen	129	13
Subtotal	974 suspects	

68. The data in Table 1 shows that suspected pirates are prosecuted in thirteen seizing states and ten regional states. Seizing states are located outside the region of Somalia and have, for the first time in modern history, deployed warships to deter and capture suspects, representing "one of the largest peacetime naval operations ever".[310] Many seizing states are acting collectively in one of three multinational naval coalitions, one of which includes the first-

[310] Secretary-General Report, above n.133, para. 8.

ever EU naval force ("EUNAVFOR").[311] Conversely, regional states are located in relatively close geographical proximity to Somalia and have not deployed warships in counter-piracy missions. The third column in Table 1 represents the percentage of suspects prosecuted relative to whether the prosecuting state is a seizing or regional state. Analysis of the data in Table 1 reveals that the states which actually assert extraterritorial jurisdiction and undertake prosecutions either have close links to the alleged offence or act on behalf of their bilateral partners pursuant to piracy prosecution agreements. There is no evidence that any of the states in Table 1 have used universal jurisdiction for piracy.

IV.D.i. Piracy prosecutions by seizing states

69. Seizing states comprise the largest number of states in the data set. Yet, they prosecute the smallest number of suspects, amounting to just 22% of the total 1248 suspects. This is despite at least five of these states claiming to establish "universal jurisdiction" for piracy in their national legislation,[312] while a further five recognize in their verbal actions universal jurisdiction's existence in customary international law for piracy.[313] The circumstances in which these states assert jurisdiction and prosecute suspects in their own domestic courts shows that a sufficiently close link with the offence must exist and a regional state is either unwilling or unable to initiate proceedings on its behalf.[314] A sufficiently close link typically includes threats to or attacks on the state's registered vessels and warships and shipping companies operating under a foreign-flag, as well as nationals killed or taken hostage.[315]

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311 Ibid.

312 Germany, Japan, the Netherlands, Spain, US.

313 Belgium, India, Italy, Malaysia, South Korea.

314 A regional state may be unwilling to prosecute suspects because no piracy prosecution agreement is in place with the relevant seizing entity or the seizure falls outside the terms of the concluded agreement. For example, South Korea prosecuted five suspects (Table 1) only after the government failed to negotiate their transfer to Yemen or Kenya for purposes of prosecution; see further Seokwoo Lee, Republic of Korea v. Araye, No. 2011 Do 12927 (Supreme Court Rep. of Korea), 106 AJIL (2012), 631

315 See also Secretary-General Report, above n.133, para. 22; Secretary-General Compilation of Legislation, above n.224, 13; Robin Geiss & Anna Petrig,

Additionally, seizing states regard Somali piracy as a serious threat to their national economy and security.[316]

For example, the US prosecutes 10% of pirates among seizing states, amounting to 2% of the total number of suspects prosecuted, all of which involve attacks on US flagged vessels, warships, nationals and shipping companies.[317] The only piracy case in the US proclaimed to be based on universal jurisdiction is *Ali*, in which a US District Court held that "[b]ecause there is no nexus between the United States and the conduct charged in the indictment, only the universality theory of extraterritorial jurisdiction is applicable here".[318] Thus, Bassiouni asserts that *Ali* is the "first modern US piracy case based on universal jurisdiction".[319] However, the US had a strong connection to the act of piracy in this case; indeed, the captured vessel carried cargo owned by a US corporation and the defendant was a long-term US resident.[320]

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above n.90, 30–31; Kenneth Scott, above n.173, 15; Milena Sterio, above n.174, 111; James, T. Gathii, Kenya's Piracy Prosecutions, 104 AJIL (2010), 425; Lauren Ploch et al., Piracy off the Horn of Africa, Congressional Research Service, Report R40528 (2011), 1–2 (www.crs.gov); House of Commons Foreign Affairs Committee, Piracy off the Coast of Somalia, HC 1318 2010-12 (2012), para. 93 (UK Foreign Affairs Committee); UK House of Lords, EU Committee, Combatting Somali Piracy: The EU's Naval Operation Atlanta, 12th Report, Sess. 2009-10 (2010), 35 (UK House of Lords).

316 E.g., UK Foreign Affairs Committee, ibid.; Lauren Ploch et al., ibid., 29.

317 United States v. Muse, No. 9-CR-5 12 (US SDNY, 2009); United States v. Said, 680 F.3d 374 (US 4th Cir., 2012); United States v. Salad, 2012 WL 6097444 (US ED Va., 2012); Chuck Mason, Piracy: A Legal Definition, Congressional Research Service, Report R41455 (2010) (www.fas.org/sgp/crs/misc/R41455.pdf); John R. Crook, Contemporary Practice of the United States Relating to International Law, 105 AJIL (2011), 133, 349; Lauren Ploch et al., ibid., 1–2; Secretary-General Report, above n.133, 11.

318 United States v. Ali, 2012 WL 2870263 (US DDC, 2012), 13–14. The District Court's decision in this case regarding universal jurisdiction was subsequently affirmed by the Court of Appeals; see United States v. Ali, 718 F. 3d 929 (US DC Cir., 2013).

319 M. Cherif Bassiouni, International Extradition: United States Law and Practice (2014), 432.

320 Japan's prosecution of four pirates (Table 1.1.) also concerned the hijacking of a foreign-flagged vessel operated by a Japanese shipping company, M/V

US practice is identical to that of other seizing states in Table 1. For example, another seizing state claiming to provide for universal jurisdiction is the Netherlands—the first European seizing state to prosecute Somali pirates and the state that has prosecuted the most suspects when compared to other Western nations.[321] The first of these cases, occurring in 2010, concerned the prosecution of five suspects for an attack on the *MS Samanyolu*, a Netherlands Antilles-registered vessel.[322] This case is frequently cited by leading scholars as an example of universal jurisdiction state practice.[323] On closer analysis, the court in the instant case referred to the jurisdiction in the Dutch Criminal Code as a form of "so-called universal jurisdiction" in passing and took care to emphasize that:

> [c]ases of piracy could occur whereby the Netherlands are not involved in any manner whatsoever, and in which a prosecution of the suspects involved would for this reason not be plausible and would seem undesirable. […] [T]he jurisdiction of the Netherlands would be an issue open to debate.[324]

In addition to doubting the applicability of Dutch law to acts of piracy having no link at all with the Netherlands, the court carefully acknowledged that the present case was not an example of universal jurisdiction either. This is because the Netherlands had deployed warships to fight Somali piracy and the offence concerned "an attack on a ship carrying the flag of the Netherlands Antilles, which is a part of the Kingdom of the Netherlands".[325] Similarly, in the *Feddah* case, the Court of Appeal held that in using the universality principle there is a "genuine link" with the Netherlands, as Somali

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Guanabara case, 66(4) High Court Reporter (Kosai Hanrei Shu) 6 (Tokyo High Court, 2013), reprinted in 1407 Hanrei Taimuzu 234 (www.courts.go.jp/app/files/hanrei_jp/188/084188_hanrei.pdf).

321 Table 1.1.

322 Cygnus case, case no. 10/600012-09 (the Netherlands Court of Rotterdam, 17 Jun. 2010), reprinted in 145 ILR (2012).

323 Maggie Gardner, above n.89, 799, 807; Roger O'Keefe, Domestic Courts as Agents of Development of the International Law of Jurisdiction, 26 Leiden J. Int'l L. (2013), 548–49.

324 Cygnus case, case no. 10/600012-09 (the Netherlands Court of Rotterdam, 17 Jun. 2010), reprinted in 145 ILR (2012), 495.

325 Ibid.

pirates had fired on Dutch navy personnel.[326] In the *Choizil* case, the Court of Appeal reasoned that the Netherlands "has an economic interest in undisturbed shipping in international waters", an interest "reflected" in the "universal jurisdiction" of Dutch courts.[327] As discussed in Section C above, so-called universal jurisdiction for piracy in the Dutch Criminal Code is not universal jurisdiction proper and it applies to acts piracy that have a sufficiently close link to the Netherlands.

Conversely, other seizing states prosecuting Somali pirates have not invoked "universal jurisdiction". For example, Malaysia—the first state in East Asia to prosecute Somali pirates—tried seven suspects for hijacking a Malaysian-flagged vessel, and for firing on a Malaysian warship and Malaysian armed forces, which was deemed to affect Malaysia's national security.[328] Reflecting on this case at the Sixth Committee, the Malaysian delegation states that, "in keeping with the practice of most other States", Malaysia prosecutes pirates for attacks on its own flagged vessel by asserting jurisdiction "on the basis of territoriality, nationality and the protective principle".[329] Similarly, the first and only piracy trial in South Korea concerned the hijacking of the *MV Samho Jewelry*, a chemical carrier operated by Samho Shipping—a South Korean company—the taking hostage of its crew and attempting to murder its captain of Korean nationality, as well as firing upon the Korean navy during the rescue operation.[330] The law of South Korea establishes extraterritorial jurisdiction on the basis of "specially protected interests", rather than that of universality,[331] while the court in the above case held that it had territorial jurisdiction based on the presence of the defendants.[332] India

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326 Feddah case, case no. 22-004920-12 (the Netherlands Court of Appeal, 21 Mar. 2014); see also Mohsen case, case no. 2200024814 (the Netherlands Court of Appeal, 2 Apr. 2015).

327 Choizil case, case no. 22-004017-11 (the Netherlands Court of Appeal, 12 Dec. 2012).

328 Table 1.1.

329 UN GAOR, 66th Sess., 12th mtg., UN Doc. A/C.6/66/SR.12 (2011), para. 61 (Malaysia).

330 Seokwoo Lee, above n.314; Secretary-General Compilation of Legislation, above n.224, 74.

331 Universal Jurisdiction in the Republic of Korea (2010) (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf (UN Note on South Korea)).

332 Seokwoo Lee, above n.314, 632.

has prosecuted the largest number of Somali pirates of all seizing states, amounting to 44%, all of which involved pirates firing on Indian warships.[333] The Indian Penal Code does not establish a substantive crime of "piracy" or universal jurisdiction.[334] Hence, the suspects were charged, amongst other offences, with "waging war" against the Indian Government under the Penal Code and offences under the Unlawful Activities Prevention Act, which criminalizes offences relating to acts of terrorism that threaten the security or sovereignty of India.[335]

70. The need for close links may partly explain why few seizing states have prosecuted such a small number of suspects relative to the total number of prosecutions undertaken, and despite more than forty seizing states contributing, at one time or another, to expensive counter-piracy operations in the Gulf of Aden.[336] Conversely, the vast majority of these seizing states have not prosecuted a single Somali pirate, even though at least seven of them claim in verbal actions to establish forms of "universal jurisdiction" in their national law for piracy,[337] while several others accept universal jurisdiction's

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333 Table 1.1.

334 A maritime piracy bill was introduced to the Indian Parliament in 2012 but did not become law.

335 Penal Code, Act No. 45 of 1860, Unlawful Activities Prevention Amendment Act 2008.

336 The practice of seizing states "on the ground" in combating piracy is just as relevant for assessing jurisdiction as those states undertaking prosecutions. In addition to the states listed in Table 1, seizing states include: Australia, Bahrain, Bulgaria, Canada, China, Colombia, Croatia, Cyprus, Czech Republic, Finland, Greece, Indonesia, Iran, Jordan, Kuwait, Latvia, Lithuania, Malta, Montenegro, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Singapore, Sweden, Switzerland, Thailand, Turkey, Ukraine, UK; see Secretary-General Report, above n.133, para. 8; Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia, UN Doc. S/2015/776 (12 Oct. 2015), paras. 43–47. According to Kenneth Scott, above n.173, 15, the deployment of warships to counter piracy developed before, and largely independent of, any focused or deliberate law enforcement effort; "[t]he law enforcement/prosecution effort that followed was largely an afterthought and was entirely reactive, in response to the military interdiction of low-level pirates at sea and the sheer necessity of doing something with them."

337 Cyprus Response to IMO Circular Letter, above n.244; Permanent Mission of Thailand to the UN (2013)

existence in international law but do not claim to establish such jurisdiction themselves.[338] Instead, suspects are prosecuted—if at all—on behalf of seizing states by bilateral partners in the region.

71. As seizing states are unwilling to assert universal jurisdiction, there is a lack of "clarity about how to dispose of pirates after their capture".[339] As a result, seizing states engage in a widespread practice known as "catch and release", which continues to this day.[340] The number of suspects released is speculative, although it is estimated to be about 90%.[341] Thus, the overwhelming majority of suspects are simply released by seizing states. For example, the German navy released suspected pirates because Germany would only try pirates "where German interests were hurt", such as cases where a German registered ship is attacked or German nationals are killed or injured.[342] This suggests that the 1248 suspects in Table 1 amounts to no more than 10% of the absolute number of *potential* prosecutions in the period of study. The lack of universal jurisdiction practice is thus not for want of available opportunity. The requirement of a nexus with acts of piracy and the practice of catch and release contrast markedly with the concept of universal jurisdiction in the account of the prevailing narrative, according to which all states take an interest in prosecuting piracy based solely on the heinous nature

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(https://papersmart.unmeetings.org/media2/702895/thailand-86.pdf); UN Note on UK, above n.244; UN Note on Australia, above n.244; UN Note on China, above n.284, paras. 10–11; UN Note on New Zealand, above n.244, 3; UN GAOR, 65th Sess., 11th mtg., UN Doc. A/C.6/65/SR.11 (13 Oct. 2010), para. 56 (Russia).

338 Norway Response to IMO Circular Letter, above n.288; Permanent Representative of Switzerland to the UN Office of Legal Affairs, Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction (2010) (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Switzerland_E.pdf); UN Note on Kuwait, above n.208; UN GAOR, 64th Sess., 13th mtg., UN Doc. A/C.6/66/SR.13 (30 Nov. 2011), para. 14 (Indonesia).

339 SC Res 1851 (16 Dec. 2008), pmbl. para. 9.

340 Secretary-General Report, above n.133, 14–15; Special Adviser Lang Report, above n.135, paras. 14, 43; SC Res 2383 (7 Nov. 2017).

341 Special Adviser Lang Report, ibid., para. 14.

342 Björn Elberling, German Involvement in the Prosecution of Somali Piracy Suspects, 52 GERMAN Y.B. INT'L L. (2009).

of the crime to protect of international community values.[343]

IV.D.ii. Piracy prosecutions by regional states

72. The remaining prosecutions in Table 1, amounting to 78% all Somali pirates, are undertaken in ten regional states.[344] Of all regional prosecutions, the largest number by any one state, amounting to 43%, occurred in Somalia—the alleged perpetrators' home state.[345] This is an example of nationality jurisdiction.[346] The remaining 57% of all regional prosecutions other than those occurring in Somalia occur in one of two situations, both of which exhibit important links with the prosecuting state.

Firstly, 242 suspects, accounting for 44%, involve offences committed against the registered vessels or nationals and/or occur in the territorial waters of the regional state concerned: Comoros,[347] Madagascar,[348] Maldives,[349]

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343 Part II.B.

344 Table 1.2.

345 Table 1. As far as the author is aware, these suspects are detained awaiting trial due to the lack of implementation of counter-piracy legislation and judicial training in Somalia.

346 Part II.A.

347 Six suspects. The Comoros has no national legislation creating a substantive crime of "piracy", Comoros Response to IMO Circular Letter (2009) (http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/COM_national_legislation.pdf).

348 Twelve suspects. See REUTERS, Madagascar Detains 12 Suspected Somali Pirates (1 Mar. 2011) (http://www.reuters.com/article/2011/03/01/somalia-piracy-madagascar idUSLDE7200K820110301).

349 Forty-one suspects. The Maldives has no national legislation creating a substantive crime of "piracy" and all detained suspects have been repatriated to Somalia.

Oman,[350] Seychelles,[351] Tanzania[352] and Yemen.[353] Therefore, they should not be counted as examples of "universal jurisdiction". Nor do these states provide for universal jurisdiction in national legislation. The domestic law of Comoros,[354] the Maldives,[355] Oman[356] and Yemen[357] apply outside national territory when there exists a close link, such as the involvement of the state's registered vessels, either the offender or victim are the state's nationals, or the crime threatens the state's security. Whereas the law of Madagascar replicates the wording of the LOSC in criminalizing piracy but requires that suspects are seized by the Malagasy state; and, in any event, the jurisdiction Malagasy courts is restricted territorially.[358]

The second situation, amounting to 56% of remaining regional prosecutions outside Somalia, occur in four states, of which 32% take place

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350 Thirty-two suspects. See, e.g., GULF NEWS, Ten Somali Pirates Sentenced to Life Imprisonment (2 Nov. 2011) (http://gulfnews.com/news/gulf/oman/ten-somali-pirates-sentenced-to-life-imprisonment-1.922673).

351 Fifty-six suspects. See, e.g., Republic v. Dahir and Twelve Ors (51 of 2009) [2010] SCSC 81 (Seychelles Supreme Court, 2010); R v. Osman & Ors (CO 19/2011) [2011] SCSC 74 (Seychelles Supreme Court, 2011), para. 32.

352 Twelve suspects. See, e.g., Fumbuka Ng'wanakilala, Tanzania Arrests 7 Pirates After Attack on Oil Vessel (4 Oct. 2011) (https://www.reuters.com/article/tanzania-pirates/tanzania-arrests-7-pirates-after-attack-on-oil-vessel-idUSL5E7L43LO20111004).

353 Eighty-three suspects.

354 Penal Code, Law No. 082 P/A.F-Law 95-012/AF.

355 Penal Code, Law No. 6/2014, Section 13.

356 Royal Decree, No. 7/1974, Articles 6–12.

357 Republican Decree, Law of Criminal Procedures 1994, Articles 244–47. In Yemen suspected pirates are tried before a Special Criminal Court, which was established to prosecute acts of terrorism and crimes threatening the state's security and national interests; see Presidential Decree 391/1999; Mohammed Al Qadhi, Yemen Tries Suspected Pirates (30 Sep. 2009) (https://www.thenational.ae/world/mena/yemen-tries-suspected-pirates-1.550303).

358 The Maritime Code, Law No. 99-028 of Feb. 3, 2000, Articles 1.5.01, 1.5.05; see also Jean E. Randrianantenaina, Maritime Piracy and Armed Robbery Against Ships: Exploring the Legal and the Operational Solutions. The Case of Madagascar (2013), 61–71 (http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/Randrianantenaina_1213_Madagascar.pdf).

in Kenya and Seychelles combined.[359] Except for Yemen,[360] all of these prosecutions are undertaken on behalf of seizing states, pursuant to formal piracy prosecution agreements, in return for significant financial and other incentives.[361] In 2006 the US was the first seizing state to capture a group of Somali pirates and pursuant to a secret, ad hoc agreement with the Kenyan Government experiment with handing them over for trial in an important test case.[362] Once Kenyan domestic courts decided that they were competent to try pirates captured by a seizing state, numerous seizing states and the EU engaged in the practice of concluding piracy prosecution agreements with

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359 Kenya, Mauritius, Seychelles, Yemen.

360 Yemen has not concluded formal piracy prosecution agreements. However, Russia and Denmark transferred forty-six suspects to Yemen on an ad-hoc, informal basis with a view to prosecution. The suspects were captured off Yemen's coast as Somali pirates posed an increasingly serious threat to and had attempted attacks not only against the respective seizing state's vessels and nationals, but also those of Yemen. Similarly, India transferred twelve suspects to Yemen, some of whom resided in Yemen, after they had allegedly captured a Yemeni vessel. See REUTERS, Russian Forces Seize Oil Tanker from Somali Pirates (6 May 2010) (https://www.reuters.com/article/us-russia-tanker-pirates-idUSTRE64531520100506); BBC NEWS, Russia Captures Somali Pirates (28 Arp. 2009) (http://news.bbc.co.uk/1/hi/world/africa/8023951.stm); The National, Yemen Tries Suspected Pirates (30 Sep. 2009) (https://www.thenational.ae/world/mena/yemen-tries-suspected-pirates-1.5503030).

361 These financial incentives are provided, in part, under the auspices of the Trust Fund, above n.15. Other incentives provided by wealthy seizing states include building new modern courtrooms and prisons, as well as providing judicial training programmes and coast guard upgrades. Additionally, regional states are incentivized in some circumstances to prosecute suspects captured by seizing states to protect their own national security, flag vessels, nationals and economy. For example, in AG v. Hashi & Eight Others [2012] eKLR (Kenya Court of Appeal, 2012), para. 38, the Court of Appeal held that Somali piracy "affected the economic activities and thus the economic well-being of many countries including Kenya"; therefore, Kenya has the right to punish the offence. See also Anthony F.T. Fernando, An Insight into Piracy Prosecutions in the Republic of Seychelles, 41 Commonwealth Law Bulletin (2015).

362 Hassan M. Ahmed v. Republic, Crim. App. No. 198 (Kenya High Court, 2009).

Kenya and other regional states.[363] Seizing states contributing to EUNAVFOR that have not negotiated piracy prosecution agreements themselves are able to transfer suspects to a regional state with whom the EU has concluded such an agreement, even if they are not a member of the EU.[364] As discussed in Part III, the conclusion of such agreements and the prosecution of suspects on behalf of seizing states has been encouraged by the UN Security Council.

73. In state practice, the existence of a piracy prosecution agreement is a precondition for a regional state to assert its jurisdiction and prosecute suspects captured by a bilateral partner. In the absence of such an agreement, prosecutions on behalf of seizing states are not entertained. In this regard, Tanzanian legislation—revised in 2010 to implement agreements with bilateral partners—expressly declares that it shall not apply to piracy committed by a foreign-flagged ship "unless there is a special arrangement between the arresting state or agency and Tanzania".[365] The terms of these

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363 See, e.g., MOU Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, US–Kenya (16 Jan. 2009). For a catalogue of fifteen cases in Kenya involving over 130 suspects, pursuant to such agreements with various seizing states, see The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, No. ICC-01/09-01/11 (ICC Pre-Trial Chamber II, 21 Apr. 2011), Annex 15 to Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute (https://www.icc-cpi.int/RelatedRecords/CR2011_04532.PDF). For examples of agreements between seizing states and the Seychelles, see Shenaz Muzaffer, Piracy in the Indian Ocean and the Horn of Africa, Manual for Prosecutions (2014), paras. 15.9, 43 (http://www.piracylegalforum.org/wp-content/uploads/2015/03/Piracy-manual-final-version-8.pdf).

364 UK House of Lords, above n.315, 35. Joint Action 2008/749/CFSP, Article 10, provides for the participation of third countries in EUNAVFOR and Norway, Croatia, Montenegro, Switzerland and Ukraine, amongst others, have taken advantage of it.

365 Penal Code, amended by Written Laws (Miscellaneous Amendments) (No. 2) Act (2010), Section 66. Remarkably, the Tanzanian delegation nevertheless claims that the national legislation of Tanzania provides for "universal jurisdiction"; see UN SCOR, 65th yr., 6374th mtg., UN Doc. S/PV.6374 (25 Aug. 2010), 34 (Tanzania). The Piracy and Maritime Violence Act 2011 (Mauritius), Section 8, expressly makes provision for the conclusion of an "agreement or arrangement with another Government or an international

agreements determine how a regional state will exercise its broad prosecutorial discretion and accept a case for prosecution, effectively making it an agent of a seizing state. The agreements also restrict the scope of jurisdiction, thereby ensuring that regional states do not assert universal jurisdiction properly so-called and prosecute *any* act of piracy committed on the high seas *anywhere* in the world.[366] For example, regional states only prosecute suspects captured by their own bilateral partners.[367] Suspects have to be captured within certain geographical limits of the regional state concerned.[368] The Seychelles is willing to accept the transfer of suspected pirates for prosecution captured by EUNAVFOR, beyond designated geographical limits, for the "protection of Seychelles flagged vessels and Seychellois Citizens on a non-Seychelles flagged vessel".[369] Similarly, Kenya is willing to accept suspected pirates pursuant to piracy prosecution agreements where there is a "Kenyan nexus".[370] Additionally, regional states have discretion to cap the number of suspects transferred for prosecution.[371] If regional states were willing to use universal jurisdiction proper for piracy,

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organisation" with a view to prosecuting suspected pirates on their behalf, presumably to prevent challenges to the legality of such transfers.

366 See also James Gathii, above n.169, 392.

367 See, e.g., Agreement between the EU and Tanzania on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European-Led Naval Force to Tanzania, 2014 OJ (L 108/1), Article 1 (EU-Tanzania Agreement).

368 See, e.g., Exchange of Letters between the EU and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, 2009 OJ (L 315/37) (EU-Seychelles Agreement); Agreement between the EU and Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associate Seized Property from EUNAVFOR to Mauritius and on the Conditions of Suspected Pirates after Transfer, 2011 OJ (L254/3); EU-Tanzania Agreement, ibid., Article 3.

369 EU-Seychelles Agreement, ibid.

370 UK Foreign Affairs Committee, above n.315, para. 97.

371 E.g., in Ali & Ors v. R (SCA 22/2012) [2014] SCCA 34 (Seychelles Court of Appeal, 2014), para. 11, of the twenty-five suspects captured by a Danish warship, the Seychelles and Kenya were willing to accept four of them for prosecution, but the remaining seventeen were released "as there was no jurisdiction that was prepared to accept them".

then there would in principle be no need to conclude piracy prosecution agreements with seizing states and the EU. The practice of concluding such agreements and prosecuting suspected pirates on behalf of their own bilateral partners is inconsistent with universal jurisdiction.[372]

74. Of the three regional states formally prosecuting suspects on behalf of seizing states, courts in Kenya and the Seychelles, whose legislation replicates the wording in the LOSC, claim to apply universal jurisdiction in actual cases.[373] Whereas the court of Mauritius in the trial of 12 suspects pursuant to a piracy prosecution agreement with the EU did not recognize universal jurisdiction for piracy, despite the law of Mauritius also reflecting the LOSC.[374] However, piracy prosecution agreements have been given little, if any, judicial consideration. In any event, regional states do not prosecute pirates absent a close link to themselves or to their bilateral partners. Therefore, prosecutions pursuant to such agreements are not examples of universal jurisdiction either.[375]

IV.D.iii. State practice does not support universal jurisdiction

75. The driving factors underlying prosecutions because of the Somali piracy crisis are twofold. The first is the prevention of impunity.[376] Somalia—the state of nationality of alleged offenders—does not have the ability to suppress pirates operating off its coast and lacks comprehensive counter-

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372 Part II.B.

373 See sources cited above n.101.

374 Police v. M. A. Abdeoulkader & Ors, Cause No. 850/2013, 2016 INT 324 (Mauritius Intermediate Court, 2016).

375 Similarly, regional states are willing to initiate prosecutions on behalf of seizing states on the basis that convicted pirates are subsequently transferred to Somalia for incarceration. To this end, Somaliland adopted The Transfer of Prisoners Law, Law No. 53/2012 to enable the transfer of prisoners from the country in which they were convicted. See further UNODC, Detention and Transfer Programme (https://www.unodc.org/unodc/en/piracy/piracy-prisoner-transfer-programme.html); MIDDLE EAST MONITOR, 120 Pirates 'Freed' from India (5 Mar. 2018) (https://www.middleeastmonitor.com/20180305-120-somali-pirates-freed-from-india/).

376 Special Adviser Lang Report, above n.135, para. 14.

piracy legislation.[377] Second, states have acted out of necessity to protect their own national interests, such as flag vessels, shipping companies, nationals and national economy and security, and/or the national interests of their bilateral partners. UN Security Council meetings underline that acting out of necessity to protect such interests is the driving momentum behind the unprecedented naval response in the Gulf of Aden, despite the scarcity of naval resources.[378] It equally explains why, before the outbreak of Somali piracy, no state in modern history has been willing to deploy warships out of a region to combat piracy.

76. Contrary to what the dominant scholarly view suggests, the recent piracy boom off the coast of Somalia has not resulted in universal jurisdiction state practice. That is to say, despite the verbal actions and *opinio juris* of several states in Table 1 being in favor of "universal jurisdiction", piracy prosecutions based on universal jurisdiction *stricto sensu* have turned out to be non-existent.[379] At no time has a state acted as an agent of the international community and prosecuted any act of piracy committed on the high seas anywhere in the world, whoever their authors and victims (or the nationality of the flag vessel or shipping company), and irrespective of the state that made the capture. Furthermore, the heinous nature of piracy has no bearing on assertions of jurisdiction and prosecutions. State practice clearly undermines the idea, inherent in the prevailing narrative, that states are motivated to prosecute piracy in the interest of the international community, and absent any connection to the state exercising such jurisdiction, because of its heinous nature. If that idea were true, we would expect a significant number of states using universal jurisdiction to prosecute Somali piracy. Yet none do.

77. The practice of states in Table 1 and the numerous other seizing states more generally is significant in terms of customary international law, not only because they include powerful states such as Russia and China but also

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377 SC Res 2383 (7 Nov. 2017), para. 4.

378 UN SCOR, 63rd yr., 6046th mtg., UN Doc. S/PV.6046 (16 Dec. 2008), 3 (Russia), 5 (China), 9 (US), 20 (Croatia), 24 (Japan), 25 (Norway), 28 (Denmark), 26 (Turkey), 32 (India); UN SCOR, 64th yr., 6095th mtg., UN Doc. S/PV.6095 (20 Mar. 2009), 28 (Malaysia); UN SCOR, 65th yr., 6374th mtg., UN Doc. S/PV.6374 (25 Aug. 2010), 27 (Norway), 38 (Korea); UN SCOR, 66th yr., 6473rd mtg., UN Doc. S/PV.6473 (25 Jan. 2011), 8 (Russia), 19 (India), 32 (Singapore), 35 (Philippines).

379 See also Yvonne Dutton, above n.5, 77.

because they are broadly representative of the international community as a whole. Professors Kontorovich and Art, in seeking to explain why universal jurisdiction prosecutions for piracy have not been used more widely, simply suggest that the most obvious reason is the fact that it is universal; states utilizing this type of jurisdiction have no link to an alleged crime but bear all of the costs and gain little benefit.[380] However, the above empirical findings reveal that states only undertake prosecutions when they have a sufficiently close link with the crime in question and therefore stand to gain the most benefit. It follows that state practice is anything but "widespread and representative, as well as consistent"[381] to support the emergence of a new rule of universal jurisdiction in customary international law.

IV.D.iv. A shift in theoretical paradigm: the true meaning of "universal jurisdiction" in the opinion of states

78. It is submitted that the better view for the lack of universal jurisdiction prosecutions, and one that has greater explanatory force, is that states' meaning of "universal jurisdiction" is different to the concept presented in the prevailing narrative.[382] The claim here is not that extraterritorial jurisdiction in respect of piracy does not exist in customary international law or that a large fraction of states is systematically mistaken about the law's existence. It is more that several powerful states, in reaction to the Somali piracy crisis, have applied the same longstanding customary rule of no proof of a nexus jurisdiction.[383] However, as a matter of pragmatism they have taken shortcuts in custom identification, leading states to mistakenly believe that universal jurisdiction *already* exists in law, and they are indifferent to the accumulation of supporting evidence. Indifference stems from jurisdiction for piracy being mutually beneficial, especially for powerful seizing states who are specially affected and seek to have suspects prosecuted on their behalf in regional states. As a result, no proof of a nexus jurisdiction in existing law is misunderstood and re-conceptualized as "universal jurisdiction". Nevertheless, the empirical record in response to contemporary piracy demonstrates that states' meaning of universal jurisdiction is the right in

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380 Eugene Kontorovich & Steven Art, above n.3, 449–50.

381 ILC Drafting Committee, above n.200, Conclusion 8.

382 Part II.B.

383 Part II.C.

international law to prosecute acts of piracy committed by foreign nationals abroad, or have them prosecuted on their behalf, when their national interests are threated or harmed, without the burden of proving any link to an offence. This is consistent with the development and use of no proof of a nexus jurisdiction for piracy historically. From this perspective, "universal jurisdiction" continues to provide the same useful and practical basis in international law to prosecute cases that affect the state's national interests. This interpretation of universal jurisdiction is antithetical to the prevailing narrative and the opinion of most scholars who have embraced it.

79. This alternative account makes good sense of the verbal actions of states, judicial decisions of courts and conduct of the UN expressing the belief that they are applying the same longstanding customary rule of jurisdiction to Somali piracy and that so-called "universal jurisdiction" is anything but new. It may also go some way to explaining—and ultimately reconciling—why states are supportive and accepting of universal jurisdiction in their verbal actions and *opinio juris* but the same states do not assert universal jurisdiction proper in actual practice.[384] Of course, this is not to say that states are unable to assert jurisdiction in piracy cases where the prosecuting state has no connection at all to an offence and truly act as an agent of the international community, which would resemble universal jurisdiction proper more closely. However, there is no empirical evidence to support such practice. States do not contemplate prosecuting pirates absent a sufficient link to the facts of the alleged offence, even if the crime in question harms the international community in some inchoate way.

80. In sum, states' belief that universal jurisdiction in respect of piracy has legal status means that it cannot simply be dismissed, even if it is based on a misunderstanding of the existing law. Yet, invoking universal jurisdiction for the protection of their own national interests—or the interests of their bilateral partners—and therefore when they stand to gain the most benefit suggests that states have reconceptualized universal jurisdiction itself. These developments in state practice, if correct, necessitate a paradigm shift in the concept of "universal jurisdiction". This proposal is given further weight by

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[384] This situation may be analogous to that faced by the ICJ in the *Nicaragua* case, in which there was considerable practice of states intervening in other states' internal affairs, while, at the same time, there was opinio juris supporting an obligation of non-intervention, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, ICJ Reports 1986, paras. 202; 108–109, 206–207.

comparing the data on piracy with state practice regarding international crimes prosecutions included in the universal jurisdiction category. As will be shown, the absence of universal jurisdiction piracy prosecutions may be explained by the fact that the same states responding to Somali piracy, of which there are more than forty, have not undertaken universal jurisdiction prosecutions with respect to more heinous international crimes either.

IV.E. Domestic prosecutions for piracy and international crimes compared

81. The data on Somali piracy prosecutions raises important questions about universal jurisdiction over crimes in general international law. According to the prevailing narrative, international crimes falling within the scope of universal jurisdiction are more heinous than piracy.[385] Therefore, they should, in theory, be met with the same if not a fundamentally greater level of prosecution based on universal jurisdiction. Building on previous work, this final section compares the data on piracy with the findings of a comprehensive empirical analysis of international crimes prosecutions in state practice from 1961 to 2016.[386] The most significant finding revealed by this analysis is that the practice of states combating Somali piracy is identical to what the same and all other states have done regarding international crimes for the past six decades—namely, both categories require a sufficiently close link to the state asserting jurisdiction. Universal jurisdiction properly so-called, in the account of the prevailing narrative, does not exist in customary international law for international crimes, irrespective of states' verbal actions and *opinio juris* in support of the concept or the heinous gravity of the crimes concerned.

IV.E.i. International crimes prosecutions: empirical findings

82. Whether the lack of universal jurisdiction prosecutions for piracy is unusual, despite widespread verbal actions and *opinio juris* in support, cannot

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385 Eugene Kontorovich & Steven Art, above n.3, 452.

386 Matthew Garrod (2018), above n.8. For analysis of international crimes prosecutions in the immediate aftermath of World War II, see Matthew Garrod (2012), above n.8.

be answered in the abstract. Rather, it must be compared with what states have done with respect to international crimes included in the universal jurisdiction category. The work on universal jurisdiction at the Sixth Committee reveals that no less than twelve crimes are claimed by different states to fall within its scope, though there remains no consensus following nearly ten years of work.[387] Professors Kontorovich and Art suggest that despite the "sharp increase" in the use of universal jurisdiction for Somali piracy, the number of universal jurisdiction piracy cases in their twelve year period of study is "nearly identical" with the number of prosecutions for international crimes during the same period.[388] They further argue that only non-Western states apply universal jurisdiction to pirates, invariably by states in the region of the crime, whereas universal jurisdiction has been exercised almost exclusively by European and Western nations in respect of international crimes involving human rights violations.[389] In support of their finding regarding international crimes prosecutions based on universal jurisdiction, the authors take a shortcut and rely exclusively on Professor Kaleck.[390]

Placing exclusive reliance on a single secondary source for proving custom and measuring the extent of universal jurisdiction state practice is problematic and further compounded by the fact that Professor Kaleck embraces universal jurisdiction's common narrative[391] and is the founder of the European Center for Constitutional and Human Rights (ECCHR).[392] The ECCHR, as with other human rights advocacy organizations, have as part of their mandate the initiation of complaints and litigation against alleged

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387 Apartheid, corruption, crimes against humanity, crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organized crime and war crimes, Informal Working Paper 2014, above n.52.

388 Eugene Kontorovich & Steven Art, above n.3, 445, 446, 452 & n.42.

389 Ibid., 437, 453.

390 Wolfgang Kaleck, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008, 30 Mich. J. Int'l L. (2009), 932–58.

391 Ibid., n.3 ("[t]he inclusion of piracy [in the category of crimes that customary international law permits the exercise of universal jurisdiction] illustrates that the principle of universal jurisdiction is not at all a new legal concept but has a long tradition").

392 Professor Kaleck has served as General Secretary and Legal Director of the ECCHR since its foundation.

perpetrators of international crimes. In strategically seeking access to courts for initiating civil and criminal complaints on behalf of the alleged victims whom they represent, they are incentivized in the promotion of "universal jurisdiction" and campaigning for its implementation. Therefore, they may not necessarily be impartial in their reporting.[393] Indeed, these NGOs have been instrumental in shaping and spreading universal jurisdiction's one-sided prevailing narrative; persistently claim that universal jurisdiction legislation and trials are expanding numerically and geographically all around the world for war crimes, genocide, crimes against humanity and torture; lobby for the adoption of universal jurisdiction statutes; and exaggerate states' obligations to prosecute perpetrators of international crimes based on universal jurisdiction.[394] Nevertheless, reflecting an increasing trend in leading scholarship,[395] the empirical findings of Professor Kaleck's research rely

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393 E.g., see Luc Reydams, NGO Justice: African Rights as Pseudo-Prosecutor of the Rwandan Genocide, 38 Human Rights Quarterly (2016).

394 See, e.g., the annual reports of universal jurisdiction compiled by five NGOs campaigning for its implementation: TRIAL International, REDRESS, ECCHR, the International Federation for Human Rights and the International Foundation Baltasar Garzón, Universal Jurisdiction Annual Review (2019) (https://www.ecchr.eu/en/publication/evidentiary-challenges-in-universal-jurisdiction-cases/). See also Amnesty International, Universal Jurisdiction: A Preliminary Survey of Legislation Around the World–2012 Update (Oct. 2012) (https://www.amnesty.org/en/documents/ior53/019/2012/en/). For further critique of NGO reporting, see, e.g., Harmen van der Wilt, 'Sadder but Wiser?': NGOs and Universal Jurisdiction for International Crimes, 13 J. Int'l Crim. J. (2015); Luc Reydams, above n.1; Luc Reydams, above n.14, 13–16; Matthew Garrod (2018), above n.8, 168; Ryan Goodman, Counting Universal Jurisdiction States: What's Wrong with Amnesty International's Numbers, Just Sec. (13 Dec. 2013) (https://www.justsecurity.org/4581/amnesty-international-universal-jurisdiction-preliminary-survey-legislation-world/).

395 Leading scholars increasingly rely on NGO reporting or other scholars who use such reporting to bolster their findings with a gloss of empirical evidence. See, e.g., Cedric Ryngaert, above n.33, 2; Davika Hovell, ibid., Appendix 1; Eugene Kontorovich, above n.17, 1426; Florian Jeßberger, Briefing: Towards 'Complementary Preparedness': Trends and Best Practices in Universal Criminal Jurisdiction in Europe, in Julia Krebs et al., above n.32, Part C, 4; Julia Selman-Ayetey, Universal Jurisdiction: Conflict and Controversy in Norway, in Kevin J. Heller & Gerry Simpson (eds.), The

heavily on such reporting. This leads Professor Kaleck to declare somewhat misleadingly that, since *Pinochet* in the 1990s, there have been more than 50 universal jurisdiction proceedings in European courts, which "illustrates that universal jurisdiction is no longer a seldom-used theoretical concept, but a widespread practice".[396] As a result, the findings of Professor's Kontorovich and Art are not a valid and reliable measure of universal jurisdiction trends in state practice for international crimes or their comparison with Somali piracy prosecutions.[397]

83. Table 2 presents the findings of a comprehensive survey of state practice in the form of actual trials purported to involve universal jurisdiction in domestic courts with respect to international crimes.[398] The survey was conducted in the period between the *Eichmann* trial in 1961—a trial widely cited by scholars as the most important historical example of universal jurisdiction—to 2016.[399]

TABLE 2. INTERNATIONAL CRIMES PROSECUTIONS, 1961 TO 2016

Prosecuting state	Nationality (number of suspects)	Percentage of suspects prosecuted
Austria	Former Yugoslav (1)	2
Belgium	Rwandan (8)	20

Hidden Histories of War Crimes Trials (2013), 268; Kevin Heller, above n.35, 357; Maximo Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 AJIL (2011), n.21; Wolfgang Kaleck & Patrick Kroker, Syrian Torture Investigations in Germany and Beyond Breathing New Life into Universal Jurisdiction in Europe? 16 J. Int'l Crim. J. (2018), 172–75.

396 Wolfgang Kaleck, above n.390, 931.

397 Even if the data relied upon by Professor's Kontorovich and Art were accurate, this practice of a handful of European states is hardly reflective of a representative international practice and militates against customary international law formation; see also Davika Hovell, above n.25, 434.

398 These trials were all brought to completion. For legislative practice of seventy-eight states regarding international crimes, see Matthew Garrod (2018), above n.8, 169.

399 The term "former Nazi" is used to denote the fact that suspects were prosecuted for alleged crimes committed in the context of World War II on behalf of the Nazi regime.

Canada	Former Nazi (1) Rwandan (1)	4
Denmark	Former Yugoslav (1)	2
France	Former Nazi (1) Mauritanian (1) Tunisian (1) Rwandan (3)	15
Germany	Former Nazi (1) Former Yugoslav (4) Rwandan (2)	17
Israel	Former Nazi (1)	2
The Netherlands	Afghans (3) Congolese (1) Rwandan (2) Surinamese (1)	17
Norway	Former Yugoslav (1)	2
Senegal	Chadian (1)	2
Spain	Argentinian (1)	2
Switzerland	Former Yugoslav (1) Rwandan (1)	4
UK	Former Nazi (1) Afghan (1) Nepalese (1)	7
Total 13 states	41 suspects	100%

The data in Table 2 shows that thirteen states have prosecuted forty-one suspects of varying nationalities for international crimes. This data is analyzed in-depth elsewhere and is not traversed again here.[400] In sum, the trials in Table 2 are claimed by leading scholars and even the ILC—many of whom purport their work to be empirically grounded—as examples of universal jurisdiction.[401] However, the interpretation of this state practice as universal

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400 Matthew Garrod (2018), above n.8, 169–93.

401 See, e.g., ILC Report Universal Jurisdiction, above n.23, Annex A, para. 24; Cherif Bassiouni, above n.319, 418; Davika Hovell, above n.25, 434 ("there has been a total of 52 completed universal jurisdiction trials worldwide since the Eichmann trial in 1961"); Florian Jeßberger, above n.395, Part C, 4 ("new

jurisdiction creates an inaccurate empirical picture and is flawed. Such inaccuracy results from two interrelated factors that nearly all scholars share in common. The first is the lack of a solid empirical basis. Despite the "new empirical turn in international legal scholarship",[402] a more in-depth analysis and a critical interrogation of the information reveals that in the context of universal jurisdiction the coding, collection and analysis of relevant data in generating empirical findings invariably entails an overreliance on depictions presented in human rights NGO reporting.[403] The accounts contained in these reports are simply assumed to be accurate; therefore, they are replicated uncritically and usually without verification. This method of measuring trends in state practice, without a rigorous examination of primary materials and how the law works in actual practice across different contexts, is not robust and reliable. Yet, the scholarly works that use this method are published in leading journals and regarded in the field as "original" and "comprehensive",[404] as well as "scientifically sound".[405] The upshot is that the total number of universal jurisdiction trials are exaggerated and reported to be expanding, while the theory of universal jurisdiction is not subjected to real-world testing and is continuously constructed in the abstract rather than empirically

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empirical data" reveals a "considerable increase" in universal jurisdiction trials worldwide between 2008 and 2017); Kevin Heller, above n.35, 40, 51–59; Wolfgang Kaleck, above n.390, 958. Maximo Langer, above n.395, 7–9 (32 defendants have been brought to trial based on universal jurisdiction since the Eichmann trial in 1961).

402 Gregory Shaffer & Tom Ginsburg, The Empirical Turn in International Legal Scholarship, 106 AJIL (2012), 1.

403 E.g., Davika Hovell, above n.25, 434–35 & Appendix 1, is critical of Amnesty International reporting on universal jurisdiction legislative state practice but relies on such reporting in respect of other NGOs in compiling a survey of so-called universal jurisdiction trials. Based on such reporting, Professor Hovell, ibid., 442, 455, makes several simplistic and unsubstantiated assumptions regarding universal jurisdiction, including its lawfulness in international law; its evolution from piracy to '"modern' incarnations" with their origins in human rights; its application to crimes such as genocide, crimes against humanity and torture; and its recognition in multilateral treaty provisions over terrorism, drug trafficking and, potentially, other transnational crimes. See also the sources cited above n.395.

404 Gregory Shaffer & Tom Ginsburg, above n.402, 8, 27.

405 Florian Jeßberger, above n.395, Part C, 4.

grounded in state practice.[406] Second, because of the weighty reliance placed on NGO reporting, combined with an apparent unwillingness to break out of universal jurisdiction's common narrative, there is fundamental confusion on the meaning of "universal jurisdiction" itself and the legal basis for it. Specifically, both scholars compiling empirical surveys of state practice, and the NGO reporting from which they proceed, incorrectly assume that numerous multilateral treaties impliedly permit or even mandate universal jurisdiction and provide a legal basis for it, which is falsely analogized with a longstanding rule of universal jurisdiction in customary international law.[407]

In fact, closer examination reveals that the international crimes prosecutions in Table 2 may be categorized into three typologies. The first typology, amounting to 12% of all international crimes prosecutions, involves jurisdiction arising out of multilateral treaties concluded between Allied powers injured by crimes committed by persons belonging to a "common enemy" during the period of World War II in which the relevant states were engaged.[408] The second typology, accounting for 27% of all international crimes prosecutions, concerns jurisdiction arising out of multilateral criminal law treaties containing extradite or prosecute obligations, such as the UN Convention Against Torture.[409] The largest number of international crimes

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406 In addition to being conceptualized based on unfounded and speculative accounts, universal jurisdiction in these scholarly accounts equally lacks explanatory force in terms of what states do, including in terms of what drives prosecutions.

407 E.g., see Eugene Kontorovich, above n.17, 1424; Maximo Langer, Universal Jurisdiction is Not Disappearing, 13 J. Int'l Crim. Just. (2015), 247–49 (relying upon NGO reporting, Professor Langer argues that, since the Pinochet case, universal jurisdiction statutes and trials have been on the rise; however, this analysis is flawed because they are really examples of treaty-based jurisdiction); Davika Hovell, above n.25, 434, reports that, according to her own survey of fifty-two completed universal jurisdiction trials worldwide, in over 30 of these trials the judgments reflected that "jurisdiction was exercised pursuant to domestic legislation implementing a treaty 'obligation to prosecute' rather than a belief that the right to exercise universal jurisdiction exists independently under customary international law". See further Cedric Ryngaert, above n.33, 2, and the sources cited above n.395.

408 See also Matthew Garrod (2012), above n.8.

409 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 5(2).

prosecutions by far, amounting to 61%, concerns jurisdiction implementing extradite or prosecute obligations pursuant to legally binding UN Security Council resolutions, with Chapter VII of the UN Charter as the ultimate source of legal authority. These resolutions established ad hoc international criminal tribunals for the prosecution of crimes occurring in internal armed conflicts in the territories of the Former Yugoslavia and Rwanda.

All three of the above groupings actually involve the implementation of different types of "treaty-based jurisdiction" in which there are sufficiently close connections to the prosecuting state or to one of its treaty partners and are not examples of universal jurisdiction.[410] The treaty itself provides a sufficient international legal basis for asserting extraterritorial jurisdiction and *ipso facto* creates important *de jure* links with the prosecuting state.[411] Treaty regimes establishing mandatory extradite or prosecute regimes in the second and third typologies, which combined amount to 88% of all international crimes prosecutions, merely require the accused's presence on the prosecuting state's territory and the failure, for whatever reason, to extradite to a competent jurisdiction. Unlike with principles of jurisdiction in customary international law, no further evidence of a special link with the prescribing state is needed.[412] This is similar to jurisdiction for piracy. Contrary to universal jurisdiction's prevailing narrative, the heinous gravity of the crimes concerned and the suppression of such crimes to protect international community values do not, in and of themselves, provide the legal basis or justification for assertions of jurisdiction.[413] In the final analysis, there is strong evidence that treaties are incapable of permitting or mandating universal jurisdiction; moreover, based on the above empirical findings, there is insufficient evidence of state practice supporting universal jurisdiction's existence in customary international law for international crimes.[414]

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410 These links include the nationality of suspects, many of whom are residents and even long-term residents of the prosecuting state and crimes that threaten or affect the prosecuting state's nationals and national interests. See Matthew Garrod (2018), above n.8, 172–76; Luc Reydams, above n.14, 15.

411 Matthew Garrod, ibid., 176.

412 Ibid.

413 Ibid., 179–80.

414 Matthew Garrod (2018), above n.8, 169–72. This finding is further supported by the Arrest Warrant case before the ICJ, in which Judges Higgins et al. conducted a survey of national legislation, case law, treaties and the writings of eminent jurists to determine whether universal jurisdiction exists in

84. Except for Israel and Senegal, all the states in Table 2 combat Somali piracy as seizing states.[415] Comparing the findings in Tables 1 and 2 gives rise to two important findings. First, assertions of jurisdiction in piracy cases in the period of study are identical to what the same states have done with respect to international crimes for the past sixty years.[416] That is to say, prosecution of both categories is dependent upon the existence of a close national interest link to the forum state. The conclusion of Professors Kontorovich and Art regarding piracy and international crimes prosecution rates based on universal jurisdiction is therefore incorrect. The absence of international crimes prosecutions based on universal jurisdiction, which are graver than piracy, adds further weight to the finding in Section D above: namely, that states do not apply such jurisdiction to Somali pirates at present. The second important finding is that states, domestic courts, the ILC and even the ICJ increasingly conceptualize treaty-based jurisdiction as "universal jurisdiction", leading to expressions that universal jurisdiction has legal status for international crimes.[417] As with no proof of a nexus jurisdiction in respect of piracy, treaty-based jurisdiction for international crimes is thus misunderstood as a concept of "universal jurisdiction". Such misunderstanding is due, in large part, to a false and overly-simplistic analogy between treaty-based jurisdiction for international crimes—which creates *de jure* links with a prosecuting state party or one of its treaty partners but imposes no legal requirement to establish actual proof of such links other than the presence of the accused—and no proof of a nexus jurisdiction for

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customary international law. The result of their "dispassionate analysis of State practice and Court decisions" was that "no general rule of positive international law can as yet be asserted", Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, ICJ Reports 2002, 63, para. 44 (joint separate opinion Higgins et al.). See also Eugene Kontorovich, above n.72, 237 (concluding that universal jurisdiction for international crimes is "untested and fragile").

415 See Table 1 and the states enumerated above n.336.

416 For practice of Belgium, Denmark, France, Germany, Spain and the Netherlands regarding international crimes, see Matthew Garrod (2018), above n.8, 169–93. Taking a longer view, the prosecution of contemporary piracy cases that affect the state's national interests is entirely consistent historically in respect of the first international crimes prosecutions at the end of World War I; see Matthew Garrod, above n.7.

417 Ibid.

piracy.[418] Yet, the empirical record demonstrates that the states in Table 2 assert jurisdiction in actual cases and undertake prosecutions when they have a sufficiently close link with the crime in question, which is entirely consistent with the practice of the same states regarding Somali piracy. The increasing recognition of universal jurisdiction's legal status for international crimes, which is used to prosecute cases that affect the state's national interests, supports the proposal that the universal jurisdiction concept has undergone a paradigm shift, displacing the account of the prevailing narrative.

I.V.E.ii. Prosecutions by Western and non-Western states compared

85. The conclusion of Professors Kontorovich and Art—namely, Western and European states apply universal jurisdiction to international crimes involving human rights violations, while non-Western states apply universal jurisdiction to piracy, is flawed. The reality is more complex. The combined states in Tables 1 and 2 totals thirty in number. The practice of these states regarding both categories of crime may be organized into three groups: (i) prosecution of piracy and international crimes (six states);[419] prosecution of piracy (seventeen states);[420] and prosecution of international crimes (seven states).[421]

86. Pirates are prosecuted by Western and non-Western states alike, albeit in disproportionate numbers.[422] The permissive and discretionary right to assert jurisdiction over piracy and the ability of seizing states to have suspects prosecuted on their behalf in regional states explains why seventeen of the thirty states prosecute piracy but not international crimes. Of these seventeen states, five of them are seizing states that do not recognize universal jurisdiction's existence in international law over crimes other than piracy.[423]

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418 Matthew Garrod (2018), above n.8, 144–46, 165–67.

419 Belgium, Denmark, France, Germany, Spain, the Netherlands.

420 Comoros, India, Italy, Japan, Kenya, Madagascar, Maldives, Malaysia, Mauritius, Oman, Seychelles, Somalia, South Korea, Tanzania, UAE, US, Yemen.

421 Austria, Canada, Israel, Norway, Senegal, Switzerland, UK.

422 Table 1.

423 India, Japan, Malaysia, South Korea, UAE; see, e.g., UN Note on South

A further ten of these seventeen states are regional states, none of which establish universal jurisdiction in their national law regarding international crimes.[424] Five of these regional states prosecute or have concluded formal piracy agreements with the ability to prosecute suspects on behalf of seizing states; and, notwithstanding suspects awaiting prosecution in Somalia, combined they prosecute 86% of all Somali pirates regionally.[425] The practice of concluding piracy prosecution agreements with seizing states and the EU in return for financial and other incentives equally explains why some regional states prosecute disproportionate numbers of pirates when compared to European and Western states.

87. Conversely, seven of the thirty states prosecute international crimes but not piracy.[426] Two of these states are not engaged in counter piracy operations,[427] while the remaining five states combined prosecute 22% of all international crimes but have not prosecuted a single Somali pirate.[428] This is because they have pirates prosecuted on their behalf in regional states. The conclusion of piracy prosecution agreements may explain why nine out of the thirteen powerful seizing states in Table 1 prosecute just 10% of all Somali pirates combined.[429] The conclusion of these agreements equally explains why

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Korea, above n.331; UN GAOR, 66th Sess., 12th mtg., UN Doc. A/C.6/66/SR.12 (2011), paras. 61–62 (Malaysia); UN GAOR, 71st Sess., 14th mtg., UN Doc. A/C.6/71/SR.14 (13 Oct. 2016), para. 27 (India).

424 Comoros, Kenya, Madagascar, Maldives, Mauritius, Oman, Seychelles, Somalia, Tanzania, Yemen.

425 Kenya, Mauritius, Seychelles, Tanzania, Yemen.

426 Austria, Canada, Israel, Norway, Senegal, Switzerland, UK.

427 Israel, Senegal. Israel has not recognized the existence of universal jurisdiction in its domestic or international law for piracy or international crimes, UN GAOR, 72nd Sess., 13th mtg., UN Doc. A/C.6/72/SR.13 (11 Oct. 2017), para. 66 (Israel). Senegal claims that its national legislation permits universal jurisdiction for genocide, war crimes and crimes against humanity, as well as acts of terrorism, attacks on state security, counterfeiting, ibid., para. 83 (Senegal); however, insofar as international crimes are concerned, this is really treaty-based jurisdiction implementing treaties establishing extradite or prosecute regimes. Hence, "the accused must be present in Senegalese territory … or one of his or her victims must reside in Senegal", ibid.

428 Austria, Canada, Norway, Switzerland, UK.

429 Belgium, Denmark, France, Germany, Italy, Japan, Spain, the Netherlands, US.

other powerful seizing states, such as Australia, Canada, China, Denmark and the UK, are supportive of universal jurisdiction for piracy, even though they do not use this type of jurisdiction themselves.[430] For example, the UK was the first seizing state to formally conclude a piracy prosecution agreement with Kenya.[431] The UK Government, deflecting criticism that UK domestic courts have not prosecuted a single Somali pirate, defends its record by suggesting that it has "delivered successful prosecutions in Kenya".[432] Similarly, Rear Admiral Peter Hudson, operational commander of EUNAVFOR, stated in evidence to the UK House of Lords EU Committee that Kenya are prosecuting "a lot of pirates on our behalf".[433] The UK has transferred suspects to bilateral partners for prosecution in situations where its national interests have been threatened. For example, in *Jama*, the Royal Navy transferred seven suspects to the Seychelles because of an aborted attack on a British warship, *Fort Victoria*.[434] The national interests threatened by Somali piracy are not confined to attacks on UK flag vessels and warships. As explained by the UK House of Commons Foreign Affairs Committee, "[t]he threat is not primarily to UK ships as very few have been captured. Rather, the threat is to the UK's economy [banking, insurance and shipping industries] and security."[435]

88. It is true that eleven of the thirteen states prosecuting international crimes are European. Unlike piracy, however, states have an international legal obligation—and not merely a discretionary permission—to assert treaty-based jurisdiction and prosecute international crimes on behalf of each other, failing extradition to another competent jurisdiction, pursuant to relevant treaties establishing mandatory extradite or prosecute regimes. And, unlike in the case of piracy, states parties to these extradite or prosecute regimes are not permitted to simply catch and release alleged perpetrators of international crimes present in their territory. It follows that the higher prosecution rate of

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430 For examples of agreements concluded by these seizing states and the Seychelles, see Muzaffer, above n.363, 205–06.

431 MOU on the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property to the Republic of Kenya, Kenya–UK (11 Dec. 2008); UK Foreign Affairs Committee, above n.315, para. 105.

432 UK Foreign Affairs Committee, ibid.

433 UK House of Lords, above n.315, 35.

434 R v. Mohammed Abdi Jama (The Alankrantxu) SC 15/2012 (unreported) (Seychelles Supreme Court, 2012).

435 UK Foreign Affairs Committee, above n.315, paras. 1, 20.

international crimes by European states is due to offenders seeking refuge in their respective territories and the inability to extradite them to another competent jurisdiction. This explains why the second and third international crimes prosecutions typologies above, both of which establish mandatory extradite or prosecute regimes, account for 88% of all such prosecutions, while Former Yugoslavs and Rwandans comprise 61% of all international crimes suspects—all of whom had sought refuge or were residents in the respective prosecuting states. For example, the *Jorgić* case concerned the prosecution by Germany of a Bosnian Serb for crimes committed in Bosnia-Herzegovina against Bosnian victims.[436] In this case the German Constitutional Court held that universal jurisdiction "required some sensible nexus with Germany".[437] The defendant in *Jorgić* had been a long-term resident in Germany, including when the crimes in Bosnia were committed.

89. The obligation to assert treaty-based jurisdiction pursuant to treaty regimes establishing extradite or prosecute obligations explains why the practice of the same states regarding piracy and international crimes prosecution rates is markedly different. For example, Germany has prosecuted 17% of all international crimes, but only 1% of all Somali pirates. Similarly, Belgium—a self-acclaimed "pioneer" of universal jurisdiction[438]—has prosecuted 20% of all international crimes, but less than 1% of all Somali pirates. In all international crimes prosecutions undertaken by Belgium, an additional link with Belgium existed because the crimes occurred in Rwanda—a former Belgian colony—and the suspects had subsequently acquired residence in Belgium.[439] Belgian nationals had also been included among the victims.[440] Therefore, Belgium's exercise of jurisdiction is far from universal. It is perhaps of no surprise that all the international crimes prosecuted by Belgium concern Rwandan suspects, and out of the six states prosecuting crimes committed in Rwanda, Belgium has undertaken the most prosecutions.

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436 Table 2.

437 Prosecutor v. Nikola Jorgić, 2 BvR 1290/99 (Germany Constitutional Court, 2000); *In re Jorgić*, 135 ILR 152.

438 Observations of Belgium on the Scope and Application of the Principle of Universal Jurisdiction, (2010), para. 13 (http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml).

439 Matthew Garrod (2018), above n.8, 191.

440 Ibid.

V. Concluding remarks

90. This Article has presented compelling empirical evidence that no state has been willing to apply universal jurisdiction proper—in the account of the prevailing narrative—in response to the surge in Somali piracy, including at the height of pirate attacks between 2008 and 2011. Thus, there is no evidence that states prosecute *any* act of Somali piracy, *regardless* of its location, because of the "heinous" gravity of the offence or in the interest of the of international community. This is despite at least sixteen states claiming to establish forms of so-called "universal jurisdiction" in their national legislation for piracy and numerous others recognizing in their verbal actions universal jurisdiction's existence in international law and applicability to piracy. Rather, states apply extraterritorial jurisdiction and prosecute pirates when either they or their bilateral partners, pursuant to piracy prosecution agreements, have a close nexus with an offence and therefore stand to gain the most benefit, usually acting out of the necessity to protect their flag vessels, nationals, shipping companies and other national interests such as economy and security.

91. The absence of Somali piracy prosecutions based on universal jurisdiction is not unusual; indeed, it is entirely consistent with state practice both for piracy during the last several hundred years and for international crimes prosecutions in the last sixty years. This Article has shown that jurisdiction for piracy on the high seas in customary international law is better conceptualized as "no proof of a nexus jurisdiction". Dating to the seventeenth century and therefore having the backing of history, states have continued to apply this same type of jurisdiction today, alongside territoriality, nationality and protective principles of jurisdiction, to the Somali piracy crisis. Conversely, the concept of universal jurisdiction is relatively modern—rooted in eminent scholarship in the 1930s, the concept laid dormant for fifty years until it was revived by leading scholars in the 1980s. During the last three decades, scholars have engaged in a process of reinventing history and developing universal jurisdiction as a mythical authority and constructing grand theories underpinning its legitimacy *in abstracto*. The prevailing narrative in leading scholarship that piracy is the "original" and "paradigmatic" universal jurisdiction crime in international law is certainly not new, but the narrative is gaining ground among states, courts and the UN in response to Somali piracy. Indeed, this Article has persuasively shown that states, courts

and the UN have taken shortcuts in the identification of custom in response to Somali piracy by relying upon scholars, resulting in no proof of a nexus jurisdiction being misunderstood and confused with the well-intentioned but flawed concept of universal jurisdiction created by scholars.

Notwithstanding such confusion, in view of current state acceptance, including among several powerful state and institutional actors, the existence of so-called "universal jurisdiction" for piracy in customary international law is undeniable. After all, it is for states to determine the law. However, the empirical record demonstrates that states and the UN have reconfigured universal jurisdiction itself; namely, as a basis in international law permitting states to apply their domestic legislation and prosecute acts of piracy committed by foreign nationals outside national territory, or to have suspects prosecuted on their behalf, when their national interests are threated or harmed, without the burden of proving any link to an offence. From this perspective, "universal jurisdiction" is distinguishable from the longstanding customary rule of no proof of a nexus jurisdiction only *in nomine* and continues to provide the same useful and practical legal basis to prosecute cases that affect the state's national interests. It follows that current state practice is incapable of supporting the emergence of a new customary rule of universal jurisdiction for piracy when the empirical data are applied to the formal criteria of customary international law. The reconfiguration of universal jurisdiction equally goes some way to explaining—and ultimately reconciling—why states are accepting of universal jurisdiction in their verbal actions and *opinio juris* but the same states do not apply universal jurisdiction proper in actual practice.

92. State practice in respect of piracy necessitates a paradigm shift in the concept of universal jurisdiction. Historically and empirically informed, it is proposed that universal jurisdiction is reconceptualized as the right in international law to assert national jurisdiction over piracy on the high seas when there exists a close link to the prosecuting state or to one of its bilateral partners. However, as jurisdiction for piracy is restricted to non-state actors on the high seas, actual proof of such links is not needed in law. Reconceived in this way, jurisdiction over piracy on the high seas does not justify the application of universal jurisdiction to international crimes in the territory of foreign states. A shift in paradigm is further corroborated by the application of extraterritorial jurisdiction to international crimes involving foreign nationals abroad. This Article has provided strong empirical evidence that, for the last sixty years, states have prosecuted international crimes when they

have a close nexus with the offence at issue. Taking a slightly longer view, it is a little-known fact that the application of extraterritorial jurisdiction to international crimes cases when the state asserting jurisdiction has a close nexus is precisely what the Great Powers meant by the term "universality" when prosecuting international crimes, for the very first time, in the immediate aftermath of World War II.[441] The requirement of a close state nexus provides a unifying rationale for both piracy and international crimes. It is worth highlighting that this proposal has already started to influence leading scholarship. For example, in an apparent effort to reconcile the empirical findings in this Article and the present author's previous works relating to universal jurisdiction with his allegiance to the prevailing narrative, Professor Kontorovich, in a dramatic turnaround, has recently purported to provide a "new" account of universal jurisdiction. Specifically, Professor Kontorovich argues that "universal jurisdiction emerged, and is primarily used, not to allow states to mete out abstract justice, but to prosecute cases [both piracy and international crimes] that directly and particularly affect their national interests".[442]

This Article has identified a worrying trend among leading scholars relying heavily, if not exclusively, on NGO reporting in order to support the argument, with apparent empirical backing, that universal jurisdiction is expanding in customary and treaty international law from piracy to international crimes; moreover, universal jurisdiction trials in respect of international crimes are significantly growing both numerically and geographically. However, a detailed survey of state practice and a critical interrogation of the evidence demonstrates that these international crimes prosecutions actually involve the application of different types of treaty-based

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441 Matthew Garrod (2012), above n.8, 782.

442 Eugene Kontorovich, above n.18, 1419. Of course, in reality this argument is not new at all and has been made by the present author on several previous occasions. It is remarkable that Professor Kontorovich does not credit the present author; see, e.g., Matthew Garrod, above n.1; Matthew Garrod (2012), above n.8; Matthew Garrod (2018), above n.8. Professor Kontorovich, ibid., continues to promote the prevailing narrative in claiming that universal jurisdiction has existed in international law in respect of piracy for hundreds of years and since World War II it has emerged as a rule of customary international law for international crimes, with its application to both categories of crime in state practice expanding in recent years.

jurisdiction, which require close connections either with the prosecuting state or to one of its treaty partners, and their application is mandatory in treaty regimes establishing extradite or prosecute obligations. As has been shown, it is not only the requirement of a close nexus that makes treaty-based jurisdiction similar to jurisdiction for piracy. Treaty-based jurisdiction requires states to establish and apply jurisdiction in respect of offences committed by foreign nationals abroad without the legal requirement of proving a connection to the relevant offence, other than the presence of the suspect on the prosecuting state's territory. It would appear, therefore, that scholars embracing universal jurisdiction's prevailing narrative are once again redeploying the same mythical authority and constructing universal jurisdiction without a rigorous examination of primary materials and how the law works in actual practice across different contexts. Contrary to the widespread perception among scholars, states, courts and eminent judges today, the concept of universal jurisdiction in the account of the prevailing narrative not only rests on false historical foundations for piracy and international crimes, but it remains a hollow concept, with no coherent theoretical underpinning or actual use in state practice, to the present day. Universal jurisdiction in non-existent for international crimes in customary international law. However, it may be the case that, as with jurisdiction for piracy, states rely upon the work of scholars and eventually accept the controversial proposition that universal jurisdiction now applies to international crimes occurring in the territory of foreign states, thereby conceptually and legally confusing treaty-based jurisdiction as "universal jurisdiction". This proposition is certainly gaining ground in the European Parliament and among numerous states and courts, although it is by no means a foregone conclusion. In any event, so-called "universal jurisdiction" for international crimes should be conceptualized and understood in line with the empirical evidence and proposal presented in this Article; namely, it requires a close nexus between the case over which jurisdiction is asserted and the state asserting jurisdiction or one of its treaty partners.

93. With these empirical findings in mind, it is perhaps time for states, policy-makers, judges and scholars to adopt the proposal presented above. This would have the benefit of shedding important clarity on the legal basis, nature, substantive content and scope of universal jurisdiction. Moreover, it could prevent excessive—and unlawful—claims of jurisdiction, beaching other rules of international law and causing further inter-state tensions and disputes. Indeed, universal jurisdiction continues to strain inter-state relations

to the present day. Some ten years after the African Union accused European states of abusing universal jurisdiction by targeting African officials, the dispute between them has not been resolved. Moreover, the African Union has called for a moratorium on the execution of arrest warrants based on universal jurisdiction and urged its member states take advantage of universal jurisdiction and "to use the principle of reciprocity to defend themselves" by indicting non-African state officials.[443]

The empirical findings of this Article have profound implications for the work on universal jurisdiction at the Sixth Committee and the ILC. The work of the former is currently at an impasse and the topic is not making meaningful progress partly because several delegations, from the outset, have adopted universal jurisdiction's prevailing narrative that a customary rule of universal jurisdiction has historical foundations for piracy based on the heinous gravity of the offence. Several delegations are seeking to expand universal jurisdiction for piracy to include a diverse range of crimes occurring in the territory of foreign states, partly due to the mistaken belief that universal jurisdiction in the account of the prevailing narrative expanded in the aftermath of World War II to include certain international crimes and was subsequently codified in a number of multilateral treaties. Yet, the application of universal jurisdiction over crimes occurring in the territory of states is enormously controversial, while no delegation has been able to demonstrate the existence of this type of jurisdiction for any crime in customary or treaty international law.

Notably, the report of ILC Member Charles Jalloh, which provides the basis on which the ILC decided, in 2018, to study the topic of universal jurisdiction, embraces the prevailing narrative.[444] Thus, ILC Member Jalloh's report states unequivocally that universal jurisdiction is a part of customary international law for piracy and international crimes, which permits a state to exercise national jurisdiction over certain crimes in the interest of the international community "based solely on the nature of the crime".[445] Consistent with the prevailing narrative, the report seeks to justify universal jurisdiction's existence by relying on alleged historical foundations in claiming

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443 Assembly/AU/Dec.420(XIX), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/731(XXI) (15–16 Jul. 2012).

444 This is illustrated by the scholarly sources referenced in ILC Member Charles Jalloh's report; see ILC Report Universal Jurisdiction, above n.23, Annex A.

445 Ibid., Annex A, para. 1.

that "especially since the Nuremberg Trials after World War II, the principle of universal jurisdiction increasingly has been invoked by States in the fight against impunity for heinous international crimes".[446] Moreover, the report justifies the application of universal jurisdiction to international crimes presently by relying upon the "classic" example of earlier eras—piracy.[447] In addition to endorsing the prevailing narrative, the report claims that universal jurisdiction state practice is "extensive", thereby making it concrete and feasible for codification.[448] However, to the extent that such practice may exist, it appears to be confused with legislation and judicial decisions implementing treaty-based jurisdiction. To be sure, the report suggests that "numerous treaties" require states to establish universal jurisdiction and that "many States already have legislation providing for a form of universal jurisdiction or quasi-universal jurisdiction based on certain treaty obligations".[449] The lack of relevant state practice casts doubts on whether universal jurisdiction really does satisfy the criteria for codification. The Sixth Committee and the ILC would be well-advised to take the findings presented in this Article into consideration in their future work.

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446 Ibid., Annex A, para. 3.

447 Ibid., Annex A, paras. 4–6.

448 Ibid., Annex A, paras. 14, 21, 23–24.

449 Ibid., Annex A, paras. 7, 21.