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Can States exercise universal jurisdiction over non-national pirates captured on the high seas?

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**THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE
WORKING IN PARTNERSHIP WITH PILPG AND THE
PILPG HIGH LEVEL WORKING GROUP ON PIRACY**

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE: Can States exercise universal jurisdiction over non-national pirates captured on the high seas.

**PREPARED BY: BAKER & MCKENZIE
MAY 2011**

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I. INTRODUCTION

A. Issue

You have asked us to provide an analysis of whether States can exercise universal jurisdiction over non-national pirates captured in the high seas by third-party States. Our analysis is based upon an analysis of international conventions and customary international law. We have chosen not to include a discussion of circumstances specific to Kenya and its agreements with other States.

B. Summary of Conclusion

In theory, universal jurisdiction allows States to prosecute certain crimes no matter the nationality or physical location of the perpetrator. Piracy is generally considered to be one of the few crimes where universal jurisdiction is allowed and encouraged. However, theory and practice are different. In the modern world, universal jurisdiction has been subject to constraint and in practice is limited. That said, for our purposes, universal jurisdiction can form the basis for Memorandums of Understanding or agreements between States where one State arrests an accused pirate and hands the accused over to another State for trial. It is also sufficient to permit the State in which the accused is found to try the accused if appropriate domestic legislation so permits.

II. FACTUAL BACKGROUND

Kenya is the southern neighbor of Somalia, where the increasing incidence of hijackings of ships off of Somalia's coast has plagued maritime traffic. The International Maritime Organization¹ reported that in 2009, in the Indian Ocean, there were 48 successful acts of

¹ The IMO is the agency of the United Nations that sets standards that regulate shipping and drafts Conventions such as the Safety of Life at Sea Convention. IMO, in which 169 member States
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piracy and armed robbery against ships, 204 attempts, 668 crew members taken hostage, and 4 crew members were killed.²

The international community applauded when, on June 24, 2010, Kenya announced that it was opening a fast-track piracy court in Mombasa, a major Kenyan port serving the international shipping industry.³ However, this favorable development suffered a setback when, on November 9, 2010, the high court of Mombasa ruled that Kenya did not have jurisdiction outside its national waters in a case that resulted in the release of nine suspected Somali pirates.⁴ The basis for the ruling was the adoption of a penal code measure that limited Kenya's jurisdiction to prosecute piracy to incidents occurring in its territorial waters. That decision is on appeal.⁵ In April of 2010 Kenya's foreign minister announced that Kenya would not accept any more Somali pirate cases.⁶

In light of the uncertainty created by the court's decision and the growth of the piracy menace, the United Nations Security Council passed a resolution proposing establishing a Regional Piracy Court that would sit at in Arusha, Tanzania (the headquarters of the Rwanda Tribunal).⁷ The resolution proposing a Regional Piracy Court was based on the report of the Secretary General's Legal Advisor on Piracy who reported that 90 percent of all pirates

participate, was formed shortly after the sinking of the Titanic in 1914. See http://en.wikipedia.org/wiki/International_Maritime_Organization (visited 4/23/11).

² IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report 2009, Ref. T2-MSS/2.11.4.1; MSC.4/Circ.152 (29 March 2010) at annex 2.

³ [Http://www.bbc.co.uk/news/10401413](http://www.bbc.co.uk/news/10401413) (visited 4/11/2011).

⁴ [Http://jurist.org/paperchase/2010/Kenya-court-rules-no-jurisdiction-over-international-piracy-cases](http://jurist.org/paperchase/2010/Kenya-court-rules-no-jurisdiction-over-international-piracy-cases). (visited 4/11/2011).

⁵ As reported in an email from Michael Scharf to Tom Campbell April 22, 2011.

⁶ Kenya had originally entered into an agreement with the European Union to accept the transfer of persons suspected of having committed acts of piracy. This included a commitment to conduct criminal trials. Official Journal of the European Union, 25.3.2009. Kenya invoked the termination clause based on its determination that it had not been provided with adequate support. See <http://www.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/index.html?ref=allsearch> (visited May 13, 2011). Kenya is using the suspension of its piracy court to renegotiate what assistance it gets. Earlier the United Nations had urged other nations to provide support to Kenya to erect a high security courtroom, and donate \$9.3 million to fund piracy trials.

⁷ Security Council resolution 1976 (2011). See <http://www.un.org/News/Press/docs/2011/sc10221.doc.htm>.

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captured by national navies were released because “no States were prepared to accept them and no jurisdiction was prepared to prosecute them.”⁸

There have been several reported instances that exemplify the failure to prosecute problem, where suspected pirates have been apprehended but then released. In one such case, Dutch Naval forces tracked the pirates who had attacked a Dutch ship back to a mother ship, captured them, freed 20 Yemeni fishermen, confiscated the pirates’ weapons, but then released the pirates on the grounds that they lacked jurisdiction to keep them.⁹

III. LEGAL DISCUSSION

A. Definition of Universal Jurisdiction

Universal jurisdiction is a principle of public international law found in customary international law or international treaties whereby a State can invoke jurisdiction over a person or persons due to the nature of the person(s) alleged crimes regardless of where the alleged crimes were committed or the nationality of the alleged perpetrator(s). While States have had differing opinions on the definition, scope or application of universal jurisdiction, the concept of universal jurisdiction is for certain acts considered to be against humanity is enshrined in many States’ laws.¹⁰

There is no universally accepted definition of universal jurisdiction in customary international law. However, the basis for jurisdiction is that certain crimes are so egregious or harmful to humanity that every State has the right to exercise jurisdiction over the person(s) alleged to have committed the act against humanity, regardless of whether there is a nexus to the State exercising such jurisdiction.¹¹ Historically, universal jurisdiction has

⁸ See Security Council Press Release 10164, January 25, 2011.

www.un.org/News/Press/docs/2011/sc10164.doc.htm (visited 4/22/2011).

⁹ See http://en.wikipedia.org/wiki/Piracy_in_Somalia at n. 63 (visited 3/16/2011)

¹⁰ See e.g., UN General Assembly, 64th Session, General Assembly Resolution A/Res/64/117, *The Scope and Application of Universal Jurisdiction*, January 15, 2010.

¹¹ See e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

been invoked for piracy, genocide, torture, crimes against humanity and war crimes both under customary international law and domestic law.¹² However, due to the highly politicized nature of universal jurisdiction, the exercise of universal jurisdiction in customary international law has generally been recognized only when the State had some nexus to either the crime or the perpetrator (*i.e.*, the person alleged to have committed the act is in the State's territory).¹³

Universal jurisdiction has also been codified in treaties and conventions. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (the "CAT") provides that a State may exercise jurisdiction over a person or persons even if the act of torture occurred outside the State's territory and by or to persons not being its nationals.¹⁴ However, in order to exercise jurisdiction over such person(s), the person(s) must be present in the State's territory.¹⁵ The preamble of Rome Statute of the International Criminal Court states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."¹⁶ The Geneva Conventions place a binding obligation on State parties to prosecute any person accused of committing crimes enumerated in the Conventions.¹⁷

In January 2001, a group of international scholars and jurists assembled to discuss and come to a consensus on the definition of universal jurisdiction. The result of such efforts

¹² See Part C, *infra*.

¹³ See generally, Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 Va. J. Int'l. L. 149 (2006-2007).

¹⁴ See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, December 10, 1984, 1465 U.N.T.S. 85, Article 5(1)(a).

¹⁵ *Id.*

¹⁶ See preamble, Rome Statute of the International Criminal Court, U.N. Doc. A/Conf/183/9), available at, <http://untreaty.un.org/cod/icc/statute/romepra.htm> (last visited on April, 27, 2011).

¹⁷ "Universal Jurisdiction," Program for International Justice and Accountability, Amnesty International USA, available at http://www.amnestyusa.org/international_justice/pdf/UniversalJurisdiction.pdf (last visited May 5, 2011).

are the Princeton Principles of Universal Jurisdiction (the “Princeton Principles”).¹⁸ Principle 1(1) defines universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”¹⁹ Principle 1(3) indicates that universal jurisdiction can be invoked when seeking extradition of a person accused of serious crime.²⁰ The Princeton Principles are meant to serve as a modern restatement of universal jurisdiction, although the legitimacy of the Principles has been questioned.²¹

B. Piracy and Universal Jurisdiction

The UN Convention on the Law of the Sea (“UNCLOS”) defines piracy as:

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

¹⁸ See generally, Princeton Principles of Universal Jurisdiction, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last visited on May 3, 2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Report of the Commission on the Use of the Principle of Universal Jurisdiction by some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, Executive Council of the African Union, June 2008, at paragraph 45 (The Princeton Principles are “merely guiding general principles compiled by some academics and jurists which, though may be relied upon by the General Assembly, did not originate from the General Assembly or indeed any body of the United Nations organization.”).

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(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”²²

UNCLOS limits the definition of piracy to acts committed on the high seas, although the traditional definition of piracy includes acts of robbery or violence within a State’s territorial waters or ports.²³

Universal jurisdiction under customary international law is said to have originated with the adjudication of piracy. However, universal jurisdiction for acts of piracy has rarely been used in practice.²⁴ Extraterritorial jurisdiction was generally exercised when there was a clear nexus between the prosecuting State and the offense.²⁵ Piracy was deemed to be prosecuted under universal jurisdiction because it generally involved heinous acts of violence.²⁶ Since acts of piracy are typically committed by individuals on the high seas where there is no territorial nexus to the crime, traditional jurisdictional grounds often did not apply, thereby creating the need for enforcement through alternative means.²⁷ Universal jurisdiction was also accepted under customary international law as the punishment for piracy, death, was the same in all nations and would not lead to forum shopping.²⁸

Piracy has been criminalized in international conventions, specifically in UNCLOS and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (“SUA Convention”).²⁹ Article 105 of UNCLOS allows a State to seize pirates on the high seas and decide what penalties shall be imposed. Article 6 of the

²² Part XI, Article 101, United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397.

²³ *Id.*

²⁴ See Eugene Kontorovich, *A Positive Theory of Universal Jurisdiction*, *Bepress Legal Series*, Paper 211 (2004) at 5.

²⁵ *Id.*; See also Eugene Kontorovich, *Universal Jurisdiction and the Piracy Analogy*, 45 *Harv. Int’l L.J.* 183, at 186.

²⁶ *A Positive Theory*, *supra*. at 6.

²⁷ *Id.* at 6-9, 18.

²⁸ See generally, *A Positive Theory*, *supra*.

²⁹ See *supra* note 9 and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, 10 March 1988, 1992 U.N.T.S. 222.

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SUA Convention only provides for jurisdiction if there is a nexus to the prosecuting State (i.e., by or against its nationals or within the State's territory) and if the State determines that another State has jurisdiction, the State must either extradite the individual or promptly prosecute the individual (which requires national legislation to enforce any offenses under the SUA Convention).³⁰ The SUA violation does not need to take place in the high seas in order to provide jurisdiction but a State may not board another ship without the flag State's consent. The jurisdictional provisions in UNCLOS and the SUA Convention have only been used once as a basis for jurisdiction which may go to State reluctance to apply the universality principles (even if available) to prosecute acts of piracy.³¹

States may not have an incentive to exercise universal jurisdiction over modern acts of piracy based on the fact that (1) the act may not affect multiple States; (2) the State may not want to go through the legal or political issues involved in exerting universal jurisdiction, especially if neither the victims nor the pirates are nationals of such State; (3) there may be issues with evidence (i.e., if the prosecuting State cannot locate the victims); and (4) unless the act of piracy are pervasive, prosecuting the act of piracy may not necessarily lead to the greater good.³²

The international community has also taken action to provide for the exercise of universal jurisdiction over individuals that committed acts of piracy. The UN Security Council has passed resolutions authorizing military action against Somali pirates.³³ Kenya has also signed a Memorandum of Understanding with the United States and certain EU/EEA countries that Kenya will prosecute individuals for piracy when they are turned over by the MOU contracting party (regardless of whether there is a nexus to the act).

³⁰ *Id.*

³¹ *See* Universal Jurisdiction and the Piracy Analogy, *supra*.

³² *Id.*

³³ *See* S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

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C. Universal Jurisdiction in Practice - Comparative Examples

Universal jurisdiction has transformed from a theoretical form of international jurisdiction to one practiced throughout the world. However, the practice of universal jurisdiction demonstrates that this form of jurisdiction is still not widely accepted. In international conventions, as well as international and domestic cases, States have run into barriers to the use of universal jurisdiction. These barriers exist even when a State has exercised jurisdiction over a person within the territory of the State at the time of arrest.

1. Universal Jurisdiction in International Conventions

Universal jurisdiction has been codified in three conventions: CAT, The Rome Statute and the Geneva Conventions. However, these are the only international conventions that allow States to invoke universal jurisdiction. Conventions on topics such as terrorism and drug trafficking do not allow for universal jurisdiction.³⁴ Instead, such treaties only allow a “prosecute or extradite” type of jurisdiction.³⁵ Such jurisdiction is not true universal jurisdiction; instead it is a compulsory yet subsidiary type of universal jurisdiction.³⁶ That is, if a State finds that a person accused or committing a crime described in any one of the numerous “prosecute or extradite” conventions, that state must prosecute or else extradite to a State willing to prosecute that individual. While this appears to be universal jurisdiction, it does not follow the definition of universal jurisdiction. True universal jurisdiction allows any state to prosecute any person alleged to have committed certain crimes, such as torture, piracy or crimes against humanity. The numerous “prosecute or extradite” conventions instead require a territorial nexus to the alleged criminal.

³⁴ Separate Opinion of President Guillaume (Arrest Warrant Case), paragraph 8.

³⁵ *Id.*

³⁶ *Id.* at paragraph 7.

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2. Examples of Universal Jurisdiction in the International Court of Justice

The International Court of Justice (the “ICJ”) is the judicial branch of the United Nations.³⁷ The ICJ’s role is to settle legal disputes among States and provide advisory opinions, in accordance with international law.³⁸ According to the Statute of the ICJ, international law includes international conventions, customary international law, general principles of law among States and judicial decisions and academic articles by highly respected experts.³⁹ Thus, decisions by the ICJ are seen as a resource for determining the state of international law.

Two disputes have come before the ICJ concerning the exercise of universal jurisdiction. The first, and most prominent, is the Arrest Warrant Case.⁴⁰ Pursuant to domestic law implemented to enact the Geneva conventions,⁴¹ Belgium issued an arrest warrant against Abdulaye Yerodia Nombasi, who was Minister of Foreign Affairs for the Democratic Republic of the Congo (the “DRC”) at the time the arrest warrant was issued.⁴² The DRC argued that both the exercise of universal jurisdiction was a violation of international law, and that the issuance of the arrest warrant violated the immunities of the Minister for Foreign Affairs of the DRC.⁴³ The ICJ decision, however, only discussed the violation of immunities.⁴⁴ Based on international law, both formal and customary, the ICJ found that Mr. Yerodia had immunity as Minister of Foreign Affairs of the DRC at the time

³⁷ “The Court”, International Court of Justice, available at <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=b1c635ff857a09fae13de50a4078c594> (last visited May 5, 2011).

³⁸ *Id.*

³⁹ Article 38(1), Statute of the International Court of Justice, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited May 5, 2011).

⁴⁰ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (“Arrest Warrant Case”), Judgment of 14 February 2002.

⁴¹ The implementing legislation is the Law of 16 June 1993 concerning the Geneva Conventions, as amended by the Law of 10 February 1999 concerning punishment of serious violations of international humanitarian law, see Arrest Warrant Case, paragraph 15.

⁴² Arrest Warrant Case, paragraphs 13 – 15.

⁴³ *Id.* at paragraph 45.

⁴⁴ *Id.* at paragraph 46.

the arrest warrant was issued and therefore Belgium had violated international law by issuing the arrest warrant.⁴⁵

While the main decision did not discuss Belgium's use of universal jurisdiction, the separate and dissenting opinions of various judges touched upon the topic. These opinions highlight the tenuous position of universal jurisdiction in international law. Universal jurisdiction, as described *infra* Part I, does not exist according to these opinions.⁴⁶ According to the President of the ICJ at that time, Mr. Gilbert Guillaume, "[u]niversal jurisdiction in absentia is unknown to international conventional law."⁴⁷

The second case brought before the ICJ on universal jurisdiction was instituted in 2009 by Belgium against Senegal pursuant to the CAT.⁴⁸ Belgium alleged that the former President of Chad, Hissène Habré, was living in Senegal and Senegal had failed to prosecute or extradite Mr. Habré pursuant to the CAT.⁴⁹ Since the ICJ is specifically named as the forum for resolving disputes related to the CAT, Belgium requested that the ICJ direct Senegal to prosecute or extradite, and also seeks provisional measures to require Senegal to continue surveillance of Mr. Habré and keep him under the control of judicial authorities.⁵⁰

The ICJ issued a judgment with respect to the provisional measures in May 2009. In that judgment, the ICJ stated that provisional measures are appropriate only where there is a "real and imminent risk that irreparable prejudice may be caused to the rights in dispute."⁵¹ In this particular case, the ICJ could not determine what rights Belgium held that could be

⁴⁵ *Id.* at paragraphs 58, 78(D)(2).

⁴⁶ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (Arrest Warrant Case), paragraph 45; Separate opinion of President Guillaume (Arrest Warrant Case), paragraph 9.

⁴⁷ Separate opinion of President Guillaume (Arrest Warrant Case), paragraph 9.

⁴⁸ "Belgium institutes proceedings against Senegal and requests the Court to indicate provisional measures," Press Release, International Court of Justice, 19 February 2009.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.* at 2.

⁵¹ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Summary of the Order of 28 May 2009 at 5.

prejudiced by Senegal's failure to continue surveillance of Mr. Habré.⁵² However, the Court decided that Senegal's statement that there was no intention to allow Mr. Habré to leave Senegal before the final judgment of the Court demonstrated that there was no real risk of irreparable prejudice to Belgium.⁵³

This judgment demonstrates that even where States have agreed to universal jurisdiction, the ICJ defers to state sovereignty. Even though the Convention Against Torture is one of the few conventions to provide universal jurisdiction to all State Parties, the ICJ failed to recognize it as a right that belonged to Belgium or to the State Parties. In connection with the opinions released with the Arrest Warrant Case, the ICJ has demonstrated that it does not consider universal jurisdiction a valid form of jurisdiction in international law.

The ICJ has not stated, however, that all practices of universal jurisdiction are invalid. According to the various opinions released with the Arrest Warrant Case, the only crime for which states can invoke universal jurisdiction is piracy.⁵⁴ However, the ICJ emphasized that piracy was exercised "on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State."⁵⁵ This differs from the question posed in that Kenya is not a non-agreeing State. Kenya has agreements with other States that explicitly states that both Kenya and the capturing State agree that Kenya will enforce its anti-piracy law. Thus, there is support for the current agreement and state of affairs with respect to piracy in East Africa.

⁵² *Id.* at 5.

⁵³ *Id.* at 6.

⁵⁴ Separate opinion of President Guillaume (Arrest Warrant Case), paragraphs 5, 9; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (Arrest Warrant Case), paragraph 52, 54, 61; Declaration of Judge Ranjeva (Arrest Warrant Case), paragraph 6.

⁵⁵ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (Arrest Warrant Case), paragraph 61.

The Arrest Warrant Case and the Habré Case demonstrate that the ICJ, an international court that interprets international law, does not find universal jurisdiction to be a valid use of jurisdiction. However, members of the ICJ have stated that piracy is a classic and valid example of universal jurisdiction. It is possible that there is support for an agreement whereby a State that captures a pirate can hand that pirate over to a different State for prosecution, so long as an agreement exists between the two States.

3. Examples of Universal Jurisdiction in domestic courts

Universal jurisdiction exists at the domestic level as well as at the international level. As discussed above, this can be seen in the law implemented to enact the Geneva Conventions in Belgium at issue in the Arrest Warrant Case. However, several other countries have domestic legislation that creates a form of universal jurisdiction within their domestic courts.

a. *Spain*

Spain implemented the Law on Judicial Power in 1985, which allows universal jurisdiction for crimes, including genocide or terrorism.⁵⁶ The Law on Judicial Power states that the Spanish courts can prosecute crimes committed by non-Spaniards outside the territory of Spain.⁵⁷ Spanish prosecutors have invoked the Law on Judicial Power over crimes committed abroad many times. Perhaps the most renowned case involved the former Chilean leader Augusto Pinochet. A group of Spanish prosecutors brought a complaint against Pinochet in Spain for crimes against humanity and genocide committed in Chile between 1973 and 1990.⁵⁸ Spanish courts determined that Spain had jurisdiction over the

⁵⁶ Bodansky, “International Decision: Guatemala Genocide Case (Naomi Roht-Arriaza): Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims,” *American Journal of International Law*, 100 A.J.I.L. 207, 207 (January 2006).

⁵⁷ *Id.*

⁵⁸ Chandra Lekha Sriram, “Revolutions in Accountability: New Approaches to Past Abuses,” 19 *Am. U. Int’l L. Rev.* 301, 320-322 (2003).

activities that occurred under Pinochet's rule pursuant to the Law on Judicial Power.⁵⁹ In that case, the Spanish courts decided that the nationalities of the victim and offender are irrelevant to determining whether jurisdiction is proper.⁶⁰ The Spanish court issued an extradition request to the UK for Pinochet.⁶¹

While the Law on Judicial Power appears broad on its face, the Spanish courts narrowed the reach of Spanish jurisdiction. In 1999, a claim was brought against various people, including former presidents and ministers, who had allegedly committed acts of genocide, torture, execution and detention against the indigenous peoples of Guatemala.⁶² After winding through the Spanish judicial system, the Constitutional Tribunal, the highest court in Spain, determined that the physical presence of the defendant was necessary for cases based on the Law of Judicial Power to move forward, but for investigations to be brought.⁶³ The physical presence of the defendant is necessary only if universal jurisdiction is sought for crimes not enumerated in the Law on Judicial Power.⁶⁴ In this way, the Law on Judicial Power allows Spanish courts to exercise universal jurisdiction over certain crimes.⁶⁵

The success of the Law on Judicial Power is still to be determined. However, it is an example of how States are defining universal jurisdiction. While the Law on Judicial Power is broad only for certain enumerated crimes, it does allow Spanish courts to exercise jurisdiction over persons physically present in Spanish territory based on other crimes.

b. *The United Kingdom*

The United Kingdom does not have a statute to implement universal jurisdiction. When the authorities arrested Pinochet on the extradition request from Spain, an issue arose

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Bodansky, *supra* note 47, 207.

⁶³ *Id.* at 211.

⁶⁴ *Id.*

⁶⁵ *Id.*

as to whether the arrest was valid.⁶⁶ In the United Kingdom, ex-heads of state have immunity in connection with the exercise of official functions.⁶⁷ The House of Lords determined that torture is not a part of the exercise of official functions, and therefore a head of state is not entitled to immunity for any such acts.⁶⁸ Furthermore, any crimes committed after the ratification of the Convention Against Torture by the United Kingdom, even if they occurred outside of the UK territory, is considered a crime in the UK.⁶⁹ The House of Lords therefore authorized the extradition of Pinochet to Spain, but it never happened because of Pinochet's declining health and inability to stand trial.⁷⁰

While the UK does not have legislation offering broad exercise of universal jurisdiction, the decision by the House of Lords established a precedent by which universal jurisdiction could be exercised by UK authorities. That is, any crime that falls under the crimes listed in the Convention Against Torture is considered a crime in the UK and can therefore be prosecuted there.

c. *Denmark*

Denmark does not have a general universal jurisdiction statute. However, the Danish penal code provides jurisdiction over any crime committed abroad for which an international convention requires Denmark to prosecute.⁷¹ In one case, the Danish court prosecuted a Bosnian Muslim for war crimes after seeking asylum in Denmark.⁷² The Geneva Conventions relative to the Treatment of Prisoners of War and the Protection of Civilian Persons in Time of War required Denmark to prosecute the crimes alleged against the Bosnian Muslim man.⁷³

⁶⁶ Sriram, *supra* note 49, 323-325.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 340-1.

⁷² *Id.*

⁷³ *Id.*

d. *Netherlands*

The Netherlands passed legislation to implement international conventions that gave Dutch courts jurisdiction over offences committed abroad.⁷⁴ However, that legislation requires that the defendant be physically located in Dutch territory at the time of his or her arrest, or that the nationality of either victim or perpetrator be Dutch.⁷⁵

e. *United States*

The United States implemented the Alien Tort Claims Act in 1789, which allows civil law suits by non-US citizens for acts committed in violation of international law or any treaty to which the US is a State Party.⁷⁶ However, a recent Supreme Court decision limits use of the statute to crimes that were considered violations of international law as of the time the statute was passed, in 1789.⁷⁷

f. *Belgium*

Belgium's legislation allowing universal jurisdiction pursuant to the Geneva Conventions came under strict scrutiny in the Arrest Warrant Case.⁷⁸ In 2003, the Belgian Parliament modified the law to require that the perpetrator be physically present in Belgian territory or that the victim was Belgian or lived in Belgium for at least 3 years at the time the crime occurred.⁷⁹

g. *Germany*

⁷⁴ Separate Opinion of President Guillaume (Arrest Warrant Case), paragraph 12.

⁷⁵ *Id.*

⁷⁶ Alien Tort Claims Act, Global Policy Forum, available at <http://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html> (last visited May 5, 2011).

⁷⁷ Warren Richey, "Ruling Makes it Harder for Foreigners," Christian Science Monitor, June 30, 2004, available at <http://www.globalpolicy.org/component/content/article/163/28118.html> (last visited May 5, 2011).

⁷⁸ See Part II(C)(2) *supra*.

⁷⁹ Bodansky, *supra* note 47, 212.

Germany also has legislation implementing the International Criminal Court that encourages German prosecutors to reject cases where the perpetrator is not of German nationality or physically present in German territory.⁸⁰

IV. CONCLUSION

In theory, universal jurisdiction allows States to prosecute certain crimes no matter the nationality or physical location of the perpetrator. Piracy is generally considered to be one of the few crimes where universal jurisdiction is allowed and encouraged. However, theory and practice are different. States have entered into conventions and treaties that have limited universal jurisdiction to a “prosecute or extradite” regime. The ICJ, the judicial organ of the United Nations, has published opinions that appear to discredit universal jurisdiction. Furthermore, while some States have domestic legislation allow universal jurisdiction, such legislation is limited to cases where the defendant is physically present or the victim is of a certain nationality. Thus, universal jurisdiction in practice is limited. While there is no general answer as to whether States can exercise universal jurisdiction over non-national pirates captured in the high seas by third States, it appears that if the State in question has legislation allowing prosecution when the perpetrator is physically located in the State’s territory at the time of arrest, that will be acceptable to the international community.

⁸⁰ *Id.*

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