J. East Asia & Int'l L. Vol. 16/No.2 (2023); 385-402
Publication type : Research Article
Section : Student Contribution
DOI : http://dx.doi.org/10.14330/jeail.2023.16.2.10

A Preview of the Legislative Practice for Universal Jurisdiction: An East Asian Context

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As a treaty obligation and customary international law, universal jurisdiction is crucial in the global fight against impunity. While Western countries have been at the forefront, actively expanding and developing universal jurisdiction, East Asian countries have adopted a more conservative approach, emphasizing state sovereignty. This article begins by exploring the theoretical construction, legal frameworks, and state practices of East Asian countries (China, Korea, and Japan) when exercising universal jurisdiction, highlighting the typical differences between these countries and Western countries. It is then observed that the passive universal jurisdiction system in East Asia is deficient in defending state interests or counteracting other countries' inappropriate extraterritorial jurisdiction. Accordingly, this article advocates a more proactive approach to the application of universal jurisdiction in East Asian countries. By doing so, while assuming responsibility to prevent impunity, the state can use universal jurisdiction as a legitimate countermeasure and reprisal in reciprocal international relations.

Keywords
Universal Jurisdiction, Restrictive Application, East Asian Countries, Conservative Approach

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All the websites cited in this article were last visited on November 4, 2023.

I. Introduction

Universal jurisdiction is unique in international law. It differs considerably from conventional forms of domestic jurisdiction in the sense of its capacity to enable a state to exercise national jurisdiction over certain grave crimes that affect the common interests of the international community, regardless of the crime's location, the alleged perpetrator or victim's nationality, or any other connection to the state.[1] While universal jurisdiction has gained widespread acceptance among most state and international law scholars, debates and disagreements persist regarding the scope of its application. Since 2009, the Sixth Committee of the United Nations General Assembly (UNGA) has discussed "the Scope and Application of the Principle of Universal Jurisdiction" over 13 years. No consensus, however, has been reached yet regarding this issue.[2]

In the late 20th century, western countries, particularly Spain and Belgium, led the way in applying universal jurisdiction. More recently, Germany has emerged as a leading country in prosecuting international crimes.[3] African countries are increasingly engaged in this area.[4] By contrast, East Asian countries such as China, South Korea, and Japan have been relatively conservative in their approach to the application of universal jurisdiction.

This study will investigate theoretical constructs, legal frameworks, and state practices of those East Asian countries in relation to universal jurisdiction. It also identifies the limitations of the current approach and advocates for a more proactive application of universal jurisdiction in East Asia.

II. The Application of Universal Jurisdiction: General Trends

The contemporary application of universal jurisdiction has been characterized as a

1 Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785-6 (1988).

2 U.N. Doc. A/RES/64/117 (Dec. 16, 2009); A/RES/65/33 (Dec. 6, 2010); A/RES/66/103 (Dec. 9, 2011); A/RES/67/98 (Dec. 14, 2012); A/RES/68/117 (Dec. 16, 2013); A/RES/69/124 (Dec. 10, 2014); A/RES/70/119 (Dec.14, 2015); A/RES/71/149 (Dec. 13, 2015); A/RES/72/120 (Dec. 7, 2017); A/RES/73/208 (Dec. 20, 2018); A/RES/74/192 (Dec. 18, 2019); A/RES/75/142 (Dec. 15, 2020); and A/RES/76/118 (Dec. 9, 2021).

3 G. Petrossian. *Germany's Pursuit of International Criminal Justice through Universal Jurisdiction*, ASIL Insights (Sept. 20, 2023), https://www.asil.org/insights/volume/27/issue/8.

4 O'Brien Kaaba, *The Application of Universal Jurisdiction in Africa*, *in* Africa's Role and Contribution to International Criminal Justice 137 (Jeremy Sarkin & Ellah T. M. Siang'andu eds., 2020).

narrative of "rise and fall."[5] In 1998, the debate on universal jurisdiction came to the forefront when former Chilean President Pinochet was arrested in London for alleged acts of torture. Since then, Western countries, most notably Spain and Belgium have displayed significant interest in prosecuting foreign criminals for international crimes, leading to the implementation of relevant domestic laws and judicial practices associated with universal jurisdiction.[6] However, the prosecution of international crimes involving high-level state leaders in foreign courts often conflicts with their immunity under international law, resulting in international diplomatic tensions. Belgium and Spain revised their laws on universal jurisdiction and restricted the conditions under which their domestic courts could exercise their jurisdiction. [7]

The contemporary theory and practice of universal jurisdiction remain a subject of ongoing academic debate, particularly after the International Court of Justice reaffirmed that the immunity of serving heads of state is absolute in the *Arrest Warrant* case.[8] Although some scholars argue that universal jurisdiction is disappearing or declining,[9] others challenge this view by highlighting the increasing number of prosecutions initiated under universal jurisdiction in different countries.[10] TRIAL International's 2021 annual review reported that 125 charges for international crimes based on universal jurisdiction were initiated and investigated in that year alone, with 16 countries conducting trials related to universal jurisdiction cases. [11]

Western and Northern Europe remain the primary regions for universal

5 L. Reydams, *The Rise and Fall of Universal Jurisdiction*, *in* Handbook of International Criminal Law 337-54 (W. Schabas & N. Bernaz eds., 2011). *See also* I. de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 J. Int'l Crim. Just. 777-808 (2009).

6 E. Kontorovich, *The Parochial Uses of Universal Jurisdiction*, 94 Notre Dame L. Rev. 1417-52 (2019).

7 As for Belgium, the Act on Grave Breaches of International Humanitarian Law (August 5, 2003) provided that the exercise of universal jurisdiction requires the existence of a meaningful links with Belgium. *See* L. Reydams, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. Int'l Crim. Just. 679-89 (2003). As for Spain, in 2009, the Spanish legislator restricted the exercise of universal jurisdiction passed Organic Law (LO) 1/2009, modifying Article 23(4) of the Organic Law of the Judicial Power (LOPJ) passed in 1985. In 2014, LO 1/2014 was further passed to introduce more limitations to universal jurisdiction. *See* María Dolores Bollo Arocena, *The Reform of the Universal Jurisdiction in Spain*, 18 Span. Y.B. Int'l L. 239-47 (2013-2014), https://www.researchgate.net/publication/284494018_THE_REFORM_OF_THE_UNIVERSAL_JURISDICTION_IN_SPAIN.

8 Arrest Warrant of 11 April 2000 (Congo v. Belg.), Judgment, 2002 I.C.J. (Feb. 14), para. 62, https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf.

9 *See generally* R. Ben-Ari, *Universal Jurisdiction: Chronicle of a Death Foretold?,* 43 Deny. J. Int'l L. & Pol'y 165-98 (2015); A. Cassese*, Is The Bell Tolling For Universality? A Plea for A Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589-95 (2003).

10 M. Langer & M. Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 Eur. J. Int'l L. 779-817 (2019).

11 *See* Universal Jurisdiction Annual Rev. 2022, TRIAL International website (Mar. 31, 2022), https://trialinternational.org/latest-post/2021-highlights-in-the-universal-jurisdiction-annual-review-ujar-released-today. States exercising universal jurisdiction in 2021 include: Argentina, Austria, Belgium, Finland, France, Germany, Ghana, Hungary, Italy, Lithuania, Spain, Sweden, Switzerland, the Netherlands, the United Kingdom, and the United States.

jurisdiction, with several significant rulings of historical importance.[12] Moreover, despite the African Union's concerns about the disproportionate number of criminal proceedings initiated by European countries such as Belgium and Spain applying universal jurisdiction against senior African officials,[13] more African countries have recently become actively involved in applying universal jurisdiction, particularly since the ratification of the African Union Model National Law on Universal Jurisdiction over International Crimes in July of 2012.[14] Two notable examples include Senegal's trial of former Chadian President Hissein Habré[15] and Ghana's pending investigation of former Gambian President Yahya Jammeh.[16]

Notwithstanding proliferation in both quantity and geographical dispersion, applying universal jurisdiction in practice demonstrates a "restrictive" tendency, as evidenced by the following dimensions. First, regarding legislative procedures, contemporary domestic legislation concerning universal jurisdiction has progressively incorporated a greater number of conditions constraining its application.[17] Second, regarding the application mode, universal jurisdiction in absentia is markedly constrained, and the majority of sovereign states exhibit a preference for exercising conditional universal jurisdiction.[18] Third, regarding the subject of application, convictions founded upon universal jurisdiction constitute a minor fraction of the cases initiated, with the vast preponderance remaining in an investigative stage. [19] Meanwhile, a substantial proportion of suspects subject to a universal jurisdiction verdict are considered "low-cost," originating from states incapable of exerting pressure on the prosecuting states or comprising low-level officials for whom the state is either unwilling to apply such pressure or support the prosecution.[20] In summary, current judicial practices concerning universal jurisdiction appear to strive for a "workable balance" [21] between state sovereignty and individual rights, moving

12 Langer & Eason, *supra* note 10, at 799.

13 W. Kaleck, Double Standards: International Criminal Law and the West 61-71 (2015).

14 Kaaba, *supra* note 4, at 143-51.

15 Ministère Public c. Hissein Habré, Jugement du 30 mai 2016, http://www.chambresafricaines.org.

16 Gambia: 2005 Massacre of Migrants under the Scrutiny of the TRRC (Feb. 24, 2021), https://trialinternational.org/latest-post/gambia-2005-massacre-of-migrants-under-the-scrutiny-of-the-trrc.

17 For example, as mentioned in Part II, Belgium and Spain revised their domestic laws to introduce more limitations to universal jurisdiction.

18 In the majority of universal jurisdiction cases, the forum state actually has a direct, differentiable, parochial connection with the offense. *See* Kontorovich, *supra* note 6, at 1417; M. Langer, *Universal Jurisdiction is not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction*, 13 J. Int'l Crim. Just. 245-56 (2015).

19 Langer & Eason, *supra* note 10, at 788.

20 M. Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 Am. J. Int'l L. 1-49 (2011).

21 N. Rosen, *Evaluating the Practice of Universal Jurisdiction Through the Concept of Legitimacy*, 19 J. Int'l Crim. Just.

towards a more "restrictive" application.

III. Conservative Approach of East Asia to Universal Jurisdiction

Contemporary trends in universal jurisdiction reveal that Western countries have played pioneering roles in developing and applying universal jurisdiction.[22] As a result of experiencing the consequences and challenges it poses, African countries have progressively engaged in state practices concerning its application, working towards realizing justice for grave international crimes. By contrast, Asian countries, particularly those in East Asia, have demonstrated a relatively conservative approach to universal jurisdiction. Although China, Japan, and South Korea are usually perceived as embodying distinct "cultural and intellectual traditions"[23] encompassing diverse political, economic, and social histories,[24] a preliminary review of the literature, position papers, and state practices indicates that these East Asian countries share common themes in their experiences of universal jurisdiction.

By identifying and examining the shared experiences and approaches of East Asian countries regarding universal jurisdiction, a deeper understanding of the legal complexities and impediment involved in applying universal jurisdiction can be achieved. In turn, the insights gained from the East Asian experience can contribute to the future development of universal jurisdiction.

A. State Policy Stance

East Asian states have rarely adopted a stance on the issue of universal jurisdiction at the UN level. Since the Sixth Committee of the UNGA began discussing "the Scope and Application of the Principle of Universal Jurisdiction," only China and South Korea have responded to the General Assembly's call for information and observations.[25]

1067-97 (2021).

22 D. Hovell, *The Authority of Universal Jurisdiction*, 29 Eur. J. Int'l L. 427-56 (2018).

23 Xiaoming Huang, *The Invisible Hand: Modern Studies of International Relations in Japan, China, and Korea*, 10 J. Int'l Relations Dev. 168–203 (2007).

24 Danielle Ireland-Piper, Extraterritoriality in East Asia: Extraterritorial Criminal Jurisdiction in China, Japan and South Korea 10-1 (2021).

25 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 (2010); Statement by Mr. Zhou Wu At the 70th Session of the UN General Assembly (2015); Government of Korea, Universal Jurisdiction in the Republic of Korea, (2010); Statement by Mr. CHOI, Yonghoon, Sixth Committee of the 68th Session of the UN General Assembly, 17 October 2013; Statement by Counsellor CHOI, Taeeun, Sixth Committee of the 77th Session of UN General Assembly, October 11, 2022.

This finding contradicts the active involvement of African and European countries. In general, the relevant reports and statements made by China and South Korea have conveyed a "restrained" policy stance, advocating that the application of universal jurisdiction should be in strict compliance with international law.

China's position on universal jurisdiction is predominantly skeptical, or even adverse. From the declaration that "the so-called universal jurisdiction is only an academic concept and has not yet constituted international legal norm" at the 64th session of the Sixth Committee of the UNGA[26] to the assertion that "the international law principles regarding universal jurisdiction are far from being formed" and "these exercises are not really universal jurisdiction" at the 75th session, China's stance on universal jurisdiction is evident. While China does not contest universal jurisdiction's theoretical definition, it contends that the application of universal jurisdiction strictly adhere to the fundamental principles of international law and be explicitly authorized by it.[27] South Korea has maintained a similar position. Its statements at the 68th and 77th sessions of the Sixth Committee of the UNGA endorsed the application of universal jurisdiction to war crimes and piracy, but noted that universal jurisdiction should be exercised in a manner that avoids conflicts with other peremptory norms of international law.[28]

B. Legal Frameworks

The criminal statutes of China, Japan, and South Korea incorporate provisions concerning universal jurisdiction, explicitly permitting the potential exercise of jurisdiction over international crimes committed extraterritorially. Nevertheless, this approach to extraterritorial criminal legislation seems to be at odds with their more "restrained" policy stances, revealing a possible tension between their legal frameworks and overall approach to application.

1. China

The Criminal Law of the People's Republic of China, initially enacted in 1979, does not include any provisions related to universal jurisdiction. It was only after China acceded to numerous international treaties in the 1980s, including the United Nations

26 Statement by H.E. Ambassador LIU Zhenmin, at the 64th Session of the Sixth Committee of the UN General Assembly (2009).

27 Statement by the Representative of China at the 75th Session of the Sixth Committee of the UN General Assembly (2020).

28 Statement by Mr. CHOI, Yonghoon, Sixth Committee of the 68th Session of the UN General Assembly, 17 October 2013; Statement by Counsellor CHOI, Taeeun, Sixth Committee of the 77th Session of UN General Assembly, October 11, 2022.

Convention on the Law of the Sea (UNCLOS), the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), and the Convention on the Prevention and Punishment of the Crime of Genocide, that it gradually emphasized universal jurisdiction. [29] In 1987, the Standing Committee of the National People's Congress (SCNPC) promulgated the Decision of SCNPC Regarding Exercising Criminal Jurisdiction over the Crimes Prescribed in the International Treaties to which the People's Republic of China is a Party or has Acceded (hereinafter the Decision),[30] effectively resolving the absence of a definitive foundation for universal jurisdiction's application within Chinese law.[31]

Article 9 of the PRC Criminal Law, amended in 1997, states: "[t]his Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, it agrees to perform." Consequently, it is widely acknowledged within Chinese criminal law academia that Article 9 of the Criminal Law institutes universal jurisdiction over crimes delineated in international treaties to which China is a party and in cases where criminals are found within China's territory.[32] Nevertheless, some scholars contend that Article 9 provides no legal foundation for the country's judicial institutions to exercise universal jurisdiction, but rather signifies China's commitment to fulfill its treaty obligations.[33] Regardless of these debates, the majority of Chinese scholarship identifies two prerequisites for China to exercise universal jurisdiction: 1) applicable crimes must be outlined in international treaties to which China is a party; and 2) China exercises jurisdiction within the scope of its treaty obligations. Accordingly, Article 9 of the PRC Criminal Law remains the sole legal basis for universal jurisdiction under Chinese legal framework, without additional statutes offering specific guidance for universal jurisdiction's application.[34]

29 Chengyuan Ma, *On Universal Jurisdiction in Chinese Criminal Law* [论中国刑法中的普遍管辖权], 31 Trib. Pol. Sci. & L. [政法论坛] 88-101 (2013).

30 Decision of SCNPC Regarding Exercising Criminal Jurisdiction over the Crimes Prescribed in the International Treaties to Which the People's Republic of China is a Party or has Acceded [全国人民代表大会常务委员会《关于对中华人民共和国缔结或者参加的国际条约所规定的罪行行使刑事管辖权的决定》] The official English translation is available at: http://www.lawinfochina.com/display.aspx?lib=law&id=1183&CGid=. The Decision stipulated that "the People's Republic of China shall, within the scope of its treaty obligations, exercise criminal jurisdiction over crimes prescribed in the international treaties to which the People's Republic of China is a party or has acceded."

31 Ma, *supra* note 29, at 94.

32 Chengyuan Ma, The Theory of International Criminal Law [国际刑法论] 226 (2008); Lijiang Zhu, *The Chinese Universal Jurisdiction Clause: How Far Can It Go?* 52 Neth. J. Int'l L. Rev. 85-107 (2005).

33 Xiudong Gao, The Application of International Criminal Treaties in China [国际刑事条约在中国的适用] 13 (2012).

34 Mingsuan Gao & Xiumei Wang, *Characteristics of Universal Jurisdiction and Reflections on Localization* [普遍管辖权的特征及本土化思考], L. & Soc. Dev.[法制与社会发展] 17-24 (2001).

2. Japan

The Penal Code of Japan also encompasses a specific array of crimes committed outside Japan that are punishable irrespective of the crime's location or the perpetrator or victim's nationality. Article 4(2) of the Penal Code of Japan permits to exercise its extraterritorial jurisdiction based on an international treaty, provided that the crimes governed by such a treaty are already prescribed in the Penal Code.[35] In this regard, the prerequisites for Japan's application of universal jurisdiction include: 1) the crimes have been regulated by an international treaty to which Japan is a party; and 2) the crimes governed by the treaty in question are already recognized as criminal offences under Japanese law. Moreover, the Act on Punishment of Organized Crimes and Control of Proceeds of Crime [組織的な犯罪の処罰及び犯罪収益の規制等に関する法律] and the Act on Punishment of Financing to Offences of Public Intimidation [公衆等脅迫目的の犯罪行為等のための資金等の提供等の処罰に関する法律] indicate the potential for Japan to exercise universal jurisdiction, as long as the aforementioned two conditions are satisfied.[36] However, the crimes addressed in Part II of the Penal Code of Japan are restricted and do not encompass most international crimes such as piracy, genocide, and war crimes.

3. South Korea

Article 3 of the Korean Criminal Act encompasses personal jurisdiction, while Articles 5 and 6 address protective jurisdiction. However, there is no provision overtly stipulates universal jurisdiction. Notably, Article 296(2), despite being titled "universality," the pertinent clauses are formulated in a manner that necessitates a nexus with South Korea.[37] This is evident in Articles 288 and 289, which are constructed to require either transportation or intention of transportation in or out of South Korea. Such requirements align more closely with the passive nationality principle or subjective territorial principle, rather than universal jurisdiction.[38] Furthermore, while Article 287 does not demand a territorial nexus with South Korea, the specific crime it addresses does not fall under the category of offenses typically

35 Penal Code of Japan, art. 4(2): In addition to the provisions of Article 2 through the preceding Article, this Code shall also apply to anyone who commits outside the territory of Japan those crimes proscribed under Part II which are governed by a treaty even if committed outside the territory of Japan. The official English translation is available at: https://www.japaneselawtranslation.go.jp/en/laws/view/3581/en.

36 Act on Punishment of Organized Crimes and Control of Proceeds of Crime, art. 12; Act on Punishment of Financing to Offences of Public Intimidation, art. 7.

37 The Korean Criminal Act, art. 296(2). It provides: "Articles 287 through 292 and Article 294 shall apply to aliens who commit any of the crimes in these Articles outside the territory of the Republic of Korea."

38 Ireland-Piper, *supra* note 24, at 125.

encompassed under the scope of universal jurisdiction. Nonetheless, Article 340 of the Korean Criminal Act stipulates piracy [해상강도] as a person who "through the threat of collective force in the sea, forcibly seizes a ship or forcibly takes another's property after intruding upon a ship."[39] Furthermore, as a party to the Rome Statute of the International Criminal Court, South Korea has integrated the crimes delineated in it into domestic legislation through the Act on the Punishment of Crimes under the Jurisdiction of the International Criminal Court [국제형사재판소 관할 범죄의 처벌 등에 관한 법률] (hereinafter ICC Act).[40]

Consequently, the ICC Act explicitly codifies the principle of universal jurisdiction in South Korean domestic law for the first time in history by stipulating: "[T]his Act shall apply to any foreigner who commits the crime of genocide, etc. outside the territory of the Republic of Korea and resides in the territory of the Republic of Korea."[41] Pursuant to this article, South Korea may prosecute foreign nationals who have perpetrated genocide, crimes against humanity, and war crimes under the ICC Act as long as they are present in South Korea, even if the alleged acts occurred outside South Korea. In addition, the application of universal jurisdiction under Article 3(5) of the ICC Act should supplement the jurisdiction of the suspect's or victim's nationality and the jurisdiction of the state in which the crime in question occurred.[42] Thus, South Korea can circumvent unnecessary friction related to the application of universal jurisdiction. It is crucial to clarify that while treaties duly concluded and promulgated by South Korea and customary international law hold the same effect in the state as its domestic law under Article 6(1) of the Constitution of the Republic of Korea, given Korea's policy stance limiting universal jurisdiction's application to crimes under the Rome Statute and piracy, numerous legal complexities and practical questions remain. Therefore, the actual scope of South Korea's application of universal jurisdiction is confined to crimes under the Rome Statute and piracy.

C. State Practices

Although the legal frameworks in China, South Korea, and Japan contain provisions enabling the exercise of universal jurisdiction, these East Asian countries are considerably more reluctant to applying universal jurisdiction than their respective legislations. China and Japan have undertaken practices exercising universal

39 The Korean Criminal Act art. 340(1). The official English translation is available at: https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60888&lang=ENG.

40 Amended by Act No. 10577, Apr. 12, 2011, https://elaw.klri.re.kr/kor_service/lawView.do?hseq=24229&lang=ENG.

41 *Id.* art. 3(5).

42 Tae Hyun Choi & Sangkul Kim, *Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute*, 19 Mich. J. Int'l L. 589-639 (2011).

jurisdiction only to the acts of piracy.

On several occasions, China has assumed jurisdiction over piracy based on its treaty obligations. In February 2000, for instance, the Higher People's Court of the Guangxi Zhuang Autonomous Region convicted 14 Burmese pirates of robbery. The defendants had hijacked the Panamanian registered ship M/V Marine Fortuner in the Sea of Adaman. The cargo ship was later broke down and sailed into a Chinese port for repairs, where the defendants were caught by Chinese police.[43] The Higher People's Court finally exercised jurisdiction over the case in accordance with Article 27 of the UNCLOS.[44] Given the absence of a specific statute addressing piracy within the PRC Criminal Law, the court held that the 14 defendants' acts were entirely consistent with the crime elements of robbery. Consequently, the court sentenced the defendants on charges of robbery, using it as a substitution of piracy.[45]

In February 2003, the Shantou Intermediate People's Court convicted 10 Indonesian pirates of robbery, finding that the defendants hijacked the Thai tanker Siam Xanxai in the waters of Malaysia and were captured by the Chinese police while disposing of stolen goods in Chinese territorial waters.[46] The defendants argued that the act of hijacking had been completed within Malaysian waters, thereby precluding the jurisdiction of the Chinese court. In response, the Shantou Intermediate People's Court held that it was entitled to exercise jurisdiction under Article 9 of the PRC Criminal Law, given that China had ratified the UNCLOS and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The court then convicted and sentenced the said defendants in accordance with the provisions of domestic criminal law.[47]

This case is a typical example of China's application of universal jurisdiction in line with its treaty obligations.[48] The abovementioned cases share a similarity in that

43 Guangxi Fangchenggang "3.17" transnational piracy case [防城港3.17跨国武装抢劫海船案], https://news.sina.com.cn/china/2000-2-1/58449.html.

44 Keyuan Zou & Jing Jin, *The Question of Pirate Trials in States Without a Crime of Piracy*, 19 Chinese J. Int'l L. 591-623 (2020).

45 *The Higher People's Court of the Guangxi Zhuang Autonomous Region published its judgment on transnational piracy case of armed hijacking of cargo ship after the trial of second instance* [广西高院二审判决武装劫持货轮的跨国海盗案], Procuratorate Daily (Feb. 1, 2000), https://www.chinanews.com/2000-08-22/26/42642.html.

46 Shantou Municipal People's Procuratorate of Guangdong Province v. Atan Naim and Ten Other Citizens of Indonesian Nationality case [广东省汕头市人民检察院诉阿丹·奈姆等十位印度尼西亚籍公民案] [2000] ShanZhongFaXingChuZi No. 22.

47 Ma, *supra* note 29, at 97. *See also* (No. 245) The Robbery Committed by Atan Naim and Others: The Application of Criminal Universal Jurisdiction [（第245号）阿丹·奈姆等抢劫案-刑事普遍管辖权的适用], in Reference to Criminal Trial [刑事审判参考] (Volume 32) 47-48 (Supreme People's Court of China ed., 2003).

48 This case is mentioned in 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 (2010) and has been cited as a typical case of China's application of universal jurisdiction.

the suspects were present in China and thus had a certain connection with China. In cases where there is a complete absence of connection between piracy and China, China may arguably still prefer to respect the judicial sovereignty of the state where the act of piracy took place. For example, on April 9, 2017, the 25th convoy of the Chinese Navy rescued a Tuvalu-flagged cargo ship hijacked by Somali pirates in the strategic Gulf of Aden and handed over three captured pirates to the Somali police. The remainder of the judicial process was conducted by Somalia to respect its sovereignty to the greatest extent.[49]

The first judgment rendered by a Japanese court based on universal jurisdiction occurred on December 18, 2013, in the *M/V Guanabara* case.[50] In this instance, the defendants were four Somali pirates who endeavored to hijack a Bahamas-registered tanker, M/V Guanabara, for ransom on the high seas of the Arabian Sea on March 5, 2011. Captured by the US Navy, the Somali pirates were subsequently handed over to Japanese Coast Guard officials on the high seas. The pirates were then transported to Japan and prosecuted by the Tokyo District Court. The Court convicted two of the Somalis under the Law on Punishment of and Measures against Acts of Piracy [海賊行為の処罰及び海賊行為への対処に関する法律] (hereinafter Anti-Piracy Act), enacted in Japan in 2009, and found them guilty of attempting to perpetrate an act of piracy as co-principals.[51] The defendants appealed, arguing that the Japanese courts lacked jurisdiction over the case according to international and domestic law. The Anti-Piracy Act provides only universal jurisdiction over suspects detained by Japanese officials.[52] Consequently, Japan, being a non-apprehending country, held no criminal jurisdiction over suspects captured by the US forces. The Tokyo High Court, however, dismissed the defendant's appeal, holding that Article 100 of the UNCLOS established the obligation of states to cooperate in combating piracy, thereby entitling each state to exercise jurisdiction over it. Additionally, the Court emphasized that jurisdiction over acts of piracy was not exclusively established through the UNCLOS, but has been acknowledged by customary international law since ancient times.[53] Notably, the tanker in this case was operated by a Japanese shipping company, evidencing a

49 *See The Convoy of Chinese Naval Escorted the Rescued Foreign Cargo Ship to the Safe Sea Area* [中国海军护航编队玉林舰 护送被救外籍货船到达安全海域], Xinhuanet (Apr. 12, 2017), http://www.xinhuanet.com/mil/2017-04/12/c_1120792981.htm.

50 M/V Guanabara Case, Tokyo High Court, 18 December 2013 [平成25(う)578海賊行為の処罰及び海賊行為への対処に関する法律違反被告事], https://www.courts.go.jp/app/hanrei_jp/detail4?id=84188.

51 Yurika Ishii, *M/V Guanabara: Japan's First Trial on Piracy under the Anti-Piracy Act*, 1 Mar. Safety & Security L. J. 45-55 (2015).

52 The Law on Punishment of and Measures against Acts of Piracy, art. 9. The English translation is available at: https://www.spf.org/opri/global-data/opri/news/09_01.pdf.

53 Ishii, *supra* note 51, at 50-1.

connection with Japan.

The first Korean piracy prosecution took place in 2011 with the case of *Republic of Korea v. Araye*, in which four Somali pirates hijacked M/V Sambo Jewelry, a chemical carrier registered in Malta on the high seas in the northern Indian Ocean near Oman.[54] The pirates unlawfully detained eight Korean and 13 Indonesian crew members while plundering the ship's possession. Subsequently, a South Korean navy task force apprehended the pirates and handed them to the Busan District Prosecutor's office.[55] The UNCLOS only provides universal jurisdiction to its state parties over piracy, while leaving the specific definition and punishment of such crimes unclear. Consequently, the initial challenge faced by the Busan District Prosecutor's Office was to select the appropriate Korean law to prosecute these pirates. At trial, the Busan District Court determined that the jurisdictional basis of Korean domestic law was rooted in Article 6 of the Korean Criminal Act, which explicitly provides for criminal jurisdiction when a victim is a Korean national. However, this jurisdiction was limited to crimes committed against eight Korean crew members and did not extend to crimes perpetrated against 13 Indonesian crew members. Although the Act on Punishment for Damaging Ships and Sea Structures [선박 및 해상구조물에 대한 위해행위의 처벌 등에 관한 법률] can be applied to "a foreigner who commits an offense … outside of the territory of the Republic of Korea,"[56] the required elements of the crime are considerably more stringent than the crime of piracy as defined under the UNCLOS.[57] In light of these considerations, the Busan District Prosecutor's Office declined to indict the defendants for crimes committed against the Indonesian crewmembers, citing the absence of jurisdiction under both domestic and international law principles.[58] Therefore, while the case constituted piracy prosecution, the Korean courts did not exercise universal jurisdiction.

54 Busan District Court [Dist. Ct.], 2011 Go-Hap 93, 27 March 2011 (South Korea). For details, *see* Seokwoo Lee & Young Kil Park, *Republic of Korea v. Araye*, 106 Am. J. Int'l L. 630-6 (2012).

55 Eric Y.J. Lee, *Military Rescue Operation for the Hostages Taken by Somali Pirates: Was the Korean Navy's "Daybreak in the Gulf of Aden" Legitimate?*, 5 J. East Asia & Int'l L. 37-60 (2012), http://journal.yiil.org/home/archives_v5n1_02.

56 The Act on Punishment for Damaging Ships and Sea Structures, art. 3(3). The official English translation is available at: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=46313&type=part&key=9.

57 Jing Jin & Erika Techera, *Strengthening Universal Jurisdiction for Maritime Piracy Trials to Enhance a Sustainable Anti-Piracy Legal System for Community Interests*, 13 Sustainability 1-31 (2021), https://www.mdpi.com/2071-1050/13/13/7268.

58 Yongtun Lu & Yongchun Cui, *On the Enlightenment of South Korean Pirate Trial to China* [论韩国海盗审判对中国的启示], Jin Ling L. Rev. [金陵法律评论] 276-88 (2015).

IV. Reconceiving the Conservative Approach of East Asia: A Functional Evaluation

As mentioned above, East Asian countries exhibit a common approach to both legislation and practice, referred to as the conservative approach, which possesses several key characteristics. At the legislative level, first, unlike numerous Western countries that acknowledge the universal jurisdiction as potentially provided by the rule of customary or treaty-based international law, East Asian countries recognize universal jurisdiction solely based on treaties and are unable to exercise jurisdiction over international crimes under customary international law. Second, emphasis is placed on ensuring that the exercise of universal jurisdiction does not conflict with other prevailing rules of international law. Third, although the domestic criminal laws of East Asian countries allow for exercising universal jurisdiction, the lack of dedicated crime and sentencing provisions for most international crimes leads to a practical dilemma: courts intending to exercise universal jurisdiction may struggle to satisfy the principle of legality without applicable domestic law. In several cases of Chinese jurisdiction over piracy, for instance, the lack of domestic law on piracy-related crimes resulted in convictions for robbery, despite the crime elements of robbery being markedly different from those of piracy. Fourth, East Asian countries have not established specialized agencies to investigate and prosecute international crimes, and the existing legislation does not provide institutional guidelines for activating universal jurisdiction. Accordingly, the aforementioned legislative context has resulted in a practically inoperative mechanism for applying universal jurisdiction, which leads to controversies and obstacles the courts face during sentencing and convictions and further results in highly limited judicial practice concerning universal jurisdiction.

Universal jurisdiction has distinct characteristics when compared to other forms of jurisdiction. It can serve for not only preventing and ending impunity in the international community, but also functioning as a countermeasure and retaliation mechanism of international relations under reciprocity. Universal jurisdiction can effectively secure national interests and defend a state's sovereignty through countermeasures and reprisals against other states.[59] It can even act as a world policeman, providing a legitimate jurisdictional basis for a state to intervene in the domestic affairs of other states. Hence, if universal jurisdiction can be fully exercised

[59] George Flecher, *Against Universal Jurisdiction*, 1 J. Int'l Crim. Just. 580-4 (2003).

under certain requirements and procedures, it will meet the state's needs to fulfill its international obligations; protect its national interests and the interests of its nationals; and provide appropriate and legitimate intervention in the domestic affairs of other states and international questions.[60] From this functional perspective, three issues exist in the conservative approach of East Asian countries towards universal jurisdiction.

First, the differences between legislative and policy stances should be clarified. Take South Korea as an illustrative case. The Constitution of the Republic of Korea stipulates that "[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea."[61] While there is no specific mention of customary international law, the prevail view regards that the term "generally recognized rules of international law" is largely interpreted to mean customary international law.[62] This further suggests South Korea's willingness to exercise universal jurisdiction over all crimes encompassed by customary international law. However, South Korea's policy stance is more restrictive. It primarily acknowledges universal jurisdiction only for crimes that are explicitly outlined in international treaties it has ratified, with the exception of piracy, which is a crime under customary international law.[63] Currently, it is generally accepted that crimes under customary international law encompass piracy, slavery, aggression, war crimes, crimes against humanity, genocide, and torture.[64] Even though South Korea have ratified the Rome Statute, there are still some crimes under customary international law not included in the international treaties ratified by Korea.[65]Therefore, reconciling the discrepancy between legislative and policy positions requires careful consideration.

Second, it is essential to enhance the operability of universal jurisdictions. This issue mainly manifests in two aspects. On the one hand, clarifying the specific scope of universal jurisdiction application is necessary. The UNGA released a report titled, "the Scope and Application of the Principle of Universal Jurisdiction," which highlights the importance of addressing the scope issue.[66] Until the scope

60 Kontorovich, *supra* note 6, at 1421.

61 R.O.K. Const. art. 6 (1). The official English translation is available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=KOR.

62 Seokwoo Lee & Hee Eun Lee, *Korea: From Norm Taker to Norm Maker in International Law*, 26 Asian Y.B. Int'l. L. 3-108 (2020), https://brill.com/display/book/9789004530973/BP000011.xml?language=en.

63 *Supra* note 28.

64 Antonio Cassese, International Law 246 (2001).

65 For example, South Korea did not ratify the International Convention to Suppress the Slave Trade and Slavery.

66 U.N. Doc. A/RES/70/119 (Dec. 18, 2015), https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F119

of the application of universal jurisdiction is clarified, the value of its application will be significantly limited even if domestic criminal law contains provisions for universal jurisdiction. On the other hand, substantive criminal law in East Asian countries provides universal jurisdiction without relevant provisions in procedural law. Considering that the application of universal jurisdiction is subject to various restrictions, it must be regulated by procedural provisions; otherwise, the judiciary may face uncertainty. In China, for instance, while the current PRC Criminal Procedure Law and related judicial interpretations provide for immunity, protection of the rights of foreign defendants, and judicial cooperation in criminal matters, these provisions are somewhat fragmented and do not establish a specialized procedural initiation mechanism or an investigation mechanism for universal jurisdiction.[67] In the future, both adding procedural law provisions related to universal jurisdiction and specifically establishing legislation for a particular international convention are required to put international convention provisions into practice and enhance their enforceability. Establishing a specialized institution to address matters related to universal jurisdiction can also be considered.

Third, the incorporation and adoption of international criminal law into domestic criminal law remain a critical challenge. Universal jurisdiction should not be perceived as an isolated jurisdictional provision. Rather, it should be integrated into domestic criminal law systems. This is particularly important for East Asian countries, which firmly adhere to the principle of legality that criminal punishment should be founded on the state's domestic laws, as outlined in the relevant provisions.[68] Accordingly, it is essential to ensure that the applicable crimes of universal jurisdiction, as prescribed in international conventions, are incorporated as specific crimes within domestic criminal law and are complete with well-defined parameters, crime elements, and corresponding punishments. South Korea's approach served as a useful reference to address this challenge. After ratifying the Rome Statute in 2002, South Korea amended its Criminal Act in 2007, incorporating crimes under the jurisdiction of the

&Language=E&DeviceType=Desktop&LangRequested=False.

67 Jie Song, *The Functions of Proactive Jurisdiction System and Its Construction in China's Legal System* [进取型管辖权体系的功能及其构建], 27 J. Shanghai U. Int'l Bus. & Econ. [上海对外经贸大学学报] 22-34 (2020).

68 Japanese Const. art. 31. It provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." The term "law" in Japanese can be expressed using various terms. Among them, the "law" as stipulated in Article 31 is "horitsu" in Japanese and generally refers to domestic laws enacted by the Diet. *See* P.R.C. Criminal Law art. 3. It provides: "For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished."; The Korean Criminal Act art. 1(1). It provies: "The criminality and punishability of an act shall be determined by the law in effect at the time of the commission of that act."

International Criminal Court within its domestic legal system.[69] By incorporating and adopting the relevant provisions of the Rome Statute into its domestic criminal laws, East Asian countries can develop comprehensive legislation encompassing international crimes, thereby strengthening their ability to combat impunity and enforcing global justice.

V. Conclusion

Universal jurisdiction, which encompasses theoretical and practical dimensions, represents and demarcates a state sovereignty.[70] The conservative approach adopted by East Asian countries toward universal jurisdiction demonstrates their desire to preserve sovereign security as a strategic priority, in line with their firm commitment to the principle of non-interference in the domestic affairs of other states.[71] Fundamentally, the reluctance of these countries to fully embrace universal jurisdiction is profoundly shaped by the imperative to safeguard their own security concerns and uphold their strategic interests.[72] Nonetheless, such a conservative approach may impede their profound engagement in the development and evolution of international law, as well as curtail their capacity to legitimately retaliate against and counteract legal provocations initiated by other States.

Current debates on the application and scope of universal jurisdiction are characterized by considerable divergence in perspectives. However, there is a shared understanding that the future development of universal jurisdiction should lean toward a more "restrictive" application.[73] In the context that the conservative approach of East Asian countries has traditionally focused on, respect for the existing rules of international law, despite its inherent limitations, can offer valuable insights and lessons for more restrained application of universal jurisdiction. To maximize their influence and contribute effectively to the development of international law, East Asian countries should actively participate in discussions on universal jurisdiction. This engagement should be complemented by efforts to address the existing gaps and

69 Young Sok Kim, *The Korea Implementing Legislation on the ICC Statute*, 10 Chinese J. Int'l. L. 161-70 (2011).

70 Rosalyn Higgins, Problems and Process: International Law and How We Use It 56 (1994). *See also* F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours 1-162 (1964).

71 Xing Yun, *Asia's Reticence Towards Universal Jurisdiction*, 4 Groningen J. Int'l. L. 54-67 (2016).

72 Hitoshi Nasu, *Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?*, 3 Asian J. Int'l L. 25-50 (2013).

73 Rosen, *supra* note 21, at 1096.

deficiencies in domestic legislation pertaining to universal jurisdiction. By embracing this proactive approach, East Asian countries can contribute to promoting global peace and justice, while simultaneously shaping the future trajectory of international criminal law in a manner reflecting their unique perspectives and concerns.

Received: August 1, 2023
Modified: September 10, 2023
Accepted: November 1, 2023