

# Accountability and Justice—The Application of the Principle of Universal Jurisdiction to Russia’s Invasion of Ukraine

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## Introduction

In the morning hours of February 24, 2022, Russian infantry and tanks launched into Ukraine in four spearhead incursions, throwing a northern front line towards Kyiv, a southern front flowing out of Crimea, a south-eastern line directed at the cities of Luhansk and Donetsk, and an eastern front toward Kharkiv.<sup>1</sup> Just before 5 a.m., Russian President Vladimir Putin, in a televised

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1. FREDRICK W. KAGAN ET AL., RUSSIAN OFFENSIVE CAMPAIGN ASSESSMENT, MARCH 4, INST. FOR THE STUDY OF WAR 2–3 (2023)

announcement, declared a “special military operation” against its western neighbor. On this Thursday, dozens of Russian missiles descended across the country. In March, the missiles would hit targets as far as Lviv, a city only 40 miles from the Polish border.<sup>2</sup> As the Russian army marched on in the weeks that followed, evidence of atrocities surfaced, culminating in the horrifying vista of the hundreds of charred, decomposed corpses of the citizens of Bucha, lined up with their hands bound behind their backs, shot at point-blank range.<sup>3</sup> In September, when Russian troops retreated under the pressure of a forceful Ukrainian counter-offensive, Ukrainian officials discovered a mass grave site containing over 400 bodies outside of the liberated city of Izium.<sup>4</sup> Just as humankind once had to learn the names Srebrenica and Račak, it now etched the names Bucha and Izium into its collective memory.

Russia’s invasion of Ukraine violates the most sacred principle of international law: the territorial integrity and political independence of all states. On this matter, the law is crystal clear and unmistakable: a state is prohibited from the use or threat of force against another state.<sup>5</sup> Every such force—if not exercised in self-defense or mandated by the authority of the United Nations Security Council—is a violation of the UN Charter and of customary international law, regardless of gravity, aims, or political intentions.<sup>6</sup> The photos, videos, and reports that have emerged from Bucha and elsewhere, evidence gathered by investigators on the ground, and intercepted communication between Russian soldiers show the atrocious crimes committed by Russian troops and their superiors—ordered by and directed from Moscow.

The questions that remain are whether and how these perpetrators can be brought to justice.<sup>7</sup> Numerous multilateral efforts are underway to establish accountability for their crimes.

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2. Natalia Zinets & Mari Saito, *Multiple rockets hit Lviv city in western Ukraine*, REUTERS (Mar. 26, 2022, 5:50 PM), <https://www.reuters.com/world/europe/three-powerful-explosions-heard-near-ukraines-western-lviv-city-says-governor-2022-03-26/>.

3. Christian Esch & Thore Schröder, *Do You Want to Die Quickly or Slowly? Survivors Describe the Russian Atrocities in Bucha*, DER SPIEGEL (Apr. 8, 2022, 6:49 PM), <https://www.spiegel.de/international/europe/a-closer-look-at-the-russian-atrocities-in-bucha-do-you-want-to-die-quickly-or-slowly-a-513b1e84-0e3a-42e9-bf17-d90e0ef9b119>.

4. Luke Harding, *Ukraine says victims from Izium mass grave show signs of torture*, THE GUARDIAN (Sep. 16, 2022, 10:51 PM), <https://www.theguardian.com/world/2022/sep/16/ukraine-mass-grave-with-440-bodies-discovered-in-recaptured-izium-says-police-chief>.

5. U.N. Charter art. 2, ¶ 4.

6. Claus Kress, *On the Principle of Non-Use of Force in Current International Law*, JUST SECURITY (Sep. 30, 2019), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>. See also G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974), <http://hrlibrary.umn.edu/instate/GAres3314.html>.)

7. Steven Pifer, *Crimea: Six years after illegal annexation*, BROOKINGS (Mar. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/>. See also Mark Ellis, *Russia’s attack violates the most sacred principle in international law*, THE TIMES (Mar. 3, 2022, 12:01 AM), <https://www.thetimes.co.uk/article/russias-attack-violates-the-most-sacred-principle-in-international-law-hdghf5n0m>; Recent history does not bode well. Putin annexed the Crimean Peninsula and facilitated separatist movements in the self-declared “republics” of Donetsk and Luhansk with full impunity. Russia’s occupation of the Georgian provinces of Abkhazia and South Ossetia in 2008 also succeeded without any accountability. CONG. RSCH. SERV., R45008, UKRAINE: BACKGROUND, CONFLICT WITH RUSSIA, AND U.S. POLICY 1, 10, 12 (2019).

In 2014, Ukraine had accepted the jurisdiction of the International Criminal Court.<sup>8</sup> Therefore, the ICC may exert jurisdiction over the territory of Ukraine and, by extension, over acts by Russian troops within its boundaries. The Court's reach is not limited to the persons committing the criminal acts. The ICC may hold officers, generals, and high echelons of the Russian military administration accountable under the principle of command responsibility, which establishes criminal responsibility of military superiors for crimes committed by their subordinates.<sup>9</sup> In fact, Putin and his Chief of the General Staff of the Armed Forces have reportedly been making low-level tactical decisions that would "normally be decided by an officer in charge of as few as 700 Russian troops."<sup>10</sup> The invasion of Ukraine has triggered the largest state party referral in the Court's history, supported by 43 states to date.<sup>11</sup> Referrals by state parties allow the Office of the Prosecutor (OTP) to launch an investigation without seeking authorization from the court's judiciary.<sup>12</sup> In mid-May 2022, the OTP dispatched 42 forensic investigators to the region to secure evidence of war crimes and crimes against humanity.<sup>13</sup>

Heeding the call, the UN Human Rights Council (UNHRC) has passed a resolution to investigate possible war crimes by Russian troops. The investigation will be conducted by the Independent International Commission of Inquiry, "an independent commission under the UNHRC responsible for coordinating and reporting upon national and international investigations."<sup>14</sup> Notably, while the resolution passed with a majority of 33 votes, China and Eritrea voted against it, and another 12 member states, including Cuba and India, abstained.<sup>15</sup>

On March 25, 2022, Lithuania, Poland, and Ukraine combined their efforts and formed a Joint Investigation Team (JIT) on core international crimes with the support of Eurojust, the European Union's (EU) agency for judicial

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8. Embassy of Ukraine, First Declaration of Ukraine, ICC 61219/35-673-384, (Apr. 9, 2014), (<https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>).

9. Rome Statute of The International Criminal Court art. 28, July 1, 2002, 2187 U.N.T.S. 90. [Rome Statute]

10. See Larisa Brown, *Russian failures fuelled [sic] by Vladimir Putin's meddling*, THE TIMES (May 17, 2022, 9:30 PM), <https://www.thetimes.co.uk/article/russian-failures-fuelled-by-vladimir-putins-meddling-hdpjhh0bz>.

11. Victoria Prentis, *Legal Response to Russia's War in Ukraine*, ATTORNEY GENERAL'S OFFICE (Dec 9, 2022), <https://www.gov.uk/government/speeches/legal-response-to-russias-war-in-ukraine>.

12. Rome Statute, art. 14.

13. See Office of the Prosecutor, *ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands*, INTERNATIONAL CRIMINAL COURT (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

14. See Niamh Forgie, *UN Human Rights Council to investigate Russia war crimes in Ukraine*, JURIST (May 12, 2022, 7:16 PM), <https://www.jurist.org/news/2022/05/un-human-rights-council-to-investigate-russia-war-crimes-in-ukraine/>. The commission will focus on investigating events in Kyiv, Chernihiv, Kharkiv, and Sumy between late February and March of 2022 in order to "determine whether war crimes were committed, and if so, who should be held accountable."

15. *Id.*

cooperation in criminal matters.<sup>16</sup> In April, the ICC's Office of the Prosecutor became a participant, and in May the group was joined by Estonia, Latvia, and Slovakia.<sup>17</sup> Eurojust supports the JIT with operational, analytical, legal, and financial assistance, and also accommodates coordination and cooperation between all national authorities that have initiated investigations into alleged core international crimes.<sup>18</sup> In May, the European Parliament and the Council adopted legislation to expand Eurojust's powers to allow it to store and analyze evidence related to war crimes, genocide, and crimes against humanity, as well as to process and to share this data with the ICC, other international organizations, and EU member states.<sup>19</sup>

On April 28, 2022, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution proposing the establishment of an ad hoc international tribunal to investigate and prosecute the crimes of Russia's military aggression in Ukraine.<sup>20</sup> A total of 115 lawmakers voted for the resolution, with none opposing.<sup>21</sup> One month later, the European Parliament adopted a resolution to support setting up a special international tribunal to punish the crime of aggression committed against Ukraine and to hold Russian political leaders, military commanders, and allies accountable.<sup>22</sup> The adopted text asks the EU to provide, as soon as possible, all the necessary human and budgetary resources, as well as the administrative, investigative, and logistical support needed to establish this tribunal.<sup>23</sup>

In November 2022, the Justice Ministers of the G7 issued their Berlin Declaration, addressing cooperation with national war crimes investigations and prosecutions under universal jurisdiction. Therein they agreed upon the establishment of domestic contact points for the collection and exchange of evidence.<sup>24</sup>

Ukraine is currently conducting national war crime trials against Russian soldiers.<sup>25</sup> In May 2021 the Ukrainian parliament adopted amendments to

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16. *Estonia, Latvia and Slovakia become members of joint investigation team on alleged core international crimes in Ukraine*, EUROJUST (May 31, 2022), <https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international>.

17. *Id.*

18. *Id.*

19. Cornelia Riehle, *Eurojust Mandate for Core International Crimes*, EUCRIM (Jul 18, 2022), <https://eucrim.eu/news/mandate-for-core-international-crimes/>.

20. Ewelina U. Ochab, *Is There Progress In Addressing Putin's Crime of Aggression?*, FORBES (May 23, 2022, 1:40 PM), <https://www.forbes.com/sites/ewelinaochab/2022/05/23/is-there-progress-in-addressing-putins-crime-of-aggression/>.

21. *Id.*

22. European Parliament, *Ukraine: MEPs want a special international tribunal for crimes of aggression*, EUROPEAN PARLIAMENT NEWS (May 19, 2022, 12:41PM), <https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression>.

23. *Id.*

24. Berlin Declaration, Nov. 29, 2022.

25. Sergey Vasiliev, *The Reckoning for War Crimes in Ukraine Has Begun*, FOREIGN POLICY (Jun 17, 2022, 3:55PM), <https://foreignpolicy.com/2022/06/17/war-crimes-trials-ukraine-russian-soldiers-shishimarin/>. See also *Ukraine begins first war crimes trial of Russian soldier*, BBC NEWS (May 13, 2022), <https://www.bbc.com/news/world-europe-61441907>. On May 23, 2022, Vadim Shishimarin, a Russian commander of the 4<sup>th</sup> Kantemirov Division

the Ukrainian criminal code regarding international humanitarian and international criminal law.<sup>26</sup> The law now specifically provides a domestic mechanism to prosecute war crimes committed in the occupied territory of Crimea.<sup>27</sup> Furthermore, on May 13, 2022, Dmytro Kuleba, the Ukrainian foreign minister, officially requested support from the G7 countries and the Council of Europe for the creation of a special tribunal to judge Russia's "aggression" against Ukraine.<sup>28</sup> This is the first official Ukrainian government request of this type.<sup>29</sup>

All of the above efforts are remarkable in their own right and demonstrate a decisive resolution of the international community (or at least a large part of it) to uphold international law and punish those who violate it. Among all these endeavors, perhaps the most striking aspect has been the re-emergence of the principle of universal jurisdiction. After its use in trials over alleged crimes in Syria,<sup>30</sup> we are again seeing universal jurisdiction stepping in as a potential gap-filler where justice may not otherwise be available. It is true that the exercising of universal jurisdiction was originally and currently remains controversial, partially owing to its inconsistent and sporadic application. However,

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of the Moscow Oblast, was sentenced to life imprisonment. He was found guilty of violating the laws and customs of war, combined with premeditated murder under p. 2 of article 438 of the Criminal Code of Ukraine. Ukrainian Legal Advisory Group, "*The First Trial against the Russian soldier*" as an indicator of the state justice system of Ukraine, ZMINA (May 25, 2022) <https://zmina.info/en/articles-en/the-first-trial-against-the-russian-soldier-as-an-indicator-of-the-state-justice-system-of-ukraine/>. For example, on May 31, two Russian artillery soldiers were sentenced to 11½ years imprisonment after being found guilty of war crimes committed in Kharkiv. The Kharkiv Regional Prosecutor's Office charged Alexander Bobikin and Alexander Ivanov, the two artillerymen, with a violation of Part 1 of Article 438 of Ukraine's Criminal Code, which defines war crimes. See Rebekah Yeager-Malkin, *Russia soldiers sentenced to 11.5 years in prison for war crimes in Ukraine*, JURIST (May 31, 2022, 2:58 PM), <https://www.jurist.org/news/2022/05/russia-soldiers-sentenced-to-11-5-years-in-prison-for-war-crimes-in-ukraine/>. Ukraine's Prosecutor General announced on the same day as the sentencing that her Office has identified over 600 Russian suspects and announced the prosecutions of 80 of these suspects. To date, there are estimates that over 760 civilians have been killed, 1000 have been injured, and 4,000 buildings have been destroyed in the Kharkiv region alone as a result of Russian shelling. See Rebekah Yeager-Malkin, *ICC Prosecutor visits war-torn Kharkiv to investigate Ukraine war crimes*, JURIST, (Jun. 16, 2022, 1:43 PM), <https://www.jurist.org/news/2022/06/icc-prosecutor-visits-war-torn-kharkiv-ukraine-to-investigate-war-crimes/>. Mark Ellis has reported that many suspects had been detained to face domestic charges of war crimes and conspiring with the enemy.

26. Gaurav Gupte, *Ukraine parliament adopts law allowing accountability for war crimes committed in Crimea*, JURIST (May 23, 2021, 6:14 PM), <https://www.jurist.org/news/2021/05/ukraine-parliament-adopts-law-allowing-accountability-for-war-crimes-committed-in-crimea/>.

27. *Id.*

28. Stéphanie Maupas, *Ukraine calls for the creation of a special tribunal on the crime of aggression*, LE MONDE (May 22, 2022, 10:22 AM), [https://www.lemonde.fr/en/international/article/2022/05/22/ukraine-calls-for-the-creation-of-a-special-tribunal-on-the-crime-of-aggression\\_5984275\\_4.html](https://www.lemonde.fr/en/international/article/2022/05/22/ukraine-calls-for-the-creation-of-a-special-tribunal-on-the-crime-of-aggression_5984275_4.html).

29. *Id.*

30. Whitney-Martina Nosakhare, *Some Hope in the Struggle for Justice in Syria*, HUMAN RIGHTS WATCH (Mar. 15, 2022, 7:00AM) <https://www.hrw.org/news/2022/03/15/some-hope-struggle-justice-syria#:~:text=Universal%20jurisdiction%20allows%20for%20the,of%20serious%20crimes%20in%20Syria>.

the question that now arises is whether universal jurisdiction can serve as an effective instrument to bring about justice for the war in Ukraine.

Anticipating the needs of today, the International Law Commission (ILC) decided in 2018 to add the topic of “universal criminal jurisdiction” to its long-term program of work. The commission, by consensus, concluded that work on the topic would constitute a useful contribution to the progressive development of international law and its codification,<sup>31</sup> and, in its 2018 report to the General Assembly, invited “the views of States” on the topic.<sup>32</sup>

To date, twelve countries have opened investigations under the principle of universal jurisdiction on the crimes committed by Russia in Ukraine: Germany, Spain, Sweden, France, Lithuania, Canada, Poland, Estonia, Latvia, Slovakia, the United States, and the United Kingdom.<sup>33</sup> Other countries will undoubtedly follow. In numerous conversations with the Ukrainian Prosecutor, Andriy Kostim, it is clear that Ukraine wants these countries to actively pursue justice through the principle of universal jurisdiction.<sup>34</sup>

This Article surveys the domestic legislation of these countries regarding universal jurisdiction and assesses whether the application of this principle can bring Russian soldiers, officials, and leaders to justice for their involvement in the war in Ukraine.

## I. Universal Jurisdiction: Bridging the Impunity Gap

International crimes are not restricted to international courts, and jurisdiction may be exercised by international or domestic courts alike. International tribunals exercise jurisdiction on the basis of international treaties or as mandated by the United Nations Security Council (UNSC).<sup>35</sup> Hence, in the absence of such conventions and in a situation where the UNSC does not or cannot act (often because of the veto power of one or more UNSC permanent members), international criminal justice is stuck.<sup>36</sup> It is in these circumstances that domestic courts may step in to provide crucial remedies by invoking the principle of universal jurisdiction.

31. See Rep. of the Int'l Law Comm'n, 70<sup>th</sup> Sess., U.N. Doc. A/73/10, at 9–10; U.N. GAOR, 73<sup>rd</sup> Sess., at 217, U.N. Doc. A/73/1 (2018).

32. *Id.*, at 10.

33. Mark Kersten, *Universal Jurisdiction In Ukraine: States should commit to using their own courts to address Russian atrocities*, JUSTICE IN CONFLICT (Oct. 17, 2022) <https://justiceinconflict.org/2022/10/17/universal-jurisdiction-in-ukraine-states-should-commit-to-using-their-own-courts-to-address-russian-atrocities/>.

34. Presidential Office, *It is necessary to strengthen cooperation with international partners regarding the creation of a special international tribunal for the crime of aggression against Ukraine - Andriy Yermak at a meeting of the working group* PRESIDENT OF UKRAINE (Nov. 22, 2022, 10:38 PM) <https://www.president.gov.ua/en/news/potribno-posilyuvati-spiivpracyu-z-mizhnarodnimi-partnerami-s-79357>.

35. Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 208 (1997).

36. Howard Varney & Katarzyna Zduńczyk, *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes*, INT'L. CTR. TRAN. JUST. Dec. 2005, at 5.

Universal jurisdiction is defined as “a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.”<sup>37</sup> Universal jurisdiction is distinct from other jurisdiction principles of law such as the “passive” or “protective” principles because universal jurisdiction is based solely on the nature of the crime.<sup>38</sup> The rationale for universal jurisdiction is that certain crimes are so injurious to the international community at large that states are obligated to pursue justice against perpetrators, regardless of the location of the crime or the nationality of the perpetrators or the victims.<sup>39</sup> That is to say, there are some crimes that are so grave, heinous, and destructive that they harm the international community as a whole; *delicta juris gentium* – wrongs against the laws of all civilized nations.<sup>40</sup> The perpetrator of such a crime becomes a *hostis humani generis* – an enemy of humankind. Any state, therefore, has a legitimate interest and moral impetus in exercising jurisdiction, and anyone who commits those crimes must be held accountable.

In its unrestricted, primal form, the basis for universal jurisdiction rests solely on the gravity of the offense rather than on a “particular nexus with a state.”<sup>41</sup> The central tenet is that universal jurisdiction proscribes certain violations of the law of nations and then authorizes states to apply that law to those violations.<sup>42</sup> However, the crimes covered by the principle of universal jurisdiction vary from state to state, and application of universal jurisdiction is often restricted to certain grave crimes of international concern, such as genocide, crimes against humanity, war crimes, piracy, slavery, and torture.<sup>43</sup>

Universal jurisdiction may seem exotic, but it has been around for centuries. The history of universal jurisdiction can be traced back to the writings of early scholars such as Hugo Grotius as well as to the prosecution of piracy.<sup>44</sup> Thus far, around 150 countries have introduced a mechanism of universal jurisdiction to bring justice to the most serious crimes.<sup>45</sup> As Kenneth Roth has

37. See Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 785 (1988), as cited in Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?* 88 INT'L REV. RED CROSS 375, 377 (2006).

38. See Philippe, *supra* note 37.

39. Mary Robinson, *Foreword to THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 15, 16 (2001).

40. See Yoram Dinstein, *The Universality Principle and War Crimes*, in 71 INT'L L. STUD. 17, 18–19 (Michael N. Schmitt & Leslie C. Green eds., 1998).

41. LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2003), cited in CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 57 (2<sup>nd</sup> ed. 2015).

42. See AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD – 2012 UPDATE* (2012), <https://www.amnesty.org/en/documents/ior53/019/2012/en/>.

43. *Id.*

44. HUGO GROTIUS, *DE JURE BELLI AC PACIS* VOL. II, BOOK II, CHAP. XXI, ¶ 3, 1–2 (1625). The US Supreme Court in *United States v. Smith* stated that [t]he common law [. . .] recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race.” 18 U.S. 153, 161 (1820).

45. *How Universal Jurisdiction Can Punish Putin and His Minions for War Crimes in Ukraine*, EUROPEAN PRAVDA (June 6, 2022), <https://www.eurointegration.com.ua/eng/news/2022/06/6/7140690/>. According to a report published by Amnesty International in 2012,



discussed, the concept of extraterritorial jurisdiction is not new; rather, it is the unwillingness of some governments to fulfill this duty against those in high places that is new.<sup>46</sup> The concept of universal jurisdiction became formally consolidated after the Second World War, through the establishment of the International Military Tribunal (IMT) and the adoption of conventions, including the Geneva Conventions of 1949.<sup>47</sup> The principle of universal jurisdiction was further strengthened by and reinscribed in case law. Two of the most important cases were—the *Eichmann* case<sup>48</sup> in 1961, and the *Pinochet* case<sup>49</sup> in 1998.

#### A. Israel – Eichmann

The *Eichmann* case was the first use of universal jurisdiction for an atrocity crime.<sup>50</sup> It gave a powerful impulse to the international community to alter its perception of the principle.

Adolf Eichmann was the high-ranking Nazi *Schutzstaffel* (SS) bureaucrat who played an indispensable role in the administration of the Holocaust. After a 16-year manhunt, Israeli intelligence forces captured and smuggled him out of Argentina to face trial in Israel.<sup>51</sup> After his arrival in Jerusalem, Eichmann was charged with breaches of the Israeli Nazis and Nazi Collaborators (Punishment) Law.<sup>52</sup> The law had been adopted in 1950 to provide for retroactive prosecution of international atrocity crimes associated with the Nazi regime and the Second World War, and was intended as an instrument to deal with Jewish collaborators who had immigrated to Israel.<sup>53</sup>

The Jerusalem District Court relied both on argumentation based on universal jurisdiction derived from customary international law (in conjunction with the Genocide Convention of 1948) and on jurisdiction under the protective principle.<sup>54</sup> Concerning the latter, it found that

“[t]he State of Israel, the sovereign State of the Jewish People, performs through its legislation the task of carrying into effect the right of the Jewish People to punish the criminals who killed its sons with intent. . . .”<sup>55</sup>

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more than 160 countries have enacted legislation supporting universal jurisdiction over one or more atrocity crimes (though there remains controversy over this figure). See *Universal Jurisdiction*, INTERNATIONAL JUSTICE RESOURCE CENTER, <http://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>

46. Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS (Sep./Oct., 2001), <https://www.foreignaffairs.com/world/case-universal-jurisdiction>

47. Varney & Zduńczyk, *supra* note 36, at 9.

48. CrimC (DC Jer) 40/61 Attorney General v. Adolf Eichmann, 5725(3) PM 277 (1961) (Isr.) [hereinafter *Eichmann Decision*].

49. See Generally *The Pinochet Precedent*, HUM. RTS. WATCH (Nov 1, 1998).

50. William Schabas Oc Mria, *The Contribution of the Eichmann Trial to International Law*, 26 LEIDEN J. INT'L L. 667, 667 (2013).

51. *High-ranking Nazi Official Adolf Eichmann captured*, HISTORY (July 21, 2010).

52. § 1(a), Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, SH 57 281 (1950), (Isr.).

53. Schabas Oc Mria, *supra* note 50, at 670.

54. *Eichmann Decision*, *supra* note 48, at para. 30.

55. *Id.* at para. 38.



Moreover, the court stated:

*“The abhorrent crimes defined [under] this Law are not crimes under Israeli law alone. These crimes which [struck at] the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (‘delicta juris gentium’). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, [international law], in the absence of an International Court, is in need of the judicial and legislative authorities of every country to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.”*<sup>56</sup>

In agreeing with the protective approach, the Israeli Supreme Court fully embraced the notion of universal jurisdiction and decisively included both Jewish and non-Jewish people into its reasoning:

*“Not only do all the crimes attributed to the appellant bear an international character; but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.”*<sup>57</sup>

The Supreme Court’s judgment made several contributions to the development of universal jurisdiction. It rejected claims that the state seeking to exercise universal jurisdiction must first offer to extradite the suspect to that person’s own state. Almost every treaty since the judgment containing an *aut dedere aut judicare* (extradite or prosecute) provision has omitted any such requirement.<sup>58</sup> Moreover, the court rejected a challenge based on the argument that the State of Israel did not exist at the time the offenses were committed.<sup>59</sup>

In addition, the Supreme Court rejected a contention that the state where the crime occurred had legal priority over other states. It noted that although the territorial state often was the most convenient forum in terms of evidence, courts in other states, such as Israel, where the bulk of the evidence happened to be located in this case, could be a better forum.<sup>60</sup>

## B. Chile – Pinochet

In 1973, the Chilean military coup overthrew the democratically elected government of Salvador Allende and brought forth systematic and widespread human rights violations under the government of General Augusto Pinochet.<sup>61</sup>

56. *Id.*, at para. 12.

57. Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), translated in 36 Int’l L. Rep., para. 277, 304-36 (1968). [hereinafter *Eichmann Appeal*]

58. Report of the International Law Commission on the Work of its 66<sup>th</sup> Session, [2014] Y.B. Int’l L. Comm’n 1, U.N. Doc. A/68/10, para. 65.

59. *Eichmann Appeal*, *supra* note 57, at para. 304.

60. *Id.* at para. 303.

61. See Marcus Klein, *The Human Rights Violations of the Pinochet Regime and Their Legacy*, 74 REV. EUR. ESTUD. LATINOAM. CARIBE. 107, 107-114 (2003).

Thousands were detained without charge or trial, tortured, extrajudicially executed, “disappeared,” abducted, and persecuted on political grounds.<sup>62</sup>

In 1998, on a visit to the United Kingdom, Pinochet was arrested on a Spanish provisional arrest warrant, which alleged that he had been accused of being responsible for the murder of Spanish citizens in Chile when he was the president of Chile.<sup>63</sup> Pinochet was served with another Spanish provisional arrest warrant alleging that he was responsible for systematic acts in Chile and other countries of murder, torture, forced disappearance, illegal detention, and forcible transfers.<sup>64</sup>

Initially, the arrest warrants were quashed by the High Court on the basis of the UK State Immunity Act of 1978 and customary international law, which prevented heads of state from being prosecuted in the UK for acts done in their *official capacity*.<sup>65</sup> However, after a complicated legal procedure, the House of Lords, Britain’s highest appeal court, ruled that Pinochet did not enjoy immunity and could be extradited to stand trial in Spain for at least some of the crimes.<sup>66</sup>

Pinochet’s arrest was condemned by Chile, which invoked interference with its national sovereignty.<sup>67</sup> Pinochet, as a former head of state, would be immune from prosecution. However, the House of Lords ruled that universal jurisdiction did not shield state officials in foreign courts who engaged in gross human rights violations.<sup>68</sup> Invoking an interpretation of Article 39(2) of 1961 Vienna Convention on Diplomatic Relations, the House of Lords concluded that the immunity conferred to heads of state under the State Immunity Act only extends to former heads of state in regard to their official acts,<sup>69</sup> which, as explained in the Second Edition of Diplomatic Law, “must be defined by international law [and] cannot be defined simply as a matter of national law or practice” and that “genocide, torture and the taking of hostages cannot be regarded as the functions of a Head of State within the meaning of international law when international law regards them as crimes against international law.”<sup>70</sup>

Lord Steyn specifically argued that the official acts “must also have been performed by the defendant *in the exercise of his functions as a Head of State*.” (Emphasis added.)<sup>71</sup> However, Lord Collins noted that “it has [sometimes] been state policy to exterminate or oppress particular groups” and that these

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62. AMNESTY INTERNATIONAL, *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity*, Oct. 1998, <https://www.amnesty.org/en/wp-content/uploads/2021/06/eur450211998en.pdf>.

63. Pinochet was subject to section 8 of the UK Extradition Act of 1989 which empowers the UK to issue arrest warrants on the request of a state party to the European Convention on Extradition. See *Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte PINOCHET / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte PINOCHET 3*, INTERNATIONAL CRIMES DATABASE, (Nov. 28, 1998), <https://www.internationalcrimesdatabase.org/Case/855/Pinochet/> [hereinafter *Pinochet Case*].

64. AMNESTY INTERNATIONAL, *supra* note 62.

65. *Pinochet Case*, *supra* note 63, at 14

66. *Id.* at 6.

67. *Id.* at 20–21.

68. *Id.* at 21.

69. *Id.* at 11.

70. *Id.* at 11.

71. *Id.* at 52.

acts, including Hitler's extermination of the Jewish peoples of Europe and other oppressed groups, would fall within this definition.<sup>72</sup> This is where the tension stood among the Lords in this decision: whether or not Pinochet's killings and disappearances of over 4,000 individuals and hostage taking and systematic torture of many more fell within this definition of official acts within the exercise of Pinochet's functions as the head of state.<sup>73</sup> Lord Steyn argued that the crimes alleged against Pinochet fell outside of his functions as a head of state because "the development of international law since the Second World War . . . [condemns] genocide, torture, hostage taking and crimes against humanity" and that it is "difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State."<sup>74</sup> Pinochet's counsel even conceded that the crimes he was accused of could not be regarded as official acts of a head of state.<sup>75</sup>

Nonetheless, universal jurisdiction is still contested. Opponents, such as the former United States Secretary of State Henry Kissinger, have long argued that the doctrine of universal jurisdiction violates state sovereignty and risks "substituting the tyranny of judges for that of governments."<sup>76</sup> Likewise, judges on the International Court of Justice have expressed cautious views about the restrictive nature of universal jurisdiction.<sup>77</sup> In his separate opinion in the *Arrest Warrant* case, then-President of the Court Gilbert Guillaume found that

*[s]tates primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction in absentia.*<sup>78</sup>

## II. Forms of Universal Jurisdiction

When discussing the concept of universal jurisdiction, a distinction must be drawn between "absolute" universal jurisdiction and "conditional" universal jurisdiction.<sup>79</sup> Absolute universal jurisdiction is best defined as the idea that

72. *Id.* at 53.

73. *Id.*

74. *Id.* at 53–54.

75. *Id.* at 53.

76. See Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 86 (2001).

77. "In particular, classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad". *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgement, 2002 I.C.J. 3, 35, ¶ 4 (Feb. 14) (separate opinion by Guillaume, P.). "Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy." *Id.* at ¶ 5

78. *Id.*, at ¶ 16.

79. Varney & Zduńczyk, *supra* note 36, at 13.

criminal jurisdiction should be based solely on the nature of the crime.<sup>80</sup> The nationality of the victim or any other connection to the state exercising such jurisdiction is irrelevant.<sup>81</sup> No assessment of *personal jurisdiction* is necessary.<sup>82</sup>

Under international law, absolute universal jurisdiction is mandated by a limited range of international conventions: the 1949 Geneva Conventions (and additional Protocol 1 of 1977)<sup>83</sup> and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.<sup>84</sup> Many (including the authors) argue that in addition to the crimes stipulated in these conventions, crimes against humanity<sup>85</sup> and genocide<sup>86</sup> also fall

80. See Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT'L L. 427, 439 (2018).

81. STEPHEN MACEDO, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION / PRINCETON PROJECT ON UNIVERSAL JURISDICTION 28 (2001); The Princeton Principles on Universal Jurisdiction were drafted by a group of jurists and legal experts who convened at Princeton University in 2001. The assembly of scholars “represented a diversity of viewpoints and a variety of legal systems,” with participants “united in their desire to promote greater legal accountability for those accused of committing serious crimes under international law.” The Principles were intended to be “useful to legislators seeking to ensure that national laws conform to international law, to judges called upon to interpret and apply international law and to consider whether national law conforms to their state’s international legal obligations, to government officials of all kinds exercising their powers under both national and international law, to non-governmental organizations and members of civil society active in the promotion of international criminal justice and human rights, and to citizens who wish to better understand what international law is and what the international legal order might become.”

82. *Id.*

83. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 135. In each of the Geneva Conventions, the High Contracting Parties are required “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches.” This has developed into a customary international law obligation. Thus, Contracting Parties to the Convention must either prosecute or extradite persons suspected of committing “grave breaches.” The term “grave breaches” refers to a series of acts found in the four 1944 Geneva Conventions and in the Additional Protocol I, which represents the most serious violations of international humanitarian law. These would include willful killing, torture, inhuman treatment of protected individuals, extensive destruction of property not justified by military necessity, and willfully attacking civilians. See Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

84. The Convention against Torture also obligates Contracting Parties to prosecute or extradite suspected torturers. The Contracting Party in the territory under whose jurisdiction a person alleged to have committed any offense referred to in Article 4 is found shall—in the cases contemplated in Article 5 (if it does not extradite him)—submit the case to its component authorities for the purpose of prosecution.

85. Amnesty International argues that: “It is now generally accepted that every state is permitted to exercise universal jurisdiction over crimes against humanity. It is also increasingly accepted that no state may harbour a person suspected of such crimes, but must exercise jurisdiction, extradite the person to a state able and willing to do so or surrender the suspect to an international court.” AMNESTY INTERNATIONAL, *Universal Jurisdiction: The duty of states to enact and enforce legislation*, Aug. 31, 2001, <https://www.amnesty.org/en/documents/IOR53/002/2001/en/>.

86. Although Article 1 of the 1948 Genocide Convention confirms that states shall undertake an obligation to prevent and punish genocide, Article 6 compels prosecution

into this category (although provisions concerning universal jurisdiction were surprisingly not expressly included in the Genocide Convention).

The Princeton Principles on Universal Jurisdiction of 2001<sup>87</sup> set forth that all of the above crimes (in addition to piracy, slavery, and crimes against peace) are established in customary international law so as to allow for universal jurisdiction.<sup>88</sup> That list, however, is non-exhaustive and is “without prejudice to the application of universal jurisdiction to other crimes under international law.”<sup>89</sup> In some states, such as Australia and Spain, a broad range of offenses, including violence against women and organized crime, may trigger universal jurisdiction.<sup>90</sup>

Unlike “absolute” universal jurisdiction, its “conditional” variant establishes restrictions on the forum state (the state in which the proceedings or prosecutions are or could be conducted).<sup>91</sup> States can gain extraterritorial jurisdiction but only if there is a certain nexus between the crime and the forum state (e.g., the victim or the accused is a citizen or resident).<sup>92</sup> Thus, the conditional universal jurisdiction approach incorporates elements of the *passive personality principle* and the *active personality principle*.

Moreover, conditional universal jurisdiction tends to set out procedural limitations, such as requiring the forum state’s chief prosecutor to approve any prosecution. Many states have shifted toward the conditional variant over the last decade.<sup>93</sup>

A recent study showed that between 1997 and 2022, 107 cases covering universal jurisdiction over war crimes, crimes against humanity and genocide were opened in sixteen countries.<sup>94</sup> Of those cases, thirty-seven involved active or passive personality jurisdiction.

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only in states where the genocide was committed or “by such international penal tribunal as may have jurisdiction.” See Convention on the Prevention and Punishment of the Crime of Genocide arts. 1, 5, Dec. 9, 1948, 78 U.N.T.S. 277. Sudhanshu Swaroop, who argues that the case to give genocide universal jurisdiction is compelling, has suggested proposals for an Optional Protocol that would give the Genocide Convention universal jurisdiction: “Why should there be an ‘*aut dedere aut judicare*’ provision in the Torture Convention, but not in the Genocide Convention?” Sudhanshu Swaroop, *Genocide and Universal Jurisdiction: A Proposal*, in AEGIS TRUST, THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW 23, 25 (2009). International and domestic court decisions are in the process of creating a considerable body of state practice, *opinion juris*, which points to a growing acceptance of universal jurisdiction for genocide, despite the provisions of the Convention. See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 361–68 (2000). Professor Theodor Meron has stated, “It is increasingly recognized by leading commentators that the crime of genocide may also be cause for prosecution by any state.” Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 570 (1995) (parentheses omitted).

87. Macedo, *supra* note 81, at 25.

88. *Id.*

89. *Id.* at 29.

90. Varney & Zduńczyk, *supra* note 36, at 13.

91. Jeremiah Lee, *Extinction or Evolution? Ending Absolute Universal Jurisdiction* In *International Law*, JURIST (May 26, 2009 08:01:00 AM), <https://www.jurist.org/commentary/2009/05/extinction-or-evolution-ending-absolute/>

92. *Id.*

93. See generally *Id.*

94. Report presented by Dr Joesph Rikh of the University of Ottawa at the IBA NY conference on Universal Jurisdiction, October 25, 2022. Germany, The Netherlands,

The issue today is whether conditionality on the use of universal jurisdiction will make it more difficult to hold accountable perpetrators of atrocity crimes, specifically in the current crisis in Ukraine. On the one hand, the sheer number of universal jurisdiction cases around the world has grown. A recent survey of universal jurisdiction complaints over core international crimes from 1961 to 2017 worldwide shows that

*“[u]niversal jurisdiction practice has been quietly expanding as there has been a significant growth in the number of universal jurisdiction trials, in the frequency with which these trials take place year by year, and in the geographical scope of universal jurisdiction litigation.”*<sup>95</sup>

On the other hand, most states have adopted a conditional, often heavily restricted, approach.<sup>96</sup>

One of the more robust uses of universal jurisdiction concerned the armed conflict in Syria, which began in March 2011.<sup>97</sup> More than nine years of fighting have led to the internal displacement of 6.2 million people and 5.6 million people becoming refugees abroad by 2020.<sup>98</sup> The conflict witnessed widespread violations and crimes committed by all parties to the hostilities, with the Syrian government and its allies responsible for the vast majority.<sup>99</sup>

With limited to no prospect of pursuing justice within Syrian domestic jurisdiction, before the ICC, or before a (non-existing) ad hoc international or hybrid tribunal, a significant impunity gap opened.<sup>100</sup> To bridge this gap, twenty-five cases in connection with the Syrian conflict – in which at least preliminary examinations were launched – were opened in domestic courts.<sup>101</sup> Countries that initiated the cases included Austria, France, Germany, Hungary, the Netherlands, Norway, Spain, and Sweden.<sup>102</sup>

Thus, considering the situation in Ukraine, there is considerable precedence for state action. However, as this Article explores, most states still pursue conditional universal jurisdiction rather than its unconditional variety. Interestingly, a major exception is Ukraine, which has recently adopted an absolute form of universal jurisdiction. In May 2021, the Ukrainian parliament amended Article 8 of the Criminal Code of Ukraine to introduce “the principle

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France, Italy, Sweden, Belgium, Finland, Switzerland, Spain, Norway, UK, Austria, Denmark, Hungary, Canada, and the United States are the sixteen countries.

95. Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30(3) EUR. J. INT'L L. 779, 779 – 791 (2019).

96. *Id.*; See also ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 58 (2010).

97. *Profile: Syria*, BBC NEWS (Jan. 14, 2019), <https://www.bbc.co.uk/news/world-middle-east-14703856>.

98. *Internally Displaced People*, UNHCR SYRIA, <https://www.unhcr.org/sy/internally-displaced-people>; *Syria Regional Refugee Response*, OPERATIONAL DATA PORTAL REFUGEE SITUATIONS (Sep. 8, 2022), <https://data.unhcr.org/en/situations/syria>.

99. Varney & Zduńczyk, *supra* note 36, at 29.

100. *Id.*, at 31.

101. *Id.*

102. *Id.*

of universal jurisdiction over aggression, genocide, crimes against humanity and war crimes”:<sup>103</sup>

“Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code.”<sup>104</sup>

### III. Head of State Immunities

When pursuing high-ranking officials, such as President Putin or other members of the Russian cabinet, states will encounter the issue of immunities of governmental representatives from foreign criminal jurisdiction. This fundamental customary rule is based on the principles of state sovereignty and sovereign equality and derives from the doctrine that foreign authorities may not hinder the official performance of those acting for or on behalf of another state.<sup>105</sup>

There are two types of immunities. Functional immunities (immunities *ratione materiae*) apply to state representatives for acts undertaken in official functions or on behalf of the state.<sup>106</sup> As functional immunities are tied to the official act, they hold beyond an official's status but do not attach to acts taken in a private capacity or before or after holding office.<sup>107</sup> Personal immunities, on the other hand, apply to sitting heads of state, heads of government, and foreign ministers (immunities *ratione personae*),<sup>108</sup> and shield both private and official acts.<sup>109</sup> As personal immunities are tied to an official's status, they lapse when the individual no longer holds office.<sup>110</sup>

There is a growing recognition that functional immunities are not applicable to the prosecution of atrocity crimes. This view is widely, although not universally, accepted and is reflected in the work of the International Law

103. See INFORMATION DEPARTMENT OF THE OFFICE OF THE VERKHOVNA RADA OF UKRAINE, *The Law “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law” was adopted*, VERKHOVNA RADA OF UKRAINE (May 20, 2021), [https://www.rada.gov.ua/news/Povido\\_mlennya/208710.html](https://www.rada.gov.ua/news/Povido_mlennya/208710.html) (Translated from Ukrainian to English via Google Translate).

104. See Criminal Code of Ukraine, 2001 (Act. No. 2341-III), <https://zakon.rada.gov.ua/laws/show/en/2341-14#Text>.

105. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 129 (2<sup>nd</sup> ed. 2003).

106. See Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 815-852 (2010).

107. See *id.* at 825.

108. Sitting heads of states, foreign ministers and other high ranking government officials are protected from alleged criminal proceedings before other states. See *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), *Judgement*, 2002 I.C.J. 3, ¶ 53.

109. *Id.*

110. Riccardo Mazzeschi, *The Functional Immunity State Officials From Foreign Jurisdiction: A Critique of the Traditional Theories*, *QUESTIONS OF INTERNATIONAL LAW* (May 12, 2015 05:16 PM), <http://www.qil-qdi.org/the-functional-immunity-of-state-officials-from-foreign-jurisdiction-a-critique-of-the-traditional-theories/>.



Commission (ILC).<sup>111</sup> The ILC found that functional immunity does not shield officials who commit genocide, crimes against humanity, war crimes, apartheid, torture, and forced disappearance.<sup>112</sup>

Moreover, there is a bifurcation of the principle of head of state immunity between international courts and (foreign) domestic courts. Generally, international courts, recognize neither personal immunities nor functional immunities. Article 27(2) of the Rome Statute of the International Criminal Court reads: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>113</sup> However, and most importantly to the present situation, the application of Article 27(2) to states not members of the ICC is highly contentious. Many scholars argue that as the ICC is a treaty-based court, under the traditional law of treaties, as laid down in Article 34 of the 1969 Vienna Convention on the Law of Treaties,<sup>114</sup> the Rome Statute can only bind member states.<sup>115</sup> Others, including the ICC itself, have taken the view that there is a customary exception even to head of state immunity before international criminal courts.<sup>116</sup>

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111. Adil Ahmad Haque, *Immunity for International Crimes: Where do States Really Stand?*, JUST SECURITY (Apr. 17, 2018), <https://www.justsecurity.org/54998/immunity-international-crimes-states-stand/>; International Law Commission, *Immunity of State officials from foreign criminal jurisdiction. Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session*, Int'l Law Comm'n, 69<sup>th</sup> Sess., May 1-June 2, July 3-Aug. 4, 2017, U.N. Doc. A/CN.4/L.893, <http://legal.un.org/docs/?symbol=A/CN.4/L.893>. However, Pursuant to the 2016 recommendation of Concepción Escobar Hernández, Special Rapporteur for “Immunity of State officials from foreign criminal jurisdiction”, the ILC refrained from including aggression on its draft list of crimes to which official immunities do not attach. This was the subject of controversies within the Commission, as some found that the ILC would be “remiss” not to recognize the non-applicability of functional immunities to aggression, particularly given that it entails “the most serious and dangerous form of the illegal use of force” and is necessarily “committed by State officials as an act performed in an official capacity”. ILC members who supported the exclusion of aggression emphasized that the ICC amendment incorporating the crime had yet to enter into force. A situation which has of course since changed. Moreover, the Rapporteur’s report explained the exclusion of aggression from the list by referring to the Commission’s prior statement that “the crime of aggression must be entrusted primarily to international courts and tribunals, given the political implications it could have for the stability of relations between States. . . .” See Rep. of the Int’l Law Comm’n, 68<sup>th</sup> Sess., May 2-June 10, July 4-Aug. 12, 2016, U.N. Doc. A/71/10, at ¶ 242, <https://digitallibrary.un.org/record/842656>; International Law Commission, *Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur\**, Int’l Law Comm’n, 68<sup>th</sup> Sess., May 2-June 10, July 4-Aug. 12, 2016, U.N. Doc. A/CN.4/701, at ¶ 222.

112. Rep. of the Int’l Law Comm’n, 69<sup>th</sup> Sess., May 1-June 2, July 3-Aug. 4, 2017, U.N. Doc. A/72/10, at ¶ 74.

113. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>

114. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

115. See Marko Milanovic, *Is the Rome Statute Binding on Individuals?*, EJILTALK.ORG (Oct. 15, 2010), <https://www.ejiltalk.org/is-the-rome-statute-binding-on-individuals/#:~:text=It%20is%20a%20treaty%2C%20to,treaties%20cannot%20bind%20non%20parties>. (stating that treaties, including the Rome Statute, can generally only bind non-parties).

116. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Judgement, at para. 38 (May 06, 2019).

However, at the level of foreign domestic courts, head of state immunities (both personal and functional) are undisputedly and firmly established under customary international law. This protection includes prosecution, arrest warrants and trials, although arguably not the decision to open an investigation. The principle of head of state immunity is firmly embodied in the International Court of Justice's ruling in the *Arrest Warrant* case.<sup>117</sup> Therein, the court found that

"... the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."<sup>118</sup>

In foreign domestic courts, personal immunities for Putin and his inner circle thus undeniably hold. However, as mentioned before, this protection lapses as soon as those individuals cease to hold office. While they may cling to their posts for years and decades to come, there are no statutory limitations for war crimes and crimes against humanity.<sup>119</sup> International criminal justice can thus play the long game.

#### IV. Universal Jurisdiction and Russia's Invasion of Ukraine

##### *Country-specific initiatives of universal jurisdiction*

##### A. Germany

Germany's 2002 Code of Crimes Against International Law (CCAIL) (*Völkerstrafgesetzbuch*)<sup>120</sup>, as the implementing legislation for the ICC's Rome Statute, provides German courts with universal jurisdiction over the crimes in the code, even in the absence of a nexus.<sup>121</sup> Section 1 of the CCAIL reads: "This Act shall apply to all criminal offences against international law designated under this Act, to [serious criminal offences designated therein] even when the offence was committed abroad and bears no relation to Germany."<sup>122</sup>

The broad definitional parameters of the CCAIL can be seen as an intentional decision to uphold the absoluteness of universal jurisdiction. Core

117. See *Arrest Warrant* of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgement, 2002 I.C.J. 3, 35.

118. *Id.* at para. 54.

119. Jean-Marie Henckaerts & Louise Doswald-Beck, *Rule 160*, in *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2008). Statutes of limitation may not apply to war crimes. See *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Nov. 26, 1968, 754 U.N.T.S. 73.

120. *VÖLKERSTRAFGESETZBUCH [VStGB] [CODE OF CRIMES AGAINST INTERNATIONAL LAW] [CCAIL]*, June 26, 2002, <https://www.gesetze-im-internet.de/vstgb/> (Ger.) [hereinafter CCAIL].

121. Hayley Evans, *A Survey of Recent Developments and Trends in Universal Jurisdiction*, *LAWFARE* (Feb. 9, 2022), <https://www.lawfareblog.com/survey-recent-developments-and-trends-universal-jurisdiction> (last visited Sep. 23, 2022).

122. CCAIL, *supra* note 120, § 1.

crimes include genocide, crimes against humanity, and war crimes.<sup>123</sup> Torture and forced disappearance are considered only accessory crimes of crimes against humanity and war crimes, both of which invoke universal jurisdiction.<sup>124</sup> German criminal law does not contain any other provisions explicitly allowing universal jurisdiction for torture or forced disappearance as stand-alone crimes.<sup>125</sup> Germany's approach has been seen as "one of the most open and forward-thinking forms of universal jurisdiction" internationally.<sup>126</sup>

If a case bears a nexus to Germany (i.e., the accused is present in Germany or is a German national), the prosecutor generally has a legal duty to begin an investigation.<sup>127</sup> In order to be tried before a German court, the defendant needs to be present in Germany.<sup>128</sup> Prosecutors and the police can, nonetheless, commence preparatory investigations to preserve evidence and allow for the start of proper proceedings once the accused has entered Germany.<sup>129</sup>

However, the German legislature curtailed this substantially unrestricted form of universal jurisdiction with procedural restrictions through the introduction of Section 153f into the Criminal Procedure Code (*Strafprozessordnung*, CPC)<sup>130</sup>, which specifically deals with the non-prosecution of offenses under the CCAIL (whereas Sections 153 a-d deal with non-prosecution of petty crimes and other possibilities to dispense with prosecution).<sup>131</sup>

Section 153f gives the Federal Public Prosecutor General (*Generalbundesanwalt*)—who serves under the Minister of Justice and prosecutes suspected terrorism, spying, and genocide-related crimes—extensive discretion as to whether to open an investigation or not (*Verfolgungsermessen*).<sup>132</sup>

In conjunction with Section 153c (1), the Federal Public Prosecutor General may dispense with prosecution if the crime was committed outside of Germany and if the accused is not resident in Germany (and is not expected to so reside).<sup>133</sup> However, if the accused is a German national, the case – under Section 153f – can be dismissed only if the offense is being prosecuted before an international court or by a state on whose territory it was committed or whose citizen was a victim.<sup>134</sup>

123. Varney & Zduńczyk, *supra* note 36, at 42, Appendix 1.

124. *Id.*

125. *Id.*

126. Toby Cadman in Lucy Trevelyan, *German prosecutors launch landmark case against two Syrians for crimes against humanity*, INT'L. BAR. ASS'N. (Dec. 23, 2019), [www.ibanet.org/Article/NewDetail.aspx?ArticleUid=E08F03F1-03DF-4FAA-9921-8D4E929ED16F](https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=E08F03F1-03DF-4FAA-9921-8D4E929ED16F) (last visited Sep. 23, 2022).

127. *Id.*

128. Georg Christian Klussmann, *Statement by the Federal Republic of Germany at the Sixth Committee on "The scope and application of the principle of universal jurisdiction"*, Oct. 22, 2021, [https://www.un.org/en/ga/sixth/75/pdfs/statements/universal\\_jurisdiction/11mtg\\_germany.pdf](https://www.un.org/en/ga/sixth/75/pdfs/statements/universal_jurisdiction/11mtg_germany.pdf); see Sixth Committee, Summary record of the 15<sup>th</sup> meeting, U.N. Doc A/C.6/76/SR.15, at para. 1-5 (2022).

129. *Id.*

130. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] [CPC], Apr. 7, 1987, § 153f (Ger.), <https://www.gesetze-im-internet.de/stop/>.

131. *Id.* at § 153, 153 a–d.

132. *Id.*

133. *Id.* at § 153 (1).

134. *Id.* at § 153f (1), Cl. 2.

Moreover, as stipulated in Section 153 f (2), the Federal Public Prosecutor General may dispense with prosecution if

- 1) There is no suspicion of a German having committed such offense;
- 2) Such offense was not committed against a German;
- 3) No suspect in respect to such offense is present in Germany and such presence is not to be anticipated; and
- 4) The offense is being prosecuted by an international court or by a state on whose territory the offense was committed, whose national is suspected of its commission, or whose national was harmed by the offense.<sup>135</sup>

The system of Section 153f thus implicates a certain procedural hierarchy. If a case lacks a nexus to Germany, priority is given to the primary right and duty of international courts or prosecutors from the home states of the victims or offenders or the jurisdiction in which the alleged crime was committed.

The prosecutor's refusal to investigate based on Section 153f does not depend on judicial consent, and contrary to other options to dispense with prosecution, is—apparently—not open to judicial control.<sup>136</sup> This makes Section 153f a remarkable outlier, which of course is not a coincidence. Indeed, the provision does not serve to address a legal issue but a political one.

This is most clearly showcased by the application of Section 153f to a petition to the Federal Public Prosecutor General against the former US secretary of defense Donald Rumsfeld and other high-ranking US officials, arising from the torture, sexual abuse, and mistreatment of Iraqi prisoners in the infamous Abu Ghraib prison complex.<sup>137</sup> The prosecutor dismissed the complaint, and the Stuttgart Higher Regional Court declared the motion for a court decision inadmissible.<sup>138</sup> This was the first high-court decision on the application of the regulation of Section 153f and, implicitly, also on the principle of universal jurisdiction contained in Section 1 of the CCAIL.<sup>139</sup> Both the decision of the prosecutor as well as the high court declaring a judicial review inadmissible were heavily criticized in German judicial literature as a case of “catching the small fry and letting the big fish go free,”<sup>140</sup> and many have brandished the behavior of the prosecutor as a deliberate (and politically motivated) act of rendering the CCAIL oblivious through utter non-application.<sup>141</sup>

135. *Id.* at § 153f (2).

136. Kai Ambos, *International Core Crimes, Universal Jurisdiction and § 153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case*, 18 CRIMINAL LAW FORUM 43, 54 (2007).

137. *Id.* at 50.

138. *Id.* at 44

139. *Id.*

140. See Denis Basak, *Der Fall Rumsfeld – ein Begräbnis Dritter Klasse für das Völkerstrafgesetzbuch?* 90 KRITV 333, 333-365 (2007); Kai Ambos, *supra* note 136.

141. See Kai Ambos, *supra* note 136.

Nonetheless, in later years, the German justice system has demonstrated significant appetite for pursuing perpetrators of war crimes, albeit through conditional universal jurisdiction and limited to lower-level perpetrators.

On February 24, 2021, the Higher Regional Court in Koblenz, Germany, convicted Eyad al-Gharib of aiding and abetting the crimes against humanity of torture and deprivation of liberty under universal jurisdiction.<sup>142</sup> Al-Gharib, a former officer of the Syrian intelligence service, had been arrested in Germany in 2019 for having helped to arrest and deliver at least 30 protesters to the al-Khatib detention center, where hundreds were tortured and starved to death.<sup>143</sup> Later in 2021, Taha al-Jumailly, an Iraqi member of the Islamic State (ISIS), was convicted of genocide against the Yazidi by a regional court in Frankfurt.<sup>144</sup> The case was unique even for the German usage of universal jurisdiction, as al-Jumailly was not on German soil when arrested.<sup>145</sup> In a later case, a German court sentenced Anwar Raslan, a former Syrian colonel who directed operations at a civil prison in Damascus, to life in prison.<sup>146</sup> Raslan had been arrested in Germany after successfully seeking asylum.<sup>147</sup> This unprecedented case was the world's first trial for state-sponsored torture in Syria.<sup>148</sup> Other important universal jurisdiction cases have been brought before German courts, although all of them based on conditional rather than absolute universal jurisdiction.<sup>149</sup>

Concerning the Russian invasion of Ukraine, Federal Minister of Justice Marco Buschmann stated in June 2022 that Germany would “naturally offer any evidence it collects to other institutions pursuing convictions for crimes committed during the course of Russia's invasion and ongoing war in Ukraine.”<sup>150</sup> Accordingly, the Federal Public Prosecutor General opened an investigation into suspected war crimes and crimes against humanity committed by Russian forces.<sup>151</sup> The office has opened a so-called structural investigation to begin collecting evidence—but no investigation against named individual

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142. Ben Hubbard, *German Court Convicts Former Syrian Official of Crimes Against Humanity*, NEW YORK TIMES (Feb. 24, 2021), [www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html](https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html); Bethan McKernan, *Germany convicts former Assad regime agent in historic Syria torture verdict*, THE GUARDIAN (Feb. 24, 2021), [www.theguardian.com/world/2021/feb/24/germany-convicts-former-assad-regime-agent-in-historic-syria-torture-verdict](https://www.theguardian.com/world/2021/feb/24/germany-convicts-former-assad-regime-agent-in-historic-syria-torture-verdict).

143. See Hubbard, *supra* note 142.

144. *Id.*

145. *German Court Finds Former 'IS' Member Guilty of Genocide*, DEUTSCHE WELLE (Nov. 30, 2021), <https://www.dw.com/en/german-court-finds-former-is-member-guilty-of-genocide/a-59976226>.

146. Jenny Hill, *German court finds Syrian colonel guilty of crimes against humanity*, BBC NEWS (Jan. 13, 2022), <https://www.bbc.com/news/world-europe-59949924>.

147. *Id.*

148. *Id.*

149. See, e.g., Hannah Brem, *Germany authorities arrest former member of Gambian military for alleged crimes against humanity*, JURIST (Mar. 17, 2021), <https://www.jurist.org/news/2021/03/germany-authorities-arrest-former-member-of-gambian-military-for-alleged-crimes-against-humanity/> (last visited Sep. 23, 2022).

150. Jon Shelton, *German justice minister: Can't prosecute Putin as head of state*, DEUTSCHE WELLE (June 9, 2022), <https://www.dw.com/en/german-justice-minister-cant-prosecute-putin-as-long-as-he-is-head-of-state/a-62083039>.

151. See Bojan Pancevski, *Germany Opens Investigation Into Suspected Russian War Crimes in Ukraine*, THE WALL STREET JOURNAL (Mar. 8, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8Bci>.

suspects yet.<sup>152</sup> In a structural investigation, the aim is to document the events on-site, gather information, and secure as much evidence as possible.<sup>153</sup> While there are no specific suspects yet, the aim of the procedure is to prepare subsequent investigations against individual perpetrators.<sup>154</sup>

The Federal Criminal Police Office (*Bundeskriminalamt*), tasked with the investigations by the Federal Public Prosecutor General, stated that it had already gathered hundreds of pieces of evidence. These sources were mainly from Ukrainian refugees who fled to Germany and filled out routinely distributed questionnaires concerning the war crimes they witnessed<sup>155</sup> and information from the German intelligence service (*Bundesnachrichtendienst*, BND).<sup>156</sup> The BND has, among other evidence, provided intercepted radio calls by Russian soldiers openly discussing atrocities.<sup>157</sup> The Federal Public Prosecutor General stated that it was conducting investigations concerning both low-ranking perpetrators as well as those “politically responsible.”<sup>158</sup>

## B. Spain

Of all the countries that had adopted the absolute variety of universal jurisdiction, no state wielded it more aggressively than Spain. Spain asserted universal jurisdiction through the promulgation of the *Ley Orgánica 6/1985 del Poder Judicial* (LOPJ, Organic Law 6/1985 on the Judiciary), which entered into force on July 3, 1985.<sup>159</sup>

Article 23.4 of the LOPJ allowed Spanish courts to have jurisdiction over acts committed by perpetrators regardless of their nationality or that of the victims or any nexus or tie to Spain if the act constituted any of the following offenses: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offenses in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking; (g) any other offense that Spain was obliged to prosecute under an international treaty or convention that included war crimes.<sup>160</sup>

Spanish criminal procedure did not require the accused to be present in Spain in order for a court to open a case, only for the actual trial.<sup>161</sup>

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152. See Deutscher Bundestag, *Ermittlungen zu Kriegsverbrechen in der Ukraine* (hib 388/2022), PARLAMENTSNACHRICHTEN (July 29, 2022), <https://www.bundestag.de/presse/hib/kurzmeldungen-905226>.

153. See *Generalbundesanwalt Frank bittet um Geduld bei Ermittlungen*, LEGAL TRIBUNE ONLINE (July 12, 2022), <https://www.lto.de/recht/nachrichten/n/generalbundesanwalt-peter-frank-straftverfolgung-kriegsverbrechen-aggressionsverbrechen-ukraine-russland-reichsbuerger-tuerkei-besuch/>.

154. *Id.*

155. *Id.*

156. See *Anklagen in Deutschland möglich. BKA: Hunderte Hinweise auf Kriegsverbrechen*, TAGESSCHAU (June 18, 2022), <https://www.tagesschau.de/inland/bka-kriegsverbrechen-ukraine-101.html>.

157. *Id.*

158. *Id.*

159. See generally LEY ORGÁNICA DEL PODER JUDICIAL (Law on the Judiciary) [L.O.P.J.] B.O.E. n. 157, July 2, 1985(Spain).

160. See *id.* at art. 23.4.

161. See *id.*

Any Spanish citizen or non-governmental organization (NGO) could seek a prosecution even without being a victim.<sup>162</sup> Furthermore, non-Spanish individuals and NGOs could also initiate proceedings if they were victims of the crime.<sup>163</sup> The investigative judge could also launch an investigation on his or her own initiative.<sup>164</sup> There was only one limitation: the suspect could not have been convicted, found innocent, or pardoned abroad.<sup>165</sup>

Unsurprisingly, Spain established itself as one of the world's most hospitable forums for cases based on universal jurisdiction, and Spanish courts endorsed the principle as a process of eliminating national boundaries.<sup>166</sup> The expansive nature of Spain's universal jurisdiction law was particularly evident when cases were brought against former Chinese government officials for the alleged genocide in Tibet,<sup>167</sup> including against the former president Jiang Zemin and six other senior government officials.<sup>168</sup> Spanish prosecutions also directed their focus toward six former U.S. government officials for CIA flights over Spanish territory and their involvement in alleged torture at Guantanamo Bay.<sup>169</sup>

However, the use of absolute universal jurisdiction was about to take significant hits. In 2009, as a result of diplomatic pressure from China, Israel, the United States, and even Rwanda and Morocco, a modification of the application of universal jurisdiction was implemented through the *Ley Orgánica 1/2009*.<sup>170</sup>

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162. See CONSTITUCIÓN ESPAÑOLA (Constitution) B.O.E. no. 311, Dec. 29, 1978 art. 125 (Spain). ("Citizens may engage in popular action and participate in the administration of justice through the institution of the Jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.").

163. *Id.* at art. 124.

164. See L.O.P.J., (under Spanish law, an investigative judge begins proceedings after a case is referred by the prosecutor or by *acción popular*. *Acción popular* is the procedure through which Spanish citizens with an interest in a particular case or acting on behalf of a victim may bring private prosecutions. This procedure has been particularly useful in the prosecution of violations of international law. The National Prosecution Office decides whether to continue proceedings begun by *acción popular*, like this case, based upon the evidence collected by an investigative judge during an initial investigation. If the case is pursued, it will be heard before the Audiencia Nacional. The Audiencia Nacional is a special court in Madrid that has extraordinary powers, including extraterritorial jurisdiction. The Audiencia's jurisdiction also provides its judges with extraordinary powers to investigate international crimes, such as torture. When an investigative judge accepts the complaint, he or she has made a preliminary finding that a crime had been committed that was subject to Spanish jurisdiction. At that point, he can begin compiling evidence, calling witnesses, and preparing a record prior to deciding if there was enough evidence to forward the case to a separate three-judge panel for trial.).

165. See L.O.P.J., art. 23.2(c).

166. See Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 506 (2007).

167. See Craig Peters, *The Impasse of Tibetan Justice: Spain's Exercise of Universal Jurisdiction in Prosecuting Chinese Genocide*, 39 SEATTLE U. L. REV. 165, 181 (2015).

168. See *id.*

169. Julian Borger & Dale Fuchs, *Spanish judge to hear torture case against six Bush officials*, THE GUARDIAN (Mar. 28, 2009) <https://www.theguardian.com/world/2009/mar/29/guantanamo-bay-torture-inquiry>.

170. See generally LEY ORGÁNICA 1/2009, DE 3 DE NOVIEMBRE, COMPLEMENTARIA DE LA LEY DE REFORMA DE LA LEGISLACIÓN PROCESAL PARA LA IMPLANTACIÓN DE LA NUEVA OFICINA JUDICIAL, POR LA QUE SE MODIFICA LA LEY ORGÁNICA 6/1985, DE 1 DE JULIO, DEL PODER JUDICIAL (Organic law 1/2009, Complementary to the Procedural Legislation Reform Law for the implementation of the



This modification of the 1985 law became effective on November 5, 2009, effectively rendering universal jurisdiction in Spain *conditional*.<sup>171</sup>

First, the amended law restricted the courts' jurisdiction to cases (i) in which the victims are of Spanish nationality, (ii) in which Spain has a "relevant connecting link," or (iii) where the alleged perpetrator is present in Spain.<sup>172</sup> Second, Spanish authorities would only be able to apply universal jurisdiction if "proceedings implying an effective investigation and prosecution have not begun in another competent country or in an International Court."<sup>173</sup>

Moreover, amendments in 2014 introduced further conditions restricting universal jurisdiction in Spanish courts.<sup>174</sup> Pursuant to Article 23.4(a) of the law, in cases of genocide, crimes against humanity, or war crimes, the alleged perpetrator must be a Spanish national, a foreigner who habitually resides in Spain, or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite (in accordance with the principle of *aut dedere aut judicare*).<sup>175</sup>

In its decision in the case of Efraín Ríos Montt of Guatemala, the Supreme Court (*Tribunal Supremo*), Spain's highest court, determined – by eight votes to seven – that Spanish courts can only exercise jurisdiction over genocide where there exists a "point of connection" with Spain.<sup>176</sup>

According to Articles 23.4(b) and (c) of the law, Spanish courts have jurisdiction for crimes of torture and forced disappearance only if the alleged perpetrator is a Spanish citizen or if the victim was a Spanish citizen at the time the act was committed, and the alleged perpetrator is on Spanish territory.<sup>177</sup> Furthermore, the new Article 23.6 of the law introduced an additional restriction, eliminating the possibility of the "acción popular" (the ability under Spanish law for civil society in a third-party capacity to press charges).<sup>178</sup> The crimes can be prosecuted if the prosecutor or the victim has lodged a complaint.<sup>179</sup>

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new Judicial Office), B.O.E. n. 266, Nov. 4, 2009, p. 92090 <https://www.boe.es/buscar/doc.php?id=BOE-A-2009-17492> (Spain).

171. See *id.*, at 92089.

172. Amnesty International, *Spain – Submission to the UN Universal Periodic Review, Eighth session of the UPR Working Group of the Human Rights Council*, AMNESTY INTERNATIONAL, (Nov. 9, 2009), <https://www.amnesty.org/en/documents/EUR41/013/2009/en/>.

173. *Id.*

174. LEY ORGÁNICA 1/2014, DE 13 DE MARZO, DE MODIFICACIÓN DE LA LEY ORGÁNICA 6/1985, DE 1 DE JULIO, DEL PODER JUDICIAL, RELATIVA A LA JUSTICIA UNIVERSAL (Organic Law 1/2014, Modification of the L.O.P.J.), B.O.E. n. 63, Mar. 14, 2014, <https://boe.es/buscar/doc.php?id=BOE-A-2014-2709> (Spain).

175. L.O.P.J., art. 23.4(a).

176. T.S., Feb. 25, 2003 (ILM, No. 42, p. 686) (Spain).

177. See L.O.P.J., at art. 23.4(b)–(c).

178. See *id.*, at art. 23.6. See also SENTENCIA 140/2018, de 20 de diciembre, B.O.E. no. 22, Dec. 20, 2018, p. 7034 <https://hj.tribunalconstitucional.es/es/Resolucion/Show/25823#ficha-tecnica> (Spain) (Spanish Constitutional Court found that although the Constitution establishes the "acción popular," it does not force the legislator to incorporate it for all types of crimes or criminal proceedings.). See also Nicolás Zambrana-Tévar, *Ruling of the Spanish Constitutional Court Legitimising Restrictions on Universal Criminal Jurisdiction*, EJIL.TALK! (Feb. 6, 2019), <https://www.ejiltalk.org/ruling-of-the-spanish-constitutional-court-legitimising-restrictions-on-universal-criminal-jurisdiction/>.

179. See L.O.P.J., at art. 23.6.

Thus, Spanish courts' ability to exercise universal jurisdiction has been severely curtailed. Nonetheless, in 2022, the Spanish public prosecutor's office opened a probe into possible "serious violations of international humanitarian law by Russia in Ukraine."<sup>180</sup> The aim of this investigation is to "determine the criminal nature" of Russia's invasion of Ukraine.<sup>181</sup> The Spanish public prosecutor's office announced this initiative just hours after Germany's federal prosecutors had opened a similar probe.<sup>182</sup> Moreover, the Ministry of Justice announced the formation of a multidisciplinary team of 39 forensic experts and other professionals to assist the ICC's Office of the Prosecutor with fieldwork in Ukraine.<sup>183</sup> Furthermore, Spain offered the support of the National Institute of Toxicology and Forensic Sciences (INTCF) to handle collected evidence.<sup>184</sup> Finally, in November 2022, Spain's Prime Minister, Pedro Sanchez, announced the deployment of Spanish police officers to support Ukrainian investigators and prosecutors with the collection of evidence.<sup>185</sup>

### C. Sweden

The Swedish criminal code enables Swedish courts to exercise jurisdiction over any crime committed outside of Sweden if the perpetrator is a Swedish citizen or a habitual resident of Sweden.<sup>186</sup> It also allows for jurisdiction over perpetrators that are merely present on Swedish territory if the offense can, under Swedish law, result in imprisonment for more than six months.<sup>187</sup> Furthermore, jurisdiction is established if an offense is covered by an international agreement containing an extradite or prosecute obligation.<sup>188</sup> The jurisdiction established in the above provisions is restricted by a requirement of dual criminality, and thus may only be exercised if the act is also punishable under the law of the state where it was committed (unless it was committed by particular individuals like members of the Swedish armed forces posted abroad or if it carries a penalty of more than four years under Swedish law).<sup>189</sup>

In 2014, the Swedish Parliament issued the Act on Criminal Responsibility for Genocide, Crimes against Humanity, and War Crimes, incorporating crimes against humanity as offenses in domestic law,<sup>190</sup> thus providing Swedish courts

180. *Spain opens probe into 'serious violations' by Russia in Ukraine*, THE LOCAL (Mar. 8, 2022), <https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine/>.

181. *Id.*

182. *See id.*

183. *Spain mobilizes 39 forensic experts for ICC probe on Ukraine war crimes*, The Nomad Today (Apr. 22, 2022), <https://www.thenomadtoday.com/articulo/spain/spain-offers-39-forensic-experts-to-investigate-war-crimes-in-ukraine/20220422163021017861.html>.

184. *See id.*

185. *Spain to deploy police in Ukraine to assist war crime investigations*, REUTERS (Nov. 21, 2022), <https://www.reuters.com/world/europe/training-center-spain-ukrainian-troops-start-operating-end-nov-pm-says-2022-11-21/> (last visited Jan. 7, 2023).

186. *See* BROTTSBALKEN [BrB] [PENAL CODE] 2:3(2) a) (Swed.).

187. *See id.*, at 2:3(2) c).

188. *See id.*, at 2:3(5) c).

189. *See id.*, at 2:5.

190. *See generally* LAG OM STRAFF FÖR FOLKMORD, BROTT MOT MÄNSKLIGHETEN OCH KRIGSFÖRBRYTELSE (Svensk författningssamling) [SFS], 2014:406 (Swed.).

with the possibility of exercising universal jurisdiction over these crimes. According to Chapter 2, Section 3 (6) a) of the Swedish Criminal Code, Swedish courts may exercise universal jurisdiction over war crimes, crimes against humanity, and genocide, even if committed abroad and without any link to Sweden.<sup>191</sup> This also holds for a number of other offenses, from hijacking and aircraft sabotage over terrorism to torture.<sup>192</sup> There is no dual criminality requirement for these provisions.<sup>193</sup>

At first glance, Section 3(6) thus allows for the exercise of a seemingly wide, unconditional form of universal jurisdiction. However, in practice, scope and application are severely limited by the fact that an indictment under this provision requires positive authorization to prosecute by the Swedish Prosecutor General.<sup>194</sup> and, if the case touches particular interests of Sweden's foreign and Security Policy, the Prosecutor General has to refer the matter to the Swedish Government for a decision.<sup>195</sup>

It is thus not surprising that most universal jurisdiction cases in Sweden have been brought under conditional universal jurisdiction and/or concerning low-level perpetrators. The *Mbanenande* case was the first where a person was convicted of genocide for participating in the 1994 massacre of Tutsis in Rwanda.<sup>196</sup> After the genocide, Stanislas Mbanenande fled to Sweden, where he claimed refuge and was later granted Swedish citizenship.<sup>197</sup> In 2010, the Rwandan prosecutor's office issued an international arrest warrant for Mbanenande, and in 2011 it asked for his extradition.<sup>198</sup> As Mbanenande had obtained Swedish citizenship in 2008, the extradition request was denied.<sup>199</sup> Instead, Mbanenande was arrested and indicted for genocide and crimes against international law by the Swedish authorities in 2012 and was sentenced to life imprisonment on June 20, 2013.<sup>200</sup>

On July 14, 2022, the Iranian citizen Hamid Noury was sentenced to life by the Stockholm District Court for grave war crimes and murder he committed in 1988.<sup>201</sup> The judges found that Noury, in his role as deputy prosecutor, had participated in the executions of political prisoners and of left-wing sympathizers who were deemed to have renounced their Islamic faith.<sup>202</sup> Following an execution order by Ayatollah Khomeini for all prisoners in the country who sympathized and remained loyal with the Iranian opposition group Mujahedeen-e-Khalq, about 5,000 prisoners had

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191. BrB, at 2:3(6) a).

192. *Id.*, at 2:3(6) a)–h).

193. *Id.*

194. *Id.*, at 2:8.

195. *Id.*

196. *Swede jailed for life in historic genocide case*, THE LOCAL (June 20, 2013), <https://www.thelocal.se/20130620/48614>.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See Sweden: Iranian Gets Life in Prison for 1980s War Crimes*, ASHARQ AL-AWSAT (July 14, 2022), <https://english.aawsat.com/home/article/3757046/sweden-iranian-gets-life-prison-1980s-war-crimes>

202. *Id.*

been killed.<sup>203</sup> The verdict caused substantial diplomatic tensions between Sweden and Iran.<sup>204</sup>

In April 2022, Sweden opened an investigation into suspected war crimes in Ukraine.<sup>205</sup> The Swedish Prosecution Authority stated that there was reason to believe that grave war crimes were being committed in Ukraine.<sup>206</sup> The purpose was to secure evidence potentially present in Sweden as early as possible, to be used in future legal proceedings, whether in Sweden, in another country's court, or in an international court.<sup>207</sup> The Swedish prosecutors encouraged people that had been the victims of or had witnessed "violence against civilians in Ukraine" to contact authorities.<sup>208</sup> Moreover, since the outbreak of the war, Sweden has committed about 700,000 US dollars in additional funds to the ICC on top of its usual annual contribution to the Court's budget.<sup>209</sup>

#### D. France

French law has accepted a specific definition of universal jurisdiction, which is set out in Article 689-1 of the French Code of Criminal Procedure.<sup>210</sup> Accordingly, the following crimes are penalized by French law under universal jurisdiction principles:

1. torture and other cruel, inhuman or degrading treatment or punishment;<sup>211</sup>
2. forced disappearances;<sup>212</sup>
3. crimes against cultural property during armed conflict;<sup>213</sup>
4. terrorism and financing terrorism;<sup>214</sup>
5. offenses committed with nuclear material;<sup>215</sup>
6. unlawful acts against the safety of maritime navigation.<sup>216</sup>

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203. *Id.*

204. See David Gritten, *Swedish court convicts Iranian ex-official over 1988 executions*, BBC NEWS (July 14, 2022), <https://www.bbc.com/news/world-europe-62162676>.

205. *Sweden launches investigation into Ukraine war crimes*, THE LOCAL (Apr. 5, 2022), <https://www.thelocal.se/20220405/sweden-launches-investigation-into-ukraine-war-crimes/>.

206. *Id.*

207. *Id.*

208. *Id.*

209. See *Sweden increases support to International Criminal Court war crimes investigations*, GOVERNMENT OFFICES OF SWEDEN (Apr. 12, 2022), <https://www.government.se/press-releases/2022/04/sweden-increases-support-to-international-criminal-court-war-crimes-investigations/>.

210. Submission of France to the U.N.G.A. Sixth Committee (Legal) 65th Session, *The scope and application of the principle of universal jurisdiction*, AT/sec. No. 214 (Apr. 27, 2010), [https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/France\\_E.pdf](https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf) [hereinafter Submission of France].

211. Code de procédure pénale [C. pr. Pén.] [Criminal Procedure Code] Art. 689(2) (Fr.); Submission of France, *supra* note 210.

212. C. pr. Pén., at Art. 689(13).

213. *Id.*, at Art. 689(14).

214. *Id.*, at Arts. 689(3), 689(9)–(10).

215. *Id.*, at Art. 689(4).

216. *Id.*, at Art. 689(5).

Furthermore, Article 113-7 of the Criminal Code states: “French Criminal law is applicable to any felony, as well as any misdemeanor punished by imprisonment, committed by a French or *foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.*” (Emphasis added.)<sup>217</sup> However, there is no obligation to prosecute these crimes.<sup>218</sup>

The use of universal jurisdiction in France requires the presence of the suspect at the time proceedings are initiated and precludes the initiation of proceedings in the absence of that person.<sup>219</sup> Furthermore, the application of universal jurisdiction in France is not possible if the alleged criminal is only passing through French territory.<sup>220</sup> A law passed in 2010 further stipulated that the accused must have a habitual residence in France.<sup>221</sup>

There are additional restrictions on the use of universal jurisdiction in France. It only applies to crimes against humanity and war crimes and has to be punishable in the state in which it occurs, or in the state that the perpetrator is a citizen of.<sup>222</sup> For example, a court halted proceedings against a Syrian national accused of crimes against humanity committed in Syria because Syria does not recognize crimes against humanity.<sup>223</sup> This restriction is considered exceedingly strict given that crimes against humanity are prohibited under customary international law.<sup>224</sup>

Another limitation to French universal jurisdiction is the prohibition against the triggering of legal proceedings by individuals or associations.<sup>225</sup> Only the Office of the Public Prosecutor may initiate proceedings under universal jurisdiction.<sup>226</sup>

The jurisdiction of the courts is further limited. According to Articles 689 and 689-1 of the Code of Criminal Procedure, French law requires that an international agreement be incorporated into French national law.<sup>227</sup> The provisions of the agreement must give national courts the jurisdiction to prosecute and sentence the person suspected of committing the offenses addressed in the agreement.<sup>228</sup>

However, it is important to note that the above limitations do not apply to cases of torture and forced disappearances.<sup>229</sup>

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217. Code Pénal [C. Pén] [Penal Code] art. 113(7).

218. C. pr. Pén., *supra* note 211, at Arts. 689, 689(1); OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN FRANCE 4-8 (2019).

219. See OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 218, at 15.

220. *La France: une Terre de Refuge Pour les Criminels de Guerre?*, AMNESTY INTERNATIONAL (June 26, 2022), <https://www.amnesty.fr/actualites/competence-univerFrancefrance-ukraine-justice-internationale-cpi>.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. C. pr. Pén., at Arts. 689, 689(1).

228. *Id.*

229. *Id.*

In addition, France has incorporated into law the jurisdictional base of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda.<sup>230</sup>

In March 2022, French prosecutors began an investigation into the killing of a Franco-Irish journalist and his research consultant near Kyiv.<sup>231</sup> In April 2022, French anti-terror prosecutors announced the opening of three separate probes into suspected war crimes committed against French nationals during the Russian invasion.<sup>232</sup> One probe was launched earlier in response to accounts of rape and killings of hundreds of civilians in Bucha and other formerly Russian-occupied towns.<sup>233</sup> To date, all French investigations into international crimes committed in Ukraine concerned crimes against French nationals.<sup>234</sup> Jeanne Sulzer of Amnesty International France has pressed the French government to change the law to allow for a broader interpretation of universal jurisdiction crimes.<sup>235</sup>

#### E. Slovakia

Slovakia has criminalized war crimes in Section 431 and 433 of its Criminal Code.<sup>236</sup> [highlighted comments]

Section 431 (War Atrocities) states that

*“[a]ny person, who in wartime, violates the rules of international law by inhuman treatment of vulnerable civilian population, refugees, wounded persons, members of the armed forces who have laid down their arms or prisoners of war shall be liable to a term of imprisonment of four to ten years.*

*“The same sentence [. . .] shall be imposed on any person who, in the wartime, violates the rules of international law by failing to take effective measures for the protection of persons who are in need of such help, in particular children, women and wounded or old persons, or who prevents such measures being taken or by impeding or blocking civil protection organisations of an enemy, of a neutral or other state in the fulfilment of their humanitarian tasks.”<sup>237</sup>*

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230. See Submission of France, *supra* note 210. French law has recognized the *ad hoc* universal jurisdiction of the French courts to judge offenses specific to those two tribunals. With regard to the universal jurisdiction of French judges, domestic laws relating to the Statutes of the two international criminal tribunals give them the ability the prosecutor perpetrators of or accomplices to the offenses defined in the Statutes if they are found in France. They also allow the tribunals to transfer cases to French courts.

231. See Gaspard Sebag, *France Opens Ukraine War Crimes Case on Possible French Victims*, BLOOMBERG (Apr. 5, 2022), <https://www.bloomberg.com/news/articles/2022-04-05/france-opens-ukraine-war-crimes-case-on-possible-french-victims>.

232. *Id.*

233. Matthew Dalton, *France Sends Police Unit to Ukraine to Support War-Crimes Probe*, THE WALL ST. J. (Apr. 11, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-04-11/card/france-sends-police-unit-to-ukraine-to-support-war-crimes-probe-86ILLrY4yIOvHuDEWUuw>.

234. *Crimes de guerre en Ukraine: Amnesty presse la France de modifier sa législation*, EUROPE 1 (June 27, 2022, 9:21 PM), <https://www.europe1.fr/politique/crimes-de-guerre-en-ukFranceamnesty-presse-la-france-de-modifier-sa-legislation-4120125>.

235. *Id.*

236. TRETNÝ ZÁKON [CRIMINAL LAW], ZÁKON, 300/2005 Zbierka Zakonov, §§ 431, 433 (Slovk.).

237. *Id.*, § 431.

Section 433 (Lawlessness in the Wartime) prescribes that

“[a]ny person who commits an offence considered to be a war crime under Article 8 of the Rome Statute of the International Criminal Court shall be liable to a term of imprisonment of 12 to 25 years or life imprisonment.

“The offender shall be liable to life imprisonment if he commits such offence and causes serious bodily harm or death to several persons or other particularly serious consequence, or if he commits it for a remuneration.”<sup>238</sup>

The principle of universal jurisdiction is enshrined in Sections 5a, 6 and 7.<sup>239</sup> Accordingly, Slovak courts may exercise jurisdiction over “a particularly serious felony if the act was committed outside of the territory of the Slovak Republic against a Slovak national, and if the act gives rise to criminal liability under the legislation effective in the place of its commission.”<sup>240</sup>

Moreover, Slovak courts may assert jurisdiction over certain crimes “. . . even if such act was committed outside of the territory of the Slovak Republic by an alien who has not his/her permanent residence on the territory of the Slovak Republic.”<sup>241</sup> This applies to a wide range of crimes including terrorism,<sup>242</sup> war atrocities<sup>243</sup> and lawlessness in the wartime,<sup>244</sup> using prohibited weapons and unlawful warfare,<sup>245</sup> genocide,<sup>246</sup> persecution of civilians,<sup>247</sup> and endangering peace.<sup>248</sup> Furthermore, there is a catch-all for international crimes: universal jurisdiction may be exercised “when it is prescribed by an international treaty.”<sup>249</sup>

The above provisions demonstrate that, in theory, the Slovak Republic has adopted a widely applicable scope of unconditional universal jurisdiction.

Pursuant to Section 14 (d), (j) and (k) of the Slovak Code of Criminal Procedure, certain crimes bearing a particular gravity and seriousness are assigned to the Specialized Criminal Court (SPC).<sup>250</sup> The court may exercise domestic jurisdiction over criminal abuse of power by a public official; establishing, masterminding, and supporting a criminal or a terrorist group; and particularly serious crimes committed by a criminal group or a terrorist group.<sup>251</sup> The SPC was established in 2003, mainly to deal with corruption and organized crime.<sup>252</sup>

238. *Id.*, § 433.

239. *Id.*, § 5a-7.

240. *Id.*, § 5.

241. *Id.*, § 5a.

242. *Id.*, § 419.

243. *Id.*, § 431.

244. *Id.*, § 433.

245. *Id.*, § 426.

246. *Id.*, § 418.

247. *Id.*, § 432.

248. *Id.*, § 417.

249. *Id.*, § 7.

250. TRESTNÝ PORIADOK [CRIMINAL CODE], ZÁKON, 301/2005 Zbierka Zákonov, §14 (Slovk.).

251. *Id.*

252. MATTHEW STEPHENSON, SPECIALISED ANTI-CORRUPTION COURTS: SLOVAKIA 1 (2016), <https://www.u4.no/publications/specialised-anti-corruption-courts-slovakia>.



Slovakia has opened investigations into alleged crimes occurring in Ukraine with a view to possibly bringing cases before its domestic courts.<sup>253</sup> The country joined the Joint Investigation Team,<sup>254</sup> and sent a team of criminologists to Ukraine to assist with the investigation of war crimes.<sup>255</sup>

#### F. Canada

Canada has incorporated the principle of universal jurisdiction into domestic legislation by allowing Canadian courts to prosecute certain crimes that did not take place on Canadian territory.<sup>256</sup>

In 2000, Canada enacted the Crimes Against Humanity and War Crimes Act (CAHWCA) to implement violations of international criminal law and international humanitarian law that are subject to individual criminal responsibility in the Rome Statute into Canadian law.<sup>257</sup> The CAHWCA extends criminal liability in a manner consistent with the Rome Statute.<sup>258</sup> The Criminal Code of Canada also extends criminal liability under universal jurisdiction for certain offenses, typically when linked to the presence of the person in Canada after the commission of the alleged offense.<sup>259</sup> The CAHWCA states that crimes against humanity (which include torture) committed outside Canada are applicable to an indictable offense if (a) at the time the offense is alleged to have been committed, the victim of the alleged offense was a Canadian citizen; or (b) after the time the offense is alleged to have been committed, the person is present in Canada.<sup>260</sup>

Because of limited resources and investigative challenges, Canadian officials will not open an investigation where the alleged perpetrator is not present in the country or where he or she has not been identified.<sup>261</sup> The term “present in Canada” is defined as being in the country longer than a “fleeting visit.”<sup>262</sup> Should an alleged perpetrator leave Canada during an investigation, Canadian officials will assess whether the individual left permanently or temporarily.<sup>263</sup> If the individual is determined to have permanently left Canada,

253. See Heather Stephenson, *What are War Crimes—and Will Putin Be Tried for Them?*, FLETCHER RUSSIA & EURASIA PROGRAM (Mar. 29, 2022), <https://sites.tufts.edu/fletcherrussia/what-are-war-crimes-and-will-putin-be-tried-for-them/>.

254. Eurojust, *supra* note 16, at 1.

255. Dasha Zubkova, *Criminologists From Slovakia Arrive In Ukraine To Assist in Investigation of Russian War Crimes*, UKRANEWS (Apr. 24, 2022), <https://ukranews.com/en/news/852231-criminologists-from-slovakia-arrive-in-ukraine-to-assist-in-investigation-of-russian-war-crimes>.

256. Submission of Canada to the U.N.G.A. Sixth Committee (Legal) 75<sup>th</sup> Session, *Scope and Application of Universal Jurisdiction in Canada*, [https://www.un.org/en/ga/sixth/75/universal\\_jurisdiction/canada\\_e.pdf](https://www.un.org/en/ga/sixth/75/universal_jurisdiction/canada_e.pdf); see U.N. Secretary-General, *The scope and application of the principle of universal jurisdiction*, U.N. Doc. A/75/151 (July 9, 2020).

257. See *Scope and Application of Universal Jurisdiction in Canada*, *supra* note 256.

258. *Id.*

259. *Id.* at 2.

260. Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24, Art. 6–7, 8(a)–(b) (Can.).

261. *Scope and Application of Universal Jurisdiction in Canada*, *supra* note 256, at 2.

262. *Id.*

263. *Id.* at 3.

officials then consider whether or not to continue with the criminal investigation *in absentia*.<sup>264</sup>

Canada has deferred to other jurisdictions when considering the use of universal jurisdiction. On May 21, 2016, a Canadian judge determined that Henri Jean-Claude Seyoboka should be deported to Rwanda to face trial for war crimes committed during the Rwanda genocide.<sup>265</sup> Seyoboka had obtained refugee status in Canada but had failed to disclose his involvement in the Rwandan army during his initial refugee interview.<sup>266</sup> He fought to remain in Canada but was eventually deported.<sup>267</sup>

In April 2022, the Royal Canadian Mounted Police (RCMP) launched a national investigation into allegations of war crimes and crimes against humanity committed in Ukraine.<sup>268</sup> The RCMP will be collecting “important information and evidence” from Ukrainians entering Canada for use in future criminal investigations.<sup>269</sup> The investigation is part of the Canadian War Crimes Program, a partnership between the Department of Justice, the RCMP, the Canada Border Services Agency, and Immigration, Refugees and Citizenship Canada.<sup>270</sup> It aims at denying safe haven to persons believed to have committed or been complicit in war crimes, crimes against humanity, or genocide and to hold them accountable.<sup>271</sup>

Moreover, Canada has announced that it is sending RCMP officers to Ukraine to support the ongoing ICC investigation. The move is unprecedented as no Canadian government has ever sent or seconded such a team.<sup>272</sup>

## G. Poland

In accordance with Articles 5 and 113 of the Polish criminal code, acts of Polish nationals or foreigners committed abroad are punishable if an international treaty contains an according obligation and if no decision on extradition has been taken.<sup>273</sup> Jurisdiction is not dependent upon the act being punishable in the place of the act.<sup>274</sup> Thus, Poland may investigate, prosecute, and

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264. *Id.*

265. Stu Mills, *Deportation looms for Gatineau man accused of war crimes in Rwanda*, CBC NEWS (May 21, 2022), <http://www.cbc.ca/news/canada/ottawa/deportation-gatineau-man-rwanda-war-crimes-1.3591906>.

266. *Id.*

267. *Id.*

268. *RCMP launching investigation into war crimes in Ukraine*, CBC NEWS (Apr. 7, 2022), <https://www.cbc.ca/news/canada/ottawa/rcmp-investigation-war-crimes-ukraine-1.6412327>.

269. *Id.*

270. *Id.*

271. *Id.*

272. Mark Kersten, *Canada sends Investigators to Help the ICC out in Ukraine. Will it do any good?*, JUST. IN CONFLICT (Apr. 5, 2022), <https://justiceinconflict.org/2022/04/05/canada-sends-investigators-to-help-the-icc-out-in-ukraine-will-it-do-any-good%E2%82%AC%81%BC/>.

273. KODEKS KARNY [KK] [CRIMINAL CODE], Arts. 5, 113 (Pol.).

274. Przemysław Saganek, *Statement by the Republic of Poland, Permanent Mission to the United Nations, Seventy-First Session of the General Assembly, Agenda item 85 “The scope and application of the principle of universal jurisdiction”* (Oct. 11, 2016), [https://www.un.org/en/ga/sixth/71/pdfs/statements/universal\\_jurisdiction/poland.pdf](https://www.un.org/en/ga/sixth/71/pdfs/statements/universal_jurisdiction/poland.pdf).

sentence foreign individuals for crimes covered in the Rome Statute (genocide, war crimes, crimes against humanity, and the crime of aggression).<sup>275</sup>

The Polish National Public Prosecutor's Office has initiated an investigation into the war of aggression started by Russia against Ukraine.<sup>276</sup> The proceedings also cover the activities of Belarus, which has made its territory available for armed aggression against Ukraine.<sup>277</sup> During the proceedings, close cooperation will be established between law enforcement authorities and the Ukrainian judiciary.<sup>278</sup> The investigation was initiated pursuant to Article 117 Section 1 of the Polish Criminal Code. Accordingly, anyone who initiates a war of aggression is punishable by a penalty of up to life imprisonment.<sup>279</sup>

Poland has already interviewed refugees, collected over 300 witness statements, and collected photographic and video evidence of specific Russian war crimes<sup>280</sup> that may be used in a criminal trial in Poland or could be forwarded to the ICC.<sup>281</sup> Similar to other European countries, if sufficient evidence is collected against military or civilian figures thought responsible for the Russian invasion, Poland may charge individuals *in absentia* and apply to Interpol for a "red notice" and a European arrest warrant, which allows for the location and arrest of a fugitive if he or she is on European Union territory and for extradition to Poland.<sup>282</sup>

On March 25, Poland, Lithuania, and Ukraine launched a Joint Investigation Team (JIT) on core international crimes committed in Ukraine.<sup>283</sup> In April, officials announced that the chief prosecutor of the ICC had joined the Polish-led probe.<sup>284</sup> In the same month, the Polish minister of justice, Zbigniew Ziobro, stated that nearly 1,000 witnesses had already been questioned.<sup>285</sup>

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275. *Id.*

276. Ministerstwo Sprawiedliwości, *Działania Ministerstwa Sprawiedliwości i polskiej prokuratury wobec wojny na Ukrainie*, SERWIS RZECZYPOSPOLITEJ POLSKIEJ (Mar. 1, 2022), <https://www.gov.pl/web/sprawiedliwosc/dzialania-ministerstwa-sprawiedliwosci-i-polskiej-prokuratury-wobec-wojny-na-ukrainie>.

277. *Id.*

278. *Id.*

279. *Id.*

280. Daniel Tilles, *ICC chief prosecutor thanks Poland for support investigating war crimes in Ukraine*, NOTES FROM POLAND (Mar. 17, 2022), <https://notesfrompoland.com/2022/03/17/icc-chief-prosecutor-thanks-poland-for-support-investigating-war-crimes-in-ukraine/>.

281. Witold Zontek, *Can Putin Be Tried in Poland?*, VERFASSUNGSBLOG (Apr. 20, 2022), <https://verfassungsblog.de/can-putin-be-tried-in-poland>.

282. *Id.*

283. *Eurojust supports joint investigation team into alleged core international crimes in Ukraine*, EUROJUST (2022), <https://eurojust.europa.eu/news/eurojust-supports-joint-investigation-team-alleged-core-international-crimes-ukraine>.

284. *Int'l war crimes prosecutor joins Polish-led probe into Russian atrocities in Ukraine*, POLSKIE RADIO (Apr. 25, 2022), <https://www.polskieradio.pl/395/9766/Artykul/2945711,Intl-war-crimes-prosecutor-joins-Polish-led-probe-into-Russian-atrocities-in-Ukraine>.

285. *Poland asks other states to join investigation of Russian crimes in Ukraine*, THE FIRST NEWS (Apr. 25, 2022), <https://www.thefirstnews.com/article/poland-asks-other-states-to-join-investigation-of-russian-crimes-in-ukraine-29924>.

## H. Lithuania, Estonia, and Latvia

The Lithuanian Criminal Code establishes universal jurisdiction under international treaties for certain crimes, including crimes against humanity, war crimes, human trafficking, money laundering, and terrorist activity, regardless of the citizenship and place of residence of the perpetrator or the territory where the crime was committed.<sup>286</sup>

One of the preconditions for the application of universal jurisdiction in Lithuania is that the state in which the criminal act was committed or the state whose national committed a criminal act has the priority to punish the offender.<sup>287</sup> Only in cases where the extradition or surrender of the offender is not possible is the invocation of universal jurisdiction considered.<sup>288</sup> According to the Code of Criminal Procedure a perpetrator may be prosecuted *in absentia*.<sup>289</sup>

For a judicial procedure against Russian perpetrators, Lithuanian national legislation and case law will yield to international treaties and their interpretations of the crimes (e.g., war crimes) eligible for domestic prosecution under the principle of universal jurisdiction.<sup>290</sup> Lithuanian adjudications will be built on interpretations under established international law and rely on previous decisions from other international courts, such as the ICC, ICTR, ICTY, and the ICJ.<sup>291</sup>

The Lithuanian parliament has called for the criminal prosecution of Russia's leadership for its invasion of Ukraine and the alleged wide-scale forced deportation of over a million Ukrainians, including more than 200,000 children, to Russian territory.<sup>292</sup> The motion by the Lithuanian parliament failed to name a specific authority that should carry out the prosecution but called on "other countries" to make use of universal jurisdiction that would allow them to try accused war criminals from other nations.<sup>293</sup>

After a request by the Ministry of Justice, the Lithuanian Prosecutor General's Office announced on March 3, 2022 that it had opened a pre-trial investigation into alleged crimes against humanity and war crimes in Ukraine, including against Putin and the Belarusian leader, Alexander Lukashenko.<sup>294</sup> The investigation will include collecting evidence of "military attacks on civilians [and the] destruction of homes, hospitals, educational institutions, and other civilian facilities."<sup>295</sup> The investigation was opened under the provisions

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286. Submission of Lithuania to the U.N.G.A. Sixth Committee (Legal) 76<sup>th</sup> Session, *The scope and application of the principle of universal jurisdiction*, No. SN78-144 (May 7, 2021), [https://www.un.org/en/ga/sixth/76/universal\\_jurisdiction/lithuania\\_e.pdf](https://www.un.org/en/ga/sixth/76/universal_jurisdiction/lithuania_e.pdf).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. Andrius Sytas, *Lithuania parliament urges criminal prosecution of Russian leadership*, REUTERS (June 16, 2022), <https://www.reuters.com/world/europe/lithuania-parliament-urges-criminal-prosecution-russian-leadership-2022-06-16/>.

293. *Id.*

294. *Lithuania prosecutors launch Ukraine war crimes investigation*, REUTERS (Mar. 3, 2022), <https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/>.

295. *Id.*

of Articles 100, 110, and 111 of the Lithuanian Criminal Code, establishing liability for the treatment of persons prohibited under international law, including aggression and prohibited military attack.<sup>296</sup>

Estonia regards universal jurisdiction as a last resort in fighting impunity. The country has not yet developed an exhaustive list of crimes for which universal jurisdiction applications apply.<sup>297</sup> Section 8 of the Estonian Penal Code states that regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to any acts committed outside the territory of Estonia if the crimes are part of an international obligation binding on Estonia.<sup>298</sup>

The Internal Security Service (ISS) of Estonia, the *Kaitsepolitseiamet*, has started to investigate war crimes committed in Ukraine.<sup>299</sup> The criminal proceedings were opened on the basis of universal jurisdiction, which allows the investigative bodies of Estonia to investigate international crimes committed outside Estonia.<sup>300</sup> Thus far, the activities of the ISS consist primarily of collecting evidence available in Estonia and evidence on cases related to Estonia.<sup>301</sup> The Office of the Prosecutor General oversees the criminal proceedings.<sup>302</sup> These are the first criminal proceedings in Estonia focusing on grave international crimes committed in the 21st century.<sup>303</sup> Moreover, Estonia joined the Joint Investigation Team (JIT) on core international crimes in Ukraine.<sup>304</sup>

The principle of universal jurisdiction in Latvia is embedded in Section 4 of the Criminal Law of Latvia (September 25, 2014).<sup>305</sup> Accordingly, non-citizens and foreigners with permanent residence in Latvia can be held liable for offenses committed outside of Latvia, irrespective of whether the action would be punishable in the territory of the criminal acts.<sup>306</sup> The Latvian criminal code also allows for “coercive measures” against legal persons in this regard.<sup>307</sup>

For foreigners without residency, jurisdiction can be established over “serious” or “especially serious” crimes if those were “directed against the Republic of Latvia or against the interests of its inhabitants.”<sup>308</sup> According to Section 7 (4), a “serious crime” is an intentional offense that would lead to

296. *Lithuania opens probe into crimes against humanity in Ukraine attacked by Russia*, LITHUANIAN NATIONAL RADIO AND TELEVISION (Mar. 3, 2022), <https://www.lrt.lt/en/news-in-english/19/1633685/lithuania-opens-probe-into-crimes-against-humanity-in-ukraine-attacked-by-russia> (last visited Sep. 27, 2022).

297. Anneli Leega Piiskop, *Statement of the Republic of Estonia at the General Debate of the 72<sup>nd</sup> Session of the UN General Assembly Sixth Committee* (Nov. 13, 2017), [https://www.un.org/en/ga/sixth/72/pdfs/statements/universal\\_jurisdiction/estonia.pdf](https://www.un.org/en/ga/sixth/72/pdfs/statements/universal_jurisdiction/estonia.pdf).

298. *Id.*

299. *Estonia's Internal Security service also investigating war crimes committed in Ukraine*, THE BALTIC TIMES (Mar. 30, 2022), [https://www.baltictimes.com/estonia\\_s\\_internal\\_security\\_service\\_also\\_investigating\\_war\\_crimes\\_committed\\_in\\_ukraine/](https://www.baltictimes.com/estonia_s_internal_security_service_also_investigating_war_crimes_committed_in_ukraine/) (last visited Sep. 27, 2022).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. EUROJUST, *supra* note 16.

305. KRIMINĀLLIKUMS [CRIMINAL LAW] 1998 (Act No. 199/200), § 4 (amended 2014) (Lat.); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 72, Annex II (2011).

306. KRIMINĀLLIKUMS, § 4 (1).

307. *Id.*, § 4 (2).

308. *Id.*, § 4 (3).

imprisonment of three to eight years.<sup>309</sup> An “especially serious crime” would be an offense punished with the deprivation of liberty for a period exceeding eight years or for life.<sup>310</sup>

Moreover, and most importantly, a crime by a foreigner outside of Latvia would also fall under Latvia’s jurisdiction if “provided for in international agreements.”<sup>311</sup> Latvian courts may, thus, exercise universal jurisdiction over war crimes, crimes against humanity, genocide, torture, and other international crimes.

Latvia has already opened investigations into alleged crimes occurring in Ukraine with a view to bringing cases before its domestic courts.<sup>312</sup>

On March 15, the Latvian State Security Service (VDD) officially commenced a criminal procedure over war crimes, crimes against humanity, and crimes against peace in Ukraine that Russian armed forces committed.<sup>313</sup> The VDD investigation is currently focused on collecting and documenting evidence of these crimes so it may be used for prosecutions in Latvia.<sup>314</sup>

Furthermore, Latvia has joined the JIT on core international crimes in Ukraine.<sup>315</sup> Latvia has also welcomed the creation of the Independent Commission of Inquiry on Ukraine,<sup>316</sup> which is based on a resolution adopted by the UN Human Rights Council to investigate, collect evidence, identify responsible individuals, and make recommendations for the prosecution of war crimes and other violations of international humanitarian law.<sup>317</sup>

On August 11, 2022, Latvia’s parliament recognized Russia as a state sponsor of terrorism and called for more comprehensive sanctions against Russia and Belarus and restrictions on visas for the violence committed against the civilian population of Ukraine “and other countries.”<sup>318</sup>

309. *Id.*, § 7(4).

310. *Id.*, § 7(5).

311. *Id.*, § 4(4).

312. See Stephenson, *supra* note 252. See also *Latvia seeks to join Kyiv in Echr case against Russia*, EURACTIV (Aug. 10, 2022), <https://www.euractiv.com/section/europe-s-east/news/latvia-seeks-to-join-kyiv-in-echr-case-against-russia/>.

313. *Latvian VDD investigates Russia’s crimes against Ukrainians; several eyewitnesses reported*, BALTIC NEWS NETWORK (July 12, 2022), <https://bnn-news.com/latvian-vdd-investigates-russias-crimes-against-ukrainians-several-eyewitnesses-reported-236068>.

314. Adrejs Pildegovičs, *Statement by H.E. Mr Andrejs Pildegovičs at the Arria-meeting on “Ensuring accountability for atrocities committed in Ukraine”*, Address Before the Security Council Arria-formula meeting (Apr. 27, 2022, 3:26 AM), <https://www2.mfa.gov.lv/en/newyork/latvia-in-the-un/other-statements-at-the-general-assembly/69051-statement-by-h-e-mr-andrejs-pildegovics-at-the-arria-meeting-on-ensuring-accountability-for-atrocities-committed-in-ukraine-27-april-2023>.

315. Eurojust, *supra* note 16.

316. Pildegovičs, *supra* note 314.

317. *Independent International Commission of Inquiry on Ukraine*, UNITED NATIONS HUMAN RIGHTS COUNCIL (March 4, 2022), <https://www.ohchr.org/en/hr-bodies/hrc/iic/hr-ukraine/index>.

318. *Latvian Parliament Recognizes Russia as Sponsor of Terrorism*, KYIV POST (Aug. 11, 2022), <https://www.kyivpost.com/russias-war/latvian-parliament-recognizes-russia-as-sponsor-of-terrorism.html>.

## I. The United States

Since it has not passed the requisite domestic legislation to do so, the United States lacks universal jurisdiction over war crimes. The United States may, however, share information with allies and international institutions with jurisdiction to prosecute such crimes.<sup>319</sup>

US federal genocide legislation (18 United States Code Chapter 50A) does not assert universal jurisdiction.<sup>320</sup> Indeed, the offense must occur in the United States or the offender must be a US national.<sup>321</sup> Likewise, the War Crimes Act of 1996 does not assert universal jurisdiction but requires the perpetrator or the victim to be a member of the US armed forces or a US citizen.<sup>322</sup>

While to date no US law authorizes the domestic prosecution of foreigners accused of committing war crimes abroad against non-US citizens,<sup>323</sup> there are a number of federal criminal statutes that rely, at least in part, on the universal jurisdiction principle. The federal piracy statute states that “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”<sup>324</sup> Moreover, a number of statutes on terrorism and security invoke some form of universal jurisdiction. These statutes govern crimes—including hostage-taking, aircraft hijacking, and aircraft sabotage—committed outside the United States by citizens of other countries, as long as the offender is “found” within the United States.<sup>325</sup> While some have argued that this requirement is not met if the perpetrators are brought to the United States by force, courts have rejected this argument, holding that the “found” requirement is met as long as the defendant is physically in the United States at the time of prosecution.<sup>326</sup> Moreover, there is legislation (18 United States Code Section 2340A), enacted in 1994, that criminalizes acts of official torture committed in foreign nations by foreign citizens.<sup>327</sup>

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319. See Stephenson, *supra* note 252.

320. See Genocide Convention Implementation Act, 18 U.S.C. §1091(e) (1994).

321. *Id.*, § 1091(d).

322. See 18 U.S.C. § 2441(b) (Supp 1996). During the inception of the law, the House Committee on the Judiciary rejected suggestions by the Departments of State and Defense to assert universal jurisdiction over war crimes. The Committee stated that universal jurisdiction “could draw the United States into conflicts in which this country has no place and where [United States] national interests are slight” and would pose “daunting” problems with respect to obtaining the necessary witnesses and evidence. The Committee argued that there would be alternative means of prosecuting war criminals, including by the conflicting nations or by an international tribunal. See Report from the Committee on the Judiciary on the War Crimes Act of 1996, H.R. REP. NO 104-698, 104th Cong. (1996).

323. *Id.*

324. Piracy and Privateering Act, 18 U.S.C. § 1651 (1994).

325. See Hostage Taking Act, 18 U.S.C. § 1203(b)(1)(B) (1994); 49 U.S.C. Appendix § 1472(n), *superseded by* Antihijacking Act, 49 U.S.C. § 46502(b) (1994); Destruction of Aircraft Act, 18 U.S.C. § 32(b)(3) (1994).

326. See, e.g., *United States v Rezaq*, 134 F3d 1121, 1132 (D.C. Cir. 1998); *United States v Yunis*, 924 F2d 1086, 1090 (D.C. Cir. 1991).

327. See 18 U.S.C. § 2340A (1994).



However, in response to Russia's targeting of civilians in Ukraine, there has been a bipartisan push to amend and expand US war crimes legislation.<sup>328</sup> The War Crimes Act of 1996 (as amended), has never been fully aligned with the US obligations pursuant to the Geneva Conventions of 1949 to enact domestic legislation establishing jurisdiction over any individual suspected of committing a grave breach of universally adopted humanitarian law treaties.<sup>329</sup> In May 2022, the United States Senate struck a bipartisan deal over a draft bill to amend the war crimes law to expand American courts' jurisdiction to cases involving atrocities committed abroad where neither party is a US citizen.<sup>330</sup> In December 2022, after an address by Zelenskyy to Congress, the Senate and the House passed the Justice for Victims of War Crimes Act which may usher in a monumental shift in US war crimes policy.<sup>331</sup> The act, now moving to President Biden's desk for signature, will allow for national prosecution of war criminals—regardless of nationality—where the victim or offender is present on U.S. soil.<sup>332</sup> The new law removes any statute for limitations but requires a certification by the Attorney General that prosecution “is in the public interest and necessary to secure substantial justice.”<sup>333</sup>

Concerning the International Criminal Court, the US administration has begun reassessing its position. After a disastrous relationship with the Court during the Trump administration,<sup>334</sup> the Biden administration seemingly views the ICC as the best avenue to bring Putin and his cohort to justice.<sup>335</sup> However, a series of US laws bar the government from providing significant assistance to the Court.<sup>336</sup> For example, the American Service-Members' Protection Act says: “No agency or entity of the United States Government or of any State or local government, including any court, may provide financial support or other cooperation, support, or assistance to the International Criminal Court” including the undertaking of any actions described in Article 89 (arrest, extradition, and transit of suspects), Article 92 (provisional arrest of suspects), or

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328. Virginia Shutt, *U.S. House passes \$ 40 billion Ukraine aid package with broad bipartisan support*, VIRGINIA MERCURY (May 10, 2022, 10:23 PM) <https://www.virginiamercury.com/2022/05/10/u-s-house-passes-40-billion-ukraine-aid-package-with-broad-bipartisan-support/>.

329. Geoffrey S. Corn, *Congress Needs to Amend the War Crimes Act of 1996*, LAWFARE (Mar. 2, 2022), <https://www.lawfareblog.com/congress-needs-amend-war-crimes-act-1996>.

330. Charlie Savage, *Russian Atrocities Prompt Bipartisan Push to Expand U.S. War Crimes Law*, NEW YORK TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/senate-bill-war-crimes-ukraine.html>.

331. Paras Shah, *Congress Passes Justice for Victims of War Crimes Act*, JUST SECURITY (Dec. 22, 2022), <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/>.

332. *Id.*

333. *Id.*

334. *US lifts Trump-era sanctions against ICC prosecutor*, BBC NEWS (Apr. 2, 2021), <https://www.bbc.com/news/world-us-canada-56620915>.

335. Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, NEW YORK TIMES (Apr. 11, 2022), <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>.

336. *Id.*

Article 93 (seizure of property and assets and execution of searches and warrants) of the Rome Statute.<sup>337</sup>

The act also prohibits the United States from responding to requests for cooperation from the ICC, from transferring classified national security information to the ICC directly or indirectly, and from providing military assistance (subject to a waiver by the president) to any party of the ICC or to the court itself.<sup>338</sup>

In 2014, the office of the US Ambassador-at-Large for Global Criminal Justice established a cooperation project to advise the Office of the Prosecutor General of Ukraine on establishing and conducting war crimes cases.<sup>339</sup> In November 2022, Ambassador Beth Van Schaak announced the expansion and multilateralization of this cooperation, with the accession of the European Union and the United Kingdom to form the Atrocity Crimes Advisory Group.<sup>340</sup> In June 2022, the US attorney general, Merrick B. Garland, visited Ukraine and committed support to “help identify, apprehend, and prosecute individuals involved in war crimes and atrocities.”<sup>341</sup> More specifically, he announced the launching of a “War Crimes Accountability Team” bringing together the Justice Department’s experts in investigations involving human rights abuses, war crimes, and other atrocities.<sup>342</sup> The team is set to provide technical assistance including operational assistance, advice concerning criminal prosecutions, collection of evidence, forensics, and legal analysis.<sup>343</sup> It will also conduct investigations of potential war crimes that fall under US jurisdiction, such as the killing and wounding of US journalists covering the invasion.<sup>344</sup> In September, the US and Ukraine signed a Memorandum of Understanding (MOU) addressing cooperation, coordination, and deconfliction of the countries’ war crimes investigations and prosecutions, including the intent to remove barriers to the exchange of information and evidence.<sup>345</sup>

## J. The United Kingdom

While the UK has established universal jurisdiction over a small number of serious offenses, this does not mean that universal jurisdiction is always

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337. American Service Members’ Protection Act of 2001, S.857, 107th Cong. (2001), <https://www.congress.gov/bill/107th-congress/senate-bill/857/text>.

338. *Id.*

339. *See infra* note 340.

340. Department of State, *Briefing with Ambassador-at-Large for Global Criminal Justice Beth Van Schaack On Justice and Accountability for Russia’s Atrocities in Ukraine*, UNITED STATES DEPARTMENT OF STATE (November 21, 2022).

341. Department of Justice, *Attorney General Merrick B. Garland Visits Ukraine, Reaffirms U.S. Commitment to Help Identify, Apprehend, and Prosecute Individuals Involved in War Crimes and Atrocities*, UNITED STATES DEPARTMENT OF JUSTICE (June 21, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-visits-ukraine-reaffirms-us-commitment-help-identify>.

342. *Id.*

343. *Id.*

344. *Id.* For this task, Eli Rosenbaum was named Counselor for War Crimes Accountability. Rosenbaum previously served as Director of the Office of Special Investigations (OSI), which was tasked with “identifying, denaturalizing, and deporting Nazi war criminals”.

345. Department of Justice, *U.S. Attorney General and Ukrainian Prosecutor General Met to Strengthen Joint Efforts to Hold Accountable Perpetrators of War Crimes and Other Atrocities Committed in Ukraine*, UNITED STATES DEPARTMENT OF JUSTICE (September 20, 2022).

exercised.<sup>346</sup> Indeed, domestic prosecuting authorities in the UK usually do not institute proceedings against suspects not present in the jurisdiction and may need permission to proceed.<sup>347</sup>

For example, under the 2001 ICC Act, a suspect alleged to have committed genocide or crimes against humanity outside the United Kingdom must either be a UK national, a resident in the UK, or a British soldier to be tried for those crimes in the United Kingdom.<sup>348</sup> This nexus requirement establishes a jurisdictional limit that excludes visitors to the UK who do not have resident status. The act does not permit prosecutions where a suspect is merely “passing through” or “present” in the UK.

The ICC Act also establishes jurisdiction where the accused was a UK resident at the time of the offense or has become a UK resident subsequent to the commission of the offense.<sup>349</sup> Amendments in 2009 clarified the concept of “resident” and introduced a “residence-plus” test.<sup>350</sup> The amendments set out a non-exhaustive list of criteria that must be taken into account when determining residency, including the length of time spent in the UK, the purposes for which the individual is in the UK, and the existence and nature of any connections to the UK.<sup>351</sup> These amendments were designed to extend jurisdiction to suspects living or wishing to remain in the UK.<sup>352</sup>

Indeed, the category “resident” has been expanded to include any person who is allowed to leave, to enter, or to remain in the territory for the purposes of work or study; any person who has made an asylum claim; and any person who has had an asylum claim rejected but cannot be physically removed.<sup>353</sup> The amendments, however, do not apply to short-term visitors, those in transit, or those undergoing medical treatment in the UK.<sup>354</sup> This distinction was justified with the claim that transitory visitors would not intend to use the UK as a “safe haven.”<sup>355</sup>

The ICC Act does not repeal the UK’s 1957 Geneva Conventions Act, which only applies to international armed conflicts, nor does it provide for jurisdiction over internal armed conflicts.<sup>356</sup> Indeed, for genocide, crimes against humanity, and war crimes committed in non-international armed conflicts (grave breaches), the UK has not adopted legislation enabling the exercise

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346. Submission of the United Kingdom to the U.N.G.A. Sixth Committee (Legal) 74th Session, *Universal Jurisdiction*, Statement By Amy Townsend, Legal Counsellor, *United Kingdom Mission To The United Nations* (Nov. 3, 2022), [https://www.un.org/en/ga/sixth/75/pdfs/statements/universal\\_jurisdiction/11mtg\\_uk.pdf](https://www.un.org/en/ga/sixth/75/pdfs/statements/universal_jurisdiction/11mtg_uk.pdf).

347. *Id.*

348. *International Criminal Court Act 2001*, c. 17, Part 5, 51(2), <https://www.legislation.gov.uk/ukpga/2001/17/part/5>.

349. *Id.*, Part 5, 68(1).

350. Sarah Williams, *Arresting Developments? Restricting the Enforcement of the UK’s Universal Jurisdiction Provisions*, 75 *MOD. L. REV.* 368, 374 (2012).

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*, at 375.

356. Memorandum submitted by John RWD Jones, Doughty Street Chambers (Mar. 10, 2009), <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153we06.htm>.

of universal jurisdiction.<sup>357</sup> However, the act (for grave breaches of the Geneva Conventions) can only be instituted in the UK with the consent of the attorney general, who ensures that public interest considerations are taken into account before a decision to prosecute is made.<sup>358</sup>

Section 134 of the UK's Criminal Justice Act imposes obligations of the UK pursuant to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) of 1984.<sup>359</sup>

Moreover, the UK government accepts universal jurisdiction under customary international law, however, only in relation to piracy and certain war crimes – in particular grave breaches of the Geneva Conventions.<sup>360</sup>

Uniquely, UK law permits private individuals to request an arrest warrant directly from a magistrate in instances where the police fail to investigate an allegation that a crime has been committed.<sup>361</sup> For example, on September 10, 2005, based on evidence presented by a UK law firm acting on behalf of a Palestinian human rights NGO, Senior District Judge Timothy Workman issued the first ever warrant under the UK's Geneva Conventions Act of 1957 against a retired Israeli general, Doron Almog.<sup>362</sup> The warrant sought Almog's arrest for his alleged participation in grave breaches of the Geneva Conventions in Israeli-occupied Gaza, where he had been a military commander.<sup>363</sup> Almog arrived at Heathrow Airport the following day but did not disembark his flight after he was informed of the warrant.<sup>364</sup> He returned to Israel before the Metropolitan Police could execute the warrant.<sup>365</sup> Both the UK prime minister and foreign secretary apologized to their Israeli counterparts for the incident.<sup>366</sup>

In another important case, in 2009, a local UK magistrate's court issued an arrest warrant for a government official from Israel, pursuant, again, to the Geneva Conventions Act of 1957.<sup>367</sup> The Westminster Magistrates' Court issued a warrant to arrest the former Israeli foreign minister Tzipi Livni "at the request of lawyers acting for some of the Palestinian victims of the fighting" over war crimes allegedly committed in Gaza.<sup>368</sup> Livni reacted angrily. The British government seemed oblivious to the court's actions, stating that there had been no application for an arrest warrant and "no record of any such

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357. *Genocide and related crimes*, in CLOSING THE IMPUNITY GAP: UK LAW ON GENOCIDE AND RELATED CRIMES – HUMAN RIGHTS JOINT COMMITTEE (Human Rights Joint Committee Publications, 2009), ¶ 13, <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/15305.htm>.

358. *Id.*

359. *Id.*

360. *Id.*

361. Nehal Bhuta & Jrgen Schurr, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART, HUM. RTS. W. II.A.2 (2006).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. Ian Black & Ian Cobain, *British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni*, THE GUARDIAN (Dec. 14, 2009), <http://www.theguardian.com/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>.

368. *Id.*

hearing.”<sup>369</sup> The judge who issued the warrant had not been identified, nor was it entirely clear who had requested the warrant since the identity of the person or group had not been made public.<sup>370</sup> Similar to the arrest warrant against Almog, the arrest warrant had been based on “private prosecutions,” by which a warrant of arrest could be issued without the prior consent of the attorney general.<sup>371</sup> In comparison, public investigations and prosecutions involve the UK government at the very early stages of investigations.<sup>372</sup> Private prosecutions do not.<sup>373</sup>

In response to the more aggressive form of universal jurisdiction through private prosecution, the British government passed a new law in 2011 restricting the issue of arrest warrants for foreign officials visiting the UK who are accused of war crimes and other crimes against humanity under universal jurisdiction.<sup>374</sup> The new law was passed in direct response to the issue of arrest warrants for Israeli officials.<sup>375</sup>

The Police Reform and Social Responsibility Act of 2011 further reduced the scope of the country’s universal jurisdiction by requiring the director of public prosecutions to approve all arrest warrants granted to alleged victims of war crimes.<sup>376</sup> The act is intended, *inter alia*, to restrict the issue of arrest warrants for certain extraterritorial offenses and to “prevent the courts [from] being used for political purposes.”<sup>377</sup>

With regard to the Russian of Ukraine, in April 2022, then Foreign Secretary Liz Truss announced the deployment of a team of war crimes experts (including experts on sexual violence) to support Ukraine with investigations into Russian atrocities.<sup>378</sup> Truss stated that

*“Russia has brought barbarity to Ukraine and committed vile atrocities, including against women. British expertise will help uncover the truth and hold Putin’s regime to account for its actions. Justice will be done.”*<sup>379</sup>

In June, Lord Ahmad announced the disbursement of £2.5 million for “delivering justice for war crimes in Ukraine,” through the Atrocity Crimes Advisory Group (ACA).<sup>380</sup> The ACA is a group consisting of the United

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369. Mark S. Ellis, *Peace for All or Justice for One?*, NEW YORK TIMES (Aug. 11, 2011), <https://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html> (last visited Sep. 27, 2022).

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. HM GOVERNMENT, NOTE ON THE INVESTIGATION AND PROSECUTION OF CRIMES OF UNIVERSAL JURISDICTION 18 (2018).

375. See HC Deb (13 Dec. 2010) (520) col. 731 (UK).

376. Police Reform and Social Responsibility Act 2011 c.13, pt. 4, § 153(1)(4A) (UK), <https://bills.parliament.uk/bills/754>.

377. *Id.*

378. UK dispatches war crimes experts to help Ukraine with investigations, GOV.UK (Apr. 22, 2022), <https://www.gov.uk/government/news/uk-dispatches-war-crimes-experts-to-help-ukraine-with-investigations>.

379. *Id.*

380. Lord Ahmad of Wimbledon, The UK’s support to Ukraine in investigating war crimes, Address Before the Ukraine Accountability Conference in The Hague (July 14, 2022), in *The*

Kingdom, the United States, and the European Union that supports the Ukrainian prosecutor general in investigating and prosecuting conflict-related crimes.<sup>381</sup> As part of this investment, the UK is providing training to a group of ninety Ukrainian judges on the conduct of war crimes trials.<sup>382</sup>

## V. The Crime of Aggression

While the rules and regulations discussed above hold true for most international crimes, the crime of aggression raises special challenges.

Like other international crimes codified today, the crime of aggression was a creation of Nuremberg. While the prosecution of Kaiser Wilhelm II for the crime of aggression had been proposed and fervently discussed after World War I, this endeavor met with disapproval and was ultimately rejected.<sup>383</sup> It took another world war for the crime of aggression to materialize as “crimes against peace” before the International Military Tribunal at Nuremberg (IMT) in 1945 and 1946. Robert Jackson, the chief prosecutor of the IMT, reported to President Harry S. Truman of the United States that confirming and prosecuting the crime of aggression was the most important outcome of the Nuremberg trials.<sup>384</sup> The IMT convicted twelve senior Nazi officials of planning, initiating, or waging wars of aggression.<sup>385</sup> Three more were convicted in the following Ministries case.<sup>386</sup> Likewise, the International Military Tribunal for the Far East convicted twenty-four Japanese officials of planning, initiating, or waging wars of aggression (or conspiring to do so).<sup>387</sup>

In its modern form, the crime of aggression was included in the ICC’s Rome Statute only after the Court was already operational.<sup>388</sup> States Parties to the ICC’s Rome Statute decided in 2017 to activate the crime, which would come into effect in the following year.<sup>389</sup> Article 8bis of the Rome Statute defines the crime of aggression as

*“the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of*

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UK’s support to Ukraine in investigating war crimes, GOV.UK (July 15, 2022), <https://www.gov.uk/government/speeches/the-uks-support-to-ukraine-in-investigating-war-crimes>.

381. *Id.*

382. Tamara Cohen, *UK to train Ukrainian judges to carry out war crimes trials for Russian soldiers*, SKY NEWS (Dec. 14, 2022), <https://news.sky.com/story/uk-to-train-ukrainian-judges-to-carry-out-war-crimes-trials-for-russian-soldiers-12767724>.

383. See generally WILLIAM SCHABAS, *THE TRIAL OF THE KAISER* (2018).

384. ROBERT JACKSON, REPORT TO THE PRESIDENT BY MR. JUSTICE JACKSON (1946), <http://avalon.law.yale.edu/imt/jack63.asp>.

385. *Id.*

386. ALLIED CONTROL COUNCIL, NO. 10., THE MINISTRIES CASE, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 “GREEN SERIES”: VOLUME 14, 441, 454, 463 (1947), [https://www.loc.gov/item/2011525364\\_NT\\_war-criminals\\_Vol-XIV/](https://www.loc.gov/item/2011525364_NT_war-criminals_Vol-XIV/).

387. See INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, JUDGMENT OF 12 NOVEMBER 1948, in *THE TOKYO WAR CRIMES TRIAL*, VOLUME 22.

388. Rome Statute, art. 8bis.

389. *Assembly Activates Court’s Jurisdiction Over Crime of Aggression*, ICC (Dec. 15, 2017) <https://www.icc-cpi.int/news/assembly-activates-courts-jurisdiction-over-crime-aggression>.

*an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.*"<sup>390</sup>

The crime of aggression is a leadership crime. As stated in the High Command case at Nuremberg, the leadership element limits criminal responsibility to those "in a position to shape or influence the policy that brings about [the criminal war's] initiation or its continuance after initiation, either by furthering or by hindering or preventing it."<sup>391</sup> The Rome Statute's scope is arguably somewhat narrower;<sup>392</sup> it assigns responsibility to those able "effectively to exercise control over or direct the political or military action of a state."<sup>393</sup>

According to Article 87 of the Constitution of the Russian Federation, the president "shall be the Supreme Commander-in-Chief of the Armed Forces."<sup>394</sup> It is thus clear that Putin exercises more than enough control to fall within the scope of the crime of aggression. The same would likely hold true for the members of the Russian Security Council, who, just days before the invasion, participated in a televised council meeting, arguably taking part in the planning and preparation for the war.<sup>395</sup>

Without precedential verdicts from the ICC, it is difficult to know how many individuals might satisfy the leadership element as it pertains to the invasion of Ukraine. Particularly, it remains an open question how much control an individual will need. In 1945, the IMT convicted Admiral Karl Dönitz of waging aggressive war despite finding neither that he was privy to the conspiracy to wage such war nor that he controlled the overall military campaign prior to 1943.<sup>396</sup> However, in the view of the IMT, his aggressive use of submarine warfare was sufficient to satisfy the effective control element.<sup>397</sup> Hence, it is well conceivable that generals and other high-ranking military officers could be included within the scope of the crime. Moreover, those leading the Wagner group could also qualify, having reportedly sent their mercenaries into Ukraine on Russia's behalf.<sup>398</sup> The IMT, in the *I.G. Farben* case, recognized that criminal liability for aggression could attach to "persons in the political, military,

390. Rome Statute, art. 8 bis (1).

391. ALLIED CONTROL COUNCIL, NO. 10., 'THE HIGH COMMAND CASE', TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 "GREEN SERIES": VOLUME 11, 488 (1947), [https://www.loc.gov/item/2011525364\\_NT\\_war-criminals\\_Vol-XI/](https://www.loc.gov/item/2011525364_NT_war-criminals_Vol-XI/).

392. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L. L. 477 (2007).

393. Rome Statute, Art. 8 bis (1).

394. See KONSTITUTSIYA ROSSIĬSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 87 (Russ.).

395. *As Security Council Meets on Ukraine Crisis, Russia Announces Start of 'Special Military Operation'*, UN NEWS, Feb 24, 2022, <https://news.un.org/en/story/2022/02/1112592>.

396. See INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL "BLUE SERIES": VOLUME 22, 556 (1945), [https://www.loc.gov/item/2011525338\\_NT\\_Vol-XXII/](https://www.loc.gov/item/2011525338_NT_Vol-XXII/).

397. *Id.*

398. See Manveen Rana, *Volodymyr Zelensky: Russian mercenaries ordered to kill Ukraine's president*, THE TIMES (Feb. 28, 2022), <https://www.thetimes.co.uk/article/volodymyr-zelensky-russian-mercenaries-ordered-to-kill-ukraine-president-cvcksh79d> (last visited Sep. 27, 2022).



and industrial fields . . . who were responsible for the formulation and execution of policies.”<sup>399</sup> Moreover, Article 8 bis (2)(g)) specifically encompasses the scenario of “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.”<sup>400</sup> Hence, if criminal responsibility for aggressive war can be attributed to private-sector individuals, those who steer mercenary groups on behalf of an aggressor state would certainly qualify.

Of course, Lukashenko and other high-ranking Belarusian officials would also be covered, considering that Article 8 bis (2)(f) also encompasses “[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.”<sup>401</sup>

Approximately fifteen countries have implemented the ICC crime of aggression into their domestic criminal codes,<sup>402</sup> and at least seventy-four countries have adopted some version of it.<sup>403</sup> The majority refers to “wars of aggression” (the focus of “crimes against peace,” as prosecuted before the Nuremberg and Tokyo Tribunals).<sup>404</sup>

However, most of these states allow the prosecution of the crime of aggression only through the *conditional* universal jurisdiction principle.

For instance, looking at German law, the outlook of pursuing Putin and other high-ranking Russian officials for the crime of aggression looks rather bleak. While the law generally contains a very broad principle of universal jurisdiction, which allows prosecution without any domestic link, this principle is restricted precisely in the case of the crime of aggression.<sup>405</sup> The law requires the perpetrator to be German or the act to have been directed against the Federal Republic of Germany.<sup>406</sup> For this reason, Germany’s Federal Prosecutor has explicitly excluded aggression from his current investigations on Ukraine.<sup>407</sup>

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399. KEVIN JON HELLER, CRIMES AGAINST PEACE, in *THE NUREMBERG MILITARY TRIBUNALS and the ORIGINS of INTERNATIONAL CRIMINAL LAW* 179–202, 185–86 (2011).

400. Rome Statute, Art. 8 bis. 2.(g).

401. *Id.*, Art. 8 bis. 2.(f).

402. The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, *Implementation Documents*, CRIME OF AGGRESSION (2022), <https://crimeofaggression.info/resourcessearch/implementation-documents/>; *Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, DERECHOS (Feb. 4, 2016) <https://www.derechos.org/nizkor/aggression/doc/aggression105.html>.

403. Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two/>.

404. Astrid Reisinger Coracini, (*Extended*) *Synopsis: The Crime of Aggression under Domestic Criminal Law*, in *THE CRIME OF AGGRESSION: A COMMENTARY*, PART IV - CRIME OF AGGRESSION AND NATIONAL LAW, 1055 (Claus Kreß & Stefan Barriga eds., 2017).

405. CCAIL, Sec. 1.

406. *Id.*

407. LEGAL TRIBUNE ONLINE, *supra* note 153.

The explanatory memorandum of the German government also states that it is not appropriate to apply the principle of universal jurisdiction, because cases related to the crime of aggression typically contain a strong foreign policy element that would make an international criminal court the more suitable prosecuting body.<sup>408</sup> However, there is some political movement concerning an amendment of this provision.<sup>409</sup> Stephan Thomae, a member of parliament and the parliamentary secretary of the Free Democratic Party, demanded to expand the powers of the Federal Public Prosecutor General in this regard and stated:

*“In the case of the most obvious breach of international law that Russia is committing against Ukraine, namely the crime of aggression, the Federal Public Prosecutor General’s hands are currently tied. . . . [Fixing] this would not be a lex Putin but would send a strong signal beyond the Ukraine war and be a real step forward in international law.”*<sup>410</sup>

The debate ties into the broader discussion of whether the crime of aggression properly attracts universal jurisdiction under customary international law. Nevertheless, at least 18 states assert universal jurisdiction over the crime.<sup>411</sup> They include Lithuania, which has reportedly opened an investigation in relation to aggression and other crimes.<sup>412</sup> Poland, pursuant to Article 117 of its Criminal Code, asserts jurisdiction over aggression that is more akin to the protective principle (based on security interests).<sup>413</sup> Poland, too, has reportedly opened an investigation that extends to aggression.<sup>414</sup>

Of course, Ukraine as well is focused on prosecuting aggression, but through territorial—not universal—jurisdiction.<sup>415</sup>

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408. Elisabeth Baier, *The Sadly Neglected Crime of Aggression*, VÖLKERRECHTSBLOG (Mar. 3, 2022), <https://voelkerrechtsblog.org/the-sadly-neglected-crime-of-aggression/#:~:text=The%20explanatory%20memorandum%20of%20the,criminal%20court%20the%20more%20suitable.>

409. LEGAL TRIBUNE ONLINE, *supra* note 153.

410. *Id.*

411. Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS, <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>.

412. *Id.*

413. Carrie McDougall, *supra* note 411.

414. @PatrycjaGrzebyk, TWITTER (Mar. 3, 2022, 5:05 PM), <https://twitter.com/PatrycjaGrzebyk/status/1499415768253054980>.

415. Moreover, it boasts a domestic crime of aggression law (Art. 437 Criminal Code of Ukraine) and has fairly recently utilized it in prosecuting former Ukrainian President Viktor Yanukovich as well as two Russian service members, Alexander Alexandrov and Yevgeny Yerofeyev. Sergey Sayapin stated that the trial was “arguably the first criminal trial on charges of aggression since the trials following from the International Military Tribunal in Nuremberg.” Victor Yanukovich was indicted with complicity in launching a war of aggression against Ukraine. See Sergey Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16 J. INT’L. CRIM. JUST. 1093 (2018); Sergey Sayapin, *The Yanukovich Trial in Ukraine: A Revival of the Crime of Aggression*, 50 ISRAEL Y.B. HUM. RTS. 63 (2020).

## Conclusion

The Russian invasion of Ukraine has ushered in a new era, a *Zeitenwende*, as the German Chancellor Olaf Scholz has called it.<sup>416</sup> With the unprecedented assault of one of the world's most powerful militaries on a European country, the unthinkable has again happened. War has come back to Europe. And along with its tides of destruction, the desire to punish those responsible for the crime of aggression, and all the crimes that are occurring in the war, is rising to new heights. Unfortunately, as countries reach for tools to hold the perpetrators accountable, they find only blunt instruments, unsharpened by their own doing.

Some argue that the history of universal jurisdiction is not one of decay but actually and that, in fact, the principle has been quietly expanding across the globe. They point to studies demonstrating that the number of universal jurisdiction cases has never been higher. While this trend may well be true, the power of universal jurisdiction has undoubtedly declined with the advent of *conditionality*. Under political pressure and the fear of diplomatic predicaments, countries have refrained from pursuing the most powerful (and most culpable) and, consequently, have voluntarily weakened their judicial teeth.

As demonstrated in this article, a common theme from the domestic legislation of the countries examined is that the application of universal jurisdiction is no longer objective; rather, some form of nexus between the suspect and the forum state, such as residence or at least presence in its territories, is now commonly required.

There are also variations in the types of prosecutions countries initiate under universal jurisdiction. However, in the purest sense, the term “universal jurisdiction” refers to prosecutions initiated against a suspect regardless of where the crime was committed or against whom, and regardless of where the suspect is currently located.<sup>417</sup>

Some states have adopted the principle of subsidiarity in their approach to universal jurisdiction. Similar to the principle of complementarity imposed by the Rome Statute,<sup>418</sup> the principle of subsidiarity means that states will only invoke universal jurisdiction if no proceedings are brought against a suspect, either before the courts of the country where the crime took place or before an international court.<sup>419</sup> States differ in their applications of the principle of subsidiarity. For example, in the absence of a nexus between Germany and the alleged crimes, German prosecutors may defer to jurisdictions where the crimes were committed or where victims reside, or to an alternative court.<sup>420</sup>

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416. Olaf Scholz, *The Global Zeitenwende: How to Avoid a New Cold War in a Multipolar Era*, FOREIGN AFFAIRS, Dec. 5, 2022, <https://www.foreignaffairs.com/germany/olaf-scholz-global-zeitenwende-how-avoid-new-cold-war>.

417. ICHRP INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD – A GUIDE TO UNIVERSAL JURISDICTION*, 6 (1999).

418. Rome Statute, Art. 1.

419. Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany*, [https://www.hrw.org/sites/default/files/related\\_material/IJ0914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf).

420. *Id.*

In Spain, universal jurisdiction may only be assumed where it is confirmed that there are no proceedings before other jurisdictions.<sup>421</sup>

For the crime of aggression, the situation is even more complicated. While many countries have adopted some form of “crimes against peace” in their criminal codes, many deem, mainly for political reasons or out of fear of potential abuses and ruptures in international relations, the crime of aggression as outside of the scope of universal jurisdiction.

There is also the near impenetrable shield of personal immunity that protects the highest leaders in domestic courts by mere virtue of their status. While it seems unthinkable that countries like Poland would allow Putin to go unpunished, as things currently stand there is no legal basis that would allow for his arrest or conviction in a national court.

Finally, even if all legal and political issues were to be overcome, *et in Arcadia ego*, there remains the looming shadow of practical implementation. How do we approach Putin and his cohorts? How do we arrest those, behind the front lines, who command their armies to wage this brutal assault on humanity? Considering the hurdles to apprehending these high-ranking individuals, it looks fairly unlikely that we shall see Putin in handcuffs any time soon.

However, all is not lost. There is no statute of limitations for atrocity crimes. The international community has the time to play the long game, as has happened before. There is a history of international courts obtaining custody of high-profile individuals: President Slobodan Milošević and Radovan Karadžić of the former Yugoslavia,<sup>422</sup> President Charles Taylor of Liberia,<sup>423</sup> Hissène Habré, the former dictator of Chad,<sup>424</sup> President Hashim Thaçi of Kosovo,<sup>425</sup> and the Libyan leader Muammar al-Qaddafi who was indicted did not expect to eventually end up in the dock.<sup>426</sup> Moreover, the political will to ensure accountability has probably never been greater than to date.

It remains to be noted that the ICC, and any other potential Special Tribunal for Ukraine, will act as a court of last resort, complementary to national jurisdiction, and prosecuting those most responsible for the war, while domestic courts will deal with the vast majority of cases. In this regard, one could compare the situation to the aftermath of World War II. While the

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421. United Nations, *Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction,”* [https://www.un.org/en/ga/sixth/71/universal\\_jurisdiction/spain\\_e.pdf](https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf).

422. Human Rights Watch, *Q&A: The International Tribunal for the former Yugoslavia Trial of Radovan Karadzic*, HUM. RTS. WATCH (Oct. 23, 2009), <https://www.hrw.org/news/2009/10/23/qa-international-criminal-tribunal-former-yugoslavia-trial-radovan-karadzic>.

423. INTERPOL *Applauds Speedy Arrest of Charles Taylor in Nigeria*, INTERPOL (Mar. 29, 2006), <https://www.interpol.int/fr/Actualites-et-evenements/Actualites/2006/INTERPOL-applauds-speedy-arrest-of-Charles-Taylor-in-Nigeria>.

424. Ilaria Allegrozzi, *Former Chad Dictator Habre's Dead, Victims Still Await Compensation*, HUM. RTS. WATCH (Aug. 24, 2021), <https://www.hrw.org/news/2021/08/24/former-chad-dictator-habres-dead-victims-still-await-compensation>.

425. Bardh Krasniqi, *Kosovo President Thaci Arrested, Moved to The Hague to Face War Crimes Charges*, REUTERS, NOV. 5, 2020, <https://www.reuters.com/article/us-warcrimes-kosovo-thaci/kosovo-president-thaci-arrested-moved-to-the-hague-to-face-war-crimes-charges-idUSKBN27L1DO>.

426. BBC, *Libya: Muammar Gaddafi Subject to ICC Arrest Warrant* (June 27, 2011), <https://www.bbc.com/news/world-africa-13927208>.

leaders of the Nazi regime, the heads of the Nazi party, the heads of the military, and the leading industrialists were handled by the IMT during the Nuremberg trials, thousands of smaller trials dealing with crimes by high-ranking officers down to individual soldiers were going on in countries like Germany, France, Poland, and Australia, carried out by various forms of Allied military tribunals or local domestic courts. They were supported by the United Nations War Crimes Commission (UNWCC), which collected and investigated evidence of war crimes, and offered legal advice on technical matters, thus acting as an arbitrator or intermediary.<sup>427</sup> However, it cannot be overstated that as was then the case and will be the same for Ukraine, the national courts will maintain the primary jurisdiction to try war criminals. Under international law, it is the states' prerogative and duty to bring to justice those who committed crimes against their own nationals.

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427. See Mark Ellis, *Assessing the Impact of the United Nations War Crimes Commission on the Principle of Complementarity and Fair Trial Standards*, 25 CRIM. L. FORUM 191 (2014).