

RESEARCH REPORT

Advancing Global Accountability

The Role of Universal Jurisdiction in Prosecuting International Crimes

December 2020



Cover Image: A man looks at a gruesome collection of images of dead bodies taken by a former Syrian military police photographer, who has been identified by the code name "Caesar," at the United Nations Headquarters in New York on March 10, 2015. The pictures were smuggled out of Syria between 2011 and mid-2013. The exhibition consisted of two dozen images selected from the roughly 55,000 photographs taken in Syria by Caesar. (Lucas Jackson/Reuters)

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About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

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Introduction

In late 2019, a civil society organization based in the United Kingdom, the Burmese Rohingya Organization UK, filed a criminal complaint before an Argentinian court against senior Myanmar officials, including State Counsellor and de facto Head of State Daw Aung San Suu Kyi. The criminal complaint alleged their involvement in crimes against humanity and genocide committed against the Rohingya, a stateless Muslim minority in Myanmar.¹ It was filed in Argentina, even though the alleged crimes were committed more than 17,000 kilometers away, in Myanmar, and involved suspects and victims who were not Argentinian. The criminal complaint was made possible because Argentinian law incorporated the principle of universal jurisdiction into its legal system. This measure has opened the door to the possibility of some accountability in circumstances where justice is impossible in the country in which the alleged crimes took place.

The purpose of this study is to consider the challenges facing the exercise of universal jurisdiction and assess to what extent universal jurisdiction remains a viable option for victims seeking justice for international crimes.

Recourse to universal jurisdiction as a justice mechanism for victims of international crimes has become increasingly popular in recent years. This is especially so given the small appetite for criminal accountability in countries where violations take place and given the considerable shortfalls of the international justice system. Although universal jurisdiction faces serious challenges at the conceptual, legal, political, and practical levels, it often remains the only avenue for victims to pursue justice and address the “impunity gap.”

According to the [Genocide Network](#) operating under the European Union Agency for Criminal Justice Cooperation (EUROJUST),² the number of new genocide, crimes against humanity, and war crimes investigations that are ongoing in European Union (EU) states rose by a third

¹ Burmese Rohingya Organization UK, *Certified Translation: A Complaint of Genocide and Crimes Against Humanity Committed Against Rohingya Community in Myanmar – Universal Jurisdiction*, 2019.

² The Genocide Network was established by the Council of the European Union. See Council of the EU, Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, No. 2002/494/JHA, June 13, 2002; and Council of the EU, Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, No. 2003/335/JHA, May 8, 2003, to ensure close cooperation between national authorities in investigating and prosecuting core international crimes, as defined in Articles 6, 7 and 8 of the Rome Statute of the ICC.

over the last three years, with about 1,295 new investigations launched in 2019.³ The total number of these cases was 2,906 in the whole of the EU in 2019.⁴

Desktop research of available literature on universal jurisdiction and analysis of open sources were employed for this paper. One of the challenges of this study was the lack of comprehensive data and information on universal jurisdiction cases worldwide, which limited the ability of the authors to conduct a comprehensive and holistic analysis of the cases.

This report is organized into two parts. The first part deals with the rationale for universal jurisdiction and its sources. It also provides historical examples where it was applied and describes the challenges and controversies it faces today. The first part also explores similarities and differences between domestic laws that give effect to universal jurisdiction. The leading role of non-governmental organizations (NGOs) and civil society in generating such cases at the domestic level is considered.

The second part looks at the use of universal jurisdiction in respect to serious crimes committed in Syria. Although there is little or no prospect for justice in Syria at the local or international level, the report considers the context of Syria and provides examples of universal jurisdiction cases brought before domestic courts in various jurisdictions. Furthermore, it explores the relationship between accountability initiatives for Syria at the international level and universal jurisdiction.

The future of universal jurisdiction as a viable mechanism of global justice is also considered. While this form of justice has made significant advances in recent years it still faces considerable headwinds, particularly of a political nature. The paper concludes with a set of recommendations aimed at entrenching universal jurisdiction as a globally recognized means of justice.

Two appendices are supplied. The first sets out seven examples of domestic laws providing mechanisms for universal jurisdiction, including the scope of jurisdiction, temporal jurisdiction, crimes covered, modes of liability permitted, and scope of prosecutorial discretion. The second appendix relies on [TRIAL International's](#) Annual Universal Jurisdiction Reviews (2019 and 2020) to provide information on twenty-five universal jurisdiction cases dealing with the Syrian conflict pursued in eight countries. It describes the suspects involved, crimes charged, and developments in each case.

3 *EUROJUST*, "Press Release: Genocide and War Crimes Cases Rise by 1/3 in the EU in 3 Years," May 23, 2019.

4 Although the number of new and total cases was lower in 2019 than 2018, it is still higher than in 2016 and 2017. (See Figure 1 on page 35.)

Universal Jurisdiction

Rationale for Universal Jurisdiction

Given the extraordinary scope of violations that amount to international crimes and in light of the fact that prosecutions of international crimes at the domestic level constitute an exception rather than the rule,⁵ some states have developed mechanisms and procedures to deal with criminal accountability for international crimes.

Jurisdiction over international crimes can be exercised by international and hybrid courts on the basis of applicable conventions or under United Nations Security Council decisions (referred to as “international jurisdiction”) or by domestic courts, including special judicial chambers mandated to try international crimes (referred to as “domestic jurisdiction”).⁶ Where domestic jurisdictions invoke universal jurisdiction, they do so on behalf of the international community.

There are a number of factors obstructing the pursuit of justice for international crimes before domestic courts in countries where alleged crimes were committed. The most common reason is a lack of political will and sometimes political interference.⁷ Criminal justice systems often remain controlled by elements from former regimes. Contextual factors also retard justice at the local level, including ongoing conflict, peace processes, and negotiated transitions that exclude justice, or where priorities are focused elsewhere.

Other factors are more pragmatic in nature, such as a lack of capacity, skills, and resources to pursue international crimes. The police, prosecution service and judiciary may be incapacitated and in need of extensive reform or rebuilding following years or decades of dictatorship, repression, or conflict.

The international community has attempted to fill this void by developing mechanisms to address criminal responsibility at the international level, which can be traced back to the

5 Case concerning the Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) (Judgment, February 5, 1970) ICJ Rep 1970, para 34. See also Thomas Kleinlein, “Jus Cogens Re-examined: Value Formalism in International Law,” *European Journal of International Law* 28, no. 1 (2017): 295–315; Jennifer L. Balint, “Appendix A: Conflict, Conflict Victimization, and Legal Redress, 1945–1996,” *Law and Contemporary Problems* 59 (1996): 231–247.

6 For example, see Hari M. Osofsky, “Domesticating International Criminal Law: Bringing Human Rights Violators to Justice,” *The Yale Law Journal* 107, no. 1 (1997): 191–225; Elena Naughton, ICTJ, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals* (2018).

7 Howard Varney, Shenali De Silva, and Alexandra Raleigh, ICTJ, *Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute* (2019), 20–28.

international military tribunals in Nuremberg and Tokyo.⁸ However, only after the genocide in Rwanda and the war in the Former Yugoslavia did the concept of international justice fully develop due to the creation of two ad hoc tribunals,⁹ which paved the way for the creation of the International Criminal Court (ICC). A number of other ad hoc or special mechanisms combining elements of domestic and international law emerged as a measure to address past atrocities locally but taking account of international jurisprudence and experience.¹⁰ These different criminal accountability mechanisms are often complemented by truth-seeking entities such as truth commissions, administrative reparation bodies, and institutional reforms and other measures aimed at ensuring the nonrecurrence of violations.¹¹

Despite significant advancements in criminal accountability at the international level, the international justice system faces ongoing challenges.

Shortcomings of the International Justice System

Where Politics Meets Law

The system of international justice is prone to global, regional, and local political pressure. Such pressure can be exercised by government and nongovernmental actors at the jurisdictional and functional levels. Jurisdictional variables include the shaping of a court's mandate, powers, and reach.¹²

Governments and nongovernmental actors can introduce measures that facilitate or minimize opportunities for interference in a court's functions. These includes factors such as degrees of financial and political support, access to territory for investigations, provision of information, protection of witnesses, access to information and evidence, and general cooperation.¹³

The joint United Nations-World Bank report on prevention of violent conflict notes that “frameworks to identify how accountability processes treat groups differently can help to identify ways in which to pre-empt spoilers and mitigate risks of conflict.”¹⁴

Limitations of the ICC

The enabling statute of the ICC (the 1998 Rome Statute) is only binding on state parties and applies only to crimes committed after 2002 on state party territories or by state party nationals. Moreover, the jurisdiction of the ICC has limitations, since it is only activated if a state party

8 Mahmoud Cherif Bassiouni, “Assessing Conflict Outcomes: Accountability and Impunity,” in *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice, Volume 1*, ed. Mahmoud Cherif Bassiouni (Portland: Intersentia, 2010), 20–24.

9 Ibid.

10 These included, for example, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Criminal Chambers in Tunisia. See Milena Sterio, “Human Rights: Future of Ad Hoc Tribunals,” in *International Human Rights Institutions, Tribunals, and Courts*, ed. Gerd Oberleitner (Singapore: Springer, 2018), 333–353; Carsten Stahn, “The Geometry of Transitional Justice: Choices of Institutional Design,” *Leiden Journal of International Law* 18, no. 3 (2005): 425–466; Howard Varney and Katarzyna Zdunczyk, ICTJ, *Legal Frameworks for Specialized Chambers: Comparative Studies for the Tunisian Specialized Criminal Chambers* (2018). See also Open Society Justice Initiative, *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes* (2018).

11 Alexander Mayer-Rieckh and Howard Varney, DCAF Geneva Centre for Security Sector Governance, *Recommending Change: Truth Commission Recommendations on Institutional Reforms: An Overview* (2019).

12 Chris Mahony, *International Criminal Justice Case Selection Independence: An ICJ Barometer* (2016), cited in United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* Conference Edition (Washington, DC: World Bank, 2018), 168.

13 For example, the US government nominated a US Department of Defense officer to be the Special Court for Sierra Leone's first prosecutor and threatened the court's financial support when the court was considering cases against actors such as Burkinabé President Blaise Compaoré and arms dealer Ibrahim Bah Muammar. The pursuit of such cases was viewed as antithetical to US interests. See Chris Mahony, “The Justice Pivot: US International Criminal Law Influence from Outside the ICC,” *Georgetown Journal of International Law* 46, no. 4 (2015): 1118.

14 United Nations and World Bank, *Pathways for Peace*, 168.

is genuinely unable or unwilling to pursue justice.¹⁵ Negotiating parties limited the personal jurisdiction of the ICC to natural persons and excluded corporate accountability.

While the limitations of the ICC's jurisdiction is addressed to some extent by section 13(b) of the Rome Statute, which allows the UN Security Council to refer a situation to the ICC even if the state in question has not ratified the Rome Statute, it poses a number of challenges in reality. The referral of a situation by the UN Security Council to the ICC requires the unanimous support of the permanent five members, which is difficult to secure considering the divergent political interests of those members. An example is the UN Security Council's inability to refer the cases of Syria, Myanmar, and Iraq to the ICC.

Challenges Facing Hybrid Courts

Practical and political challenges can place formidable obstacles in the path of the establishment of hybrid courts. One of the most recent mechanisms of this kind is the Special Criminal Court for the Central African Republic, which is yet to be fully operationalized.¹⁶ The proposed Hybrid Court for South Sudan that was agreed to in the Peace Agreement of 2015 and in the Revitalized Peace Agreement of 2018 has not been established.¹⁷

The so-called hybrid tribunals are meant to be built on local ownership and combine elements of international and domestic criminal law.¹⁸ Although they are generally praised for being "closer to the crime scene and victims," hybrid courts located in countries where alleged crimes occurred might be vulnerable to local pressure and interference.

The stalemate at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a case in point. Its complex legal and procedural design was aimed at preventing political interference. However, the cases against Ao An, Meas Muth, and Yim Tith deadlocked as a result of government imposing its will on the national judges.¹⁹ This illustrates the extent to which political interference by the Cambodian government into the ECCC operations made it difficult to complete cases in accordance with law. As observed by one commentator, "The exercise of political influence by government actors at all levels in Phnom Penh has tainted the court's operation and infringed upon its judicial independence."²⁰

Lack of Cooperation

The ICC relies heavily on the cooperation of other states in performing its functions, in particular, conducting investigations, executing arrest warrants, and enforcing judicial decisions.²¹ The investigations into the situations in Darfur and Libya are cases in point. Since the investigation

15 Under customary international law, states are obliged to investigate and prosecute gross human rights violations and international crimes. For a detailed analysis, see International Commission of Jurists, *A Practitioner's Guide: International Law and the Fight Against Impunity* (2015). See also ICRC, IHL Customary Database, Rule 158: Prosecution of War Crimes.

16 Amnesty International, "Central African Republic: Five Years Later, More Efforts to Be Done to Get Special Criminal Court Fully Operational," June 3, 2020.

17 Human Rights Watch (HRW), Joint NGO letter on the Mandate Renewal of the Commission on Human Rights in South Sudan, February 6, 2020.

18 See Stahn, *The Geometry of Transitional Justice*; Varney and Zdunczyk, *Legal Frameworks for Specialized Chambers*. An example of a truly decentralized model is Kosovo, where international prosecutors and judges were increasingly deployed to local courts in the various districts. See also Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (2008).

19 Cases 004/2, 003 and 004. See Open Society Justice Initiative (OSF-JI), "Dead End at Cambodia's Khmer Rouge Tribunal: UN Must Respond," April, 28, 2020; and OSF-JI, *Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: Deadlock Continues in Ao An Case* (2020).

20 OSF-JI, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia* (2010).

21 The lack of cooperation is also evident from the failure of several countries to execute ICC arrest warrants, including state parties South Africa and Kenya, which refused to enforce the arrest warrant against former Sudanese President Al-Bashir. See, for example, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, the African Union's submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir,'" July 16, 2018, ICC-02/05-01/09-370; Decision on Jordan's request for leave to appeal, *Prosecutor v Omar Al-Bashir*, PTC II Decision, February

into the Darfur situation was opened, the ICC has been unable to secure access to Darfur due to ongoing insecurity and lack of cooperation from Sudanese authorities.²² The change in power in Sudan following the ouster of President Omar Al-Bashir has brought renewed hope for Sudanese victims because the transitional leadership has expressed support for the ICC.²³ In Libya, authorities have refused to cooperate with the ICC alleging that given the ongoing domestic proceedings against Saif Al-Islam Gaddafi, his case was inadmissible before the ICC.²⁴

In extreme circumstances, a lack of cooperation can transform into open hostility. In Kenya intimidation of witnesses and lack of cooperation from the Kenyan Government forced the ICC prosecutor to withdraw charges against then Kenyan President Uhuru Kenyatta and then Deputy President William Ruto.²⁵

Although hybrid courts or specialized chambers may serve as an alternative or complement to the ICC,²⁶ in practice their establishment requires significant cooperation from the state in which the violations occurred and considerable financial and technical support from the international community. The creation of such a tribunal may stall due to political pressure from those opposed to justice or those who are themselves implicated in the crimes to be investigated, as has happened for the proposed Special Tribunal for Kenya and the Hybrid Court for South Sudan.²⁷ Hybrid tribunals, particularly those based outside of the countries in which alleged atrocities took place, face challenges involving a lack of cooperation. Even those established in the territorial states in question may face obstacles in which political and security authorities refuse to cooperate.

Global and Regional Dynamics

International justice may be undermined by political forces at the global or regional level. An example is the impasse that emerged between the ICC and the African Union (AU) over the arrest warrant for then Sudanese President Al-Bashir. The AU General Assembly adopted a resolution calling on African states not to cooperate with the ICC and not to execute the arrest warrant.²⁸ These actions were coupled with demands by the AU for a mass withdrawal from the ICC, which resulted in Burundi leaving the ICC in 2017 and attempts by The Gambia and South Africa to withdraw.²⁹

21, 2018, ICC-02/05-01/09-319; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA), March 15, 2016.

22 BBC, "ICC Prosecutor Shelves Darfur War Crimes Inquiries," December 12, 2014.

23 HRW, "Sudan Opens Door for ICC Prosecutions: Ex-President Bashir May Finally Face Trial for Alleged Darfur Crimes," February 12, 2020.

24 Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for Shared Responsibility," *Journal of International Criminal Justice* 10, no. 2 (2012): 325–350; ICC, "Saif-Al-Islam Gaddafi case: ICC Pre-Trial Chamber I confirms case is admissible before the ICC," April 5, 2019.

25 International Federation for Human Rights (FIDH), "Press Release: Termination of Ruto and Sang Case at the ICC: Witness Tampering Means Impunity Prevails over Justice Again," April 5, 2016; OSF-JI, "Dead End at Cambodia's Khmer Rouge Tribunal: UN Must Respond," April 28, 2020; and Thomas Escriott and Duncan Miriri, "ICC Prosecutor Withdraws Charges against Kenyan President," *Reuters*, December 5, 2014.

26 See, for example, the ECCC, established in 1997; the Special Panels to the Dili District Court in East Timor, established in 2000; the Extraordinary African Chambers, established in 2013; the War Crimes Chambers in Bosnia and Herzegovina, established in 2003; and the Specialized Criminal Chambers in Tunisia established in 2014. See Varney and Zdunczyk, *Legal Frameworks for Specialized Chambers*.

27 David Ochami, Mutinda Mwanzia, and Peter Opiyo, "Annun Disappointed by MPs Failure to Establish Tribunal," *The Standard*, February 13, 2020; Waakhe Simon Wudu, "Critics Slam Multimillion-dollar Deal Between South Sudan, US-based Lobbying Firm," *VOA News*, April 30, 2019. See also UN Commission on Human Rights in South Sudan, UN Doc. A/HRC/40/CRP.1, February 20, 2020, pars. 907–912.

28 African Union (AU) Assembly of State Parties, 13th Ordinary Session, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (Doc. Assembly/AU/13(XIII)), July 1–3, 2009, par. 10.

29 AU Assembly of State Parties, 28th Ordinary Session, Decision on the International Criminal Court (ICC) Doc. EX.CL/1006(XXX), AU Assembly Doc. Dec.622(XVIII), (Jan.30–31, 2017), par. 8; *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) 2017 (3) SA 212 (GP).

Political economy and international relations are intrinsically linked with international criminal justice. States have exercised influence on the shaping of international and hybrid tribunals and have applied geopolitical pressure on international prosecutors.³⁰ This pressure has been reflected in case selection,³¹ the withdrawal or suspension of certain investigations,³² and the deployment of international justice efforts against certain parties.³³

The US government's recent targeting of ICC prosecution staff is the latest in efforts aimed at undermining the court by the United States. On June 11, 2020, US President Donald Trump issued an executive order blocking the financial assets of certain ICC staff and imposing visa restrictions on them and their immediate family members.³⁴ During a press conference, Attorney-General William Barr said that the measures "are an important first step in holding the ICC accountable for exceeding its mandate and violating the sovereignty of the United States."³⁵ The US administration has openly taken this decision in response to an ICC plan to investigate allegations of war crimes committed by all sides during the conflict in Afghanistan.³⁶

The invoking of universal jurisdiction at the local level may see the launching of cases that might otherwise be obstructed by geopolitical pressure on international or regional judicial bodies. This is not to suggest that universal jurisdiction cases are entirely free from geopolitical pressure, but such cases are arguably less likely to be the subject of such pressure, particularly when initiated in a jurisdiction with a strong and independent judiciary free from political interference.³⁷

Jurisdiction of States and Universal Jurisdiction

The principle of sovereignty of states, which is based on the equality of all states, stands as a cornerstone of international law and relations, granting states the power to prescribe laws and regulate their internal affairs without interference by other states.³⁸ Traditionally, the law of jurisdiction relied on the territorial dimension of sovereignty, where states enjoy "exclusive sovereignty over their own territories, and no sovereignty over other States' territory."³⁹

Although the principle of territoriality continues to underpin the international legal order, the concept of jurisdiction has evolved to respond to a more cooperative approach of states that has adapted to growing globalization and transnational activity. International law has incrementally opened the door to the exercise of extraterritorial jurisdiction.⁴⁰ The decision by the Permanent

30 Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice," in *Historical Origins of International Criminal Law, Volume 4*, eds. Morton Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping (Brussels: Torkel Opsahl Academic EPublisher, 2015), 865–904.

31 Mahony, *International Criminal Justice Case Selection Independence*.

32 Mahony, *Case Selection Independence Framework for Tracing Historical Interests*.

33 Ibid.

34 *UN News*, "US Sanctions against International Court Staff a 'Direct Attack' on Judicial Independence," June 25, 2020.

35 *The Guardian*, "Trump Targets ICC with Sanctions after Court Opens War Crimes Investigation," June 11, 2020.

36 Chris Mahony, "The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute," *Georgetown Journal of International Law* 46, No. 4 (2015).

37 Ibid at 1125–1130.

38 Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010) (hereinafter cited as *Introduction ICL* 2010), 43.

39 Cedric Ryngaert, "The Concept of Jurisdiction in International Law," in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. Alexander Orakhelashvili (Edward Elgar Publishing Inc., 2015), 51; Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine," *Utrecht Law Review* 9, no. 4 (2013): 68–89.

40 Ryngaert, "The Concept of Jurisdiction in International Law," 53. For purposes of this paper, extraterritorial jurisdiction encompasses all situations where states apply their jurisdiction "extraterritorially," where such jurisdiction is based on the principle of nationality, the passive nationality principle, and the protective principle or the principle of universal jurisdiction.

Court of International Justice (PCIJ) in the *Lotus case* is often described as the moment when extraterritorial jurisdiction of states was accepted at the international level.⁴¹ The PCIJ found that:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.⁴²

The following grounds for extraterritorial application of jurisdiction have developed under international law: the principle of nationality (or active nationality principle),⁴³ the passive nationality principle,⁴⁴ and the protective principle or principle of universal jurisdiction.⁴⁵ These grounds are increasingly invoked by states to address transnational crimes (such as human trafficking and transnational economic and financial crimes), crimes against international peace and security (like terrorism), or international crimes such as crimes against humanity, genocide, and war crimes.

Although there is no internationally recognized definition of universal jurisdiction, it is commonly understood 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.”⁴⁶

The basis for universal jurisdiction depends solely on the gravity of the offense that the individual is alleged to have committed, “rather than on a particular nexus with a state, although in practice universal jurisdiction is often only exercised when the alleged perpetrator is present on the state’s territory.”⁴⁷ This principle is based on the premise that international crimes are so heinous and destructive of the international order that any state may exercise jurisdiction in respect of them and has a legitimate interest in doing so. The AU-EU Expert Report on the Principle of Universal Jurisdiction defines the universal jurisdiction principle as follows:

Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offense.⁴⁸

The use of universal jurisdiction before domestic courts has been on the rise since the World War II.⁴⁹ Important initiatives in this regard include the prosecution of Nazi war criminal Adolf Eichmann by an Israeli court, the extradition of Nazi concentration camp guard John Dem-

41 For a discussion on the Lotus principle, see An Hertogen, “Letting Lotus Bloom,” *European Journal of International Law* 26 (2015): 901–926.

42 *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10, as cited in Hertogen “Letting Lotus Bloom,” 19.

43 This is based on the nationality of a perpetrator.

44 This is based on the nationality of a victim.

45 Cryer, *Introduction ICL* 2010, 43–50.

46 See, for example, Kenneth C. Randall, “Universal Jurisdiction under International Law,” *Texas Law Review* 66 (1988): 785–8, as cited in Xavier Philippe, “The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?” *International Review of the Red Cross* 88 (2006): 375, 377.

47 See Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (New York: Oxford University Press, 2003), as cited in Ryngaert, “The Concept of Jurisdiction in International Law,” 57.

48 Council of the EU, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, April 16, 2009, 7.

49 See, for example, Tesch and Others (the Zyklon B Case) I LRTWC 93, cited in Cryer, *Introduction International ICL* 2010, 53.

janjuk from the United States to Israel; a number of prosecutions initiated in Belgium, France, Germany, and Switzerland of those accused of crimes committed in Rwanda and the Former Yugoslavia; and efforts to bring Chilean junta leader Augusto Pinochet to justice.⁵⁰

During this time, a number of international and national instruments were adopted that buttressed the universal jurisdiction principle, including the 1949 Geneva Conventions, Australia's 1988 War Crimes Amendment Act, the United Kingdom's 1991 War Crimes Act, and the Belgian Law of 16 June 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocols I and II of 8 June 1977. Notwithstanding these developments, the principle of universal jurisdiction saw some setbacks, in particular when Belgium failed to prosecute suspects accused of responsibility for the Rwandan Genocide and when it bowed to pressure to amend and ultimately repeal its universal jurisdiction law after it attempted to hold former US President George H. W. Bush and then Vice-President Dick Cheney accountable for their role in the 1990–1991 Gulf war.⁵¹

Sources of Universal Jurisdiction

The obligation of states to investigate and prosecute international crimes on the basis of universal jurisdiction arise from treaties and conventions that impose a duty on states to investigate and prosecute or extradite suspects to other state parties willing to do so, namely the so-called *aut dedere aut judicare* principle.⁵² Accordingly, a state that has ratified or acceded to such a treaty must either prosecute or extradite.⁵³ In this sense, the jurisdiction that arises from these obligations is not truly universal, but, rather, confined to a jurisdictional regime consisting of the state parties to the treaty.⁵⁴ The states in question have effectively agreed to share jurisdiction among themselves.

A distinction must be made between a duty to investigate international crimes (that are all prohibited under customary international law) and the duty to exercise universal jurisdiction over these crimes. It remains debatable whether the latter has passed into customary international law.⁵⁵

Treaty Law

Some treaties oblige state parties to criminalize certain conduct on a broad jurisdictional basis and to either prosecute or extradite a suspect. These treaties and conventions relate to combating either transnational or international crimes. Regarding the former, examples include the 1979 International Convention against Taking of Hostages and terrorism-related treaties⁵⁶ This report focuses on international crimes or “core crimes” as they are referred to sometimes.⁵⁷ The treaties that include the *aut dedere aut judicare* principle and a broad jurisdictional basis are set out below.

50 Ibid. at 53–55.

51 Ibid. at 56.

52 Robert Cryer, *An Introduction to International Criminal Law and Procedure*, 4th edition, Cambridge University Press (2019) (hereinafter cited as *Introduction ICL 2019*, 74.

53 A rare example of a treaty provision stipulating a permissive universal jurisdiction over a “core crime” is Article 5 of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

54 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2004), 107.

55 See “Customary International Law” section below.

56 Article 5(1) and (2). See also Cryer, *Introduction ICL 2019*, 75.

57 For the purposes of this report, “core crimes” include genocide, crimes against humanity, war crimes, torture as a stand-alone crime, and enforced disappearance as a stand-alone crime.

The Geneva Conventions (1949) and their Additional Protocol I (1977)

The four Geneva Conventions of 1949 include grave breaches (war crimes) provisions expressly recognizing certain violations as crimes subject to universal jurisdiction.⁵⁸ The provisions are phrased in the imperative and, accordingly, impose an obligation on member states to investigate and prosecute grave breaches on the basis of universal jurisdiction or extradite suspects to other states. The four Geneva Conventions and Additional Protocol I probably impose the broadest jurisdictional basis, because they do not require a presence of a suspect on the territory of a concerned state.⁵⁹

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts [or hand them over to another High Contracting Party].⁶⁰

Under these treaties, the obligation is limited to grave breaches. However, states remain free to criminalize other war crimes based on universal jurisdiction if they are inclined to do so.

The Convention Against Torture

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) obliges each state party to assume jurisdiction over the crime of torture when the crime is committed on its territory, when committed by one of its nationals, when a victim is a national of the state in question, or when a suspect is present on its territory.⁶¹ If a state party does not extradite the suspect, it must submit the case to its authorities for prosecution.⁶²

The content and scope of such obligations were the subject of the *Habré case* before the International Court of Justice (ICJ) in 2012.⁶³ In 2008, former Chadian President Hissène Habré claimed before the ECOWAS Court that the criminal proceedings initiated against him in Senegal would violate his right to due process. In the meantime, Belgium approached the ICJ, seeking Habré's extradition to Belgium in the light of Senegal's long delay in prosecuting him for torture. The ICJ found that state parties to CAT are obliged to criminalize torture on the basis of universal jurisdiction and that the duty to conduct a preliminary inquiry into such criminal conduct arises the moment that a state has reason to believe that a suspect is in its territory.⁶⁴

The International Convention on Enforced Disappearances

The International Convention for the Protection of all Persons from Enforced Disappearance provides that state parties shall take measures to prosecute perpetrators of enforced disappearance when such crimes are committed on their territories or if committed by one of their nationals (regardless of territorial location), or if committed against one of their nationals (regardless of territory), or when suspects are present on their territories.⁶⁵ The treaty includes the *aut dedere aut judicare* principle, which requires states to exercise jurisdiction over an offender or to "extradite or surrender him or her to another State in accordance with its international obliga-

58 See Art. 49 of the 1949 Geneva Convention I; Art. 51 of the 1949 Geneva Convention II; Art. 130 of the 1949 Geneva Convention III; Art. 147 of the 1949 Geneva Convention IV; and Articles 11, 85–86, and 88 of 1977 Additional Protocol I.

59 Rule 157: Jurisdiction Over War Crimes, IHL Database, International Committee of the Red Cross (ICRC).

60 Art. 49, Geneva Convention I (1949); Art. 50, Geneva Convention II (1949); Art. 129, Geneva Convention III (1949); Art. 146, Convention IV (1949).

61 Articles 5–9.

62 ICJ, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment of July 20, 2012, para 92.

63 Ibid.

64 Ibid. at paras 74–75, 88.

65 Article 9.

tions or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”⁶⁶

The 1948 Genocide Convention

The Genocide Convention imposes a duty on member states to “prevent and punish” genocide, but its jurisdictional basis is limited to courts of “the State in the territory of which the act was committed” or an international criminal court.⁶⁷ It imposes no duty to “prosecute or extradite;” however, some commentators assert that the convention can be read to include this obligation based their argument on the interpretation of the ICJ judgment in the *Genocide and Bosnian Genocide Cases*.⁶⁸

International Convention on the Suppression and Punishment of the Crime of Apartheid

As opposed to other conventions that impose an obligation on state parties to assume universal jurisdiction over the international crimes in question, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid provides for a permissive universal jurisdiction by stipulating that:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.⁶⁹

A permissive universal jurisdiction is one where states may invoke universal jurisdiction if they so decide, but they are not required to do so.

Customary International Law

A prevailing view among scholars and practitioners is that, under customary international law, states *are entitled* to assert a permissive form of universal jurisdiction over war crimes, crimes against humanity, genocide, and torture because those crimes are prohibited under customary international law.⁷⁰ However, others argue that universal jurisdiction for certain or all international crimes is mandatory based on the concepts of *jus cogens* and *erga omnes*.⁷¹

Domestic Laws

A distinction should be made between the substantive aspect of international crimes as they have developed under customary international law (such as the prohibition of certain conduct, elements of crimes, and sentence) and the procedural aspect, which includes the basis for jurisdiction (like universal jurisdiction or territorial jurisdiction). The status of universal jurisdiction under international customary law remains a subject of debate, and to the best of our knowledge, no state has applied universal jurisdiction exclusively on the basis of customary international law.

66 Article 9(2).

67 Article 6.

68 Lee A. Steven, “Genocide and the Duty to Prosecute or Extradite: Why the United States Is in Breach of Its International Obligation,” *Virginia Journal of International Law* 39 (1999): 425–466, at 460–1, cited in Cryer, *Introduction ICL* 2019, 6; Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, 3rd Edition (Oxford: Oxford University Press, 2013), cited in Cryer, *Introduction ICL* 2019, 76

69 Article 5.

70 International Commission of Jurists (ICJ), *A Practitioners Guide: International Law and the Fight Against Impunity* (2015); Broomhall, *International Justice and the International Criminal Court*, 110.

71 Mahmoud Cherif Bassiouni, “International Crimes: Jus Cogens, and Obligatio Erga Omnes,” *Law and Contemporary Problems* 59 (1996): 63–74, 63.

The constitutions of some countries require that laws incorporating international crimes be enacted by parliament, while others allow courts to rely directly on international law (both treaty and customary international law). Domestic laws incorporating international criminal law can be inadequate, because they often retain domestic principles of criminal law and do not incorporate various rules of customary international law, such as the non-applicability of statutes of limitations and *res judicata* to international crimes.⁷² They invariably fail to include modes of liability under international criminal law, such as command and superior responsibility for crimes committed by subordinates.⁷³

Some countries, like Germany, do not apply rules that emanate from customary international law that are not domestically codified, because of a strict adherence to the principle of legality,⁷⁴ whereas some common law jurisdictions directly apply customary international law.⁷⁵ In South Africa, section 232 of the Constitution provides for the direct application of customary international law, particularly for the prosecution of international crimes under the domestic law. This has been confirmed by the South African Constitutional Court in two leading cases.⁷⁶

However, at a practical level, even in countries that directly apply customary international law, it may be difficult for prosecutors and judges to accept that customary international law is capable of creating crimes under domestic law.⁷⁷ Relying on customary international law directly in the prosecution of international crimes could result in a number of challenges, including disputes as to when specific prohibited conduct passed into customary international law, what constitutes the different elements of the crimes, and what penalties to impose.

The concept of customary international law is unfamiliar to many judges, investigators, and legal practitioners. Criminal law tends to be codified, with the material and mental elements of offenses and penalties prescribed for each offense, even in countries with common law traditions. In the United Kingdom, the House of Lords has ruled that the greater the potential prejudicial impact of the application of nondomesticated customary norms, the greater the need to ensure that those rules are domestically incorporated and subjected to national legislative scrutiny and approval.⁷⁸

When the International Criminal Court was established by the Rome Statute in 1998, a number of state parties domesticated international crimes as prescribed in the statute,⁷⁹ and

72 Rule 160: Statutes of Limitation, IHL Database, ICRC; Article 7(2) of the 1950 European Convention on Human Rights; and Article 15(2), International Covenant on Civil and Political Rights (1966).

73 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Hadžihasanović and Others case, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, Case No. IT-01-47-AR72, par. 17 (Disposition on the first ground of appeal). See also Rule 153, IHL Database, ICRC; *The International Criminal Law Practitioner Library, Volume 1: Forms of Responsibility in International Criminal Law*, eds. Gideon Boas, James L. Bischoff, Natalie L. Reid (New York: Cambridge University Press, 2008), 254.

74 Although article 25 of the Basic Law (German Constitution) provides that “the general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.” German criminal courts have not indicted persons accused of international crimes exclusively on the basis of international customary criminal law. This is because the constitutional principle of legal certainty enshrined in article 103 of Germany’s Basic Law “prevails over both, the human rights endorsement of customary international criminal law and the respective customary rules.” See Kirsten Schmalenbach, “International Criminal Law in Germany,” in eds. Erika de Wet, Holger Hestermayer, and Rüdiger Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press, 2015), 376–402.

75 Cryer, *Introduction ICL* 2019, 80.

76 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation (SALC) Centre and Another* [2014] ZACC 30; *State v Basson (CCT30/03A)* [2005] ZACC 10.

77 *Ibid.*

78 The House of Lords in the United Kingdom, *R v Jones* [2006] UKHL 16, March 29, 2006.

79 These state parties include Australia, Canada, Germany, Kenya, Norway, Panama, Peru, Senegal, South Africa, Switzerland, and Uganda. For more countries, see the website of the Coalition for International Criminal Court, www.iccnw.org

some adopted universal jurisdiction over them.⁸⁰ The principle of complementarity, which gives primary jurisdiction over international crimes under the Rome Statute to state parties, has encouraged states to domesticate the Rome Statute.⁸¹

States have also domesticated other international crimes as per their other treaty obligations. In 2012, Amnesty International found that 163 of the 193 UN member states “can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.”⁸² Similarly, it found that some 95 UN member states have included torture as a separate crime under national law (not as a war crime or crime against humanity) and at least 85 UN member states have provided for universal jurisdiction over this crime.⁸³

Approaches to Universal Jurisdiction

A distinction is often drawn between “pure” universal jurisdiction (also referred to as “universal jurisdiction in absentia”) and “conditional” jurisdiction (universal jurisdiction “with presence”). Pure universal jurisdiction takes place when a state asserts jurisdiction (either through an investigation or by seeking extradition) of a suspect who is not present in the state’s territory. Conditional universal jurisdiction requires the presence of a suspect in the country seeking to act against them. Considering the diplomatic issues that arise between states and the practical difficulties in pursuing a suspect outside of a country’s territorial jurisdiction, most states have adopted laws of conditional universal jurisdiction.⁸⁴

Domestic laws dealing with universal jurisdiction vary in relation to complexity, level of applicability to international crimes, procedures, and scope of jurisdiction, including temporal jurisdiction; the crimes covered; and the extent to which the principle of complementarity or subsidiarity applies to universal jurisdiction.

Triggering Universal Jurisdiction

States have adopted very different models in dealing with universal jurisdiction. In most cases, states have chosen to include a “power to prosecute” core crimes based on universal jurisdiction by giving prosecutors broad discretionary powers. However, under German law, prosecutors have an obligation to investigate and prosecute and have discretion only in certain circumstances.⁸⁵ If a case bears a nexus to Germany (for example, the presence of a suspect in Germany), a prosecutor has a legal duty to begin an investigation. But if there is no nexus to Germany, prosecutors enjoy discretion and may refrain from investigating. In practice, in relation to cases where there is no evidence available in Germany, prosecutors will normally defer to international courts or other jurisdictions. Where no other jurisdiction is investigating then it is the legal duty of German prosecutors to investigate under the principle of “mandatory prosecution.”⁸⁶

Crimes Covered

Crimes covered by the principle of universal jurisdiction vary from state to state but tend to include a broad range of offenses, as in Australia or Spain,⁸⁷ where violence against women,

80 These state parties include Argentina, Belgium, Denmark, France, Germany, The Netherlands, Norway, Switzerland, Spain, and the United Kingdom.

81 “The Challenge: Fighting Against Impunity for International Crimes,” Parliamentarians for Global Action, www.pgaction.org/programmes-and-campaigns/rome-statute/

82 Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update* (2012), 2.

83 *Ibid.* at 13.

84 Cryer, *Introduction ICL* 2019, 58.

85 Section 153 of the German Criminal Procedure Code (Strafprozessordnung), cited in OSF-JI and TRIAL International, *Briefing Paper: Universal Jurisdiction Law and Practice in Germany* (April 2019) (hereinafter cited as *UJ in Germany*).

86 *Ibid.*

87 Australia’s Criminal Code Act 1995 (Cth), Category D offences e.g. Div. 80, 91, 101–103, 141, 144, 268, 274; and Spain’s Organic Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July 1985) and the amendments that followed.

organized crime, or even corruption by public officials give rise to the universal jurisdiction principle. Some states have confined the application of universal jurisdiction to certain crimes of international concern, such as crimes against humanity, genocide, and war crimes.⁸⁸ Other countries have included stand-alone crimes, such as torture and enforced disappearance. Switzerland has subjected enforced disappearance (as a stand-alone crime) to the universal jurisdiction principle.⁸⁹ South Africa has enacted three laws that allow for the application of the universal jurisdiction principle to crimes against humanity, genocide, war crimes, and the stand-alone crime of torture.⁹⁰

Temporal Jurisdiction

States have different approaches to the temporal jurisdiction of international crimes. Most states have adopted a strict approach to the principle of legality; most do not allow for the applicability of their universal jurisdiction statutes to acts committed before their entrance into force, even though they may already have been prohibited under customary international law. However, Dutch law stipulates that such a strict approach will not apply where The Netherlands has ratified applicable treaties.⁹¹ This is yet to be applied in practice.⁹²

It should be noted that the principle of legality, including the nonretroactivity of laws, is not infringed on when pursuing international crimes prohibited under customary international law.⁹³ The International Covenant on Civil and Political Rights (ICCPR) stipulates in article 15(2) that a state party may indict, bring to trial, and punish any person for any conduct “which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Accordingly, prosecutors may pursue crimes under customary international law if they can demonstrate that the criminal prohibitions in question had passed into customary international law at the time the crimes were committed.⁹⁴ Similarly, legislation criminalizing conduct retrospectively would not violate the principle of legality if such conduct was already prohibited under customary international law.⁹⁵ Such legislation would not criminalize behavior that was previously lawful; instead, it would create a new jurisdiction for its prosecution.⁹⁶ Section 7(4) of South Africa’s Geneva Conventions Act stipulates that “Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.”⁹⁷

Conditional Versus Pure Approaches

Most states have adopted the conditional approach to universal jurisdiction requiring the presence of suspects on their soil to assume jurisdiction (including Norway and Spain).⁹⁸ In the Netherlands, the presence of a suspect in the country is only required for applying universal

88 Sections 6–12, the Code of Crimes against International Law in Germany (Völkerstrafgesetzbuch – VStGB).

89 Article 185bis, Swiss Criminal Code, December 21, 1937 (RS 311.0).

90 Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002; Implementation of the Geneva Conventions Act, 8 of 2012; and Prevention of Combating and Torture of Persons Act, 13 of 2013.

91 Article 94, Dutch Constitution. This exception applies, however, only to treaty provisions of international law, not to unwritten customary law. See OSF-JI and TRIAL International, *Briefing Paper: Universal Jurisdiction Law and Practice in the Netherlands* (April 2019) (hereinafter cited as *UJ in Netherlands*).

92 *Ibid.*

93 See, for example, Howard Varney and Katarzyna Zdunczyk, ICTJ, *Transitional Justice in Tunisia: Tension between the Need for Accountability and Due Process Rights* (2018).

94 Mahmoud Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, (New York: Cambridge University Press, 2011), 300.

95 See also Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (New York: Cambridge University Press, 2008), 160.

96 Valentina Spiga, “Non-retroactivity of Criminal Law,” *Journal of International Criminal Justice* 9, no. 1 (2011): 5–23, at 14, as cited in Varney and Zdunczyk, *Transitional Justice in Tunisia*.

97 Implementation of the Geneva Conventions Act, 8 of 2012.

98 See, for example, Section 5, Norwegian Penal Code.

jurisdiction in case of crimes committed abroad by foreigners against non-nationals.⁹⁹ In some countries the presence of a suspect is needed to initiate the investigation (as in Switzerland), but the inquiry may continue even if the suspect leaves the country in question.¹⁰⁰ On the other hand, in the Netherlands the moment a suspect leaves the country, the basis for the jurisdiction ends and the investigation must stop.¹⁰¹ In South Africa, the presence of a suspect is required for the prosecution to proceed; however, it is not required for the police to launch an investigation. The Constitutional Court in South Africa ruled that the police remain under an obligation to investigate international crimes under the Implementation of the Rome Statute Act even if a suspect is outside of the territory of the republic.¹⁰²

The German model of universal jurisdiction allows for the launching of investigations even where suspects are not present in Germany.¹⁰³ This model was adopted in Spain before it restricted the scope of universal jurisdiction. The current approach requires that the suspect must be present in Spain and the victim must be Spanish or that there be some other relevant link to Spain.¹⁰⁴ Although reform efforts in 2014 expanded the list of crimes falling under universal jurisdiction, the eligibility criteria for filing a complaint in Spain were limited by excluding NGOs as possible complainants. In December 2018, the Spanish Constitutional Court ruled that the restrictions imposed on the exercise of universal jurisdiction were reasonable in light of the Spanish Constitution and international law.¹⁰⁵ Subsequently, the socialist government tabled further reforms of the law, claiming it would reintroduce the initial scope of the universal jurisdiction principle.¹⁰⁶

Principle of Subsidiarity

Some states have adopted the principle of subsidiarity to deal with crimes prosecuted under universal jurisdiction. The principle of subsidiarity is similar to the principle of complementarity imposed by the Rome Statute of the ICC. This approach is based on the premise that justice is best served in a territorial state because of the proximity to victims, the availability of evidence, and sociocultural considerations.¹⁰⁷ For these reasons, some states will only invoke universal jurisdiction if no proceedings are brought against a suspect before the courts of the country in which the crime took place or before an international tribunal.

The practice and law of states differ in relation to the application of the principle of subsidiarity. German prosecutors may accord primacy to jurisdictions where alleged crimes were committed or where victims reside—or, alternatively, to an international court, if there is no nexus between Germany and the crime.¹⁰⁸ In Switzerland, prosecutors may refrain from pursuing crimes committed abroad by foreign nationals against foreign nationals provided that an international court or a foreign authority is prosecuting the offense and the suspect is delivered or extradited to those authorities.¹⁰⁹ In Spain, the subsidiarity principle is most rigidly applied because universal jurisdiction may only be assumed where it is confirmed that there are no proceedings

99 Article 2(1)(b) and (c), International Crimes Act (2003). (Wet Internationale Misdrijven – ICA).

100 OSF-JI and TRIAL International, *Briefing Paper: Universal Jurisdiction Law and Practice in the Switzerland* (June 2019) (hereinafter cited as OSF-JI and TRIAL: *UJ in Switzerland*).

101 OSF-JI and TRIAL International, *UJ in Netherlands*.

102 *National Commissioner of the South African Police Service v SALC and Another* [2014] ZACC 30, pars 63–64 read together with par 81.

103 The prosecution may take the absence of a suspect into consideration when exercising its discretion.

104 Nicolás Zambrana-Tévar, “Ruling of the Spanish Constitutional Court Legitimising Restrictions on Universal Criminal Jurisdiction,” *EJIL: Talk!*, February 6, 2019.

105 ICRC, National Implementation of IHL, Constitutional Court of Spain, Sentence 140/2018, of December 20, 2018.

106 *El País*, “El Gobierno Cree ‘Imprescindible’ Recuperar la Justicia Universal,” July 11, 2018.

107 This includes such language as legitimacy of proceedings and understanding of social and cultural underpinnings of a conflict.

108 OSF-JI and TRIAL International, *UJ in Germany*.

109 Article 264m(2), Swiss Criminal Code.

before other jurisdictions (be it an international tribunal or a foreign state). Article 23(4) of Spain's Organic Act No. 6/1985 of 1 July as amended in 2009 and 2014 provides:

No other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes . . . Proceedings already initiated in Spain must be temporarily stayed if proceedings connected with the same offences are initiated by a court in another country or an international court.¹¹⁰

In South Africa, the Constitutional Court ruled that “investigating international crimes committed abroad is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.”¹¹¹

A different approach was adopted in Norway, which does not apply any principle of subsidiarity. Proceedings in another country or even before the International Criminal Court do not constitute a bar to investigations or prosecutions there.¹¹²

Examples of Universal Jurisdiction Cases

This section provides examples of universal jurisdiction cases that were brought before domestic courts in relation to international crimes. Some examples include cases based on the passive or active personality principle.

Demjanjuk Case – 1985¹¹³

In this case, Israel requested the extradition of Ukrainian-American John Demjanjuk from the United States based on the Nazis and Nazi Collaborators (Punishment) Law adopted by Israel following World War II.¹¹⁴ Demjanjuk was suspected of being the notorious camp guard “Ivan the Terrible” from the Treblinka concentration camp. Following an initial request by Israel in 1983,¹¹⁵ a US court agreed to extradite Demjanjuk to Israel in 1985. The US court found that the Nuremberg tribunals:

“exercised a much broader jurisdiction which necessarily derived from the universality principle. Whatever doubts existed prior to 1945 have been erased by the general recognition since that time that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation.” It also ruled that “Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial.”¹¹⁶

In 1986, as a result of this decision, Demjanjuk was extradited to Israel to face war crimes and crimes against humanity charges. Although convicted to death by a court of first instance in

¹¹⁰ Ministry of Foreign Affairs and Cooperation, Translated from Spanish: *Contribution of Spain on the Topic “The Scope and Application of the Principle of Universal Jurisdiction,”* February 22, 2016.

¹¹¹ *National Commissioner of the South African Police Service v SALC and Another* [2014] ZACC 30, par. 61.

¹¹² OSF-JI and TRIAL International, *Briefing Paper: Universal Jurisdiction Law and Practice in Norway* (January 2019) (hereinafter cited as *UJ in Norway*).

¹¹³ This case was based on the universal jurisdiction principle.

¹¹⁴ Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, passed by the Israeli Knesset (parliament) on the 16th Av, 5723 (August 6, 1963).

¹¹⁵ *The New York Times*, “Extradition Due in War Crime Case,” February 24, 1986.

¹¹⁶ United States Court of Appeals, Sixth Circuit, *John DEMJANJUK, Petitioner-Appellant, v. Joseph PETROVSKY, et al., Respondents-Appellees*, No. 85-3435, October 31, 1985.

1993, he was acquitted on all counts by the Supreme Court of Israel on the basis that, although he was a guard at the Sobibor and Trawniki concentration camps, he was mistakenly identified as “Ivan the Terrible.”¹¹⁷ Following his return to Ohio in 2009, Germany requested his extradition, alleging he was an accessory to the murder of over 29,000 people at the Sobibor concentration camp.¹¹⁸ He was extradited to Germany the same year. In 2011 Demjanjuk was convicted and sentenced to five years in prison on 28,060 counts of accessory to murder but was released pending his appeal. He died in 2012 before his appeal was decided.¹¹⁹

Chuckie Taylor Case¹²⁰

Chuckie Taylor is a born-and-raised American who travelled to Liberia in 1994 to live with his father, Charles Taylor, who was then President of Liberia. During his father’s presidency (1999–2003), Taylor became the commander of the notoriously violent Anti-Terrorist Unit, commonly known in Liberia as the “Demon Forces.” He was apprehended in 2006 after attempting to enter the United States, a day after his father surrendered to the Special Court for Sierra Leone (SCSL). Taylor was indicted by the US Department of Justice under the 1994 US Torture Act, and in 2008 a jury convicted him on six counts of torture and conspiracy to commit torture and one count of possession of a firearm while committing a violent crime. He was sentenced to 97 years in prison.¹²¹

Chuckie Taylor is the only person to date to have been successfully prosecuted under the US Federal Extraterritorial Torture Statute, 18 USC § 2340A.¹²² Under the Act, jurisdiction is assumed where the alleged offender is a national of the United States or is present in the United States, regardless of the nationality of the victim or alleged offender.

Spanish Prosecution of El Salvadoran Officials for the Murder of Six Jesuit Priests¹²³

In 1989, during the Salvadoran internal armed conflict, an elite battalion of the Salvadoran Army entered the grounds of the Jesuit University of Central America with orders to kill Father Ignacio Ellacuría, a well-known critic of the Salvadoran military dictatorship. The battalion’s instructions were to leave no witnesses. Six Jesuit priests, a cook, and her sixteen-year-old daughter were murdered. In 2008, the Spanish Association for Human Rights and the Centre for Justice and Accountability filed a complaint before the Spanish National Court against former Salvadoran President Alfredo Cristiani Burkard and fourteen former military officers and soldiers for their alleged roles in these killings. In 2009, Judge Eloy Velasco formally charged fourteen former officers with murder, crimes against humanity, and state terrorism for their role in the massacre.

117 Chris Hedges, “Israel Recommends that Demjanjuk Be Released,” *The New York Times*, August 12, 1993.

118 Von Sebastian Fischer and Conny Neumann, “Alleged Nazi Guard Deported: Demjanjuk Lands in Munich,” *Spiegel International*, May 12, 2009.

119 Joe Holley and Adam Bernstein, “Convicted Nazi Criminal John Demjanjuk Dies at 91,” *The Washington Post* March 17, 2012.

120 This case was based upon the Active Personality Principle.

121 HRW, “Q & A: Charles ‘Chuckie’ Taylor, Jr.’s Trial in the United States for Torture Committed in Liberia,” September 23, 2008; HRW, “US: Justice Dept. Brings First Charges for Torture Abroad: Ex-Liberian President’s Son Indicted for Torture in Liberia,” December 6, 2006.

122 In June 2020, Michael Sang Correa, an alleged member of the notorious Gambian “Junglers” death squad set up by former President Yahya Jammeh in the mid-1990s, was indicted in the United States on torture charges. If this case proceeds, it will be the second case to be prosecuted in the United States under the 1994 federal extraterritorial torture statute, 18 USC §2340A. See Human Rights Watch, “Gambia: US Charges Alleged ‘Death Squad’ Member with Torture,” June 12, 2020.

123 This case was based upon the passive personality principle, which allows states, in limited cases, to claim jurisdiction to try a foreign national for offenses committed abroad that affect its own citizens.

The charges were retained following the 2014 amendments to Spain's universal jurisdiction law because five of the murdered priests were Spanish nationals.¹²⁴ In 2017, one of the suspects, Orlando Montano, 77, was extradited to Spain from the United States, where he had previously served twenty-one months imprisonment for immigration fraud.¹²⁵ During 2018, the Criminal Chamber of the Spanish National Court partially upheld the appeal filed by the accused, eliminating from the indictment the crime against humanity charge, leaving him to face charges of eight murders committed with a terrorist intent. His trial began in June 2020.¹²⁶ Some three months later, Montano was found guilty of the murder of the five Spaniards and sentenced to 133 years in prison for his role in the "decision, design and execution" of the murders.¹²⁷ Almudena Bernabéu, a member of the private prosecution team that helped to build the case against Montano, said the verdict demonstrated the importance of universal jurisdiction:

It doesn't really matter if 30 years have passed, the pain of the relatives carries on . . . I think people forget how important these active efforts are to formalise and acknowledge that someone's son was tortured, or someone's brother was executed.¹²⁸

The trial was live streamed internationally, allowing the victims, their families, and people in El Salvador to access the historic trial proceedings. The [Guernica Centre for International Justice](#), which brought the case to trial, along with Spanish co-counsel Manuel Olle Sese, noted that the "ruling shows that Universal Jurisdiction is a crucial, and very much alive tool for victims of international crimes and in many instances, the only one possible."¹²⁹

Mirsad Repak Case in Norway¹³⁰

Mirsad Repak, an ethnic Bosnian, was a member of the paramilitary group the Croatian Defence Forces and a guard at the notorious Dretelj detention camp in Bosnia and Herzegovina. Numerous reports of torture and sexual violence emerged from the camp. Repak fled the armed conflict in 1993, and after arriving in Norway as an asylum seeker, he was granted Norwegian citizenship in 2001.¹³¹ Initially, Repak was arrested and charged under the 1902 Norwegian Penal Code, but after Norway adopted a new penal code that incorporated international crimes into its legal system in 2005, his indictment was amended to include war crimes and crimes against humanity. In 2008, Repak was found guilty of eleven counts of war crimes and sentenced to five years in prison and a fine, but he was acquitted of all crimes against humanity charges.

The conviction with some modifications was upheld by Norway's Court of Appeal. The verdict was further appealed to the Supreme Court, which upheld the convictions of the ordinary crimes, but found that Repak should not have been charged with war crimes and crimes against humanity for acts that had been committed before the new Penal Code entered into force in 2005.¹³² The court applied a strict interpretation of the principle of legality, in particular, non-retroactivity of laws, although the conduct in question had been prohibited under customary international law at the time of the offense.

124 As such, the case was based on the passive personality principle, strictly speaking.

125 TRIAL International, "Inocente Orlando Montano Morales," October 18, 2016 (last modified July 15, 2020).

126 The Guernica Group, "Historic Trial Against Salvadoran Colonel to Start on Monday, June 8 in Madrid, Spain," June 4, 2020.

127 Sam Jones, "Ex-Salvadoran Colonel Jailed for 1989 Murder of Spanish Jesuits," *The Guardian*, September 11, 2020.

128 Ibid.

129 Ibid.

130 This case was based on the universal jurisdiction principle.

131 It remains a universal jurisdiction case, not an active personality jurisdiction case, because Repak was not Norwegian at the time of the commission of the crime.

132 Julia Selman-Ayetej, "Universal Jurisdiction: Conflict and Controversy in Norway," in *The Hidden Histories of War Crimes Trials*, eds. Kevin J Heller and Gary Simpson (Oxford University Press, 2013), 267–289.

Ousman Sonko¹³³

Ousman Sonko was the former minister of interior of The Gambia, the former commander of the Presidential Guard, and the former inspector general of police under Gambian dictator Yahya Jammeh. In 2016, following the removal of the Jammeh regime, Sonko fled to Senegal, then Sweden, where he was refused asylum, and eventually arrived in Switzerland, where he applied for asylum. Alerted to Sonko's presence in Switzerland, the international NGO TRIAL International lodged a criminal complaint against him with the prosecuting authorities in Bern, and he was arrested. There, he was charged with crimes against humanity for allegedly taking part in multiple acts of torture in detention centers during his period in office.¹³⁴

Initially charged with the crime of torture, his indictment was reformulated as a crime against humanity, and his case was transferred to the Swiss Office of the Attorney General.¹³⁵ In August 2020, the Swiss Federal Court rejected a plea from Sonko for release from prison after prosecutors indicated that their probes against him were accumulating more evidence.¹³⁶

Kumar Lama Case in the United Kingdom (UK)¹³⁷

During the internal conflict in Nepal from 1996–2006, Colonel Kumar Lama was an officer in the Nepalese army and served in the Goringhate Army Barracks in Kapilvastu. He was accused of torturing two detainees, who were suspected of being involved in the Maoist insurgency. In 2008, Lama was convicted by a district court in Nepal for the torture of one of the detainees and was ordered to pay compensation. Although disciplinary proceedings were recommended, he was sent on a peacekeeping mission to South Sudan with the United Nations.¹³⁸

Unhappy with the lack of accountability at the local level, two victims launched a complaint against Lama in the United Kingdom (UK). Lama was arrested in the UK in 2013 and subsequently charged with two counts of torture under Section 134(1) of the Criminal Justice Act 1988, which provides universal jurisdiction before the British courts for torture committed anywhere in the world.¹³⁹

In 2016, Lama was acquitted of one of the torture charges, and the court was unable to reach a verdict on the second. The Crown Prosecution Service decided not to seek a retrial, and as a result, the court acquitted Lama of the second charge.¹⁴⁰ Criticism was levelled against the prosecution's handling of evidentiary issues and the failure to provide adequate protection to victims and witnesses in the United Kingdom.¹⁴¹

Gibril Massaquoi Arrested in Finland¹⁴²

On March 10, 2020, Finnish authorities arrested Gibril Massaquoi, a Sierra Leonean national and a former lieutenant-colonel and spokesman of the Revolutionary United Front (RUF)—a rebel group responsible for many human rights violations during the Sierra Leonean Civil

133 This case is based on the universal jurisdiction principle.

134 TRIAL International, "Osman Sonko," October 7, 2017 (last modified August 8, 2020).

135 Ibid.

136 *Swiss Info*, "Court Keeps Ex-Gambian Minister Sonko Behind Bars," August 14, 2020.

137 This case was based on universal jurisdiction principle.

138 Advocacy Forum Nepal, *Vetting in Nepal: Challenges and Issues* (2014), 41.

139 REDRESS, "Colonel Kumar Lama's Acquittal: Prosecuting Torture Suspects Should Remain a Priority of the UK," September 6, 2017.

140 Devika Hovell, "The 'Mistrial' of Kumar Lama: Problematizing Universal Jurisdiction," EJIL: Talk!, April 6, 2017.

141 Sneha Shrestha, *The Curious Case of Colonel Kumar Lama: Its Origins and Impact in Nepal and the United Kingdom, and Its Contribution to the Discourse on Universal Jurisdiction*, TLI Think! (2018); Clive Baldwin, "Catch Them or Else: If Nepal Can't Prosecute War Crimes at Home, Other Countries May Step In," HRW, September 10, 2018; Hovell, "The 'Mistrial' of Kumar Lama."

142 This case was based on universal jurisdiction principle.

War. Massaquoi was arrested in Tampere, Finland, on charges of war crimes and crimes against humanity allegedly committed in Liberia between 1999 and 2003, which included homicides, sexual violence, and the recruitment and use of child soldiers. Massaquoi was an informer for the SCSL and testified in the case against members of Armed Forces Revolutionary Council—a rebel group that allied itself with the RUF. He was thereafter “relocated” to Finland.

It was the investigation and documentation efforts of [Civitas Maxima](#) and the [Global Justice and Research Project](#) that revealed Massaquoi’s involvement in international crimes in Liberia. The organizations submitted evidence to the authorities in Finland. The whereabouts of Massaquoi appeared online as early as 2010. The Liberian and Finnish authorities closely collaborated in the investigation, which resulted in Massaquoi’s arrest.¹⁴³ Following a preliminary investigation, the prosecutor general, Finland’s supreme prosecution official, issued an order to proceed with Massaquoi’s case.¹⁴⁴

Former President of Chad, Hissène Habré Prosecuted in Senegal¹⁴⁵

The case of Hissène Habré, former Chadian president and dictator (1982–1990) commenced in 2001, after seven torture victims from under Habré’s reign filed an application before the UN Committee against Torture requesting Senegal either try Habré or extradite him.¹⁴⁶ Because one of the victims was a Belgian national, a judge in Belgium requested Senegal to extradite him to Belgium for prosecution. Fearing backlash on the continent for extraditing an African to the Western state, Senegal referred the case to the AU for review, which culminated in a request to Senegal to try Habré for international crimes in its domestic courts. In 2012 the ICJ ordered Senegal to take the necessary measures to try Habré or extradite him to Belgium for trial. That same year, Senegal and the AU agreed to establish the African Extraordinary Chambers (EAC) in the domestic Senegalese judicial system in order to try alleged perpetrators of international crimes committed in Chad between June 1982 and December 1990.¹⁴⁷

The trial of Habré began in September 2015 and lasted until February 2016. In May 2016 the EAC convicted Habré of crimes against humanity, war crimes, and torture, including rape and sexual slavery, and sentenced him to life imprisonment. In July 2016 he was ordered to pay reparations to victims. In 2017, the Senegalese Appeal Chamber confirmed the ruling by the court of the first instance and the sentence,¹⁴⁸ and it ordered Habré to pay 123 million euros in compensation to a victims’ trust fund.¹⁴⁹ The trial of Habré was the first trial in the world in which the courts of one country prosecuted a former head of state for international crimes. It was also the first case in Africa to be tried on the principle of universal jurisdiction.¹⁵⁰

Recent Universal Jurisdiction Cases in Germany Dealing with Syria¹⁵¹

In April 2020, a trial against two Syrian regime agents for crimes committed during the Syrian war commenced in the German city of Koblenz.¹⁵² Two former Syrian intelligence officials, An-

143 Civitas Maxima, “Press Release: Former RUF Commander Arrested in Finland over War Crimes and Crimes Against Humanity Allegedly Committed in Liberia,” March 11, 2020.

144 Jari Tanner, “Finland Jails Sierra Leone Man in Liberia War Crimes Case,” *AP News*, March 12, 2020.

145 This case was based on the universal jurisdiction principle.

146 Mutoy Mubiala, *Regional v. Universal Jurisdiction in Africa: The Habré Case*, Torkel Opsahl Academic EPublisher (2016).

147 *Ibid.*

148 “Hissène Habré” webpage, HRW, www.hrw.org/tag/hissene-habre.

149 Reed Brody, *Victims Bring a Dictator to Justice: The Case of Hissène Habré*, Bread for the World – Protestant Development Service Protestant Agency for Diakonie and Development (June 2017). The trust fund is not yet operational.

150 HRW, “Senegal/Chad: Court Upholds Habré Conviction Decision Brings to a Close 26-Year Struggle for Justice,” April 27, 2017.

151 These cases are based on the universal jurisdiction principle.

152 In 2017, a low-level soldier was convicted in Sweden of the war crime of violating human dignity by posing with a corpse in the boot/trunk of his vehicle. He was sentenced to eight months in prison. Anne Barnard, “Syrian Soldier Is Guilty of War Crime, A First in the 6-Year Conflict,” *The New York Times*, October 3, 2017.

war Raslan and Eyad al-Gharib, were charged with crimes against humanity, murder, rape, and sexual assault. Raslan was believed to be the head of branch 251 of Syria's General Intelligence Directorate between 2011 and 2012 where, according to prosecutors, at least 4,000 detainees were tortured through a variety of means, including beatings and electric shocks.¹⁵³ The prosecution also alleges that at least 58 people died under his command.¹⁵⁴

The indictment emerged from an initial “structural investigation” that was initiated by German prosecutors in 2011.¹⁵⁵ The victims are represented by various NGOs, including the European Centre for Constitutional and Human Rights and the Open Society Justice Initiative.¹⁵⁶ Much of the evidence was collected by the Commission for International Justice and Accountability, a nonprofit organization investigating atrocity crimes in Syria and Iraq.

Another trial with a connection to Syria began in Germany in April 2020. Taha “Al-J,” an Iraqi citizen accused of war crimes, crimes against humanity and genocide committed against Yazidis while he was part of the Islamic State of Iraq and Syria (ISIS), was arrested in 2019 in Greece and extradited to Germany. According to the indictment, he was an active member of ISIS from 2013 to 2019 in Iraq, Syria, and Turkey. The charges against Al-J includes the murder of a five-year-old girl, whom Al-J chained to the window in the open sun as a form of punishment.¹⁵⁷

Universal Jurisdiction: Challenges

Given the multiple obstacles in the path to criminal justice for international crimes at both the international and domestic levels, universal jurisdiction presents itself as a viable alternative to these more traditional mechanisms. However, there is some controversy around the applicability of the universal jurisdiction principle. These controversies are grouped into four categories: conceptual, legal, political, and practical.

Challenges at the Conceptual Level

At the conceptual level, some commentators oppose the broad scope of the principle of universal jurisdiction, arguing that it violates national sovereignty. As observed by one scholar, “The main problem of universal jurisdiction lies in the contradiction between the universality of its mission and the particularity of the political interests of the sovereign nation states which provide the statutory framework for the application of the doctrine.”¹⁵⁸

Legal Challenges

Legal controversies include immunities for high-level officials and the applicability of the internationally recognized principle *ne bis in idem*, which states that nobody “shall be held criminally liable for the same crime twice,” and other due process guarantees.

The *Ne Bis In Idem* Principle

Theoretically, a person could be convicted of murder in one state and then charged with the crime against humanity of murder in another state because “the protection granted by Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) is limited to

153 Loveday Morris, “German Court Case Is First to Try Syrian Regime for War Crimes,” *The Washington Post*, April 23, 2020.

154 Ibid.

155 Hannah El-Hitami, “They Felt Too Safe: How Two Syrian Agents Ended Up on Trial in Germany,” *Justice Info*, May 4, 2020.

156 Abby Sewell, “Syria War Crimes Trial to Open in Germany,” *US News*, April 22, 2020.

157 *The Guardian*, “Alleged Isis Member on Trial in Germany for Genocide and Murder,” April 24, 2020.

158 Rahim Hesenov, “Universal Jurisdiction for International Crimes—A Case Study,” *European Journal on Criminal Policy and Research* 19 (2013): 275–283.

multiple prosecutions in one state, and not as between states.”¹⁵⁹ It leaves a regulatory void in cases where more than one state may assume jurisdiction over a crime. This reading of the *ne bis in idem* principle opens the door for states to investigate and prosecute persons amnestied, pardoned, or granted other forms of immunity for serious international crimes in the countries where the crimes took place. In this regard, the European Court of Human Rights in *Ould Dah v. France* found that France was justified in arresting a Mauritanian army officer for torture committed in Mauritania, because the amnesty law in that country was generally incompatible with the duty on states to investigate acts of torture.¹⁶⁰

Immunities of High-level Officials

Another controversy raised by critics of the principle of universality relates to personal immunities of high state officials from prosecution before the courts of a receiving state. The issue of immunities is a complex one, given the interplay between the law of immunities and international criminal law, which has generated vigorous debate among scholars and practitioners.¹⁶¹

Functional immunity does not preclude prosecutions of serious international crimes.¹⁶² This is confirmed by the Nuremberg Judgment and the Pinochet decision,¹⁶³ and it has since been accepted by the United Nations General Assembly,¹⁶⁴ the International Law Commission,¹⁶⁵ and in decisions by national courts, like the Supreme Court of Israel in the Eichmann case.¹⁶⁶

In relation to universal jurisdiction, states reviewed in this study have not adopted specific regulations on immunities, rather, they rely on their treaty obligations and customary international law to determine whether state representatives enjoy immunities for serious crimes committed while in office.

- In Germany, the universal jurisdiction law does not provide any guidance on immunities, but immunities for diplomats, consular officers, and representatives of states are respected. Also, customary international law, which is part of German federal law, is applicable directly. However, immunities are not a bar to an extradition request by a recognized international tribunal or the ICC.¹⁶⁷
- The universal jurisdiction law in The Netherlands provides that foreign heads of states, ministers of foreign affairs, and persons who have immunities pursuant to an applicable treaty or principles of customary international law enjoy immunity from prosecution.¹⁶⁸
- In Norway, the law on immunities in relation to universal jurisdiction is governed by ratified international treaties, including the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), and the Convention on Privileges and

159 Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 80.

160 ECtHR, *Ould Dah v. France*, Admissibility Decision, Case No. 13113/03, March 17, 2009.

161 See, for example, Paola Gaeta and Patryk I. Labuda, “Trying Sitting Heads of State: The African Union Versus the ICC in the Al Bashir and Kenyatta Cases,” in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017) 138–162; Dapo Akande, “The African Union, the ICC and Universal Jurisdiction: Some Recent Developments,” EJIL:Talk!, August 29, 2012.

162 Functional immunity only covers the acts performed by state agents in the discharge of their duties (“official acts”), whereas “personal immunity” covers both “private” and “official” acts of foreign officials.

163 “Judgment” [Nuremberg IMT, Judgments and Sentences], *American Journal of International Law* 41, no. 1 (1947): 172–333, 172, 221 as cited in Cryer, *Introduction ICL* 2019, 550; Judgment of March 24, 1999, reported as *R. v. Bow Street Stipendiary Magistrate and others*, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3) in [1999] 2 All E.R. 97

164 UN General Assembly, *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal*, UN GA Resolution 95 (I), December 11, 1946.

165 Text of the Nürnberg Principles Adopted by the International Law Commission, UN Doc. A/CN.4/L.2.

166 *Attorney-General of Israel v Eichmann*, 36 International Law Reports (1969) 277, at 308–10.

167 OSF-JI and TRIAL International, *UJ in Germany*.

168 OSF-JI and TRIAL International, *UJ in the Netherlands*.

Immunities of the United Nations (1946) as well as customary international law. Immunities have not been raised in universal jurisdiction cases so far.¹⁶⁹

Political Challenges

The controversy that resonates most strongly among critics of universal jurisdiction is the abuse of political power. In this context, some states have claimed that the principle of universal jurisdiction has been used as a method to advance political agendas (for example, in cases involving the United States or Israel) or that it has been used as a tool to unfairly target Africans.¹⁷⁰

In Belgium, the universal jurisdiction laws were significantly adjusted following criminal complaints made against high officials of Israel and the U.S. In 2001, Lebanese and Palestinian victims filed a complaint against then-Israeli Prime Minister Ariel Sharon and Israeli Brigadier General Amos Yaron alleging that they were behind massacres, killings, rapes, and disappearances committed in refugee camps in Beirut in 1982. The case was dismissed by the investigating judge and the Court of Appeal, but in 2003 the Court of Cassation partially reversed this decision, holding that the presence of suspects was not required to activate universal jurisdiction in Belgium. The court ruled, however, that the case against Sharon could not proceed as he was protected by personal immunity under customary international law. Following the judgment, Israel withdraw its ambassador in Belgium.

Also, in Belgium in 2003, seven Iraqi victims and an NGO filed a complaint against then US President George H. W. Bush, then Vice-President Richard “Dick” Cheney (who was US secretary of Defense at the time of the alleged crimes), and other senior officials who played central roles during the 1990–1991 Gulf War. Considerable US diplomatic pressure was applied against Belgium, including a threat to relocate NATO’s head office.¹⁷¹ Amendments were quickly made to the universal jurisdiction law providing for an explicit immunity defense based on official capacity.¹⁷² In addition, limitations were imposed on launching cases by civil parties.¹⁷³

However, in 2003, a Belgian court ruled that a universal jurisdiction case against Israeli Brigadier General Amos Yaron could proceed. Two days later, US Secretary of Defense Donald Rumsfeld threatened to withdraw funding for the new NATO headquarters building. In August 2003, the Belgian Parliament repealed the Universal Jurisdiction Statute and introduced changes to the Belgian Criminal Code, Criminal Procedure Code, and Judiciary Act. The universal jurisdiction principle was thus significantly eroded, because it only permitted universal jurisdiction cases to be instituted against Belgian citizens or residents. It also deprived victims and NGOs of the right to initiate proceedings as civil parties based on the passive personality principle.¹⁷⁴

In Spain, amendments to the universal jurisdiction law were introduced in 2009, when the Audiencia Nacional opened an inquiry into crimes against humanity allegedly committed by six Israelis during a bombing raid on Gaza in 2002. As reported by the *BBC* at the time, “In a statement, the Israeli government branded the inquiry in Madrid “unacceptable,” while the

169 OSF-JI and TRIAL International, *UJ in Norway*.

170 HRW, *Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly*, October 19, 2009. See also Council of the European Union, *AU-EU Expert Report on the Principle of Universal Jurisdiction* (2009), paras 33–38.

171 *The Telegraph*, “US Threatens to Pull NATO HQ Out of Belgium,” June 13, 2003.

172 Loi modifiant la loi du 16 juin 1993, art. 4 (replacing art. 5, §3 of the 1993/1999 Law) and 5 (replacing art. 7, §1 of the 1993/1999 Law).

173 Loi modifiant la loi du 16 juin 1993, art. 5 (replacing art. 7, §1 of the 1993/1999 Law).

174 Maximo Langer, “The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes,” *American Society of International Law* 105 (2011). The passive personality principle allows states, in limited cases, to claim jurisdiction to try a foreign national for offenses committed abroad that affect its own citizens.

then Foreign Minister Tzipi Livni told her Spanish counterpart the killings were already under investigation in Israel. Soon afterwards, Madrid confirmed that the law on universal jurisdiction would be changed.¹⁷⁵ The law, which previously permitted the exercise of jurisdiction without the physical presence of the suspect on Spanish soil, was amended to require such physical presence.¹⁷⁶

A second set of reforms to the Spanish universal jurisdiction law were enacted in 2014, in the context of tensions between Spain and China after an investigation into allegations of genocide in Tibet had been opened in Spain. International arrest warrants were issued against several former Chinese officers (among them former President Jiang Zemin and former Prime Minister Li Peng).¹⁷⁷ The Spanish Congress passed a law, with retroactive application, to confine universal jurisdiction investigations to crimes of genocide and crimes against humanity where the accused or victims were Spanish citizens or habitually resident in Spain at the time of the crimes.¹⁷⁸

In South Africa, it was argued by the South African Police Services in the “Torture Docket Case,” brought on behalf of victims of torture in Zimbabwe, that political concerns justified not proceeding with an investigation. This included a political justification that an investigation would damage relations between Zimbabwe and South Africa.¹⁷⁹ The Constitutional Court reasoned that such a justification undermines the principle of accountability for international crimes, especially as political tensions are often unavoidable.¹⁸⁰ In particular, the court found that “when an investigation under the ICC Act is requested . . . political considerations or diplomatic initiatives, are not relevant at that stage.”¹⁸¹ The Torture Docket Case is significant because it demonstrates that political decisions not to investigate international crimes for diplomatic, comity, or policy reasons are subject to judicial scrutiny.¹⁸²

Practical Challenges

Universal jurisdiction may prove difficult to apply because it relies on mutual assistance among states and faces procedural and logistical challenges before domestic courts. In relation to mutual assistance, it must be noted that “the existence of universal jurisdiction per se does not give rise to any obligations on behalf of the territorial or nationality State to assist in any investigation, provide evidence or extradite suspects.”¹⁸³ The recourse to mutual assistance may result in long delays, particularly when extradition requests are involved. Typically, a suspect will exhaust all local remedies to avoid extradition. Israel requested the extradition of Demjanjuk in 1983, but it was only granted in 1985. His trial in Israel ended with an acquittal in 1993—ten years after the extradition request was submitted. When eventually extradited to Germany to face justice, Demjanjuk was convicted only in 2011—some twenty-six years after the first attempt to hold him accountable.

175 Steve Kingstone, “Spain Reins in Crusading Judges,” *BBC*, June 25, 2009.

176 Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool* (2010).

177 Rosa Ana Alija Fernández, *The 2014 Reform of Universal Jurisdiction in Spain From All to Nothing*, *Zeitschrift für Internationale Strafrechtsdogmatik* 13 (2014): 717–727.

178 *Nationalia*, “Spain’s Supreme Court Upholds Dismissal of Tibet Genocide Charges against Chinese Former Leaders,” April 23, 2015.

179 Christopher Gevers, “The Application of Universal Jurisdiction in South African Law,” *EJIL:Talk!*, April 24, 2012.

180 Lillian Chenwi and Franziska Sucker, “South Africa’s Competing Obligations in Relation to International Crimes,” *Constitutional Court Review* 7, no. 1 (2015): 199–245, 213.

181 *Southern Africa Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP), para 31.

182 Max Du Plessis, Institute for Security Study, *Policy Brief: The Zimbabwe Torture Docket Decision and Proactive Complementarity* (November 2015).

183 Broomhall, *International Justice and the International Criminal Court*, 119–23, as cited in Cryer, *Introduction ICL* 2019, 65.

Collaboration with local authorities may not be possible when an investigation targets a member of the military or government. This became evident in the case of Nepalese military officer Kumar Lama, who was tried in the United Kingdom for torture. While the Nepalese government allowed Lama's British defense lawyers to visit Nepal to help compile his defense, it declined that same access to British police and prosecutors.¹⁸⁴ Difficulties in accessing crime scenes and forensic evidence have been a recurring problem in universal jurisdiction investigations, resulting in overreliance on witness testimonies.¹⁸⁵ Witnesses may be difficult to locate due to movements of people, stigma associated with crime, unwillingness to seek justice, and fear of reprisals or intimidation.

Lack of intercultural understanding can prove challenging in trials that take place thousands of kilometers away from crime scenes and with the assistance of interpreters. In Lama's trial in the United Kingdom, it was noted that:

The trial was only the third universal jurisdiction trial in UK history. It was very nearly lost in translation. The first trial collapsed in March 2015 when interpreter after interpreter proved their ineptitude in the difficult task of court translation, an essential aspect of a trial scheduled to include testimony from twenty Nepalese witnesses.¹⁸⁶

Non-national judges often have limited understanding of the cultural, social, and political contexts in which the crimes were committed. This shortcoming can impact the ability of courts to appraise the credibility of witnesses and assess evidence. Long delays further hamper proceedings because of memory loss and the risk of retraumatization.¹⁸⁷

Witnesses coming from other cultural backgrounds may feel intimidated in countries they do not know, especially when confronted with unfamiliar court settings. Practical challenges include differences in legal procedures, with some countries allowing the preparation or precognition of witnesses before court hearings and others not.

TRIAL International in a 2019 report provides a detailed account of the hurdles common to universal jurisdiction cases. The report highlights, for example, the challenge of identifying and gaining the trust of witnesses, some of whom are deeply traumatized. The safety and security of victims and witnesses cannot be properly addressed unless NGOs and states work together. Some states, but not all, have resources and mechanisms to ensure the long-term safety of witnesses.¹⁸⁸

184 Sneha Shrestha, *The Curious Case of Colonel Kumar Lama*, 19.

185 TRIAL International, *Evidentiary challenges in universal jurisdiction cases: Universal Jurisdiction Annual Review 2019 #UJAR* (2019) (hereinafter cited as *UJAR 2019*), 9.

186 Hovell, "The 'Mistrial' of Kumar Lama."

187 Gabriele Chlevickaitė, Barbora Holá, and Catrien Bijleveld, "Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice?," *Journal of International Criminal Justice* 18 (March 2020): 185–210.

188 TRIAL International, *UJAR 2019*.

Role of Nongovernmental Organizations

It is apparent that without the groundwork laid by local and international NGOs few universal jurisdiction cases would see the light of day. Apart from Germany, where the special unit dealing with international crimes is proactive in initiating investigations, elsewhere, most investigations are launched on the back of leads and evidence provided by NGOs. For the most part, NGOs are the driving force behind universal jurisdiction cases. They collect evidence, identify victims and witnesses, and cultivate relationships with them. Often, it is easier for NGOs to access countries where crimes have been committed and to operate on the ground because they do not require state-to-state cooperation.¹⁸⁹

Through their contacts on the ground, NGOs monitor the movements of suspects, making them well placed to alert local authorities when a suspect appears on its soil. NGOs provide support to victims and witnesses, which ranges from legal and psychosocial support to financial assistance. NGOs also facilitate cases by publishing practical guides on the application of universal jurisdiction. Together with other civil society actors, they play a leading advocacy role in pushing for the use of universal jurisdiction across the world.¹⁹⁰

International NGOs such as the Center for Constitutional Rights, the Center for Justice and Accountability, Civitas Maxima, the European Center for Constitutional and Human Rights, Guernica Group, Human Rights Watch, the International Truth and Justice Project, Open Society Justice Initiative, REDRESS, and TRIAL International engage in extensive documentation, evidence collection, and litigation of international crimes before domestic courts based on the universal jurisdiction principle.

Civil society actors play a leading role in capacity building and providing technical expertise to local authorities. They engage in significant advocacy to pressure domestic authorities into acting. Media advocacy can help to shape public discourse and focus attention on the lack of accountability, thereby encouraging state authorities to act.

Although NGOs continue to play a critical role in ensuring the success of universal jurisdiction cases, they face significant challenges. First, cases are primarily prosecuted by state authorities, leaving little space for NGOs to engage in criminal proceedings, unless private prosecutions are pursued. While victims have significant rights in some states to participate in criminal proceedings through civil party or other forms of representation, other states provide limited rights or

¹⁸⁹ See, for example, the work of the Commission for International Justice and Accountability.

¹⁹⁰ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008).

no rights at all.¹⁹¹ The involvement of victims in criminal proceedings through representation, as civil parties or auxiliary prosecutors, can greatly enhance and support prosecutions.¹⁹² This is particularly the case when state investigations or prosecutions fall short in certain respects. The judgment in the Jesuits Massacre case noted that “this investigation and trial would have not been possible without the professional, committed and tireless work abroad and in Spain, of the private prosecutors.”¹⁹³

Evidence collected by NGOs is sometimes viewed as tainted and courts, may reject it, as occurred in the Kumar Lama case discussed above. On the other hand, state authorities can rely heavily on NGOs to carry out witness protection and provide transportation and accommodation for witnesses without always reimbursing them for these expenses or doing so in a timely manner.¹⁹⁴ Emmanuelle Marchand, Head of the legal Unit at Civitas Maxima, noted that it was unfortunate that a state’s duty of providing care to foreign victims and witnesses often stops at the border of the country exercising universal jurisdiction. In many cases, NGOs remain responsible for the psychosocial care and security of victims during the investigation in the field and post-trial period, when they return to their home countries.¹⁹⁵

191 Howard Varney, Katarzyna Zdunczyk, and Marie Gaudard, ICTJ, *The Role of Victims in Criminal Proceedings* (2018).

192 Most countries with inquisitorial criminal trial processes permit victims to play a role as “civil party,” typically for the purpose of seeking civil compensation orders against the offender. Several inquisitorial systems also allow a victim to participate through an auxiliary prosecutor, who, although subsidiary to the state prosecutor, can take various steps in the criminal proceedings, including the trial. See Redress and Institute for Security Studies, *Victim Participation in Criminal Proceedings: Survey of Domestic of Practice for Application to International Crime Prosecutions* (September 2015); and Victorian Law Reform Commission, *Victims of Crime: Consultation Paper* (2015).

193 Audiencia Nacional Sala De Lo Penal Sección Segunda: Rollo De Sala Procedimiento Ordinario N.º 4 / 2.015 Procedimiento De Origen: Sumario N.º 97 / 2.010 Órgano De Origen: Juzgado Central de Instrucción núm. 6.

194 Interview with Emmanuelle Marchand, Head of the Legal Unit and Senior Counsel at Civitas Maxima, on November 19, 2020.

195 Ibid.

Universal Jurisdiction for Crimes Committed in Syria

Background

Context of Conflict in Syria

The armed conflict in Syria began as peaceful protests in March 2011, in the wake of the Arab Spring.¹⁹⁶ After over nine years of fighting, the war has taken an unspeakable toll, with over 6.2 million people, including 2.5 million children, displaced within Syria¹⁹⁷ and 5.6 million refugees abroad.¹⁹⁸ The Syrian Observatory for Human Rights, a monitoring group based in the United Kingdom, estimated the death toll from the start of the uprising until March 2020 to be as high as 586,100, of which 115,490 were civilians.¹⁹⁹

Crimes Committed in Syria

The conflict has been characterized by widespread violations and crimes committed by all parties to the hostilities, although the Syrian government and its allies are responsible for the vast majority. The United Nations, various independent bodies, and civil society have reported gross human rights violations and serious violations of international humanitarian law that amount to international crimes. The list of crimes committed include the use of chemical weapons;²⁰⁰ the arbitrary detention and torture of hundreds of thousands, including many deaths in

196 BBC, "Profile: Syria," January 14, 2019.

197 UNHCR in Syria, "Internally Displaced People," webpage, www.unhcr.org/sy/internally-displaced-people.

198 UNHCR Data Portal, "Syria," webpage, <https://data2.unhcr.org/en/situations/syria>.

199 Syrian Observatory for Human Rights, "Syrian Revolution NINE Years On: 586,100 Persons Killed and Millions of Syrians Displaced and Injured," March 15, 2020. Other estimates differ, depending on available data and methodologies. The Syrian Network for Human Rights, for instance, documented 226,247 civilians killed in Syria from March 2011 to September 2020. For further estimates, see UK Home Office, *Country Information and Guidance: The Syrian Civil War, Syria* (August 2020).

200 Organisation for the Prohibition of Chemical Weapons, *Conclusions on the Outcome of Consultations with the Syrian Arab Republic regarding Its Chemical Weapons Declaration*, EC-82/DG.18, July 6, 2016; UN General Assembly, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013: Note by the Secretary-General*, UN Doc. A/67/997, September 13, 2013; UN Security Council, *Final Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic*, UN Doc. A/68/663-S/2013/735, December 13, 2013.

detention;²⁰¹ the enforced disappearance of nearly 100,000 Syrians;²⁰² massive sexual and gender-based violations;²⁰³ and ongoing violations of international humanitarian law, including deliberate or reckless attacks against civilians and civilian structures, such as hospitals and schools.²⁰⁴

Impunity for Crimes Committed in Syria

Although many reports suggest that there is compelling evidence of crimes such as genocide, crimes against humanity, war crimes, and torture, impunity continues unabated. There are several challenges to criminal accountability.²⁰⁵ These include:

Inability to Pursue Justice Domestically

Injustice and impunity are firmly entrenched in Syria. The criminal justice system, including its institutions and laws, criminalize fundamental freedoms, such as freedom of speech, expression, assembly and association, while taking no steps to identify, investigate, prosecute, or punish officials who have committed human rights abuses. This is true for the many crimes that have been committed during the conflict and that continue to this day, including the many human rights violations that preceded the war.²⁰⁶ The Assad regime has in large part moved political cases out of the regular system and placed them before exceptional courts.²⁰⁷ Lawyers are subject to ongoing intimidation and attacks,²⁰⁸ and the judiciary lacks independence and basic resources.²⁰⁹

At the same time, there is little or no justice available to victims in the multiple “jurisdictions” existing in Syria under the control of armed groups, some of which have established courts or similar structures to settle disputes in respective territories.²¹⁰ As a result, impunity is pervasive.

Limited Prospects for Justice Before the International Criminal Court

Syria is not a party to the Rome Statute, and the ICC cannot assume jurisdiction over the crimes committed in Syria unless Syria accedes to the treaty or accepts the court’s jurisdiction.

201 HRW, *If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities* (2015); *The Guardian*, “‘They Were Torturing to Kill’: Inside Syria’s Death Machine,” October 1, 2015; HRW, *Torture Archipelago: Arbitrary Arrests, Torture and Enforced Disappearances in Syria’s Underground Prisons Since March 2011* (2012); Syrian Network for Human Rights, *Documentation of 72 Torture Methods the Syrian Regime Continues to Practice in Its Detention Centers and Military Hospitals* (2019).

202 Syrian Network for Human Rights, *The Ninth Annual Report on Enforced Disappearance in Syria on the International Day of the Victims of Enforced Disappearances* (August 30, 2020).

203 UN Human Rights Council, “*I Lost My Dignity: Sexual and Gender-based Violence in the Syrian Arab Republic*,” Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3, March 8, 2018; HRW, “Syria: Sexual Assault in Detention Security Forces Also Attacked Women and Girls in Raids on Homes,” November 19, 2012; Lawyers and Doctors for Human Rights, “*The Soul Has Died: Typology, Patterns, Prevalence and the Devastating Impact of Sexual Violence against Men and Boys in Syrian Detention Centres*” (2019); HRW, *Torture Archipelago* (2012); HRW, “Iraq: ISIS Escapees Describe Systematic Rape: Yazidi Survivors in Need of Urgent Care,” April 14, 2015.

204 Save Syrian Schools, “*We Didn’t Think It Would Hit Us: Understanding the Impact of Attacks on Schools in Syria*” (2018); HRW, *World Report 2019: Syria* (2019); Amnesty International, “Syria: Damning Evidence of War Crimes and Other Violations by Turkish Forces and Their Allies,” October 18, 2019; Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, February 2, 2017, A/HRC/34/64.

205 For detailed analysis, see Mark Lattimer, Shabnam Mojtahedi, and Lee Anna Tucker, CEASEFIRE and Syria Justice and Accountability Centre, *A Step Towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria* (2015).

206 HRW, *Syria: Criminal Justice for Serious Crimes under International Law* (December 17, 2013).

207 See International Legal Assistance Consortium (ILAC), *Rule of Law Assessment Report: Syria* (2017), 42: “A parallel system of exceptional courts has been created in Syria through a raft of repressive laws to deal with perceived threats to the state or the political control of the Ba’ath party. There is no clear delineation between the jurisdictions of the regular courts and the exceptional courts, or even between the various exceptional courts.”

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*

tion through a declaration, which seems inconceivable without a transition of leadership.²¹¹ It remains highly improbable that the UN Security Council will refer the situation in Syria to the ICC given the opposition from Russia and China, although sixty-four countries have requested it do so.²¹² In March 2019, the London-based Guernica Centre for International Justice submitted a request to ICC Prosecutor Fatou Bensouda under Article 15 of the Rome Statute, asking the ICC to open an investigation into the forcible deportation of Syrians to Jordan.²¹³ In its communication, the Guernica Centre relied on the “Myanmar precedent,” namely the power of the ICC to exercise jurisdiction even if only one element of the crime occurs in a state party, like deportation as a crime against humanity.²¹⁴

No Prospects for an Ad-Hoc International Tribunal or a Hybrid Tribunal

The establishment of special criminal chambers or a hybrid court in Syria for now remains impossible, because it would require not only the political will of the Assad regime, but also cooperation from international actors such as international organizations, donors, and experts—which the regime is unlikely to accept.²¹⁵ Similarly, it is doubtful that the UN Security Council will set up an ad hoc tribunal given Russia and China’s firm opposition to “international” solutions to impunity. In these circumstances, universal jurisdiction remains the only viable avenue to pursue criminal accountability in Syria.²¹⁶

International efforts to secure accountability in Syria

According to TRIAL International’s 2019 and 2020 universal jurisdiction reports, twenty-five cases were opened in connection with the Syrian conflict in which at least a preliminary examination was launched.²¹⁷ These cases were initiated in Austria, France, Germany, Hungary, The Netherlands, Norway, Spain, and Sweden. This total includes three structural investigations conducted in Germany and France,²¹⁸ which do not relate to specific suspects. Four cases have so far resulted in convictions, of which one was overturned by a court of higher instance and referred for retrial. Three cases are at the trial stage; and indictments have been issued in another four. Twelve cases are at the investigation stage, and authorities have been conducting preliminary examinations in two cases. One case in Spain has been closed after it was dismissed by the Supreme Court and Constitutional Court.²¹⁹ Among the 25 cases, 20 were pure universal jurisdiction cases, 3 were based on the passive nationality principle, and 2 on the active nationality principle.

211 The Rome Statute of the International Criminal Court, 1998, Articles 12–13. Syria has ratified the Geneva Conventions (I–IV) of 12 August 1949 as well as Additional Protocol I relating to the Protection of Victims of International Armed Conflicts. It is also a party to the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

212 HRW, *Syria: Criminal Justice for Serious Crimes under International Law* (2013); United Nations, “Press Release: Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution,” May 22, 2014.

213 Maryam Saleh, “Syrian Refugees Use Precedent Set in Rohingya Case to Try to Bring Government Officials before the International Criminal Court,” *The Intercept*, March 16, 2019.

214 International Criminal Court (ICC), “ICC Pre-Trial Chamber I Rules that the Court May Exercise Jurisdiction over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh,” September 6, 2018.

215 There have been proposals to create an international or hybrid tribunal exclusively for ISIS-affiliated perpetrators, which include both Syrian and Iraqi nationals as well as foreign fighters. However, that proposal has been criticized for offering selective and potentially politicized justice and appears unlikely to be implemented. See Impunity Watch, *ISIS-Only Tribunal: Selective, Politicized Justice Will Do More Harm Than Good* (2019).

216 Emma Broches, “An Accountability Update for Crimes Committed in Syria,” *Lawfare*, January 13, 2020.

217 This data is based on our review of the TRIAL International, *UJAR 2019*, and TRIAL International, *Universal Jurisdiction Annual Review 2020: Terrorism and International Crimes: Prosecuting Atrocities for What They Are* (2020) (hereinafter cited as *UJAR 2020*).

218 In Germany, a structural investigation (*strukturermittlungsverfahren*) is opened where there is evidence that a crime has taken place, but potential perpetrators have not yet been definitively identified. The investigation focuses on structures related to the potential crime and groupings of potential perpetrators.

219 TRIAL International, *UJAR 2020*.

Most of the Syria-related cases have been launched in Germany. This may be explained by the fact that many Syrian refugees live in Germany, which allows the authorities better prospects of apprehending suspects and finding witnesses. In addition, Germany enjoys a relatively flexible approach to jurisdiction that permits prosecutors to open an investigation even if a suspect is not present in the country. Germany has been conducting two structural investigations into crimes committed by the Assad regime and non-state armed groups.²²⁰ Structural investigations pave the way for prosecutions by prioritizing cases and identifying suspects. Germany also has a long history of invoking international criminal law and prosecuting such crimes through its Central Office of the State Judicial Administration for the Investigation of National Socialist Crimes, which was originally tasked with pursuing Nazi criminals.²²¹

France leads in the development of new state practice in relation to criminal accountability of corporations for serious international crimes. Not only have several individuals connected to the Lafarge company been indicted for crimes against humanity committed in Syria, but the company itself has been charged with complicity in crimes against humanity.²²² However, in late 2019, the Court of Appeals revoked the indictment of the company for complicity in crimes against humanity.²²³ The judicial investigation into QOSMOS, a French software components company, is ongoing for aiding and abetting acts of torture by allegedly supplying surveillance equipment to the Assad regime.²²⁴

In terms of cases against individuals, those under investigation, under indictment, or on trial run the gamut from high-ranking officials of the Syrian intelligence services to foreign fighters and members of non-state armed groups, including the Islamic State, Jabhat al-Nusra, and the armed resistance. The cases are being brought for crimes committed against civilians and Syrian government officials.²²⁵

During September 2020, the Netherlands conveyed its decision through a diplomatic note to hold Syria responsible for human rights violations under international law, specifically for torture in violation of the UN Convention against Torture.²²⁶ With this step, the Netherlands asked Syria to enter into negotiations, which is a necessary first step in dispute settlement. Should the two states be unable to resolve the dispute, the Netherlands can propose to submit the case to arbitration. If no agreement is reached, the Netherlands has indicated its intention to refer the case to an international court.

220 TRIAL International, *UJAR* 2019.

221 Federal Republic of Germany, Records of the Central Office of the Judicial Authorities of the Federal States for the Investigation of National Socialist Crimes (B 162).

222 Three Belgium firms were found guilty and fined for violating EU sanctions and exporting isopropanol, a chemical used to produce sarin gas, to Syria between 2014 and 2016 without the required permits. Although the case was not brought on the basis of universal jurisdiction, the case offers another example of how some criminal corporate accountability can be achieved. *BBC*, “Belgium Firms Prosecuted over Exporting Sarin Precursor to Syria,” April 18, 2018).

223 *Reuters*, “France’s Lafarge Has Charge of Crimes against Humanity Lifted,” November 7, 2019; *Sherpa*, “French Court Narrows Charges against Lafarge,” November 7, 2019. However, Lafarge is still being investigated for “financing terrorism” by allegedly funneling payments to armed groups, including the Islamic State, endangering people’s lives, and violating sanctions.

224 TRIAL International, *UJAR* 2019. Italian authorities have also taken action against the Area Spa for providing the Syrian government with internet and telephone wiretapping gear in violation of a European embargo against the Assad regime. *Motherboard*, “Italian Cops Raid Surveillance Tech Company Accused of Selling Spy Gear to Syria,” December 1, 2016.

225 See Appendix 2.

226 Government of the Netherlands (Ministry of Foreign Affairs), “The Netherlands Holds Syria Responsible for Gross Human Rights Violations,” September 18, 2020.

International Justice Initiatives and Universal Jurisdiction

Initiatives have been launched by the international community that may facilitate universal jurisdiction cases before domestic courts and secure evidence for possible future prosecutions at the international level.

The Independent International Commission of Inquiry on the Syrian Arab Republic

In 2011, the UN Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic.²²⁷ The Commission is charged with investigating human rights violations committed in Syria since 2011, in particular to “identify those responsible with a view of ensuring that perpetrators . . . are held accountable.”²²⁸ To date, the commission has published more than twenty mandated reports and thirteen papers, detailing multiple serious violations together with recommendations. It has interviewed some 8,000 victims and witnesses and collected documentation, photographs, video recordings, satellite imagery, and forensic and medical reports from governments and NGOs.

The International, Independent and Impartial Mechanism for Syria

In 2016, the UN General Assembly established the [International, Independent and Impartial Mechanism](#) (IIIM).²²⁹ The Mechanism is mandated to collect, consolidate, preserve, and analyze evidence of crimes committed in Syria that could be used in a court or tribunal, whether national, regional, or international. IIIM prepares case files and engages with war crimes investigative units in national jurisdictions where courts can exercise jurisdiction. To date, the it has received 66 requests for assistance from 11 jurisdictions and concluded 56 frameworks for cooperation.²³⁰ However, the IIIM’s capacity to conduct field investigations and extract evidence has yet to be fully developed. It collaborates with NGOs to build its operational capacity and acts as the main repository of information and evidence for future criminal cases, now totaling more than 2 million records. Unlike the Commission of Inquiry, the IIIM is not expected to publish the findings of its work.²³¹

Civil Society

Many civil society organizations and actors collect information and document violations committed in Syria. One of the most prominent is the [Commission for International Justice and Accountability](#) (CIJA), which conducts investigations according to international criminal law standards with the aim of preserving evidence for future criminal prosecutions. CIJA works with domestic and international enforcement agencies, including the IIIM.

There are also many Syrian organizations dedicated to documenting violations of the conflict, including [Dawlaty](#), [Lawyers and Doctors for Human Rights](#), the [Syria Archive](#), the [Syrian Institute for Justice](#), [Syria Justice and Accountability Centre](#), the Syrian Network for Human Rights, the [Syrian Observatory for Human Rights](#), and the [Violations Documentation Center](#) in Syria. The [Day After Association](#) (TDA) is an independent, Syrian-led civil society organization

227 UN Human Rights Council, *Resolution Adopted by the Human Rights Council at Its Seventeenth Special Session*, UN Doc. S-17/1, 2 August 2011.

228 UN Human Rights Council “Independent International Commission of Inquiry on the Syrian Arab Republic” webpage, www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/AboutCol.aspx.

229 UN General Assembly, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/RES/71/248, December 21, 2016.

230 UN Secretary-General, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, A/75/31 (August 13, 2020), 3.

231 Syria Justice and Accountability Centre, *Responding to Misconceptions Regarding the IIIM* (August 2, 2017).

working to support democratic transition in Syria. In August 2012, TDA completed work on a comprehensive approach to managing the challenges of a post-Assad transition in Syria. The initial TDA project brought together a group of Syrians representing a large spectrum of the Syrian opposition—including senior representatives of the Syrian National Council, members of the Local Coordination Committees in Syria, and unaffiliated opposition figures from inside Syria and the diaspora—to participate in an independent transition planning process. TDA also works to preserve documentation relating to land and property ownership in order to facilitate the return of displaced Syrians to their homes.²³²

Some NGOs have developed “guides” on universal jurisdiction that can be applied in various countries, like the series of Arab- and English-language guides prepared by the Syria Justice and Accountability Centre.²³³ These organizations and others engage in advocacy to focus the world’s attention on continuing abuses in Syria.

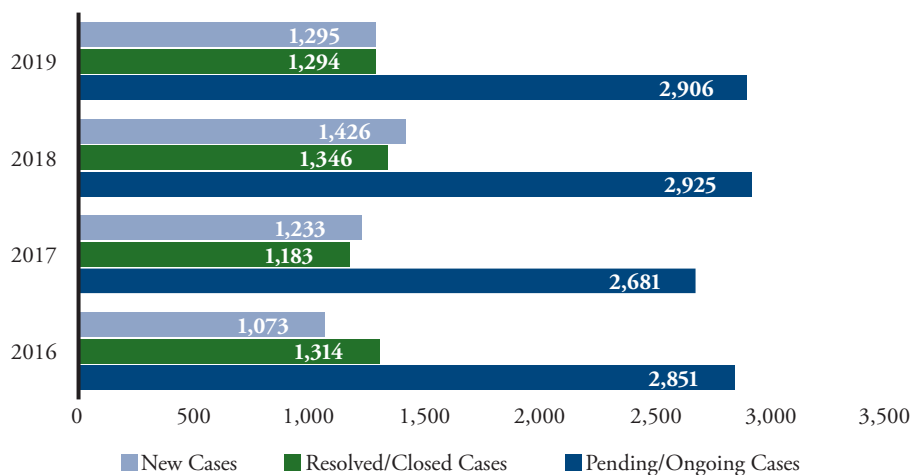
232 Noha Aboueldahab, Brookings Doha Center, *Writing Atrocities: Syrian Civil Society and Transitional Justice* (2018).

233 See SJAC, “SJAC Launches Universal Jurisdiction Guides,” September 5, 2019. Another example is the *Guides to Universal Jurisdiction* developed by TRIAL International in partnership with other organizations.

The Future of Universal Jurisdiction

In recent years, the Genocide Network and TRIAL International have recorded an increase in universal jurisdiction cases in the European Union and worldwide. The Genocide Network reports that more than 2,900 universal jurisdiction cases were before courts in the European Union in 2019, an increase from 2,851 in 2016 and 2,681 in 2017. The number of convictions arising from these cases has not been tabulated yet.

Figure 1: Core Crimes' Cases in EU Members States



Source: EUROJUST, EU Genocide Network (2019).

In a 2020 report, TRIAL International recorded 207 named suspects in universal jurisdiction cases around the world,²³⁴ which amounted to a 40 percent increase between 2018 and 2019.²³⁵ Most charges instituted were crimes against humanity (146), followed by war crimes (141), torture (92) and genocide (21). There were eleven accused on trial, sixteen convictions, and

²³⁴ As explained in the report, “The present report only highlights cases where judges or prosecutors have initiated investigations into the most serious international crimes. It does not, therefore, include every complaint that victims, lawyers and NGOs filed under universal jurisdiction with national authorities in 2019 if these complaints did not result in significant judicial advances, are still pending or have been dismissed by the relevant national authorities.” See TRIAL International, *UJAR* 2020. As explained, “Due to the increase in structural investigations, in which a large number of suspects are investigated, the exact figure is unknown. 207 is the minimum number.”

²³⁵ TRIAL International also includes some cases based on active or passive personality jurisdiction, where the relevant case has had an impact on the practice of universal jurisdiction.

two acquittals.²³⁶ These numbers only related to publicly disclosed cases. The French Specialised Unit has 150 cases on its books, but only a small number have been made public.²³⁷

Although the numbers of universal jurisdiction cases are tiny when compared to the total numbers of criminal cases opened,²³⁸ there is nonetheless great value in each case for the global fight against impunity. A complaint brought before a domestic court for international crimes is already a small measure of acknowledgment for victims, because it is often accompanied by considerable media attention and advocacy campaigns. Similarly, an international arrest warrant issued against a high-level perpetrator constitutes a form of accountability because it inhibits travel and places them at risk of arrest. The issuing of arrest warrants focuses attention on the suspects and raises questions around their role in public life.²³⁹ Universal jurisdiction convictions contribute to the development of state practice and international law.

There are significant variations in universal jurisdiction laws among countries, which raises challenges. It makes any recourse to universal jurisdiction a difficult, complex, and technical exercise for complainants. Generally, only specialized NGOs supported by domestic lawyers and experts have the technical knowledge to navigate such complexities.

Unfortunately, decisions to bring cases based on universal jurisdiction are often informed by domestic political climates and international pressure. At the national level, the opening of universal jurisdiction cases may require the approval of an attorney general or the minister of justice, with the possible concurrence of the Ministry of Foreign Affairs, which may make recommendations or impose conditions.²⁴⁰ Global political pressure has resulted in universal jurisdiction laws being diluted and weakened. Prosecutors pursuing universal jurisdiction may be confronted by political headwinds when powerful elements in society are opposed to this form of justice. Such political pressure will be difficult to resist unless the criminal justice system in question is truly independent and shielded from political interference.

Cooperation between states is essential to ensure the successful extradition of suspects and the collection of evidence. However, recourse to mutual assistance arrangements in criminal matters can be an extremely time-consuming exercise and may involve years of proceedings.²⁴¹ Cooperation between stakeholders is paramount as it avoids duplication and promotes some standardization. In the longer term, the proposed draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes could potentially facilitate greater cooperation between states.²⁴²

It appears that universal jurisdiction cases tend to be more successful in countries that have considerable experience in dealing with international crimes. This experience not only has an impact on how investigations and prosecutions are conducted and how judges apply international law, but also on the enactment of flexible universal jurisdiction legislation.

236 See TRIAL International, *UJAR* 2020.

237 *Ibid.* at 3.

238 The Genocide Network reports that there were over 2,900 universal jurisdiction cases opened before the courts of EU member states in relation to international crimes in 2018, whereas in the same year in Germany there were some 5.5 million criminal cases opened.

239 See, for example, NATO Association, "U.N. Ban on Sri Lanka's Peacekeepers Led by Alleged War Criminal Is the Tip of the Iceberg," October 1, 2019. Also, the international arrest warrant issued by the French judge against three high-ranking Syrian officials has effectively prevented them from travelling abroad. See FIDH, "BREAKING: French Judges Issue International Arrest Warrants against Three High-Level Syrian Regime Officials," November 5, 2018.

240 OSF-JI and TRIAL International, *UJ in Switzerland*, 18.

241 HRW, *Universal Jurisdiction in Europe: The State of the Art* (2006).

242 See MLA Initiative, led by Slovenia, Argentina, Belgium, Mongolia, the Netherlands, and Senegal for the adoption of the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes.

In conclusion, the pursuit of universal jurisdiction has opened the door to the possibility of justice in contexts where it was previously thought impossible. A sufficiently high number of countries have introduced universal jurisdiction into their domestic systems. There is no turning back. However, universal jurisdiction is far from generally accepted and has suffered setbacks. This is particularly the case at the political level, with the reach of universal jurisdiction being clawed back. Much work remains to be done to entrench universal jurisdiction as a recognized and viable means of global justice.

Recommendations

Universal jurisdiction plays an essential role in international justice. It provides an additional avenue for victims seeking justice, with the potential to serve as a last resort when all other options have failed. The recommendations set out below are aimed at promoting and strengthening universal jurisdiction around the world.

1. The adoption of carefully crafted universal jurisdiction laws enabling the criminalization of international crimes and introducing the principle of universal jurisdiction at the domestic level should be encouraged worldwide.
2. There is a need for increased advocacy efforts to promote universal jurisdiction and the adoption of domestic laws, as described above. NGOs should form coalitions to encourage the enactment of such laws.
3. In line with calls for “clarity” on the application of universal jurisdiction by states at the international level,²⁴³ UN members should be urged to adopt guidelines that encourage and promote the effective and practical use of universal jurisdiction for the most serious crimes under international law, including war crimes, genocide, crimes against humanity, slavery, and torture.²⁴⁴ Any guidelines adopted by the United Nations should set out the minimum standards for the application of universal jurisdiction. They should not seek to dilute or limit existing domestic legal frameworks that provide for the robust application of universal jurisdiction.
4. Research institutions, in collaboration with civil society, should develop model universal jurisdiction laws and guides for different legal systems. These would greatly facilitate advocacy initiatives with policy makers, governments, and parliaments.
5. States must comply with their international obligations to prosecute or extradite persons accused or convicted of crimes under international law, consistent with international due process norms.
6. In order to facilitate universal jurisdiction at the domestic level, states should be encouraged to adopt specific prosecutorial policies, strategies, or guidelines in relation to the

243 UN General Assembly, “Universal Jurisdiction Principle Must Be Defined to Avoid Abuse, Endangerment of International Law, Sixth Committee Hears as Debate Begins,” October 15, 2014.

244 UN General Assembly, Sixth Committee (Legal), 73rd session, *The Scope and Application of the Principle of Universal Jurisdiction* (Agenda item 87); UN General Assembly, Sixth Committee (Legal), 74th session, *The Scope and Application of the Principle of Universal Jurisdiction* (Agenda item 84).

handling of universal jurisdiction cases. The guidelines should be adopted with a view to facilitating access to justice for victims. Such policies could address practical challenges and assist prosecutors to balance various interests when making decisions. Where policies or guidelines already exist, these should be reviewed to ensure that they promote, not retard, the application of universal jurisdiction.

7. States should be encouraged to follow Germany's lead and carry out initial structural investigations in relation to situations where it appears that human rights violations are rife, for purposes of understanding the nature of the violations, the systematicity, and structure behind the crimes and identifying key suspects.
8. Universal jurisdiction cases are greatly facilitated by the use of *civil parte* or private prosecutors. Not only can civil parties and private prosecutors assist domestic authorities to pursue universal jurisdiction cases, but they also professionalize victim participation and help to overcome intercultural differences and challenges.
9. States exercising universal jurisdiction should make budgetary provision for the prompt reimbursement of NGOs who carry out field work and incur logistical and operational expenses, such as for security and witness protection, psychosocial care, transportation, and accommodation of victims and witnesses.
10. Consideration should be given to the establishment of a well-resourced global repository of information on universal jurisdiction to learn lessons and develop best practice. Such a center could:
 - a. Be established and led by civil society or an academic institution to ensure open access to information (subject to data protection regulations);
 - b. Gather sources and laws of universal jurisdiction worldwide;
 - c. Monitor and update developments on universal jurisdiction investigations and cases worldwide;
 - d. Share and publish information on trends, patterns and innovations;
 - e. Confidentially share information with domestic investigators and prosecutors to advance justice and to avoid duplication of efforts;
 - f. Collect and analyze all universal jurisdiction jurisprudence developed before domestic courts.

Appendix 1: Examples of Universal Jurisdiction Laws

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
Australia ¹	Extraterritorial jurisdiction is done on an ad-hoc basis; the Australian Criminal Code as a whole does not extend extraterritorially. Division 15 (“Extended geographical jurisdiction”) of the Criminal Code identifies four types of “extended” jurisdictional assertions: Categories A, B, C, and D.	“If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies: (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.”		Examples of Category D offenses in the code include treason and urging violence against the constitution, espionage, acts of terrorism, associating with terrorist organizations, genocide, crimes against humanity, war crimes, and torture.	Aiding, abetting, counseling, or procuring the commission of an offense; joint commission of offenses; and commission by proxy.	The Commonwealth Attorney-General’s consent is required before a prosecution can commence. “In exercising discretion as to whether to consent, the Attorney-General may have regard to matters including considerations of international law; practice and comity; prosecution action that is being, or might be brought, in a foreign country; and public interest.” ²

¹ The information has been largely extracted from: United Nations, *Australia Views on the Scope and Application of the Principle of Universal Jurisdiction*, Note No:032/2016, May 03, 2016; Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Cheltenham: Edward Elgar, 2017), 73–107.

² *Australia Views on the Scope and Application of the Principle of Universal Jurisdiction* (2016).

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
<p>Germany³</p> <p>The presence of the suspect in Germany is not generally necessary for the investigation of core international crimes; however, there is still prosecutorial discretion.</p>	<p>Code of Crimes against International Law (Völkerstrafgesetzbuch—VStGB) incorporating the Rome Statute of the ICC.</p> <p>This law was amended by Article 1 of the Act of 22 December 2016, effective as of January 1, 2017.</p>	<p>As regards the core crimes of genocide, crimes against humanity, and war crimes, Section 1, sentence 1 of the VStGB does not stipulate any criteria restricting universal jurisdiction.</p>	<p>An act may only be punished by criminal law if criminal liability was established by law before or the time when the act was committed.</p> <p>The crime of genocide came into force on February 22, 1955, in Section 220a of the German Criminal Code (Strafgesetzbuch—StGB); effective as of June 30, 2002, it was transferred to Section 6 of the VStGB with much of the same wording.</p> <p>“While the VStGB itself is not applicable to criminal acts committed prior to its adoption, relevant criminal acts may be prosecuted under former Section 220a of the StGB. Therefore, acts committed prior to February 22, 1955, cannot be prosecuted under the crime of genocide.”</p>	<p>Core crimes including genocide, crime against humanity, and war crimes. Torture and enforced disappearance are only underlying crimes of crimes against humanity and war crimes, both of which invoke universal jurisdiction. German criminal law does not contain any other provisions explicitly allowing universal jurisdiction for torture or enforced disappearance as stand-alone crimes.</p> <p>The German Criminal Code, however, provides for the application of universal jurisdiction in relation to crimes other than the core crimes.⁴</p>	<p>VStGB specifies two modes of liability: 1) Individual criminal responsibility of the perpetrator for their own actions; and 2) Responsibility of military commanders and civilian superiors for crimes committed by their subordinates.</p> <p>“Other than these, the VStGB does not stipulate any special modes of liability, for example, for participation in a crime. Therefore, the general modes of liability set forth in the general criminal law of the StGB also apply to the crimes under the VStGB.”</p>	<p>Double criminality is not required for these crimes.</p> <p>“German law enforcement and courts are primarily competent to investigate and sentence crimes under the VStGB. Generally, they do not have a legal duty to step aside in favor of other jurisdictions. (...)</p> <p>If the case bears a nexus to Germany, the competent prosecutor usually has a legal duty to begin an investigation.</p> <p>If the 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 victim(s) or offender(s) or the jurisdiction in which the alleged crime was committed.”</p>

³ TRIAL International: *UJ in Germany*.

⁴ See, for example, Sections 5 and 6, German Criminal Code.

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
<p>The Netherlands⁵</p> <p>The suspect must be present in the Netherlands — the jurisdiction ends if the suspect leaves Dutch territory.</p>	<p>2003 International Crimes Act (ICA), entered into force on October 1, 2003</p>	<p>Article 2(1) of the ICA gives Dutch authorities jurisdiction over the following three situations:</p> <p>“(a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands;</p> <p>(b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national; and</p> <p>(c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.”</p>	<p>As a general rule, Dutch law prohibits retrospective application of laws, but it allows this principle to be put aside when provisions of treaties or resolutions by international institutions stipulate that this principle should be set aside (it does not apply to customary international law, however).</p> <p>“The jurisdiction is not only over extraterritorial international crimes punishable pursuant to the ICA, but also crimes punishable pursuant to acts involving international crimes committed before October 1, 2003, because the competence provision in Article 15 of the ICA applies retroactively.”⁶</p>	<p>Genocide, war crimes committed during international armed conflict, war crimes committed during non-international armed conflicts, violations of the laws and customs of war, torture, crimes against humanity (including enforced disappearance as a crime against humanity), and enforced disappearance as a stand-alone crime.</p>	<p>The modes of liability stipulated under the general rules of Dutch criminal law also apply to the crimes listed in the ICA. However, following the Rome Statute, the ICA also includes command responsibility.</p> <p>The ICA does not contain provisions concerning complicity, conspiracy, or aiding and abetting. The general provision on modes of liability as contained in Article 91 of the Dutch Penal Code applies.</p>	<p>The ICA does not establish an obligation to prosecute such crimes. Once a public prosecutor is informed by the police or a complaint of an offense is filed, they have the sole authority to initiate criminal proceedings and enjoy wide discretion.</p>

5 The information has been largely extracted from Ruth A. Kok, “National Adjudication of International Crimes: A Dutch Approach” in eds. Elies Van Sliedregt and Sergey Vasiliev, *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014); TRIAL International: *UJ in the Netherlands*.

6 Kok (2014).

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
The Netherlands (cont.)			<p>The 2012 Amendment Act has allowed the retroactive application of the ICA with respect to genocide committed after September 18, 1966, the date of entry into force of the 1964 Act Implementing the Genocide Convention.</p> <p>Crimes against humanity can only be prosecuted under universal jurisdiction since the moment when ICA entered into force.</p> <p>Dutch courts have had universal jurisdiction over war crimes since July 10, 1952, when the Wartime Offenses Act entered into force.</p> <p>Enforced disappearance was included for the first time as a relevant international crime in the ICA; therefore, jurisdiction can only be established for alleged acts that happened after the ICA's entry into force.</p>			<p>“The Dutch Minister of Justice and Security, after requesting advice from the Dutch Public Prosecution Service, decides whether a case will be taken over by a competent international court. (...)</p> <p>Dutch authorities also apply the principle of subsidiarity to other national jurisdictions.</p> <p>Dutch authorities can investigate and prosecute a suspect in the Netherlands under universal jurisdiction even if there is an extradition request from another state.”⁷</p>

7 TRIAL International: *UJ in the Netherlands*.

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
The Netherlands (cont.)			The Dutch authorities have jurisdiction over acts of torture as an independent offense committed after December 21, 1988, pursuant to the Dutch Torture Convention Implementation Act.			
Norway⁸ The suspect must be present.	Sections 5 and 6 of the Norwegian Penal Code (Penal Code)	Crimes committed abroad by a foreign national can be pursued in Norway under the Penal Code if: “1) The alleged perpetrator is domiciled in Norway, (Section 5, para. 1, lit. b), 2) The alleged perpetrator is a national of or domiciled in another Nordic country and is present in Norway (Section 5, para. 2, lit. b), 3) The alleged perpetrator is present in Norway (Section 5, para. 3).” “When the alleged foreign perpetrator is neither domiciled nor present in Norway, they can only be investigated and prosecuted if the victim is a Norwegian national or domiciled in Norway (Section 5, para. 5), which is referred to as <i>passive personality jurisdiction</i> .”	Chapter 16 of the Penal Code, which deals with genocide, crimes against humanity, war crimes, conspiracy, incitement, and responsibility of superiors, entered into force on March 7, 2008. Therefore, the Swiss authorities can assume jurisdiction and prosecute these international crimes in Norway if they had been committed on or after that date. Torture as a separate crime was incorporated into the Penal Code on June 25, 2004; acts committed after this date can be prosecuted in Norway. Enforced Disappearance as a stand-alone crime can be prosecuted in Norway if committed on or after June 7, 2019.	Universal jurisdiction applies to war crimes, genocide, or crimes against humanity, as well as other acts that are deemed to constitute a breach of the laws of war. “Crimes committed abroad that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law.” Torture and enforced disappearance as stand-alone crimes as well as conspiracy or incitement to genocide, crimes against humanity, war crimes, and breach of responsibility of superiors are all crimes that are not explicitly listed but arguably could be covered. This also could include terrorism-related acts and genital mutilation.	According to the Norwegian Penal Code, crimes committed through direct perpetration or through contributing to the perpetration of the crime in one of the proscribed ways can be subject to universal jurisdiction (Section 15, Penal Code). The Penal Code also includes breach of a superior responsibility as a separate crime (not as a mode of liability). Companies can be held criminally liable under Norwegian law.	The prosecution has broad discretion in deciding whether to prosecute or not, given especially that public interest is a precondition for invoking universal jurisdiction for any crime. “Investigations or prosecutions underway in another country or before the International Criminal Court against the same alleged perpetrator do not prevent Norwegian authorities from investigating or prosecuting an alleged crime.”

8 The information has been largely extracted from: TRIAL International: *UJ in Norway*.

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
<p>Spain⁹</p> <p>The suspect must be present in Spain.</p>	<p>Organic Act No. 6/1985 of 1 July on the Judiciary</p> <p>A number of amendments have been introduced subsequent to the adoption of the act that have limited the scope of universal jurisdiction (currently, universal jurisdiction can only be initiated by the victim or the prosecution).¹⁰</p>	<p>“Jurisdiction of Spanish courts shall also have jurisdiction over acts committed by Spanish nationals or foreigners outside the national territory, where those acts are classified as one of the offenses under Spanish criminal law.”</p>		<p>Genocide and crimes against humanity; terrorism; piracy or unlawful seizure of aircraft; crimes related to the prostitution or corruption of minors or legally incompetent persons; trafficking in psychotropic, toxic, or narcotic drugs; illegal trafficking or smuggling of persons, whether or not they are workers; crimes relating to female genital mutilation if the perpetrators are present in Spain; any other crime that should be prosecuted in Spain under an international treaty or agreement, especially treaties on international humanitarian law and human rights protection.</p> <p>Organic Act No. 1/2014 increased the number of offenses subject to prosecution under the principle of universal jurisdiction in Spain, including by expanding the list of offenses to violence against women beyond genital mutilation and adding offenses involving government corruption and organized crime.</p>		<p>“[N]o other competent country or international court has initiated proceedings, including an effective investigation and, where appropriate, prosecution, of such crimes.”</p> <p>Proceedings already initiated in Spain must be temporarily stayed if proceedings connected with the same offenses are initiated by a court in another country or an international court.</p>

9 The information has been largely extracted from Government of Spain, Ministry of Foreign Affairs and Cooperation, “Contribution of Spain on the Topic ‘The Scope and Application of the Principle of Universal Jurisdiction,’” February 22, 2016.

10 Zambrana-Tévar, EJIL-Talk!

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
<p>South Africa</p> <p>The suspect must be present in the country for prosecution to proceed, but does not have to present to launch an investigation.¹¹</p>	<p>Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002;</p> <p>Section 6(1) and (2) of the Prevention and Combating of Torture of Persons Act 13 of 2013;¹²</p> <p>Sections 5(1), 7(1), and 7(2) of the Implementation of the Geneva Conventions Act 8 of 2012¹³</p>	<p>Relevant laws are applied if:</p> <ul style="list-style-type: none"> • a person is a South African citizen; • a person is not a South African citizen but is ordinarily resident in the Republic; • a person, after the commission of the crime, is present in the territory of the Republic; • a person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.¹⁴ 	<p>The Implementation of the Rome Statute Act (Section 5(3)) and the Torture Act generally do not have a retrospective application.</p> <p>The Geneva Convention Act seems to have included a provision allowing for retrospective application under Section 7(4):</p> <p>“Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect.”</p>	<p>Genocide, crimes against humanity, war crimes, as defined under the Rome Statute of the ICC, and torture as a stand-alone crime per the Torture Act</p>	<p>The Implementation of the Rome Statute Act has transposed the modes of liability provided for under the Rome Statute.</p> <p>Similarly, the Geneva Convention Act incorporates the command responsibility of military commanders and superiors (Section 6).</p> <p>Section 4 of the Torture Act provides for a perpetrator’s various modes of liability. It stipulates, for example, that any person who “incites, instigates, commands or procures any person to commit torture,</p>	<p>Different rules are applicable under various statutes dealing with international crimes. For example, Section 6(2) of the Torture Act requires:</p> <p>“If an accused person is alleged to have committed an offence contemplated in 15 section 4(1) or (2) outside the territory of the Republic, prosecution for the offence may only be instituted against such person on the written authority of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution, who must also designate the court in which the prosecution must be conducted.”</p>

11 National Commissioner of The South African Police Service v SALC and Another (CCT 02/14) [2014] ZACC 30, par 81.
 12 Act No. 13 of 2013: Prevention of Combating and Torture of Persons Act, 2013.
 13 Act No. 8 of 2012: Implementation of the Geneva Conventions Act, 2012.
 14 National Commissioner of The South African Police Service v SALC and Another (CCT 02/14) [2014] ZACC 30, par 41.

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
South Africa (cont.)			Under section 232 of the Constitution, core international crimes can be prosecuted through direct application of customary international law (though, it has not been applied in practice yet). This has been confirmed by the Constitutional Court in <i>The National Commissioner of The SAPS v Southern African Human Rights Litigation Centre and Another and S v Basson</i> cases. ¹⁵		is guilty of the offence of torture and is on conviction liable to imprisonment for life.” Section 7 further states, “Nothing contained in this Act affects any liability which a person may incur under the common law or any other law.”	Under the Rome Statute Act, the Constitutional Court held that the South African Police Service and the National Prosecuting Authority (NPA) <i>have a duty to investigate</i> torture as a crime against humanity based on the principle of universal jurisdiction. The court, however, set out two preconditions: 1) that the country where the alleged crimes occurred is unable or unwilling to prosecute and 2) that an investigation is reasonable and practicable in the circumstances of each particular case. ¹⁶

¹⁵ *National Commissioner of the South African Police Service v SALC and Another* (CCT 02/14) [2014] ZACC 30; *State v Basson* (CCT30/03A) [2005] ZACC.

¹⁶ *National Commissioner of the South African Police Service v SALC and Another* (CCT 02/14) [2014] ZACC 30, pars 63–64 read together with par 81. See also Attila Kisla, “Universal Jurisdiction—A Useful Tool for Prosecuting International Crimes: Comparing the Use of Universal Jurisdiction in Germany and South Africa,” Southern Africa Litigation Center, May 8, 2020.

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
<p>Switzerland¹⁷</p> <p>The suspect must be present. If the suspect leaves the territory after an investigation has been initiated, the investigation may continue.</p>	<p>Swiss Criminal Code (SCC) of December 21, 1937 (RS 311.0)</p>	<p>The moment an alleged perpetrator enters Switzerland, the Swiss authorities assume jurisdiction over crimes committed abroad.</p>	<p>“War crimes have been punishable under Swiss law since March 1, 1968. Until December 31, 2010, violations of international humanitarian law were sanctioned by Articles 108 and 109 of the former Military Criminal Code (MCC) and, therefore, subject to military jurisdiction.”</p> <p>“The crime of genocide was introduced into the SCC on December 15, 2000; it can be prosecuted only if committed on or after that date.”</p>	<p>Genocide, crimes against humanity, war crimes, and enforced disappearance (as a stand-alone crime).</p> <p>Swiss law applies the universal jurisdiction principle to some other offenses that are not core crimes, including offenses against minors and crimes or offenses prosecuted under the terms of an international agreement.¹⁸</p>	<p>Different modes of liability are covered by the SCC’s general rules, which makes a distinction between the categories of main participation and secondary participation. The two incur different sentences.</p> <p>Command and superior responsibility were introduced following Switzerland’s domestication of the Rome Statute.</p>	<p>Double criminality is not required for these crimes.</p> <p>In principle, Swiss prosecuting authorities have an obligation to investigate; however, the SCC allows for prosecutorial discretion when the alleged crimes are committed abroad and neither the victim nor the perpetrator are Swiss nationals.</p>

¹⁷ The information has been largely extracted from TRIAL International: *UJ in Switzerland*.

¹⁸ See Swiss Confederation Federal Department of Foreign Affairs (DFAE) Directorate of Public International Law, *The Scope and Application of the Principle of Universal Jurisdiction* (April 24, 2020).

	Applicable Law	Scope of Jurisdiction	Temporal Jurisdiction	Crimes	Modes of Liability	Prosecutorial Discretion and Subsidiarity
Switzerland (cont.)			<p>The provisions containing crimes against humanity were only enacted into Swiss Criminal Code on January 1, 2011. Previously, there existed no law allowing prosecution for these crimes on the basis of universal jurisdiction in Switzerland. One interpretation of Article 101(3) could indicate the statutes of limitations do not apply to crimes against humanity and therefore, that the provisions criminalizing crimes against humanity could be applied retrospectively. There is, however, no case law on the issue.¹⁹</p> <p>Enforced disappearance as a stand-alone crime can be prosecuted under universal jurisdiction if the act took place on or after January 1, 2017.</p>			<p>For alleged crimes committed abroad "...by foreign nationals against foreign nationals, the prosecution—with the exception of measures to secure evidence— may terminate or refrain from an investigation and prosecution if a foreign authority or an international criminal court with a jurisdiction recognized by Switzerland is prosecuting the same offense and the suspected perpetrator is extradited or delivered to the corresponding judicial authorities."²⁰</p> <p>In universal jurisdiction cases, international criminal courts have priority over Swiss jurisdiction.</p>

¹⁹ TRIAL International: *UJ in Switzerland*.

²⁰ *Ibid.*

Appendix 2: Syria-Related Cases¹

	Country	Suspect(s)	Crime(s)	Developments
1.	Austria [Conviction and appeal, but no retrial] [Universal jurisdiction principle]	Palestinian national, former member of the Farouq Brigades (suspect unnamed). (Suspect in Austria.)	The accused is alleged to have executed at least 20 unarmed and injured Syrian government soldiers in Al Khalidiya and Homs between 2013 and 2014. Charges: Terrorist offences, war crime of murder, and violations of the 1949 Geneva Conventions.	The accused sought asylum in Austria in 2015. He was reported to the Austrian authorities by other refugees to whom he had disclosed that he had been a member of the Farouq Brigades. Following a temporary adjournment of the trial, on May 10, 2017, the accused was found guilty on 20 charges of murder as a war crime and sentenced to life imprisonment by a jury in Innsbruck. Following the appeal, the Supreme Court overturned the conviction, arguing that the rights of the accused had been violated, because one of the key witnesses for the defence had not been called by the court. A retrial scheduled to begin on December 10, 2018, before the Regional Court of Innsbruck, was delayed.
2.	Austria [Ongoing investigation] [Passive nationality principle]	High-ranking officials of the Syrian intelligence services, including Military Intelligence, Air Force Intelligence, and General Intelligence services. (Suspects in Syria.)	The investigation was initiated after 16 women and men residing in Germany and Austria filed a complaint before the prosecutor in Austria. ² One of the torture survivors is an Austrian national. The suspects remain in Syria. Charges: Crimes against humanity and war crimes.	The investigation into the alleged crimes is ongoing.

¹ Information and summaries in the table have been largely extracted from TRIAL International, *UJAR 2019* and *UJAR 2020*. In some instances, this information has been further complemented from other sources.

² European Center for Constitutional and Human Rights, "Torture in Syria: The Path to Justice Leads Through Europe," May 29, 2018.

	Country	Suspect(s)	Crime(s)	Developments
3.	France [Ongoing investigation] [Passive nationality principle]	<ul style="list-style-type: none"> • Ali Mamluk, Director, National Security Bureau • Jamil Hassan, Head, Syrian Air Force Intelligence • Abdel Salam Mahmoud, Director of Air Force Intelligence investigative branch (Suspects in Syria.) 	<p>“In November 2013, Patrick Dabbagh and his father, Mazen Dabbagh,³ both dual French Syrian nationals, were arrested at their home in Damascus by Syrian Air Force Intelligence agents and detained for interrogation at the Mezzeh investigative branch. Neither has been seen since.”⁴ In 2018, the family was notified that both were dead.</p> <p>Charges: War crimes and complicity in crimes against humanity, torture, and enforced disappearances.</p>	<p>Following the complaint by Mazen Dabbagh’s brother filed in France, a French judge issued an international arrest of warrant in October 2018 for three individuals, who remain in Syria, who are high-level regime officials. The French investigation by investigative judges is ongoing.</p> <p>In 2019, investigative judges heard from approximately 20 new witnesses who had been held in the Mezzeh detention center in Damascus.</p>
4.	France [Ongoing investigation] [Passive nationality principle]	(Suspects in Syria.)	<p>As a consequence of the Syrian army’s bombardment of Baba Amr, in Homs, on February 22, 2012, several journalists operating from a media center based there died, while others were seriously injured. French photojournalist Rémi Ochlik and American war crimes correspondent Marie Colvin were both killed in the attack.⁵ Other journalists were victims too.</p> <p>Charges: War crimes.</p>	<p>The investigation by French investigative judges is ongoing. This case was originally opened in 2012 as a homicide case but was reclassified in 2014 as a war crimes case. In 2018, documents declassified as part of the civil suit in the United States for the extrajudicial killing of Marie Colvin were filed as part of the ongoing investigation in France.</p>
5.	France / Germany [Ongoing investigation] [Universal jurisdiction principle]	Structural investigation.	<p>A Syrian photographer who defected from the Syrian military police and sought refuge in Europe brought thousands of photographs that depict dead and mutilated bodies in detention centers and military hospitals, evidence of torture by the Syrian regime.</p>	<p>In 2015, based on the photographs, French authorities opened a preliminary investigation into the matter. In 2018, a joint French-German investigative team was created. France normally requires some sort of a link for the investigation to be opened; however, in this case, France claimed jurisdiction based “on the possibility some perpetrators came to France to claim asylum, proving de facto their presence in the country.”⁶</p>

3 FIDH, “Q&A on the Dabbagh Case: French Judges Issue 3 International Arrest Warrants against Top Syrian Officials,” November 5, 2018.

4 TRIAL International, *UJAR* 2019.

5 FIDH, “War Crimes against Journalists in Homs: FIDH and Victims’ Families Call for Charges to Be Brought,” March 12, 2018.

6 TRIAL International, 2019 *UJAR*.

	Country	Suspect(s)	Crime(s)	Developments
6.	France [Indictment] [Active personality]	<p>Current and former directors and top executives of French-Swiss cement company Lafarge Holcim Group and its Syrian subsidiary Lafarge Cement Syria:</p> <ul style="list-style-type: none"> • Eric Olsen and Bruno Lafont, former CEOs, Lafarge Holcim Group • Bruno Pescheux, CEO, Lafarge Cement Syria, 2008–2014 • Frédéric Jolibois, former Director, Lafarge Cement Syria • Jean-Claude Veillard, Director of Security, Lafarge • Christian Herrault, Vice Director, Lafarge • Sonia Artinian, Human Resources Executive, Lafarge • Jacob Waerness, former Safety Director, Lafarge Cement Syria <p>Suspects are French and Norwegian nationals. (Suspects in France and Switzerland.)</p>	<p>The criminal complaint alleges that crimes were committed in Syria between 2013 and 2014 in relation to Lafarge’s cement factory in Jalabiya, in northern Syria. At that time, this was an area where several armed groups, including Islamic State in Iraq and Syria (ISIS), were operating. “Lafarge allegedly entered into negotiations with ISIS to purchase oil and pozzolan from them and to obtain official ISIS passes for crossing checkpoints in order to maintain its production in the area. Testimonies also point to Lafarge risking its employees’ lives and violating a number of basic labor rights.”⁷</p> <p>Charges: Financing of a terrorist enterprise, complicity in war crimes, complicity in crimes against humanity, deliberate endangerment of people’s lives, exploitative labor practices, forced labor, and violation of the EU embargo on oil purchases.</p>	<p>The initial investigation was opened in 2016 by the French Prosecutor on the basis that the company violated the EU embargo by illegally purchasing oil in Syria. The same year, 11 former Syrian employees and NGOs filed a criminal complaint in Paris against Lafarge, Lafarge Cement Syria, and their current and former CEOs, for financing of terrorism, complicity in crimes against humanity committed in Syria and for a series of labor rights violations. Soon after, the investigative judges granted the opening of the investigation.</p> <p>In 2017 and 2018, former CEOs and directors of Lafarge and its Syrian subsidiary, Lafarge Cement Syria, were indicted on charges of financing terrorism and deliberate endangerment of people’s lives. Some were also charged with breaching the EU embargo.</p> <p>In June 2018, Lafarge as a legal entity was charged with complicity in crimes against humanity, financing of a terrorist enterprise, breaching an embargo, and endangering lives.</p> <p>On October 24, 2019, the Paris Court of Appeals denied civil party status to the NGOs Sherpa and the European Center for Constitutional and Human Rights (ECCHR) to pursue charges. On November 7, 2019, the court confirmed the indictment of nine Lafarge executives and the Lafarge company; however, it revoked the indictment of the company for complicity in crimes against humanity. Both decisions have been appealed to the French Supreme Court.</p>

	Country	Suspect(s)	Crime(s)	Developments
7.	France [Ongoing investigation] [Universal jurisdiction principle]	Abdulhamid A., Syrian national, former member of the General Intelligence Directorate. (Suspect in France.)	Syrian Intelligence agencies have been continuously accused of using torture and killing opposition activists. It is suspected that Abdulhamid A. participated in crimes committed by the Syrian regime against the civilian population between 2011 and 2013. Charges: Genocide, crimes against humanity, war crimes, and torture and complicity in crimes against humanity.	On February 12, 2019, Abdulhamid A. was arrested as part of a joint French-German investigation, charged, and placed in pre-trial detention. An investigation is ongoing.
8.	France [Ongoing investigation] [Active personality]	French companies, including QOSMOS, and their management as accomplices to acts of torture. (Suspects in France.)	“In the early years of the conflict, the Bashar al-Assad regime specifically targeted human rights defenders, activists, and cyber-activists. Identifying and tracking these targets was possible due to sophisticated communication surveillance tools, including, it is believed, technology designed by French technology company, QOSMOS.” Charges: Aiding and abetting acts of torture by allegedly supplying surveillance material to the Bashar al-Assad regime in Syria.	In 2012, NGOs filed a request in France to open an investigation into the possible supply by French companies, including QOSMOS, of surveillance material to the Syrian regime. In 2014, the investigation was opened, and both the company and five Syrian witnesses testified before the investigative judge. In January 2018, after the investigative judge in charge of the case notified his intention to close the investigation, FIDH and LDH filed a brief requesting to hear a new witness, which was accepted by the judge. The investigation is still ongoing.
9.	Germany [Ongoing investigation] [Principle of universal jurisdiction]	Structural Investigations. Suspects unnamed. (Suspects in Syria and elsewhere.) The structural investigation has resulted thus far in investigations against at least 10 individuals involved in crimes committed by the Syrian government.	The investigation focuses on international crimes committed by the Syrian regime since 2011, including crimes committed by four Syrian intelligence services. Charges: War crimes and crimes against humanity.	In September 2011, the German federal prosecutor decided to launch a “structural investigation” into war crimes and crimes against humanity committed by the Syrian government since 2011. This investigation was made possible thanks to the release of the so-called Caesar photographs, taken by a former employee of the Syrian military police.

	Country	Suspect(s)	Crime(s)	Developments
10.	Germany [Ongoing investigation] [Principle of universal jurisdiction]	Jamil Hassan, Head of the Syrian Air Force Intelligence Directorate. (Suspect in Syria.)	The Syrian Air Force Intelligence Directorate is regarded as the most powerful and most brutal of Syria's four intelligence services, operating a number of detention facilities across Syria. Similar to other intelligence services, since 2011, the Air Force Intelligence Directorate has been tasked with the surveillance, arrest, detention, and killing of regime critics. Hassan has headed the Air Force Intelligence Directorate since 2009. Under his direct supervision, hundreds of detainees were allegedly subjected to torture, inhuman treatment, and extrajudicial killing. Charges: crimes against humanity and war crimes in form of direct perpetration, co-perpetration, or as a military commander.	“On November 6, 2017, 11 Syrian torture victims, supported by EC-CHR, SCLSR and SCM, filed two criminal complaints in Germany denouncing crimes against humanity and war crimes allegedly committed in various detention facilities of five branches of the Syrian Air Force Intelligence Directorate in Damascus, Aleppo, and Hama as well as in the Saydnaya military prison.” ⁸ The complaints name high-ranking officials of the National Security Office and Air Force Intelligence Directorate, including Jamil Hassan, as well as high-ranking Syrian military officials. ⁹ In 2018, the German Federal Court of Justice issued international arrest warrant against Jamil Hassan. As reported by TRIAL International: “The Government of Germany reportedly sent an extradition request to the Government of Lebanon in February 2019 demanding facilitation of his extradition to Germany in accordance with the arrest warrant issued against him in June 2018. Hassan reportedly visited Lebanon to receive medical treatment.” ¹⁰
11.	Germany [Ongoing investigation] [Principle of universal jurisdiction]	Structural investigation against non-state armed groups. Suspects unnamed. (Suspects in Syria, Iraq, Germany, and elsewhere.)	“The investigation concerns crimes committed by non-state armed groups in Syria and Iraq, including extrajudicial killing, torture, inhuman treatment, abduction for the purpose of blackmail, and other war crimes. Part of the investigation focuses on the attack by the Islamic State (IS) against the region around the town of Sinjar in north-western Iraq in August 2014. The Yazidi minority was reportedly subjected to genocide, mass executions, widespread kidnappings, and sexual enslavement in Syria and Iraq.” ¹¹	This structural investigation was opened in Germany in 2014 in order to investigate crimes committed by ISIS and other non-state actors in Syria and Iraq. The structural investigation has led to investigations against 30 specific individuals and involved indictments and further prosecutions on several occasions. [¹² In December 2016, the Supreme Court of Germany issued an arrest warrant against a high-ranking IS commander allegedly responsible for genocide and war crimes, including abduction and sexual enslavement of Yazidi women in Syria and Iraq.” ¹²

8 TRIAL International, *UJAR 2019*.

9 TRIAL International, “Profile: Jamil Hassan,” available at: <https://trialinternational.org/latest-post/jamil-hassan/>

10 TRIAL International, “Profile: Anwar R. and Eyad A.” available at <https://trialinternational.org/latest-post/anwar-r-and-eyad-a/>

11 TRIAL International, *UJAR 2019*.

12 TRIAL International, *UJAR 2019*.

	Country	Suspect(s)	Crime(s)	Developments
12.	Germany [Trial] [Principle of universal jurisdiction]	Former members of Jabhat-al Nusra and brothers: <ul style="list-style-type: none">• Ahmed K.,• Sultan K.• Mustafa K.• Abdullah K.	“In November 2012, the four accused allegedly joined Jabhat al-Nusra in Syria and fought against Syrian government troops in the city of Ras al-Ayn, in northern Syria. Mustafa K., Sultan K., and other Jabhat al-Nusra members reportedly captured an official of the regime of Bashar al-Assad and forced his family to leave the city while plundering their possessions. The governmental official was later found dead.” ¹³ In addition, some brothers are accused of forcing Kurdish population to leave and of taking part in hostilities against the Kurds. Charges: War crimes, membership in a terrorist group.	On June 12, 2017, the four brothers were arrested in Northern Germany. Ahmed K., Sultan K., and Mustafa K. were indicted on January 25, 2018. Following their April 2018 trial, on December 13, 2018 war crimes charges were dropped against Mustafa K. and Sultan K., while terrorism charges were upheld. Ahmed K. was acquitted of all charges.
	[Ongoing investigation] [Principle of universal jurisdiction]	(Suspects in Germany.)		Abdullah K. has not been formally charged yet.
13.	Germany [Trial] [Principle of universal jurisdiction]	Syrian nationals and former members of a combat unit belonging to Jabhat al-Nusra: <ul style="list-style-type: none">• Abdul Jawad A.K.• Abdulrahman A. A.• Abdalfatah H. A.• Abdoulfatah A. (Suspects in Germany.)	“Abdul Jawad A.K., founding member of a combat unit belonging to Jabhat al-Nusra, and Abdulrahman A. A. and Abdalfatah H. A., who joined the unit at a later stage, allegedly took part in hostilities during the capture of Raqqa. In March 2013, the accused, together with other members of the combat unit, reportedly executed 36 Syrian civil servants who had been taken prisoner during the capture of Raqqa. Prior to the killings, the civil servants had been sentenced to capital punishment by a Shariah court.” ¹⁴ Charges: War crimes, murder, membership in a terrorist group.	In the course of 2016 and 2017, they were arrested in Germany. The four were formally charged with membership in a terrorist organization, murder, and war crimes for their alleged involvement in the killing of 36 Syrian civil servants in Syria in March 2013. As reported by TRIAL International in their 2020 report: “In 2019, the trial against four Syrian nationals and former members of a combat unit belonging to Jabhat al-Nusra, Abdul Jawad A. K., Abdulrahman A. A., Abdoulfatah A. and Abdalfatah H. A., continued before the Higher Regional Court of Stuttgart.”

13 TRIAL International, *UJAR 2019*.

14 TRIAL International, *UJAR 2019*.

	Country	Suspect(s)	Crime(s)	Developments
14.	Germany [Conviction] [Principle of universal jurisdiction]	Ibrahim Al F., Syrian national, alleged former member of Ghurabaa al-Sham, part of the Free Syrian Army (FSA). (Suspect in Germany.)	Involved in fighting against the Syrian government as part of the FSA, Ibrahim Al F. and over 150 fighters under his command allegedly controlled a district in northern Aleppo and frequently looted the surrounding areas. As reported by TRIAL International, the accused participated in the abduction of two civilians who resisted the looting, their subsequent one-month detention and torture, and release after a ransom was paid. It was under his command that his subordinates allegedly abducted at least six other civilians and severely tortured them, which resulted in the death of at least one person. Charges: War crimes, torture, and abduction for the purpose of blackmail.	After his arrest in April 2016 in Germany, he was charged in October 2016 and found guilty by the Higher Regional Court of Dusseldorf in September 2018 and sentenced to life imprisonment. On August 6, 2019, the Federal Supreme Court upheld the conviction and life sentence of Ibrahim Al F.
15.	Germany [Conviction] [Principle of universal jurisdiction]	Mohamad K., Syrian national. (Suspect in Germany.)	Mohamad K. is a former member of the FSA accused of committing war crimes in Idlib, Syria.” Jointly with two other members of the FSA, the suspect allegedly captured and detained two members of an armed group fighting on the side of the Syrian government for an unknown period between January 2012 and January 2013 and tortured them.” ¹⁵ The torture was filmed by another FSA member. Charges: War crimes.	On June 20, 2018, Mohamad K. was arrested on suspicion of having jointly committed war crimes, namely cruel and inhuman treatment of civilians, in the province of Idlib, northern Syria. On December 10, 2018, he was charged with war crimes. The Stuttgart Higher Regional Court has not yet scheduled the trial. As Reported by TRIAL International in its 2020 Report: “On 19 February 2019, the trial against Syrian national Mohamad K. began before the Higher Regional Court of Stuttgart. On 4 April 2019, Mohamad K. was found guilty of two counts of war crimes and sentenced to four years and six months’ imprisonment by the Higher Regional Court of Stuttgart.”

15 TRIAL International, *UJAR 2019*.

	Country	Suspect(s)	Crime(s)	Developments
16.	Germany [Conviction] [Principle of universal jurisdiction]	Suliman Al-S., Syrian national. (Suspect in Germany.)	<p>“On February 17, 2013, Canadian national Carl Campeau, who had been working as a legal adviser to UN forces (UNDOF) in the Golan Heights, was abducted by the terrorist organization Jabhat al-Nusra in the Damascus area. Suliman Al-S. allegedly participated in his abduction by keeping the victim under surveillance between March and June 2013. Campeau was held captive for eight months, until he managed to escape, in October 2013. While in detention, his captors issued death threats against him and tried unsuccessfully to obtain a ransom for his release.”¹⁶</p> <p>Charges: Aiding and abetting abduction for the purpose of blackmail, attempted robbery by blackmail in three cases, aggravated deprivation of liberty and war crimes against humanitarian organizations.</p>	<p>Suliman Al-S was arrested in January 2016 in Germany. In June 2016, he was indicted for war crimes, abduction for the purpose of blackmail, unlawful imprisonment, attempted blackmail, use of force or threats against life, and membership in a terrorist organization abroad.</p> <p>The trial commenced on October 20, 2016. On September 20, 2017, the Higher Regional Court of Stuttgart pronounced him guilty of aiding and abetting the kidnapping of a UN staff member in Syria in February 2013, and sentenced him to three years and six months in prison. However, the court dropped the charges of membership in a terrorist organization. Following an appeal by the prosecutor, the Court of Appeal lengthened his sentence to four years and nine months.</p>
17.	Germany [Trial] [Principle of universal jurisdiction]	Structural investigation. Anwar Raslan and Eyad al-Gharib, Syrian nationals and former members of the Syrian intelligence agencies. (Suspects in Germany.)	<p>Raslan is believed to have been the head of Branch 251 of the Syrian General Intelligence Directorate from April 29, 2011 to Sept. 7, 2012, during which time, according to the prosecution, at least 4,000 detainees were tortured using methods including beatings and electric shocks. Another accused is suspected of working in Branch 251 of the Syrian General Intelligence Directorate.¹⁷</p> <p>Charges: Crimes against humanity, war crimes and grave domestic crimes including murder, rape, and severe sexual harassment.</p>	<p>On February 12, 2019, German authorities arrested Raslan and al-Gharib as part of a German-French joint operation. On October 22, 2019, the German Federal Public Prosecutor formally indicted them before the Higher Regional Court of Koblenz.</p> <p>In April 2020, their trial began in Germany.¹⁸</p>

¹⁶ TRIAL International, *UJAR* 2019.

¹⁷ Loveday Morris, “German Court Case Is First to Try Syrian Regime for War Crimes,” *Washington Post*, April 23, 2020.

¹⁸ *Ibid.*

	Country	Suspect(s)	Crime(s)	Developments
18.	Germany [Indictment] [Principle of universal jurisdiction]	Fares A. B., Syrian national and ISIS member. (Suspect in Germany.)	Allegedly, the accused joined ISIS in the summer of 2014. He was deployed in an ISIS prison where he allegedly abused at least three prisoners. He is also alleged to have conducted raids, brought newly arrested individuals to the prison, hit a truck driver on the head with a machine gun, and participated in the shooting of a prisoner captured by ISIS for alleged blasphemy. Charges: Membership in the terrorist organization ISIS and war crimes.	On June 12, 2019, the Higher Regional Court of Stuttgart indicted Syrian national Fares A. B.
19.	Germany [Indictment] [Principle of universal jurisdiction]	Syrian national, member of the armed resistance against the Assad regime (name withheld).	The accused is an alleged member of the armed resistance against the Syrian government in Dara'a. He is alleged to have posed for pictures with the severed head of a combatant, who presumably fought for the government. Charges: One count of war crimes, namely the demeaning and degrading treatment of a person protected by international humanitarian law, committed in Syria between 2012 and 2014.	On August 26, 2019, the Koblenz Prosecutor General issued an official indictment. The accused is currently detained pending confirmation of the indictment by the Higher Regional Court of Koblenz.
20.	Hungary [Indictment] [Principle of universal jurisdiction]	Hassan Faroud, ISIS member. (Suspect in Hungary.)	Faroud allegedly commanded a small ISIS unit in the province of Homs, Syria, where he ordered an occupation of Al-Sukhnah. He is alleged to have ordered a "death list" be drawn up of those who rejected ISIS's goals. Executions included the public beheading of the local imam and at least 25 civilians, including women and children, in Al-Sukhnah. He allegedly personally participated in the beheading of the imam and murders of three other civilians and is believed to have shot another person. Charges: Terrorism and crimes against humanity.	Faroud left Syria in 2016 and made it illegally to Leros, Greece, on February 27, 2016, where he obtained a refugee status on October 27, 2017. The accused was a subject of investigation by the Greek Intelligence Service since July 2018. In August 2018, he was convicted in Malta for living there with forged identification documents, received a suspended sentence, and was ordered to leave Malta. On December 30, 2018, Faroud was caught again using forged travel documents in Hungary, where he received a suspended prison sentence and was detained in Budapest's Nyírbátor asylum detention facility, awaiting his expulsion to Greece. On March 22, 2019, a Budapest Court issued a detention order for Hassan Faroud for alleged murders committed in Syria. On September 3, 2019, Faroud was indicted by the Prosecutor in Budapest for terrorism and crimes against humanity. He remains in custody awaiting trial.

	Country	Suspect(s)	Crime(s)	Developments
21.	The Netherlands [Ongoing investigation] [Principle of universal jurisdiction]	Abu Khuder, Syrian national and alleged former member of Jabhat al-Nusra. (Suspect in The Netherlands.)	Initially an alleged FSA member, Khuder was radicalised and allegedly joined Jabhat al-Nusra, a group previously linked to al-Qaeda. As a commander of the Jabhat al-Nusra battalion known as Ghuraba'a Mohassan (Strangers of Mohassan), he is alleged to have participated in the execution of a captured Syrian lieutenant colonel in July 2012. Charges: War crimes and membership in a terrorist organization.	“Abu Khuder (..) has been living in the Netherlands since 2014, where he was granted temporary asylum. On May 21, 2019, he was arrested by Dutch police on suspicion of war crimes and terrorism offenses based on witness testimonies obtained following a raid against six suspected former Jabhat al- Nusra members in Germany.” ¹⁹ On May 24, 2019, an investigative judge in The Hague ordered his detention extended through the judicial investigation. On September 2 and November 18, 2019, lawyers of the accused, who represented him at the hearings, denied the charges.
22.	The Netherlands [Ongoing investigation] [Principle of universal jurisdiction]	Syrian national, alleged former commander of Ahrar al-Sham (name withheld). (Suspect in the Netherlands.)	The suspect is an alleged former commander of Ahrar al-Sham fighters who took part in an April 2015 offensive against Hama. He is alleged to have subjected persons hors de combat to humiliating and degrading treatment by posing with the corpse of an enemy fighter and kicking the body of another. He also reportedly features in video footage, “singing to celebrate the deaths of fighters and referring to them as dogs.” ²⁰ Charges: War crimes and membership in a terrorist organization.	The suspect was arrested on October 22, 2019, by the Dutch Police in an asylum center in Ter Apel, based on a tip from the German authorities given in 2015, when he spent a short time there seeking asylum before returning to Syria due to personal circumstances.
23.	Norway [Preliminary examination] [Principle of universal jurisdiction]	High-ranking intelligence and military officials of Bashar al-Assad's regime. (Suspects in Syria.)	The survivors were arrested for their anti-Assad activities and subsequently tortured in 14 different detention centres. Charges: War crimes, crimes against humanity and torture.	The preliminary examination follows a complaint filed by five torture survivors from Syria supported by a number of NGOs. The complaint was filed on November 13, 2019.

¹⁹ TRIAL International, *UJAR 2020*.

²⁰ TRIAL International, *UJAR 2020*.

	Country	Suspect(s)	Crime(s)	Developments
24.	Spain [Case closed] [Principle of universal jurisdiction]	<p>Nine high-level members of Syrian security and intelligence forces:</p> <ul style="list-style-type: none"> • Ali Mamluk, Head, Syrian National Security Bureau (NCB) • Abdul-Fattah Qudsiyeh, Deputy Head, NCB • Mohammad Dib Zeitun, Head, General Syrian Security Directorate • Jamil Hassan, Head, Syrian Air Force Intelligence Directorate • Faruq Al-Sharaa, former Vice President • Mohamed Said Bekheitan, Deputy Head, ruling Baath Party • Mohammad Al- Hajj Ali, Major General • Jalal Al-Hayek, General • Suleiman Al-Yusuf, Colonel • Unnamed high-level official, Syrian government 	<p>On February 17, 2013, Abdulmueemen Alhaj Hamdo, a Syrian national born in Idleb, disappeared during work while making delivery between the municipality of Mashta el Helou and the city of Homs, in western Syria.</p> <p>In 2015, Hamdo's eldest son recognized his father's body in several "Caesar" photographs.</p> <p>Charges: Terrorism, enforced disappearances and torture.</p>	<p>On February 1, 2017, Amal Hag Hamdo Anfalis filed a complaint with the Spanish National Court against the nine suspects for alleged acts of terrorism and enforced disappearance committed against her brother.</p> <p>On March 27, 2017, Judge Eloy Velasco Núñez found the complaint admissible and opened an investigation, but on July 27, 2017, the Spanish National Court decided to dismiss the case after the public prosecutor argued it lacked jurisdiction to hear the case and to judge the alleged crimes.</p> <p>On March 13, 2019, the Spanish Supreme Court dismissed the appeal lodged by the law firm and ruled that Spanish courts did not have jurisdiction over the crimes.</p> <p>This decision was appealed before the Constitutional Court on April 30, 2019. The Constitutional Court found that there was no prima facie infringement of the victim's fundamental rights, and as a result, it dismissed the appeal.</p>
25.	Sweden [Preliminary examination] [Principle of universal jurisdiction]	<p>Syrian nationals, and 25 known and several unknown high-level officials of the Syrian security services.</p> <p>(Suspects in Syria.)</p>	<p>The atrocities committed by the Syrian security services against the political opponents of the Assad regime have been widely documented. These have included killings, torture, detention in inhuman conditions, and sexual violence.</p> <p>The complaint is concerned with nine victims, who had been arrested in Syria in relation to their anti-Assad activism. The victims had been subsequently detained in 17 different detention centres across Syria, where they were allegedly subjected to severe torture.</p> <p>Charges: War crimes, crimes against humanity, torture and degrading treatment, rape, severe bodily injury, and illegal abduction.</p>	<p>On February 20, 2019 nine survivors filed a criminal complaint with the War Crimes Unit of the Swedish Police alleging, among others, war crimes and crimes against humanity have been committed against them by Syrian high-level security officials.</p> <p>As part of the preliminary examination, all nine torture survivors testified before the Swedish police.</p> <p>The survivors are supported by a number of NGOs.</p>

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