



Universal Criminal Jurisdiction Scoping Paper

Introduction	1
Definitions	2
Universal Jurisdiction and International Law	2
<i>Aut Dedere aut Judicare</i>	3
<i>Extraterritorial Jurisdiction</i>	4
<i>In Absentia?</i>	4
<i>Available Guidelines but Lack of State Adoption</i>	6
Recent State Opinion of Universal Jurisdiction	7
Examination of Recent Universal Jurisdiction Matters.....	8
<i>Examination of All Reports since 2015</i>	9
<i>Examination of Universal Jurisdiction in 2020 Specifically</i>	9
Factors for Consideration in Pursuing Exercise of Universal Jurisdiction	10
<i>Incorporation of International Law into Domestic Law</i>	10
<i>Treaty Adoption and Implementation</i>	10
<i>Court/Prosecutor/Police Investigation and Prosecutorial Capacity for Complex Cases</i> .	11
<i>Existence of an International Investigatory Mechanism or Fact-Finder</i>	11
<i>Alternate Avenues for Bringing a Case</i>	12
<i>Presence of the Accused</i>	12
<i>NGO Participation</i>	13
Outcomes of Universal Jurisdiction Matters	13
Summary	13

Introduction

National prosecution for egregious international crimes such as genocide, war crimes, and crimes against humanity is vital to international justice and accountability. Where it is not possible or practical to prosecute in the state in which the crime took place, international law has developed several forms of jurisdiction in which an accused may be prosecuted in other states—including the state of the perpetrator’s nationality and the state of the victim’s nationality. The exercise of *universal* jurisdiction permits a state to prosecute when the crime neither took place on its soil nor involved its nationals. Thus, the exercise of universal jurisdiction can fill an important gap to prevent impunity where States that are *directly* affected are unwilling or unable to bring a prosecution.

This scoping paper provides a review of scholarship and commentary on the use of universal jurisdiction in international criminal matters. It notes that the exercise of universal jurisdiction, while growing, is still a relatively novel concept. Pursuing such matters is resource-intensive and success

This paper has been produced by the AJC secretariat, in consultation with AJC members.
It should not be taken to reflect the views or positions of all members.

is not guaranteed. Because of this, it is important to examine which, how, and whether Forum State courts may be inclined to exercise universal criminal jurisdiction—one of many potential avenues for justice. Thus, this scoping paper’s purpose is assist in determining how, and to what extent, the Coalition may pursue the exercise of universal criminal jurisdiction regarding international crimes against the Rohingya. This may be applicable more broadly to other contexts as well.

Definitions

The term ‘**jurisdiction**’ refers to the capacity and competence of a state’s courts to prosecute a particular individual or particular crime. It can also be described as the link between the crime, either by the perpetrator or the crime’s effects, to the ‘**Forum State**,’ or the state prosecuting. That jurisdictional link can be defined in at least seven ways, including by:

- 1) The territory on which the crime was committed;
- 2) The nationality of the alleged perpetrator;
- 3) The nationality of the victim;
- 4) The nation’s flag on a ship or vessel;
- 5) The right of a state to protect its fundamental interests;
- 6) The state agreeing to a request of another state with jurisdiction to prosecute; or
- 7) Universal jurisdiction (essentially where the link is related to the gravity of the crime).

‘**Universal jurisdiction**’ refers to the capacity and competence of a state’s courts to prosecute foreigners committing crimes against other foreigners and committed outside of the state. A form of universal jurisdiction can be exercised where:

- 1) The accused is not a national of the Forum State, but is found within its territory;
- 2) The victims are not nationals of the Forum State, but are found within its territory;
- or
- 3) Neither the accused nor the victims are within the Forum State’s territory.

It is important to note that this first ‘form’ is most common.

‘**Foreigners**’ refers to individuals who are not citizens or residents of the particular state at the time of the crime’s commission.

‘**International crimes**,’ here, includes the core offences found in the *Rome Statute* such as genocide, crimes against humanity, and war crimes, as well as ‘torture’ defined by the *UN Convention against Torture (CAT)*.¹ This paper is focused on the domestic capacity and competence to prosecute these crimes. It should be noted that this paper goes beyond, and does not address, other historically-recognised international crimes such as piracy, for which there is broad state agreement universal jurisdiction may be used.

‘**Enabling legislation**’ refers to legislation that incorporates international crimes, and any obligations to prosecute crimes, into domestic law.

Universal Jurisdiction and International Law

Although prosecution is a matter of domestic conduct, the exercise of universal jurisdiction is governed by international law. This is because it involves the fundamental international legal principles of sovereignty and non-interference. Under these principles, the primary state has sovereignty—or *retains control* of its internal affairs—and the Forum State must *refrain* from interference in the first states’ ability to retain that control.

¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol 1465, 85, <https://www.refworld.org/docid/3ae6b3a94.html>, art 1.

However, the principles of sovereignty and non-interference have been increasingly balanced with the recognition that certain acts “are so serious and the magnitude of their impact so great that their commission shocks the conscience of all humanity.”² The reasoning follows that, if the conduct offends all humanity, it may be prosecuted anywhere. This conduct includes egregious international crimes such as genocide, war crimes, crimes against humanity, and torture—in short, violation of *jus cogens* norms. As such, the term ‘universal jurisdiction’ denotes the right—although not an obligation—to prosecute these international crimes.

Aut Dedere aut Judicare

This right to prosecute must be differentiated from an *obligation* to prosecute. The principle of *aut dedere aut judicare* (used to denote an obligation to ‘extradite or prosecute’ an accused particularly of international crimes) is closely related to the exercise of universal jurisdiction. The principle is incorporated into several international treaties, including:

Geneva Convention I, 1949	Articles 49, 50
Geneva Convention II, 1949	Articles 50, 51
Geneva Convention III, 1949	Articles 129, 130
Geneva Convention IV, 1949	Articles 146, 147
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977	Articles 80, 85, 88
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Articles 6,7

These articles obligate the State Party to investigate—and then either extradite or prosecute—individuals alleged of breaching the prohibited conduct in the treaty. For example, in the CAT, Article 6 requires taking into custody and conducting a preliminary inquiry for any suspect in a signatory’s territory; Article 7(1) states: “if [the state] does not extradite [the suspect, the state shall] submit the case to its competent authorities for the purpose of prosecution.”

At the International Court of Justice, *Belgium v Senegal* points to the role regarding prosecution with a treaty with the concept of *aut dedere aut judicare*. Belgium began proceedings against Senegal when Senegal failed to institute proceedings against Hissène Habré, the former President of Chad. Habré was resident in Senegal since 1990. The CAT states in Article 6(2) that there is an obligation that if an individual is present in a state’s territory, the state must immediately undertake a preliminary inquiry into the facts. The Court found that Senegal was put on notice in 2000 when a complaint was filed against Habré regarding crimes against humanity, torture, arbitrary detention, and enforced disappearances. It found that Senegal had an obligation to prosecute, in particular in relation to charges filed in 2000; and that it must cease doing its wrongful act and prosecute or extradite. In relation to Article 7(1) the obligation to prosecute did not apply to facts alleged before Senegal became a signatory in June 1987, but there was nothing to stop its ability to prosecute.

Notably, the principle, as an *obligation*, is different from the *exercise* of universal jurisdiction. The obligation accepted by a state does not necessarily *create* the jurisdiction through which a court may be permitted to prosecute. Treaties such as the CAT address this by also making it an obligation for a state to incorporate crimes prohibited by the treaty into domestic law (see: Article 4, CAT) thereby providing the domestic courts with jurisdiction over such crimes. However, even if crimes are incorporated into domestic law, such incorporation does not provide for all types of universal jurisdiction (for example, where neither suspect nor victim are within the state’s territory.)

² International Law Commission, 2018, “Annex A: Universal Criminal Jurisdiction,” https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf, [6]. See also: *Attorney-General of the Government of Israel v Eichmann* (1962) International Law Reports, v 36, 304 (Israel Supreme Court) (English Translation) and *Polyukhovitch v Commonwealth* (1991) 172 CLR 501 [33]-[34] (Australian High Court).

Notably, Article 7 does not exclude prosecution *in absentia*, but nor does it explicitly require it. Rather, Article 7(1) refers specifically to instances where a suspect is ‘in the territory’ of the State Party.

It is therefore possible, through the separation of powers, that a state may have signed on to a treaty containing the obligation to ‘extradite or prosecute,’ but has not incorporated a law permitting the judicial branch to exercise jurisdiction over the crimes.

Extraterritorial Jurisdiction

Also distinct from universal jurisdiction is **extraterritorial jurisdiction**. Where universal jurisdiction is exercised where there is *no* territorial or nationality link between the Forum State and the crime, extraterritorial jurisdiction is exercised where there *is* a link between the Forum State despite the crime taking place outside the Forum State’s territory. For example, extraterritorial jurisdiction may be exercised where a perpetrator is a dual-national of the territorial state and the Forum State; thus, the Forum State exercises its jurisdiction over its national, but over a crime he/she committed abroad.

This link may be persuasive in seeking a court’s jurisdiction because it relies on a more ‘traditional’ mode of jurisdiction—in other words, a type of jurisdiction with which the court may be more familiar. Thus, if seeking to bring a universal jurisdiction matter, it is important first to identify whether there may be a more conducive Forum State because of a link perhaps not readily obvious.

In Absentia?

As noted above, there are three circumstances in which a universal jurisdiction case may be brought:

- 1) Where the accused is not a national of the Forum State, but is found within its territory;
- 2) The victims are not nationals of the Forum State, but are found within its territory;
- or
- 3) Neither the accused nor the victims are within the Forum State’s territory.

This final form of universal jurisdiction—a pure universal jurisdiction—is debated heavily.

If a matter proceeds without the accused present, it is brought *in absentia*. Whether a matter can proceed *in absentia* depends on the Forum State’s laws on criminal procedure. In some cases, an investigation may begin *in absentia*, but the Forum State will request and require extradition of the accused before the trial may begin. In other cases, an investigation and a trial may begin *in absentia*.

In *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo vs Belgium)* the Democratic Republic of Congo (**DRC**) applied to the International Court of Justice regarding Belgium’s arrest warrant, issued on the basis of universal jurisdiction, for the DRC’s acting Foreign Minister Abdulaye Yerodia Ndombasi for crimes against humanity and war crimes. The DRC initially argued that Belgium: (1) violated the DRC’s territorial sovereignty and the principle of sovereign equality by issuing the warrant of the sitting official; and (2) the warrant constituted a violation of immunity for a sitting Minister. However, in the DRC’s memorial and submissions to the Court, it confined its arguments to the question of the Minister’s immunity.

The Court found (13:3) that the Belgian international arrest warrant constituted a violation of the sitting Minister's immunity³ and that (10:6) Belgium was obligated to revoke the warrant.⁴ However, eleven of the sixteen judges either wrote declarations, joint separate opinions, or dissenting opinions. While universal jurisdiction was not the subject of the final matter, seven of these opinions or declarations provide *obiter dicta*, or judicial commentary, on universal jurisdiction. Four are relevant to this scoping paper:

- In his separate opinion, President of the Court Judge Gilbert Guillaume focused specifically on universal jurisdiction *in absentia*. Judge Guillaume stated that particularly such exercise of universal jurisdiction is contrary to the principle of territorial sovereignty.⁵ He concluded that:

[A]t no time has it been envisaged that jurisdiction should be conferred upon courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.⁶

- In his separate opinion, Judge Francisco Rezek noted the need for some connection to the Forum State, such as the presence of the accused in the state's territory. Like President Guillaume, he stated: "If the application of the principle of universal jurisdiction does not presuppose that the accused be present on the territory of the Forum State, coordination becomes totally impossible, leading to the collapse of the international system of cooperation for the prosecution of crime" (footnote omitted).⁷ In discussing the adoption of universal jurisdiction, Judge Rezek (from Brazil) noted the potential for a North-South divide:

It is essential that all States ask themselves, before attempting to steer public international law in a direction conflicting with certain principles which still govern contemporary international relations, what the consequences would be should other States, and possibly a large number of other States adopt such a practice. Thus it was apt for the Parties to discuss before the Court what the reaction of some European countries would be if a judge in the Congo had accused their leaders of crimes purportedly committed in Africa by them or on their orders (footnote omitted).⁸

- In his declaration, Judge Raymond Ranjeva acknowledged that, "evolving opinion and political conditions can be seen as favouring the retreat from the territory-based conception of jurisdiction and the emergence of a more functional approach in the service of higher common ends"⁹—in other words that international custom was changing and making space for universal jurisdiction. However, he stated: "Acknowledging such a trend cannot however justify the sacrifice of cardinal principles of law in the name of a particular kind of modernity. Territoriality as the basis of entitlement to jurisdiction remains a given,

³ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment (Merits)*, 14 February 2002 (President Guillaume, Vice-President Shi, Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek and Buergenthal, and Judge ad hoc Bula-Bula; Judges Oda and Al-Khasawneh, and Judge ad hoc Van den Wyngaert dissenting) [78](2).

⁴ *Ibid* [78](3).

⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment*, 14 February 2002 (Separate opinion of Judge Gilbert Guillaume) [15].

⁶ *Ibid*; see also [16].

⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment*, 14 February 2002 (Separate opinion of Judge Francisco Rezek) [9].

⁸ *Ibid* [8].

⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment*, 14 February 2002 (Declaration of Judge Raymond Ranjeva) [9].

the core of contemporary positive international law.”¹⁰ As such, Judge Ranjeva found little support for the exercise of universal jurisdiction in favour of Belgium, particularly in relation to universal jurisdiction *in absentia*.

- Finally, in their joint separate opinion, Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal approached universal jurisdiction differently from that of Judges Guillaume, Rezek, or Ranjeva. The joint separate opinion found that, while there was little support in international law or custom to provide for universal jurisdiction *in absentia*, there equally was little to believe its exercise was illegal.¹¹ In leaving room for the exercise of universal jurisdiction at the national level, the Judges stated: “[T]he international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.”¹² On universal jurisdiction *in absentia*, the Judges state that instances where the accused is not in the state’s territory does not preclude the exercise of universal jurisdiction,¹³ there must be “safeguards in place” including respecting the person’s immunities¹⁴ and restricting its exercise to “only over those crimes regarded as the most heinous by the international community.”¹⁵

Thus, international law supports at least a *form* of universal jurisdiction—that is, a state’s right to prosecute an accused of certain egregious international crimes if the individual is within its territory. However, it is unclear whether international law broadly supports *conducting a trial* under the exercise of universal jurisdiction for certain international crimes if the accused is not present the Forum State’s territory, even if the victims are.

Available Guidelines but Lack of State Adoption

Experts and NGOs have attempted guidelines for the use of universal jurisdiction, but none have yet been formally adopted by states. These guidelines include, in chronological order:

- *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, compiled by Amnesty International, 30 April 1999;¹⁶
- *The Princeton Principles on Universal Jurisdiction*, compiled through working groups with judges, international legal academics, and representatives of large international NGOs, 2001;¹⁷
- *The Cairo-Arusha Principles of Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* (or the Cairo-Arusha Principles), compiled through a series of convenings held by Africa Legal Aid, a pan-African and international NGO focusing on human rights and accountability in Africa, July 2001-October 2002;¹⁸ and the
- *Madrid-Buenos Aires Principles of Universal Jurisdiction* (or the Madrid-Buenos Aires Principles, spearheaded by Baltasar Garzón International Foundation and compiled through a series of convenings and working groups consisting of judges, lawyers, NGO representatives, and academics, 2015.¹⁹

¹⁰ Ibid.

¹¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment*, 14 February 2002 (Joint separate opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal) [44]-[45].

¹² Ibid [51].

¹³ Ibid [58].

¹⁴ Ibid [59].

¹⁵ Ibid [60]. These included piracy, war crimes, and crimes against humanity.

¹⁶ Amnesty International, 1999, “Universal Jurisdiction: 14 Principles On The Effective Exercise Of Universal Jurisdiction,” <https://www.amnesty.org/en/documents/document/?indexNumber=IOR53%2F001%2F1999&language=en>.

¹⁷ Princeton University, 2001, “The Princeton Principles on Universal Jurisdiction,” https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

¹⁸ Africa Legal Aid, 2002, “The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective,” <https://www.africalegalaid.com/product/oct-dec-2002-the-cairo-arusha-principles-on-universal-jurisdiction-in-respect-of-gross-human-rights-offences-an-african-perspective/>.

¹⁹ Baltasar Garzón International Foundation, 2015, “Madrid-Buenos Aires Principles on Universal Jurisdiction,”

The Madrid-Buenos Aires Principles is the most expansive of the principles proposed, including:

- Explicitly calling attention to the potential for economic and environmental crimes—either for such crimes to be considered a type of ‘more traditional’ universal jurisdiction crimes such as war crimes or crimes against humanity (Principle 2) or being separate from such crimes but still rising to the gravity and scale that would warrant exercise of universal jurisdiction (Principle 3); and
- Including the potential for civil liability (Principle 6) and the application of universal jurisdiction in civil law cases, separate from criminal law (Principle 7). In this expansion of universal jurisdiction to civil law, however, Principle 7 states that application of universal jurisdiction may be applied in civil matters, “provided the damage is due to one of the crimes listed...”.

The *Madrid-Buenos Aires Principles* have not been adopted formally and therefore are not binding. However, they may provide support to a growing argument that universal jurisdiction is being cemented in international law.²⁰

Recent State Opinion of Universal Jurisdiction

In December 2017, the United Nations General Assembly adopted a resolution to commission a report by the Secretary-General, collecting “information and observations on the scope and application of universal jurisdiction.”²¹ Only 11 states provided responses to the Secretary-General’s request for information. Of these, the report quotes Argentina, Australia, El Salvador, Mexico, Qatar, and Switzerland as stating that universal jurisdiction was necessary or plays a role in reducing impunity for international crimes.²² The small response, however, failed to recommend a consensus on the use of universal jurisdiction.

Following the tabling of the report, members of the General Assembly’s Sixth (Legal) Committee provided the following commentary in 2018. The discussion provides greater clarity regarding state caution in applying or promoting universal jurisdiction. For example:²³

- **Argentina** noted that there was danger in unlimited and undefined jurisdiction, providing the example of its use in politically motivated attacks, which could result in jurisdictional conflict between states;
- **Cuba** warned that the “principle should not be used in the politically motivated application by courts in developed countries against persons from developing countries when there is no basis in international treaties.”
- **Egypt** emphasised that universal jurisdiction is complementary to territorial, national jurisdiction and that, “[g]reater attention should be afforded to complete legislative reforms on the national and regional levels that respect the principle of national ownership;”
- **Eswatini** noted the potential role of cultural relativism in application, arguing against the notion of a set of “global moral norms;”
- **Gabon** emphasised that the scope of universal jurisdiction should be limited and can only be exercised when the territorial state “does not intend to exercise its jurisdiction;”

<https://fibgar.org/upload/proyectos/35/en/principles-of-universal-jurisdiction.pdf>.

²⁰ Eventually, such principles could be considered (or at least inform) “the teachings of the most highly qualified publicists” as a form of international law. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <https://www.refworld.org/docid/3ae6b3930.html>, art 38(1)(d).

²¹ General Assembly Resolution 72/120, *The Scope and Application of the Principle of Universal Jurisdiction*, A/RES/72/120 (18 December 2017), <https://undocs.org/A/RES/72/120>.

²² Report of the United Nations Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, A/73/123 (3 July 2018), <https://undocs.org/A/73/123> [39]-[47].

²³ See: “Without Clear Definition, Universal Jurisdiction Principle Risks Misuse, Abuse, Sixth Committee Speakers Warn,” United Nations Meetings Coverage, 10 October 2018, <https://www.un.org/press/en/2018/gal3571.doc.htm/>.

- **India** noted that piracy was accepted as a crime for which universal jurisdiction was appropriate, but that the “misuse of the principle should be avoided in respect of acts that do not legally enjoy such jurisdiction; the...legal clarification of the principle’s meaning is yet to emerge;”
- **Mauritius, Mexico, and South Africa** noted the disagreement amongst states regarding immunities, particularly in relation to Heads of States; and
- **Syria** expressed concern about “the existence of serious loopholes and irregular practices in international relations [that] make it impossible to achieve the purposes behind the notion of universal jurisdiction,” referring to a concern in broadening its scope and use.

These concerns, from states across the Global South, suggest that similar concerns would arise if other states in the Global South were to be approached regarding the exercise of universal jurisdiction.²⁴ Importantly, these points were also made in the International Law Commission’s 2018 report to the UN General Assembly proposing a study on the scope of universal jurisdiction.²⁵ At time of publication, this study has yet to be undertaken.

Examination of Recent Universal Jurisdiction Matters

Apart from state opinion, state practice is important to consider in establishing where and when universal jurisdiction may be successfully exercised.

A brief examination of recent universal jurisdiction matters is only possible through the work of several non-governmental organisations that have been promoting and tracking its use. Of particular note are the annual reports (hereafter ‘**the TRIAL reports**’) by international non-governmental organisations TRIAL International (**TRIAL**),²⁶ REDRESS,²⁷ the European Center for Constitutional and Human Rights (**ECCHR**),²⁸ the International Federation for Human Rights (**FIDH**),²⁹ and the International Foundation Baltasar Garzón (**FIBGAR**).³⁰

The TRIAL reports document all universal jurisdiction matters that were brought for investigation, through to either dismissal, acquittal, conviction, or appeal. However, they do not address matters that were contemplated but *not* brought because of cost, strategy, or capacity. Furthermore, most of the reports focus on universal *criminal* jurisdiction, but some do mention civil liability for international criminal activity especially in relation to the United States.³¹

²⁴ For critiques of the use of universal jurisdiction, particularly regarding use by the Global North of nationals of the Global South, see, for example: Nergis Canefe, 2018, “International Criminal Law and Limits of Universal Jurisdiction in the Global South: A Critical Discussion on Crimes against Humanity,” PhD, York University, <https://yorkspace.library.yorku.ca/xmlui/handle/10315/34965>; and Thamil Ananthavinayagan, 2020, “A Tale of German Global Criminal Justice: A TWAAIL Perspective on the Syrian Torture Trial,” *Just Security* <https://www.justsecurity.org/70986/a-tale-of-german-global-criminal-justice-a-twaail-perspective-on-the-syrian-torture-trial/>. See also: Devika Hovell, 2018, “The Authority of Universal Jurisdiction,” *The European Journal of International Law* 29 (2) <http://www.ejil.org/pdfs/29/2/2890.pdf>.

²⁵ International Law Commission, 2018, “Annex A: Universal Criminal Jurisdiction,” https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf.

²⁶ TRIAL’s work in relation to universal jurisdiction includes investigating suspects of international crimes and assisting in filing complaints based on universal jurisdiction. It also maintains an online database of universal jurisdiction matters, found here: TRIAL International, *Universal Jurisdiction Database*, <https://trialinternational.org/resources/universal-jurisdiction-database/>.

²⁷ REDRESS’s work on universal jurisdiction is found in its larger focus on international accountability. While REDRESS focuses on matters in the UK and the Netherlands, it supports victims to participate in trials elsewhere. See: REDRESS, <https://redress.org/our-work/international-accountability/>.

²⁸ While ECCHR’s work does not have a specific focus on universal jurisdiction, it advocates and engages in the use of legal avenues to reach international accountability for grave crimes. In as such, it supports universal jurisdiction in training human rights defenders and intervening in relevant cases. See: European Center for Constitutional and Human Rights, <https://www.ecchr.eu/en/about-us/>.

²⁹ FIDH’s work regarding universal jurisdiction includes documentation of crimes, representation of victims in universal jurisdiction proceedings, and lobbying for state adoption of laws and policies to enable the exercise of universal jurisdiction. See: International Federation for Human Rights (FIDH), <https://www.fidh.org/en/issues/international-justice/>.

³⁰ FIBGAR organised two international conferences on universal jurisdiction, resulting in the drafting of the Madrid-Buenos Aires Principles on Universal Jurisdiction. However, FIBGAR was not listed as a partner on the most recent TRIAL report. For more information, see: International Foundation Baltasar Garzón, <https://fibgar.es>.

³¹ The Madrid-Buenos Aires Principles on Universal Jurisdiction included consideration of civil universal jurisdiction.

Examination of All Reports since 2015

In examining all TRIAL universal jurisdiction reports since 2015, only 12 matters in total were brought or began investigation in the Global South.³² This is in contrast to countries like France, in which 8 matters were brought or began investigation in 2015 alone.³³ The Global South countries represented include: Argentina, Brazil, Chile, Ghana, South Africa, and Senegal.

For matters in the Netherlands, Germany, Sweden, Norway, Italy, and France, a number of the arrested suspects arrived as asylum seekers. This raises the potential for identifying Forum States to which perpetrators may flee and notifying appropriate Forum State authorities. However, caution should be taken in pursuit of such matters not to play into any potential Forum State narrative that *all* asylum seekers may be a threat or criminals.

Additionally, since 2015, there were also 3 matters in relation to businesses. This potentially represents an expansion of universal jurisdiction to address corporate liability in aiding and abetting international crimes. To this, the International Commission of Jurists 2008 report, *Corporate Complicity & Legal Accountability*, identified a trend in national criminal law to establish criminal liability for corporate actors. The report states, as domestic law develops, “so do the arguments for an expansion of international courts’ jurisdiction”³⁴—and does the argument for corporate liability following the exercise of universal jurisdiction. None of the current cases related to businesses have been successful in achieving a guilty verdict, yet identification of corporate bodies that operate in a country of interest and a Forum State may be a way to fill a gap in taking other perpetrators into custody.

Examination of Universal Jurisdiction in 2020 Specifically

In looking at all matters documented by the TRIAL reports in 2020 (69 criminal matters), only four were ‘active’ in the Global South (3 in Argentina, 1 in Ghana).³⁵ All four regarded high-level alleged perpetrators who were not resident or in custody in the Forum State. These 69 matters also indicate that, in approximately 65 cases, the state has ‘effective control’ over or an existing relationship with the suspect before an investigation or charge is brought. In other words, the suspect was:

- 1) Living in the state exercising jurisdiction;
- 2) A national/citizen of the state exercising jurisdiction (thus, the Forum State potentially exercising extraterritorial jurisdiction); or
- 3) Otherwise present voluntarily in the territory (transiting, undergoing medical treatment).

The 2020 matters also indicate a strong relationship between previous colonial powers and former territory. For example, two of the three matters initiated, investigated, or on-going in 2020 by Italy are in relation to Libya. Seven of the seventeen matters initiated, investigated, or on-going by France are in relation to Rwanda. Two of the four matters initiated, investigated, or on-going by Belgium are in relation to Rwanda and one regards the Democratic Republic of Congo. The higher

³²TRIAL International, 2019, “Universal Jurisdiction Annual Review,” https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf; TRIAL International, 2018, “Universal Jurisdiction Annual Review,” <https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>; TRIAL International, 2017, “Universal Jurisdiction Annual Review,” https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf; TRIAL International, 2016, “Universal Jurisdiction Annual Review,” <https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2016-publication.pdf>.

³³TRIAL International, 2015, “Universal Jurisdiction Annual Review,” <https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2015-publication.pdf>.

³⁴ International Commission of Jurists, 2008, “Corporate Complicity & Legal Accountability: Volume 2 Criminal Law and International Crimes,” <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf> (57).

³⁵ TRIAL International, 2020, “Universal Jurisdiction Annual Review,” https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf

number of matters is likely because the existing ties make it more common for suspects to seek asylum in previous colonial states.

Factors for Consideration in Pursuing Exercise of Universal Jurisdiction

Synthesising the sources above, it is possible to create a list of factors that assist in bringing a universal jurisdiction matter. The following factors are dependent on whether there is domestic political will to provide resources for such resource-intensive cases and for public prosecutors to decide to pursue matters, particularly where a Head of State is involved.

Incorporation of International Law into Domestic Law and Inclusion of Universal Jurisdiction for Such Crimes

Because universal jurisdiction is an exercise in a domestic court, the court must have the capacity to hear matters that take place outside of its territory and the capacity to hear matters that include the conduct that constitutes international crime. An adequate enabling legal framework for universal jurisdiction requires both incorporation of international crimes into domestic law and including such crimes can be brought under universal jurisdiction.

It can help if a state is monist, meaning that international law obligations exist in domestic law upon signature to a treaty—this is the case in France, Germany, and Argentina. This is as opposed to dualist states such as the United Kingdom, the United States, and Australia, where the state must take some action, such as executive assent or legislative adoption, to have international law take effect in domestic affairs.

Incorporation and enabling of universal jurisdiction has been accomplished by amending domestic criminal code and criminal procedure—for example, France’s *Code of Criminal Procedure* has been amended to list the treaties that provide relevant offences under which France may prosecute, provided that the suspect is found in France voluntarily.³⁶ This both establishes international crimes as crimes that can be prosecuted in domestic courts and gives courts the jurisdiction to hear cases that have no other jurisdictional or nationality link to France.³⁷ Alternatively, incorporation may be accomplished by creating a separate criminal code, specific to international crimes. This is the case in Germany’s national *Code of Crimes Against International Law (National Code)* which enables prosecution for grave breaches of the *Geneva Conventions*, terrorism, torture, genocide, and trafficking of persons, amongst other offences. There is no requirement of a link to Germany whatsoever; however, the accused must be found to be voluntarily in Germany. This National Code is unique in its far-reaching jurisdiction.³⁸

However, incorporation alone should not be sufficient to identify a Forum State as ripe for attempting a universal jurisdiction matter. Attention must be paid to the elements of the crimes incorporated to ensure such elements are not understood or defined by regressive domestic policy or related laws.

Treaty Adoption and Implementation

Relatedly and as noted above, some international treaties have obligations to incorporate crimes described in the treaty into domestic law. Where a state has signed these treaties, it may be more likely that there is corresponding domestic legislation to enact its obligations domestically. For

³⁶ *Code de Procédure Pénale*, 1958, (France) art 689. Note, however, that the French penal code permits prosecution of an offender *in absentia* if the victims of a crime are French.

³⁷ *Ibid.* Notably, although France has domestic legislation regarding cooperation with the International Criminal Court (ICC), offences within the jurisdiction of the ICC are not explicitly given universal jurisdiction within French legislation. See: Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003) 132, 140.

³⁸ *Gesetz sure Einführung des Völkerstrafgesetzbuches*, Bundesgesetzblatt Teil I, 2002 Nr 42, 2254 (Germany). See also Reydam n 38. 156-157.

example, both Argentina³⁹ and South Africa⁴⁰ make war crimes, crimes against humanity, and genocide crimes domestically prosecutable through legislation implementing the *Rome Statute*.

As discussed above regarding the International Court of Justice in *Belgium v Senegal*, treaty obligations to extradite or prosecute may apply pressure to Forum State courts to exercise jurisdiction.

Court/Prosecutor/Police Investigation and Prosecutorial Capacity for Complex Cases

Investigation of international crimes is exceedingly complex, and made increasingly so when particular vulnerabilities arise. These may include matters regarding sexual and gender-based violence or crimes against children. Training and experience in prosecuting such matters increases the likelihood additional matters with such elements may be brought.

Likewise, as with all criminal matters, strong evidence is the key to assuring a successful prosecution. The 2016 TRIAL report highlights the importance of specialised international crimes units in countries such as the Netherlands, France, and Germany, which assist in preparing cases and initiating prosecution. This is important in addressing the specific knowledge required for, and the complexity of, investigation and prosecution of international crimes. The establishment of specialised units are also recommended in the 2020 FIDH, REDRESS, and ECCHR report, *Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes (FIDH report)*.⁴¹ None of the Global South countries examined in the TRIAL reports have such units at time of writing.

Mutual legal assistance treaties and relationships across jurisdictions can ease burdens for prosecutors and judges in seeking evidence. For example, in the prosecution of Franco-era Spanish leaders in Argentina, the investigating judge has conducted several rogatory commissions to Spain—in other words, has requested, and often granted, that foreign judges permit investigation in their jurisdiction.⁴²

Existence of an International Investigatory Mechanism or Fact-Finder⁴³

The presence and reporting of an international fact-finder or investigatory mechanism may ease the burden of a complex investigation and to emphasise the need for prosecution. They may also assist in overcoming an inability to enter a concerned state for investigation.

The International, Impartial and Independent Mechanism (IIIM) for Syria provides an example, particularly for universal jurisdiction matters regarding crimes in Syria. The Terms of Reference for the IIIM require it to collect and preserve evidence and prepare files “to facilitate and expedite” criminal proceedings including in national courts “that may or may in the future have jurisdiction” over such crimes.⁴⁴ As of May 2020, the IIIM had received 61 requests from courts in 11 different states.⁴⁵ While it is difficult to know how many, it is reasonable to assume most of these courts are

³⁹ *Ley de Implementación del Estatuto de Roma, Ley 26.200 de 2007*, (Argentina) arts 8-10.

⁴⁰ *Implementation of the Rome Statute of the International Criminal Court Act, 2002*, (South Africa) s 2.

⁴¹ FIDH, ECCHR, and REDRESS, “Breaking Down Barriers: Access to Justice in Europe for International Crimes,” 2020. https://www.fidh.org/IMG/pdf/breaking_down_barriers_en_web.pdf, (109).

⁴² TRIAL International 2020 report, n 36, 18. Notably, the role of an investigative judge largely only exists in civil law countries, as opposed to common law countries where only parties may present evidence.

⁴³ It should be noted that the Truth Commissions may also assist as supplementary fact-finders, in the same manner as international fact-finding missions.

⁴⁴ United Nations, General Assembly, “Annex: Independent Investigative Mechanism for Myanmar Terms of Reference,” *Letter dated 16 January 2019 from the Secretary-General Addressed to the President of the General Assembly*. <https://undocs.org/en/A/73/716>, [3].

⁴⁵ “The Fight Against Impunity: A Prerequisite For Peace In Syria,” 2020, *France Diplomacy - Ministry For Europe And Foreign Affairs*. <https://www.diplomatie.gouv.fr/en/country-files/syria/the-fight-against-impunity-a-prerequisite-for-peace-in-syria/>.

considering the exercise of universal or extraterritorial jurisdiction. A mechanism dedicated to compiling complex evidence can assist in this process.

Additional to a mechanism compiling individual case files, the existence of a United Nations fact-finding mission can assist in laying the groundwork for domestic investigators and prosecutorial teams. It can also lend legitimacy to requests for prosecution. For example, the UN Independent International Fact-Finding Mission on Myanmar's September 2019 report includes a paragraph urging state courts to exercise universal jurisdiction.⁴⁶

Alternate Avenues for Bringing a Case

Criminal proceedings are traditionally initiated by a public prosecutor representing the state or society. However, alternate avenues to initiating a prosecution may provide more fertile ground for universal jurisdiction matters.

In civil law countries, victims' organisations can act as '**civil parties**' to petition a court directly—rather than through the initiation of a prosecutor—to instigate an investigation.⁴⁷ Non-governmental organisations (**NGOs**) with specialised legal training and experience in bringing universal jurisdiction matters can to either challenge a prosecutor's failure to bring proceedings or to expedite an investigation.

Likewise, in many common law countries, private prosecution—or prosecution initiated by a private individual rather than the state prosecutor—may also be available. Often, a lawyer stands in as the listed party, but may be representing victims' groups. However, as a recent attempted private prosecution in Australia regarding crimes against the Rohingya serves to demonstrate,⁴⁸ it is necessary to identify before pursuing that: 1) domestic criminal procedure permits bringing any private prosecution; and that 2) the enabling legislation permits private prosecution of international crimes. Notably, Australia's enabling legislation requires that prosecution of war crimes necessitates consent of the Federal Attorney-General—consent which was not given.⁴⁹

Presence of the Accused

As noted above, state opinion and practice is divided regarding whether universal jurisdiction may be exercised if the accused is absent. For example, Germany permits *in absentia* proceedings, but only as a last resort.⁵⁰ The United Kingdom only permits prosecution regarding grave breaches of the *Geneva Conventions* and torture if the accused is voluntarily in the United Kingdom—however, this includes transit.⁵¹ Argentina's enabling legislation is silent and thus does not prohibit prosecution *in absentia*; none of the accused in the three universal jurisdiction matters under investigation are in custody or on Argentinian soil.⁵²

⁴⁶ It states as follows: "The mission reiterates its call upon Member States to exercise jurisdiction to extradite or investigate and, if appropriate, prosecute alleged perpetrators of crimes under international law committed in Myanmar. Given that, at this stage, the jurisdiction of the International Criminal Court is limited, States must exercise universal jurisdiction to this end." Human Rights Council, 2019, *Report of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/42/50, <https://undocs.org/pdf?symbol=en/A/HRC/42/50>, [112].

⁴⁷ See, for example, on France, Reydams, n 38,134.

⁴⁸ *Taylor v Attorney-General* [2019] HCA 30 (Australian High Court).

⁴⁹ *Ibid* [20]-[24].

⁵⁰ *Strafprozeßordnung* (German Code of Penal Procedure) §153f. For commentary, see Reydams, n 38, 144-145.

⁵¹ However, any arrest warrant for such crimes requires the consent of the Director of Public Prosecutions, *Magistrates' Courts Act 1980* (UK) s 1(4A). For a sample regarding state guidance on bringing a universal jurisdiction matter, see: United Kingdom Government Publications, 2018, "Note on the Investigation and Prosecution of Crimes of Universal Jurisdiction," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.

⁵² TRIAL International 2020 report, n 36, 17-20.

It must be noted that if a Forum State's legislation states that the accused must be in its territory 'voluntarily,' this excludes presence because of extradition.

NGO Participation

In the universal jurisdiction matters in Argentina, Brazil, Ghana, Senegal, and South Africa examined in the TRIAL reports, each was brought by or with the support of NGOs. NGOs in these matters either represented or amplified complaints by victims of the crimes to be prosecuted. This was also the case for many European matters examined in the FIDH report.⁵³ NGOs in contact with victims can assist in the collection of information and outreach/communication regarding court proceedings. NGOs with legal experience can assist in ensuring the matter brought before the court is not being tried in another forum. Collaboration across NGOs with experience in universal jurisdiction can lower the learning-curve for supporting these matters effectively and efficiently.

Outcomes of Universal Jurisdiction Matters

Universal jurisdiction matters are often not brought to trial. State consensus is still forming and the scope of universal jurisdiction is not clear. Such matters are also lengthy and require considerable resources, both in investigating the best Forum State in which to bring a matter and in conducting the matter itself. Those running such matters may be prevented from accessing evidence and may have difficulty communicating with victims or incorporating their needs. If expectations are not managed properly, universal jurisdiction matters could promise false hope for access to justice.

However, bringing a universal jurisdiction matter may provide positive outcomes. For example:

- If a matter is successful in prosecution (the accused is found guilty):
 - The accused may be punished if in state custody; and
 - Depending on the state law, its capacity, and the location of the victims, compensation may be awarded.
- If a party or Prosecutor is successful in bringing a case, but there is no guilty verdict:
 - Parties can assure a fair trial has been conducted, with facts heard and litigated; and
 - There is ideally opportunity for victim participation in the trial(s).
- If no trial results:
 - Any investigation provides may complement other investigation/fact-finding mechanisms;
 - Even an initial investigation may result in an international arrest warrant, hindering the accused from travel; and
 - A complaint represents an opportunity to raise awareness of victims' concerns.

Summary

In sum, this brief review of available scholarship and research finds:

- Both treaty and customary law recognise a right of states to exercise universal jurisdiction to prosecute certain international crimes; but debate remains regarding prosecuting an accused *in absentia*.
- Political considerations remain a concern for states regarding the exercise of universal jurisdiction and international agreement on the scope of universal jurisdiction and uniformity is required.

⁵³ FIDH, ECCHR, and REDRESS report, n 42, 13.

- Courts in the Global South largely have not exercised universal jurisdiction, even if states have established universal jurisdiction over certain crimes.
- State domestic competency to exercise universal jurisdiction may be encouraged or hindered by:
 - Incorporation relevant of international law;
 - Relevant treaty adoption and implementation;
 - Court/Prosecutor/Police investigation capacity for complex cases;
 - The existence of an international investigatory mechanism or fact-finder;
 - The presence of alternate avenues for initiating a prosecution; whether the accused is voluntarily present in the Forum State's territory; and
 - NGO assistance in championing the matter.

These factors also are dependent on whether there is domestic political will, as well as legal assistance to frame the case in a way that it is not repeating proceedings elsewhere.

- Finally, initiating and supporting a matter regarding the exercise universal jurisdiction requires considerable collaboration and resource-sharing.