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CHALLENGES IN THE APPLICATION OF THE UNIVERSAL JURISDICTION PRINCIPLE IN RESPECT OF CASES FROM BELARUS

Case studies from Lithuania, Germany, Poland and Czechia

Research report

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Challenges in the application of the universal jurisdiction principle in respect of cases from Belarus. Case studies from Lithuania, Germany, Poland and Czechia. Research report.

About iSANS

iSANS is an international expert initiative aimed at identifying, analysing, and countering hybrid threats to democracy, the rule of law, and the sovereignty of the states of Western, Central and Eastern Europe and Eurasia.

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CONTENTS

Foreword: Research goals and methodology 1

I. Introduction to the principle of universal jurisdiction and the relevant debate 4

II. Comments on some key issues, raised by states

Which crimes are subject to universal jurisdiction? 7
The obligation of states to investigate and prosecute 9
The problem of the exercise of universal jurisdiction in absentia 10
Immunities 12
The abuse of political power 14
A subsidiary nature of the universal jurisdiction 16

III. On states' practices

Organic growth of the application of the universal jurisdiction 18
Surge of the universal jurisdiction in response to international crimes committed in Ukraine 19
The Harausky case incident in Switzerland 20
Poland 24
Lithuania 30
The Czech Republic 37
Germany 40

IV. General critique of the universal jurisdiction implementation 48
Witness protection and treatment 48
Trial documentation and access of the public to it 50
Lack of optimal structures and target financing 53
Lack of cooperation on a practical level 54

V. Lessons from the application of the universal jurisdiction principle to cases from Belarus 57

VI. Recommendations 60

Bibliography 62

Foreword: Research goals and methodology

There are reasonable grounds to believe that, at least since June 2020, the Lukashenka regime perpetrated crimes against humanity against Belarusians. Hundreds of thousands of people have become victims of torture, enforced disappearances, including prolonged *incommunicado* detention, sexualised violence, extrajudicial executions, politically motivated persecution, and deportation. The commission of crimes against humanity in Belarus, accompanied with impunity, should lead to the appropriate reaction on the part of the international community of States to ensure effective, prompt, and fair investigation of crimes capable of leading to the efficient prosecution of alleged perpetrators, irrespective of their official status, and punishment of those responsible by a court of law.

However, more than three years after the start of unprecedented repression, there has been no progress in bringing perpetrators to justice. Impunity prevails, encouraging the de-facto authorities to continue and intensify their repressive policies and commit new crimes. The people of Belarus and those who support them deal with an accountability gap. Given the lack of an independent judicial system in Belarus and thus the absence of reasonable perspective of achieving justice domestically while the country is governed by the Lukashenka regime which is interested in shielding perpetrators and unjustly imprisoning and torturing victims, other legal avenues of obtaining redress and dispensing justice should be pursued, including the international ones.

Ensuring justice for victims of international crimes in Belarus in the national law enforcement systems of other States on the basis of the universal jurisdiction principle has been repeatedly recommended in reports and resolutions by inter-governmental organisations, including the OSCE, European Parliament, and the PACE. This avenue has been hailed as an effective instrument to end the impunity. Given that hundreds of thousands of Belarusians have fled to other countries, it could be expected that a large number of applications for investigation of crimes would be submitted to the police and prosecutors in European countries. Indeed, the first complaints were submitted already in autumn 2020. However, investigation of cases from Belarus in several European countries has stumbled and faces various legal, procedural, and institutional obstacles. A flow of new applications has not materialised. Concerned NGOs and the legal community seek ways to overcome these barriers.

In this context, iSANS decided to conduct research into the existing challenges to the effective application of the universal jurisdiction principle to cases of international crimes committed in Belarus, by studying the situation in four European states where applications from victims from Belarus have been

submitted for investigation, identify and analyse the main problems preventing effective application of the universal jurisdiction principle, and develop recommendations for relevant actors. The countries chosen for research were Lithuania, Poland, Germany, and the Czech Republic.

From April to November 2023, iSANS researchers studied relevant literature and cases of the application of the universal jurisdiction in respect of international crimes committed in other countries, applicable legislation of the four states in focus, and their experience – or lack thereof – in applying this principle, and engaged in communication with relevant actors. Questionnaires for interviews were developed and requests for interviews sent. iSANS researchers visited all four countries and interviewed, in some instances more than once, over twenty representatives of relevant actors engaged in documenting crimes, preparation of applications, submitting them to the law enforcement bodies, reviewing them and taking decision on whether to investigate or turn the application down, investigation, and developing policies and strategies in respect of delivering justice in the cases of crimes committed in Belarus and other foreign countries.

Our interlocutors included representatives of Belarusian, international and local human rights NGOs, attorneys acting on behalf of victims, prosecutors, including high-level representatives of Prosecutor General's Offices, officials in the Ministries of Justice and the Ministries of Foreign Affairs. We are immensely grateful to all of the persons interviewed in the course of the research and their organisations for their openness, constructive approach, and willingness to engage for the sake of the common cause of ending impunity in Belarus, ensuring justice for victims, and bringing perpetrators to account. Needless to say, some information was not easy to get hold of, and some representatives of official bodies agreed to meet for interviews in person but would refrain from written responses on substance. We chose not to identify in the report the names and institutions of people we interviewed for security reasons as well as due to confidentiality some of our interlocutors had to insist on. Nevertheless, we are sincerely thankful to them all.

Certain challenges of this kind are understandable, given that we have indeed discovered a number of stumbling blocks on the way to effective application of the universal jurisdiction principle, and talking about them is not always easy, given a huge demand for justice for Belarus. Some of these problems correspond to general challenges encountered in applying the universal jurisdiction globally, while some appear to be specific to the current situation with cases from Belarus. The overall conclusion may appear discouraging: three and half years after the start of the ongoing wave of brutal repression, not a single perpetrator of international crimes in Belarus has been punished, not a single case has been sent to court, no charges have been brought, only in one country under research,

Lithuania, a considerable amount of evidence has been collected, based on review of applications from over 50 victims and other documentation, investigation of one case has been opened in Poland in respect of Polish citizens, while no investigation has been opened in respect of victims of Belarusian nationality, and in Germany and the Czech Republic no investigations has been open at all. Given that several thousands of Belarusians have become victims of international crimes by the Lukashenka regime, the situation is clearly far from adequate and requires serious changes in laws, procedures, institutional arrangements, capacity building and education, resource allocation, communication with civil society, and most and foremost, political will to make these changes happen.

We have been able to identify and describe seven major problem areas and develop 12 concrete recommendations. Our hope is that they will be seriously taken into account by all relevant actors, including policy makers, and will serve as a basis for further discussion and concrete action. Belarusians, who collectively chose the European path for themselves and their country in 2020, fought for their future, their ideals, and their dreams consistently, peacefully, and courageously, risking their freedom, health and ultimately their lives for this cause, deserve nothing less than accountability in action.

We would like to express our gratitude to the Transition Promotion Programme of the Ministry of Foreign Affairs of the Czech Republic which provided support to this project.

I. Introduction to the principle of universal jurisdiction and the relevant debate

The fight against impunity has played a role in the development of international criminal law ever since the aftermath of the Second World War, when the argument that the most serious crimes of concern to the international community as a whole should not go unpunished was formulated.[1] The idea gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Geneva Conventions of 1949 are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions. The idea that in certain circumstances sovereignty of states could be limited for such heinous crimes was accepted as a general principle. Later on, other international conventions and, to some extent, rules of customary law[2] enlarged the universal jurisdiction's scope of application. Through years this was confirmed by a number of cases, starting with the Eichmann case in 1961, the Demanjuk case in 1985, and the Pinochet case in 1999, which emphasized that universal jurisdiction could lead to the trial of perpetrators of international crimes.[3]

Princeton Principles on Universal Jurisdiction define the scope of universal jurisdiction as follows: "When [standard grounds of jurisdiction] and other connections are absent, national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity that they affect the fundamental interests of the community as a whole. This is universal jurisdiction: it is jurisdiction based solely on the nature of the crime. National courts can exercise universal jurisdiction to prosecute and punish, and thereby deter, heinous acts recognized as serious crimes under international law".[4] Later, the AU-EU Expert Report on the Principle of Universal Jurisdiction defined the universal jurisdiction principle as "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

[1] T. Kluwen. Universal Jurisdiction in Absentia Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity? // Goettingen Journal of International Law. 2017. Vol. 8, No. 1. P.10.

[2] Generally it is firmly settled that universal jurisdiction is part of customary international law (C. Ryngaert. International Trends and the EU's Approach to Promoting Universal Jurisdiction Through Its External Relations. // Universal Jurisdiction and International Crimes: Constraints and Best Practices. Workshop paper. Policy Department for External Relations. Directorate General for External Policies of the European Union. September 2018. P. 7; F. Jeßberger. Towards 'Complementary Preparedness': Trends and Best Practices in Universal Criminal Jurisdiction in Europe // Universal Jurisdiction and International Crimes: Constraints and Best Practices. Workshop paper. Policy Department for External Relations. Directorate General for External Policies of the European Union. September 2018. P. 9.

[3] X. Philippe. The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh? // International Review of the Red Cross. 2006. Vol. 88, N. 862. P. 378

[4] The Princeton Principles on Universal Jurisdiction (Princeton Principles) (2001), p. 23

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".[5] The principle of universal jurisdiction derogates from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. As Professor of law Xavier Philippe points out, it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.[6] When states prosecute presumed perpetrators of core crimes, they can be considered to act as 'agents of the international community'.[7] In doing so, they provide accountability for international crimes and send a signal that (future) atrocities will not go unpunished. This serves as a prevention and deterrence function of universal jurisdiction.[8] Today the principle of universal jurisdiction is widely accepted by states owing to the specific nature of international crimes. Understanding of its important role in the pursuit of accountability and preservation of humanity's fundamental values is shared even by member states of the Association of Southeast Asian Nations (ASEAN) which traditionally raise concerns of universal jurisdiction's scope and implementation during discussions before various United Nation bodies.[9]

The states and the academic community agree that the definition of the universal jurisdiction is very broad and leaves, as Professor of law Luc Reydams notes, "so much undefined that one must wonder how it can satisfy the requirement of legal certainty in criminal law".[10] To address the problem, scholars, NGOs and intergovernmental organizations have devoted enormous amounts of time and resources to 'study and clarify' the universal jurisdiction. A number of reports on the nature and scope of the universal jurisdiction have been produced and principles adopted, including the following:

- Amnesty International's 14 Principles on the Effective Exercise of Universal Jurisdiction (1999);
- the International Law Association's Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (2000);

[5] AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction Report. African Union. Addis Ababa,15 April, 2009. Para.7 (https://reliefweb.int/report/sudan/au-eu-technical-ad-hoc-expert-group-principle-universal-jurisdiction-report)

[6] X. Philippe. Op.cit. P. 377

[7] Attorney General v. Adolf Eichmann. District Court of Jerusalem. Judgment of 11.12.1961. Para 12 (https://www.legal-tools.org/doc/aceae7/pdf)

[8] C. Ryngaert. Op. cit. P. 7.

[9] Ch. W. Ling. Universal Jurisdiction Through the Eyes of ASEAN States: Rule of Law Concerns and the Need for Inclusive and Engaged Discussions. TOAEP Policy Brief Series. 2022. N. 141. (https://www.toaep.org/pbs-pdf/141-cheah/)

[10] L. Reydams. The Application of Universal Jurisdiction in the Fight Against Impunity. Policy Department, Directorate-General for External Policies. European Union, 2016. P.6.

- the Princeton Principles on Universal Jurisdiction (2001);
- Africa Legal Aid's Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective (2002);
- the Institute of International Law's Resolution Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (2005);
- the AU-EU Expert Report on the Principle of Universal Jurisdiction (2009);
- and the Madrid-Buenos Aires Principles of Universal Jurisdiction (2015). [11]

In 2009, at the request of the United Republic of Tanzania on behalf of the Group of African States, the item entitled "The scope and application of the principle of universal jurisdiction" was included in the agenda of the sixty-fourth session of the UN General Assembly[12] to give states a floor to address the ambiguities.[13] A summary of the first meeting shows that states agree on little else other than that universal jurisdiction "exists" and that is "important".[14] In 2017, the General Assembly decided to establish a working group of the Sixth Committee to facilitate comprehensive discussions of the topic.[15] The records of subsequent meetings indicate that little progress has been made since. By and large, the debate in the Sixth Committee has stalled, and similar arguments are repeated over and over again. States still disagree about the most fundamental issues some of which will be referred to below.

In 2018, the UN International Law Commission has decided to add the topic of universal criminal jurisdiction to its long-term programme of work[16] – an important step which demonstrates that the discussions on universal jurisdiction enter a new phase, that can be described as more legal that political.

[11] Ibid.

[12] Request for the Inclusion of an Additional Item in the Agenda of the Sixty-third Session. The Scope and Application of the Principle of Universal Jurisdiction. A/63/237/REV.1 OF 23 July 2009. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/421/25/PDF/N0942125.pdf?OpenElement

[13] The Assembly has had the item on its agenda annually since then. See, for example, Sixth Committee (Legal) — 78th session. The Scope and Application of the Principle of Universal Jurisdiction (Agenda item 84). https://www.un.org/en/ga/sixth/78/universal_jurisdiction.shtml

[14] L. Reydams. Op. cit.. P.7.

[15] The Scope and Application of the Principle of Universal Jurisdiction, UN Doc. A/RES/72/120, 18 December 2017 (https://www.legal-tools.org/doc/0ef888/)

[16] Report of the International Law Commission, Seventieth Session, UN Doc. A/73/10, 10 August 2018, p. 8 (https://www.legal-tools. org/doc/jwtgoz/)

II. Comments on some key issues, raised by states

Which crimes are subject to universal jurisdiction?

The question of which crimes are subject to universal jurisdiction under international law is not yet settled definitely. Scholars seem to agree that at least crimes against humanity, genocide and war crimes (in international as well as non-international armed conflicts[17]) are accepted as such. Legal scholar Tim Kluwen even refers to the "consensus" in this regard.[18] Professor of law Florian Jeßberger lists the same three crimes referring to their nature,[19] while Reeves adds that not only the nature of the crime, but the crime's effect on international interests, or the crime's common recognition, is necessary both to demonstrate a legitimate juridical concern as a matter of universal jurisdiction and to determine the proper scope of that concern.[20] A Korean legal scholar Jiewuh Song includes piracy into the list and argues that what unites universal jurisdiction over piracy and those atrocities recognised in international law is that such jurisdiction serves to mitigate enforcement gaps. Though piracy is not an atrocity, universal jurisdiction is appropriate, in Song's opinion, since traditional jurisdictional grounds leave the international legal prohibition on piracy inadequately enforced. Universal jurisdiction increases the chances of capturing pirates, which then increases compliance with the law. Similarly, legally recognised atrocities are inadequately addressed by standard jurisdictional principles, especially since they are frequently conducted by the state, and, thus, universal jurisdiction is justified with respect to these crimes as a method of filling an enforcement gap.[21]

Some, including legal scholar and an employee of the Ministry of Foreign Affairs of the Czech Republic Pavel Caban, consider that universal jurisdiction over the crime of torture should be dealt with within the framework of the above three categories of crimes under international law or within the framework of the relevant treaty regime.[22] However, bearing in mind the nature of the crime of torture, which is directed against the most fundamental interests of the international community as a whole, it can be included in the group of crimes subject to universal jurisdiction as a stand-alone crime rather than as a part of crimes against humanity, genocide and war crimes. This understanding is

[17] P. Caban. Universal Jurisdiction Under Customary International Law, International Conventions and Criminal Law of the Czech Republic: Comments // Czech Yearbook of Public & Private International Law. 2013. Vol. 4. Pp. 173-200. P. 176.

[18] T. Kluwen. Op. cit. P. 11.

[19] F. Jeßberger. Op. cit. P. 9.

[20] A. R. Reeves. Liability to International Prosecution: The Nature of Universal Jurisdiction // The European Journal of International Law. 2017. Vol. 28, N. 4. P. 1054.

[21] J. Song. Pirates and Torturers: Universal Jurisdiction as Enforcement Gap-Filling // Journal of Political Philosophy. 2015. Vol.23, N. 4. Pp. 481–484.

[22] P. Caban. Op. cit. P. 176.

shared by some States, which classify torture and other cruel and inhuman treatment, as well as enforced disappearances as stand-alone crimes directly falling under universal jurisdiction, thus underlining they should be persecuted even outside of the state's obligations under the treaty (if any).

There is a discussion on whether universal jurisdiction can be exercised over the crime of aggression – it seems that this crime, due to its extreme political sensitivity, deserves special treatment, and it is not usually included within the scope of universal jurisdiction. [23]

Position of the States on the scope of application of the universal jurisdiction often differs drastically from that of the academics. Notwithstanding the long-term efforts made by the UN Sixth Committee to elaborate a joint understanding in this regard among the states, their opinions on the matter demonstrate no consensus can be reached in the near future.[24] In 2016, the chairperson of the UN Sixth Committee's working group on universal jurisdiction prepared an informal working paper to boost the discussion which set out a "preliminary list" of crimes that "may" attract universal jurisdiction. This broad list included apartheid, corruption, crimes against humanity, crimes against peace/crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organised crime, and war crimes.[25] The records of subsequent meetings indicate that move did not bear any fruit. Some delegations (Thailand, India, Burkina Faso) claim piracy on the high seas was only crime in which claims of universal jurisdiction is undisputed, some advocate against an unwarranted expansion of the crimes covered under universal jurisdiction (China), point to its inconsistency and the necessity to invoke it with caution (Cameroon) and to abide by international law principles such as sovereign equality, non-interference and immunity (China, Russia). Referring endlessly to the absence of a common understanding of this principle among States and necessity to establish precise, universally recognised consensus on its scope and application, delegations seem to be not ready to start actually developing them.[26]

Interestingly, on the national level the situation does not look so hopeless. Crimes covered by the universal jurisdiction vary from state to state but tend to include a broad range of offenses, as in Australia or Spain, where violence against

[23] P. Caban. Op. cit. P.177.

[24] The Sixth Committee has been debating the topic annually since 2009 (Annex.1. Universal Criminal Jurisdiction. Report of the International Law Commission. Seventieth session (30 April–1 June and 2 July–10 August 2018) (General Assembly Official Records Seventy-third Session Supplement N. 10 (A/73/10)). P.313. https://legal.un.org/ilc/reports/2018/english/annex_a.pdf

[25] The Scope and Application of the Principle of Universal Jurisdiction. Informal Working Paper prepared by the Chairperson for discussion in the Working Group, 4 November 2016. (https://www.un.org/en/ga/sixth/75/universal_jurisdiction/wg_uj_informal_wp.pdf).

[26] Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Seventy-seventh session, 12th meeting (am). Meetings coverage. GA/L/3662, 12 October 2022 (https://press.un.org/en/2022/gal3662.doc.htm).

women, organised crime, or even corruption by public officials give rise to the universal jurisdiction principle. Some states have rather narrowly confined the application of universal jurisdiction to certain crimes of international concern, such as crimes against humanity, genocide, and war crimes. Other countries have included stand-alone crimes, such as torture and enforced disappearance.[27]

Despite discussions about its legitimacy, universal jurisdiction has been extended to the crime of aggression by around half of the sixteen States that have implemented the Aggression Amendments to the ICC Statute into domestic law. In addition, there are around fourteen States which seem to have established universal jurisdiction over the substantively related crime of "aggressive war" or "incitement to aggressive war". These are Armenia, Azerbaijan, Belarus, East-Timor, Hungary, Kazakhstan, Latvia, Lithuania, Moldova, Poland, Portugal, Tajikistan, Uzbekistan and Vietnam.[28] Universal jurisdiction is thus making its way into the national laws and practice.

The obligation of states to investigate and prosecute

Many commentators and human rights advocates argue that that mandatory obligation applies to all *jus cogens* crimes, and thus all universal jurisdiction offenses. Associate Professor of Philosophy Jovana Davidovic contends that the failure to prosecute violations of these norms undermines the international rule of law, and this threat generates special standing for the international prosecution of *jus cogens* crimes.[29] A more limited version of the mandatory view focuses on genocide, torture, and certain war crimes, based on the theory that relevant treaties specifically mandate prosecution for these offenses.[30] Treaties and conventions impose a duty on states to investigate and prosecute suspects of serious international crimes or extradite them to other state parties willing to do so, namely the so-called *aut dedere aut judicare* principle. Accordingly, a state that has ratified or acceded to such a treaty must either prosecute or extradite. In this sense, researchers Howard Varney and Katarzyna Zduńczyk note that the jurisdiction that arises from these obligations is not truly universal,

[27] See, for example, regarding torture Section 7 (1) of the Criminal Code of the Czech Republic (2009, amended 2011), Article 698-2 of the French procedural criminal code, § 312a of the Criminal Code of the Republic of Austria (1974, amended 2019); regarding enforced disappearance – Article 689-13 of the French procedural criminal code, § 312b of the Criminal Code of the Republic of Austria, Article 185bis (2) of the Swiss Criminal Code of 21 December 1937 (RS 311.0).

[28] A. Hartig. Domestic Criminal Courts as Gap-Fillers?: Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine. Völkerrechtsblog, 12.04.2022 (https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/).

[29] J. Davidovic. Universal Jurisdiction and International Criminal Law. In: The New Philosophy of Criminal Law. C. Flanders and Z. Hoskins (eds). 2016. Pp. 123–127.

[30] E. Kontorovich. The Inefficiency of Universal Jurisdiction // University of Illinois Law Review. 2008. N. 1. Pp. 405-406.

but, rather, confined to a jurisdictional regime consisting of the state parties to the treaty.[31]

Because of the overwhelming state practice inconsistent with the mandatory view, some commentators deny the existence of a duty to prosecute[32] and rather talk about an entitlement to assert universal jurisdiction over certain crimes.[33] States are obviously not ready to realise a role of a "global enforcer", where they must prevent and punish core international crimes committed anywhere in the world, and prefer a limited "no safe haven" approach, according to which states should not be a refuge for participants in these crimes. In recent years, this principle has made important inroads in national legislation and practice and becomes louder in national[34] and international rhetoric.[35]

The problem of the exercise of universal jurisdiction in absentia

Another contentious issue is the question whether the prosecuting state may exercise universal jurisdiction only when the alleged perpetrator is present in or becomes a resident or citizen of the prosecuting state (so called conditional universal jurisdiction) or whether there does not have to exist any such a link with the prosecuting state (so called "absolute" or "pure" universal jurisdiction). It is generally accepted that the legal basis for this practice should be sought in international customary law, since no conventional law either permitting or prohibiting States asserting universal jurisdiction *in absentia* seems to exist. On the one hand, state practice appears ambivalent; many states have legislation that does not allow for prosecuting authorities to assert absolute universal jurisdiction,[36] while the laws of other States do allow it[37] – or, in the case of South Africa, even oblige it under certain conditions.

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[31] H. Varney, K. Zduńczyk. Advancing Global Accountability. The Role of Universal Jurisdiction in Prosecuting International Crimes. Research report. International Center for Transitional Justice, 2020. P. 9.

[32] E. Kontorovich. Op. cit. Pp. 405-406.

[33] H. Varney, K. Zduńczyk. Op. cit. P. 11.

[34] According to the Government Note, it is UK Government policy that the United Kingdom should not provide a safe haven for war criminals or those who commit other serious violations of international law (Note on the investigation and prosecution of crimes of universal jurisdiction. Government of the United Kingdom. 2018, para. 1. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf

[35] L. Reydams. Op. cit. P. 22.

[36] According to Brazil, the accused should be necessarily present on the territory of the forum State (Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op. cit.).

[37] El Salvador stressed that application of the universal jurisdiction principle requires no presence of the accused on Salvadoran territory. All that is necessary is that the conduct in question must have affected assets or property protected by international law and that such conduct implies a serious impact on universally recognized human rights (Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op. cit.).

The critics of "absolute" universal jurisdiction are of the opinion that this broader concept is either illegal, or may easily lead to the improper infringement of the sovereignty of foreign states, to undesirable competition between jurisdictions of different states ("judicial chaos") and to political misuse and (politically biased) selectivity.[38]

However, various authors agree that the exercise of at least some initial procedural (investigative) steps under universal jurisdiction in the absence of the person sought or accused is possible under international law.[39] The presence of the accused on the territory of the prosecuting state from the very beginning of the investigation is thus only a national procedural condition for the exercise of universal jurisdiction, required not as a reflection of an international legal obligation, but adopted voluntarily only for practical reasons – these reasons being political concerns (it may be politically inconvenient to have such a wide jurisdiction because it is not conducive to international relations) and practical considerations concerning the difficulty in obtaining the evidence and the intention not to overburden national judicial system. The goal of an investigation *in absentia* (gathering information, receiving testimonies) may be to collect evidence as a form of anticipated legal assistance for the benefit of the state on whose territory the alleged offender is present, or in light of an anticipated arrival of a suspect on the prosecuting state's territory in the future, or (if it is accepted that investigation *in absentia* may also include coercive acts such as issuance of an arrest warrant or a request of extradition) with a view to preparing an extradition request to the state on whose territory the alleged offender is residing or present.[40]

Germany can be an example of effective implementation of "absolute universal jurisdiction". Here it is combined with quite wide prosecutorial discretion concerning the exercise of universal jurisdiction: a prosecutor is entitled to dismiss the case if the offence took place outside German territory, if the alleged offender is not or is not expected to be resident in Germany, if the offence is being prosecuted by an international court or by a state (a) on whose territory the offence was committed, (b) a citizen of which is either suspected of the offence, or (c) a citizen of which suffered injury as a result of the offence. The prosecutor is also authorised to dismiss the case after the formal proceedings have begun if continuing would be seriously detrimental to Germany or to another important public interest of overriding importance.[41] Thanks to the legislative possibility to commence preliminary investigation *in absentia*, several structural investigations were initiated in Germany. This led, over years, to the

[38] P. Caban. Op. cit. P. 179.

[39] P. Caban. Op. cit. P. 180; X. Philippe. Op.cit. P. 380.

[40] P. Caban. Op.cit. P. 181.

[41] P. Caban. Op.cit. P. 178.

identification of several concrete perpetrators of core international crimes which were later tried.

This promising example does not however influence opponents of the universal jurisdiction. As the representative of Burkina Faso quoted, citing the President of the International Court of Justice, Judge Gilbert Guillaume, in the case between the Democratic Republic of Congo and Belgium[42], "International law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*."[43]

Immunities

The issue of immunities is a complex one, given the interplay between the law of immunities and the international criminal law, which has generated vigorous debate among scholars and practitioners.

Immunities are of two types. The first is personal immunity, or immunity *ratione personae*. This is an immunity granted to certain officials because of the office they currently hold, rather than in relation to the act they have committed. States usually recognise that the head of state, the head of government, ambassadors, and the foreign and defence ministers are protected by personal immunity from prosecution by foreign authorities for criminal offence committed in performing their official functions. Personal immunities cease with the cessation of the post.

The second one is functional immunity, or immunity *ratione materiae*. This is an immunity granted to persons who perform certain official functions of state. Many States include this principle in their national laws. However, once the accused leave their offices, they are immediately liable to be prosecuted for crimes committed before or after their term in office, or for crimes committed in a personal capacity whilst in office, not related to performing their official functions.

In the last decades, a consensus gradually emerged that functional immunity[44] does not preclude prosecution of serious international crimes. This was confirmed by the Nuremberg Tribunal Judgment and developed further in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. It has since been accepted by the United Nations General Assembly, the International Law Commission, and in decisions by national courts, like the

[42] Case concerning the arrest warrant of11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, Judgment of 14 February 2002.

[43] Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op. cit.

[44] A person who, in performing an act of state, commits a criminal offence is immune from prosecution even after the person ceases to perform acts of state.

Supreme Court of Israel in the Eichmann case[45] and the Pinochet decision.[46] Moreover, in 2017, the International Law Commission adopted Draft Article 7, in the context of its work on the immunity of state officials from foreign criminal jurisdiction, which confirms that functional immunity does not apply with respect to genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.[47]

There is a debate over personal immunities of high state officials from prosecution before the national courts of foreign states.[48] According to the Princeton Principles on Universal Jurisdiction, "sitting heads of State, accredited diplomats, and other officials cannot be prosecuted while in office for acts committed in their official capacities."[49] This way, the personal immunity have to be observed in the case of prosecutions for crimes under international law by the national courts,[50] meaning that while a person continues to hold a high-level official position, he or she cannot be prosecuted by a national court of a foreign state. The most famous example here is probably the International Court of Justice's 2002 ruling, that a Belgian arrest warrant grounded in universal jurisdiction over the Democratic Republic of the Congo's acting Minister of Foreign Affairs, Abdoulaye Yerodia Ndombasi, contravened the international law of immunity and was therefore void.[51]

The Court, however, emphasised that "the immunity from jurisdiction enjoyed by incumbent [officials] does not mean that they enjoy impunity in respect of crimes they might have committed" (para. 60 of the judgment). Immunity thus does not absolve the defendant of international criminal liability in absolute terms, but merely shields him from prosecution in certain circumstances such as from prosecution by the national courts. And that shield is neither absolute nor an individual right, but rests in the hands of the defendant's home State. As the Court observed, the defendant's State could itself prosecute or waive the immunity. The Court further explained that the immunity would not stand in the way of a prosecution by an international tribunal with jurisdiction over the crime. The Court also indicated that the immunity shield is weaker once the accused

[45] H. Varney, K. Zduńczyk. Op. cit. P. 22.

[46] Opinions of the Lords of Appeal for Judgement in the Cause *in re Pinochet* (Pinochet I). Judgment of 25 November 1998 (https://internationalcrimesdatabase.org/Case/855/Pinochet/)

[47] Draft Articles on Immunity from Foreign Criminal Jurisdiction of State Officials Provisionally Adopted by the Commission, UN Doc. A/CN.4/722, 12 June 2018, Article 7 (https://digitallibrary.un.org/record/1636856?ln=ru).

[48] The representative of the Russian Federation, for instance, claimed that Western courts ignored the immunity of State officials under the pretext of exercising universal jurisdiction, and thus abused it for political purposes (Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op. cit.).

[49] Princeton Principles on Universal Jurisdiction, 2001, p. 49 (https://lapa.princeton.edu/hosteddocs/unive_jur.pdf).

[50] P. Caban. Op. cit. P. 185.

[51] Case concerning the arrest warrant of11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, Judgment of 14 February 2002..

leaves office, consequently watering down an objection to the exercise of universal jurisdiction.[52]

To summarise, the current approach provides for prosecution for international crimes of high-level officials holding their posts only by international tribunals but once they leave the office, they can be also prosecuted by national courts of foreign States in the framework of the universal jurisdiction.

The abuse of political power

Opponents of universal jurisdiction have claimed that it has been used as a method to advance political agendas or that it has been used as a tool to unfairly target states of the Global South. During a meeting between the African Union (AU) and the European Union (EU) organised to discuss the issue of the exercise of universal jurisdiction by European states in 2009, the African side underlined abusive applications of the principle which could endanger international law.[53] African states take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them. The African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states.[54] In AU view, indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states which evokes memories of colonialism.[55]

Not only African states voice their concerns. At the UN GA Seventy-seventh session, Cuba's representative expressed concern over "the undue use of the universal jurisdiction in unilateral, selective and politically motivated exercise of jurisdiction of the courts of developed countries against nationals or legal persons of developing countries",[56] and the representative of China stressed that the principle must not be abused and that, in exercising universal jurisdiction, States must abide by international-law principles such as sovereign equality, non-interference and immunity.[57]

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[52] A. J. Colangelo. Universal Jurisdiction as an International "False Conflict" of Laws // Michigan Journal of International Law. 2009. Vol. 30. P. 916.

[53] AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction Report. African Union. Addis Ababa,15 April, 2009. (https://reliefweb.int/report/sudan/au-eu-technical-ad-hoc-expert-group-principle-universal-jurisdiction-report). Para. 2.

[54] Ibid. Para. 34.

[55] Ibid. Para. 37.

[56] Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op.cit.).

[57] Ibid.

The neo-colonialist argument is familiar from the critiques of the ICC, Tim Kluwen notes. Indeed, it is often Western (-European) States that assert (absolute) universal jurisdiction. The accused, on the other hand, are usually nationals of non-Western States. This may be explained by reference to the more developed judicial system in Western States, enabling them to pursue complicated cases such as the prosecution of international crimes. Furthermore, developing States are often dependent on Western aid and hence not in the position to initiate proceedings against nationals of a Western State.[58]

While that was the case for many years previously, Florian Jeßberger refers to newly emerging global trends in the field which can potentially alter the situation: regionalisation of universal jurisdiction and its reversion.[59] Regionalisation was demonstrated, inter alia, in the prosecution of former Chadian dictator Hissène Habré before the Extraordinary African Chambers in the Senegal "on behalf of Africa" and on the basis of the universal jurisdiction. This is a welcome development not only because local (or, in this case, regional) justice is "better justice" than universal justice delivered by "third states" far removed from the affected community, but also a tool to address concerns of 'legal imperialism'.

Reversion of universal jurisdiction on European perpetrators is demonstrated, inter alia, by the efforts of Argentinean prosecutors investigating crimes committed under the Franco regime in Spain and by the growing attention drawn to European companies' involvement in international crimes.[60] Both these trends have the potential to address (and ease) the perception of universal jurisdiction as a post-colonial tool of European justice systems to deal with crimes allegedly committed in the Global South.[61]

As for the politization of the universal jurisdiction, the Torture Docket case considered by the Constitutional Court of South Africa is significant here as it demonstrates that political decisions not to investigate international crimes for diplomatic, comity, or policy reasons are subject to judicial scrutiny.[62] In this case, brought on behalf of victims of torture in Zimbabwe, it was argued by the South African Police Services that political concerns (potential damage to relations between Zimbabwe and South Africa) justified not proceeding with an

[58] T. Kluwen. Op. cit. P. 34.

[59] F. Jeßberger. Op. cit. P. 9.

[60] A prominent example here is confirmation in November 2022 by the Swedish Supreme Court of Swiss citizen Alex Schneiter's indictment for complicity in war crimes in Sudan in 1999-2003. As the former head of exploration of the Swedish oil company Lundin Energy, Schneiter was accused of having paid the Sudanese army and non-state armed groups to forcibly displace the local population from oil-rich areas, in order to secure the company's operations (Universal Jurisdiction Annual Review 2023. Trial International. Geneva, 2023. P. 11).

[61] F. Jeßberger.. P. 9

[62] H. Varney, K. Zduńczyk. Op. cit. P. 23

investigation. The Constitutional Court reasoned that such a justification undermines the principle of accountability for international crimes, especially as political tensions are often unavoidable. 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."[63]

A subsidiary nature of the universal jurisdiction

Quite a number of remarks of state delegations in the UN underlined a subsidiary nature of the universal jurisdiction. For example, Poland commented that universal jurisdiction raises a very delicate matter of reconciling the competence of each state to decide on its jurisdiction and the obligation to respect jurisdiction of other states.[64] Pakistan's delegate said that universal jurisdiction was not a primary form of jurisdiction and should be only exercised in exceptional circumstances and subordinate to national and territorial jurisdiction. She also noted that the universal jurisdiction cannot be exercised in isolation from other principles of international law, such as sovereignty and territorial integrity and should not be used as a license with which to undermine state sovereignty.[65] The representative of Mexico underlined "a fundamental distinction between universal jurisdiction and extraterritorial types of jurisdictions, traditionally based on criminal legislation of countries." She noted that national courts must keep a prerogative to exercise their jurisdiction, meaning that the universal jurisdiction should only be applied when the territorial State is unwilling or lacks capacity to do so, and when the International Criminal Court does not have a jurisdiction to hear the case.[66]

It is not quite clear why states keep focusing on this, bearing in mind that there is no any debate on the issue between the states as well as within academic circles where there is a general agreement that the jurisdiction of the state intending to prosecute on the basis of universal jurisdiction should give way to the jurisdiction of the state where the alleged crime was committed, or the state of nationality of the alleged perpetrator or the state of the nationality of the victims, and should be activated only as an alternate mechanism, if the states with the primary jurisdiction are unable or unwilling to genuinely investigate and prosecute the crime.[67] Professor of Law Anthony J. Colangelo even suggests there can be no conflict between state sovereignty and universal jurisdiction,

[63] Ibid.

[64] P. Saganek. Statement. Republic of Poland Permanent Mission to the United Nations. Eighty-six Session of the General Assembly "The Scope and Application of the Principle of Universal Jurisdiction. New York, October 19, 2015. P. 3.

[65] Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op.cit.

[66] Ibid.

[67] P. Caban. Op. cit. P. 183.

"since the law being applied is the same everywhere," as the state that exercises universal jurisdiction enforces shared normative and legal commitments of all. And, as the universal jurisdiction state is enforcing an international norm that would be applied anyway as it governs within all other states, including states with national jurisdiction, it can claim no sovereign interference. That is, they have no "sovereignty claim" under international law that, for instance, genocide, torture, or war crimes are legal within their borders. Hence, to put it in conflict of laws terms, this is a "false conflict" both because *(i)* the universal jurisdiction state applies a norm that by force of international law applies within the jurisdictions of all other interested states, and *(ii)* no other state can claim a legitimate sovereign interest in the choice of a domestic law contrary to that norm.[68]

[68] A. J. Colangelo. Op. cit. P. 883.

III. On states' practices

Organic growth of the application of the universal jurisdiction

While five years ago the common narrative was that the application of the universal jurisdiction is in decline, its results are meagre at best and far from 'universal', and states that were at the forefront of its active support have retreated one by one,[69] empirical data shows an increase of a number of cases prosecuted under universal jurisdiction, reflecting institution building and improved legislation, institutional learning, as well as better opportunities to successfully investigate and prosecute war crimes in Europe.[70] According to Eurojust, the number of newly opened cases on core international crimes in Europe increased by 44% between 2016 and 2021.[71] Convictions have been obtained in relation to situations as diverse as Syria, Afghanistan, Iran, Rwanda and Liberia, sometimes for crimes dating back 40 years. Many other cases are still pending, and several trials or appeal hearings have taken or will take place in Finland, France, Germany and Sweden in 2023 for crimes allegedly committed in Rwanda, Sierra Leone, Syria and Sudan.[72]

Today, no one denies universal jurisdiction can be effectively used to combat the international crime. Various studies demonstrate that a number of investigations and prosecutions for the crime of genocide, crimes against humanity and war crimes is increasing every year. 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. In a 2020 report, TRIAL International recorded 207 named suspects in universal jurisdiction cases around the world, which amounted to a 40 percent increase between 2018 and 2019. Most charges instituted were crimes against humanity (146), followed by war crimes (141), torture (92) and genocide (21).[73] Compared to the much lower number of verdicts delivered by the ICC during the same time period, these numbers are of remarkable significance.[74]

These growing numbers are largely due to the collaboration between prosecuting authorities and specialised NGOs, whose investigative efforts and support for victims have been critical. In addition, specialised prosecutors have been deepening their expertise on the specificities of investigating international

[69] L. Reydams. Op. cit. P. 6.

[70] F. Jeßberger. Op. cit. P. 9.

[71] Universal Jurisdiction Annual Review 2023. Op. cit. P. 12.

[72] At a Glance: Universal Jurisdiction in EU Member States. Eurojust factsheet. The Hague, Netherlands, 2023. P. 4.

[73] H. Varney, K. Zduńczyk. Op. cit. P. 35.

[74] F. Jeßberger. Op. cit. P. 9.

crimes. In their turn, courts have over the years resolved a number of crucial legal questions on a case-by-case basis.[75]

Nevertheless, some countries are trailing behind in the context of the expanding application of the universal jurisdiction. The vast majority of states have never exercised universal jurisdiction despite having included it in their legal framework. Others, including many European states, have yet to pass appropriate comprehensive legislation. Some countries are faced with logistical problems: if investigations take place, courts might not be in a position to efficiently handle the growing caseload. Resources are an issue for many states that have instituted specialised units: some investigations have been going on for many years, even in instances where the suspect is in pretrial detention.

Surge of the universal jurisdiction in response to international crimes committed in Ukraine

According to the leading international NGO working in the field of universal jurisdiction, Trial International, the year 2022 was marked by an unprecedented mobilisation of legal and judicial resources to respond to the international crimes committed in Ukraine.[76] In parallel with the opening of proceedings before the International Criminal Court, the International Court of Justice and the European Court of Human Rights, as well as setting up of an Independent International Commission of Inquiry by the UN Human Rights Council, numerous countries launched probes at the national level into international crimes committed in Ukraine. Attention to atrocities in Ukraine is not limited to the continent on which the country is located; investigation within the frame of the universal jurisdiction was launched in Canada, which can be explained, among other, by the significant number of victims and witnesses of crimes who arrived there. “Structural investigations”, targeting not specific persons or incidents, but meant to collect evidence in relation to the crimes committed during the armed conflict, in order to enable investigators to pro-actively build cases for the benefit of future criminal proceedings, were launched in several countries, including Poland, Lithuania, Estonia, Latvia, Slovakia, and Romania.

As discussed in the previous chapter, over the past decade, some countries in Europe have built a strong expertise in investigating international crimes, in particular through structural investigations conducted by specialised investigative units. In particular, German, French and Swedish specialised prosecutors have been carrying out such investigations into crimes committed during the Syrian armed conflict. The convictions in 2021 and 2022 of Syrian officials for crimes against humanity were made possible thanks to a structural

[75] Universal Jurisdiction Annual Review 2023. Op. cit. P. 12.

[76] Ibid. P. 10.

investigation opened in Germany ten years earlier. The structural investigations on Ukraine started in 2022 can capitalise on these experiences.

Political will to prosecute outrageous crimes in Ukraine was demonstrated by countries which have little or no experience in investigating international crimes. With the massive influx of Ukrainian refugees, prosecutors of Poland, Romania, Slovakia and Latvia, among others, began collecting testimonies in order to preserve evidence for future cases. In the opinion of experts from Trial International, the mobilisation of such an important number of actors bears a risk of duplication, overdocumentation and re-traumatisation of victims, in particular taking into account varying levels of expertise of investigators.[77] A joint investigation team has thus been set up through Eurojust with seven European countries and the ICC to coordinate and enhance their efforts.

The construction of solid evidentiary foundations from the very beginning of the armed conflict is encouraging, considering that one of the major challenges to the effective exercise of universal jurisdiction is the passage of time, as key witnesses become hard to locate, forget about the events or pass away, and documentary and other evidence are lost or destroyed. In the first ten months of the armed conflict, no international criminal suspects have been arrested outside of Russia and Ukraine. Perpetrators may, however, eventually travel or settle down elsewhere. The ongoing collection and preservation of evidence will then be instrumental to their prosecution. The same notion applies to prospects of getting hold of perpetrators of crimes against humanity in Belarus. As universal jurisdiction cases demonstrate, justice may be achieved decades after the crime was committed.

A massive uptake of universal jurisdiction has happened to respond to the atrocities committed in Ukraine, prompting many countries to invest additional resources. Recent advancement must, however, go beyond temporary momentum. As indicated in Trial International's report, it should consolidate into longer term strategic commitment, through sustained human, financial and material resources for international crimes prosecutors, regardless of the attention of the international community to a specific situation.[78]

The Harausky case incident in Switzerland

While this study focuses on the investigation of cases from Belarus under the universal jurisdiction principle in four countries where applications have been lodged by victims of the persecution by the Lukashenka regime after the beginning of mass protests in response to the falsification of the results of the

[77] Ibid. P. 10.

[78] Ibid. P. 10.

presidential election in August 2020, it is worth starting the discussion by looking at a case originating from an earlier period of repression in Belarus which was investigated and tried in a country initially not included in the scope of this report. The first case concerning the situation in Belarus that reached a national court of another country within the framework of the universal jurisdiction was the case of Yury Harausky in Switzerland.

A modern definition of international crimes was introduced into the Swiss Criminal Code (SCC) in 2001 in order to incorporate the Rome Statute into the current legislation. Today, Swiss authorities have universal jurisdiction to prosecute the following crimes: genocide, crimes against humanity, war crimes, and enforced disappearance (as a stand-alone crime), when they are committed abroad by a foreigner against foreign nationals[79]. Crimes against humanity were introduced into the SCC on 1 January 2011. The definition of this crime is based on Article 7 of the Rome Statute. In the SCC, the existence of a state or organisational policy is not required for the commission of a widespread or systematic attack; however, it can be used as contextual information to demonstrate its systematic nature. Article 264a of the SCC provides a list of prohibited acts, which are equivalent to the list of underlying crimes listed in Article 7 of the Rome Statute. However, the definitions of some crimes differ on certain elements. The crime of enforced disappearance was introduced into the SCC as an independent offense in January 2017. Before the entry into force of this provision, the crime of enforced disappearance could only be prosecuted as a crime against humanity. As of 2017, the Swiss authorities have universal jurisdiction to prosecute any person who has committed this offense abroad according to Article 185bis (2) of the SCC. Article 185bis of the SCC reproduces the definition as formulated for enforced disappearance as a crime against humanity in Article 264a(1)(e) of the SCC, which follows Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

The provision requires four elements for the crime of enforced disappearance:

1) the deprivation of liberty of the person;
2) the authorisation or acquiescence of the State or a political organization;
3) any refusal of information concerning the fate or whereabouts of the person; and
4) the perpetrator's intention to remove the person from the protection of the law.

[79] Universal Jurisdiction. Law and Practice in Switzerland. Briefing paper. Open Society Justice Initiative, Trial. New York, 2019. P. 6.

The provision punishes both the person who deprives the victim of her or his liberty and the person who refuses to provide information about the victim's whereabouts. An important difference between the Enforced Disappearance Convention and the SCC is that, under the SCC, a State does not necessarily have to be involved as the authorisation or acquiescence of a political organisation suffices. Under the SCC, "political organisation" refers to any non-state entity that exercises de facto power over or controls a portion of a given territory. Another difference is that the refusal to provide information on the fate of the disappeared person may only be punished if such conduct violates a legal obligation of the perpetrator to provide information.

The trial of Yury Harausky, an ex-fighter of the Belarusian SOBR (special rapid response unit of the Ministry of the Interior of Belarus), which was called a "death squad" in independent Belarusian media, was held in September 2023 in the canton of St. Gallen, Switzerland. This was the first case in Swiss history of a trial of a foreign national accused of enforced disappearance.

Harausky fled Belarus to Switzerland in 2018 where he applied for asylum. A year later, in an interview with Deutsche Welle he stated his involvement in the abduction and murder by the SOBR of the leading opposition figures in 1999 – Yury Zakharenko, Viktar Hanchar, and Anatoly Krasousky. The official investigation in Belarus into the abduction and murder was not effective. In 2004, PACE special rapporteur Christos Pourgourides concluded that Zakharenko, Hanchar and Krasousky were abducted by a special squad of security forces under the command of Lieutenant Colonel Dmitry Pavlichenka, and all this happened with the knowledge of the country's leadership. The PACE report, however, did not contribute to the disclosure of these crimes in Belarus. On the basis of Harausky's confession in the 2019 interview, he was reported to the criminal prosecution authorities of the canton of St. Gallen in Switzerland in 2021 by TRIAL International, FIDH, and Viasna Human Rights Centre, as well as by the relatives of two of the disappeared. The procedure was made possible by the application of universal jurisdiction, as the accused was present on the territory of St. Gallen when the complaint was lodged.

Ahead of the trial, there were hopes that, in the case of a guilty verdict, it will spur the investigation of cases submitted by victims of torture and other crimes by Belarusians to law enforcement agencies in other countries, and that new circumstances may open up and evidence be obtained during Harausky's trial, thus making it possible to initiate an official investigation into other likely participants in the abduction and murder of Belarusian opposition politicians.[80]

[80] А. Отрощенков. Эксперт: Швейцарский суд не ограничится лишь выяснением роли Гаравского в исчезновениях. 19.09.2023 (https://reform.by/jekspert-shvejcarskij-sud-ne-ogranichitsja-lish-vyjasneniem-roli-garavskogo-v-ischeznovenijah).

However, to a strong disappointment of the filing parties, victims' relatives, and everyone concerned, following a two-day trial, the court acquitted Yury Harauski of the enforced disappearances, even though he had publicly and repeatedly confessed to and apologised for having participated in the abduction. Despite the consensus between the suspect, his lawyer, the prosecution, and the applicants that Mr. Harauski had taken part in these tragic events, the court held that his participation in the crimes could not be established beyond reasonable doubt. While the court recognised the responsibility of the Lukashenka regime in the crimes, the judges were not convinced of the involvement of the defendant. Mr. Harausky's testimony in the courtroom differed from the one he had given during pre-trial investigation, and he was giving evasive answers in the courtroom. As a result, the judges were not convinced about his involvement in the crime and presumed that the defendant could have learned some of the information about the events from conversations with his colleagues.

The outcome of the process "...may be a result of the insufficient work of the prosecution as well as the consequence of procedural reasons, but the verdict does not necessarily call into question the very events of the crime," concluded the lawyer of an NGO which filed the case.[81] Given that a guilty verdict based solely on the information obtained from the defendant and his confession would be very shaky, one could have assumed that the investigators and the judges would make additional efforts to obtain other evidence. However, given the secrecy surrounding the tragic events and the period of 24 years that have passed since the commission of the crime, it would be very difficult.

Explaining the verdict, the judge said that this is a special case in which "the authorities are involved, and they are responsible for enforced disappearances. Yury Harausky has been acquitted today, but the representatives of the regime in Belarus are not." In the words of the three human rights NGOs which had filed the case, "Irrespective of the verdict, the trial of Yury Harauski has already set an historic precedent: for the first time anywhere in the world, a court ruled on crimes committed in Belarus, on the principle of universal jurisdiction. Today's acquittal demonstrates that the road to justice is sometimes strewn with pitfalls. However, it will not undermine the determination of the victims to pursue their fight for truth and justice. The three partner organisations stress that the international community must now increase its efforts to hold accountable the regime's most senior officials and bring an end to impunity for the crimes committed in Belarus."[82] The NGOs pledged to appeal the verdict.

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[81] Суд оправдал белорусского спецназовца Гаравского. Он утверждал, что причастен к исчезновению оппонентов Лукашенко. Сергей Горяшко, Би-би-си. 28 сентября 2023 (https://www.bbc.com/russian/articles/c98dlv0lnvxo).

[82] Belarus: Acquittal of Lukashenka regime henchman in Switzerland. Press release by TRIAL International, FIDH and Viasna Human Rights Centre, 28 September 2023 (https://www.fidh.org/en/region/europe-central-asia/belarus/belarus-acquittal-of-lukashenka-regime-henchman-in-switzerland).

Poland

As it was stated by Polish delegation to the UN, Poland belongs to a group of states which opt for a wide scope of jurisdiction.[83] The Polish Penal Code contains Chapter XVI on crimes against peace, humanity, and war crimes, which provides for the criminalisation of virtually all forms of crimes known to international law.[84] Article 110 of the Penal Code[85] provides that the Polish penal law applies to foreigner who committed abroad an offence against the interests of the Republic of Poland or of the Polish nationals. The same Article indicates that the Polish penal law shall apply to foreigners who committed crimes "other than listed in para. 1, if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland and where no decision on his extradition has been taken" (Chapter XIII of the Code).

Relevant provisions of the Polish law (since its adoption in 1997 the Code has been amended many times) are criticised by scholars. In particular, Nowak notes ambiguous definitions of prohibited behaviours, containing terminology which is foreign to the Polish law and even sometimes to the ICC Statute which served as a guide when making changes to the text of the Code. The provisions of the ICC Statute have not been directly, in their totality, included in the Code, but at the same time, the provisions included into the Polish law have not been adjusted to the language used in the Rome Statute. The result is a mixture of terms which may be very difficult to interpret[86] and which may hinder application of the universal jurisdiction in Poland.

Absence of a legislative clarity is not the only reason why cases within the frame of the Chapter XVI crimes are rarely investigated and prosecuted in Poland. Among others are the lack of awareness on the part of the law enforcement about them; the lack of necessary qualifications, and of a funding; and finally – the lack of the general public's awareness or interest in prosecution of such crimes.[87] Moreover, provisions of Art. 110 indicating that an offense should be

[83] P. Saganek. Op. cit. P. 3.

[84] W. Zontek. Can Putin Be Tried in Poland? 20 April 2022 (https://verfassungsblog.de/can-putin-be-tried-in-poland/).

[85] Dz.U.2022.0.1138 t.j. - Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny. https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-karny-16798683

[86] For instance, Art. 7 of the ICC Statute refers to a 'widespread or systematic attack directed against any civilian population', whereas new Art. 118a of the Penal Code mentions 'massive attack against a population'. The Penal Code refers to "rape or other violations of a person's sexual freedom with the use of violence, unlawful threat or deceit", but it is not clear whether these terms cover "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" mentioned in Art. 7(1 g) of the Statute. Most of these new terms have not been explained in the law, the only clarification that was adopted directly in the Code is the definition of 'slavery' (Art. 115 § 23 PC). (C. Nowak. The Internationalization of the Polish Criminal Law: How the Polish Criminal Law Changed Under the Influence of Globalization // Crime, Law and Social Change. 2013. N. 59. P. 150)

[87] C. Nowak. Op. cit. P. 152.

committed “against the interests of the Republic of Poland or of the Polish nationals” limit the scope of the application of universal jurisdiction and opens a possibility for a broad discretion by the law enforcement officials.

Case-law

On 1 March, 2022, the Polish Minister of Justice decided to initiate proceedings against Russia for its military attack on Ukraine and possible war crimes and crimes against humanity. The scope of the investigation includes the actions of the authorities of the Republic of Belarus, who assisted Russia.[88] The decision was made after Ukraine addressed Polish authorities with a request to conduct an investigation. As it was stated in a press-release of Mazowiecki Branch of the Department for Organised Crime and Corruption of the National Prosecutor's Office in Warsaw, “Violation of the legal rights of a country directly adjacent to Poland is a threat to European and international security. It is also directed against the interests of the international community, which includes the Republic of Poland.” The Minister of Justice and the Prosecutor General Zbigniew Ziobro stressed that as part of the proceedings in the case, the Prosecutor's office will document all the events that will later become the basis for bringing the perpetrators of the crime to international criminal responsibility.[89]

Just three weeks after the large-scale aggression against Ukraine started, Poland, Lithuania and Ukraine established a Joint Investigative Team[90] (JIT) into alleged core international crimes committed in Ukraine. They were soon joined by Estonia, Latvia, Slovakia and Romania; cooperation with the ICC and the Europol was established, and a Memorandum of Understanding with the United States was signed. The aim of the JIT is to facilitate investigations and prosecutions in the States concerned, as well as those which could be taken forward to the ICC.[91] Professor of Law Diane Orentlicher notes that depending on what arrangements Ukraine forges with its partners, this could form the nucleus of a brand of criminal authority best described as “delegated jurisdiction.”[92] Other

[88] Mazowiecki pion PZ PK wszczął śledztwo w sprawie napaści Rosji na Ukrainę. 01.03.2022 (https://www.gov.pl/web/prokuratura-krajowa/mazowiecki-pion-pz-pk-wszczal-sledztwo-w-sprawie-napasci-rosji-na-ukraine).

[89] Działania Ministerstwa Sprawiedliwości i polskiej prokuratury wobec wojny na Ukrainie. 01.03.2022 (https://www.gov.pl/web/sprawiedliwosc/dzialania-ministerstwa-sprawiedliwosci-i-polskiej-prokuratury-wobec-wojny-na-ukrainie).

[90] A joint investigation team (JIT) is one of the most advanced tools used in international cooperation in criminal matters, comprising a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations. (Joint investigation teams. Website of the EU Agency for Criminal Justice Cooperation. https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams).

[91] Joint investigation team into alleged crimes committed in Ukraine, Website of the EU Agency for Criminal Justice Cooperation. (https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine).

[92] D. Orentlicher. How States Can Prosecute Russia’s Aggression With or Without “Universal Jurisdiction”. March 24, 2022 (https://www.justsecurity.org/80818/how-states-can-prosecute-russias-aggression-with-or-without-universal-jurisdiction/)

commentators note that the initiation of proceedings in Poland is symbolic and would not conflict with international investigations. On the opposite, it will assist the ICC by collecting evidence in an orderly manner.[93]

These evidences can also subsequently be used in a criminal trial on a national level as, though it seems unlikely that the political decision-makers of the Kremlin, headed by Vladimir Putin, will be brought before the Polish justice system, such a fate may befall people from military or civilian circles (e.g. media propagandists, oligarchs) who support the Russian aggression and war crimes. With enough information about these people, it is possible to charge them *in absentia* and apply to Interpol for a red notice.[94] Meanwhile, the investigation demonstrates the lack of indifference to what is happening by the international community. The initiation of proceedings by the Polish prosecutor's office should be assessed as the state's compliance with its international obligations concerning the prosecution of crimes covered by international law.[95]

Situation with the review of cases from Belarus

It is known that since 2020, applications for investigation of a number of cases from Belarus within the framework of the universal jurisdiction have been filed in Poland (reportedly, up to 10 cases total). This number includes cases of both Belarusian and Polish nationals who suffered from torture and other crimes in the hands of the Lukashenka regime. Such cases are handled by Belarusian NGOs and individual lawyers working pro bono. Detailed information about these cases is not available both in the public domain and to organisations that professionally deal with this topic and follow the developments. In their opinion, this is due to the fact that when considering issues related to such cases, the courts applied a "non-disclosure clause" to the participants of the process, excluding the dissemination of information not only related to the identities of the victims, witnesses or suspects, but also to the course of the case, the stage of the investigation and the procedural actions taken. This has led to the fact that state bodies, attorneys and NGOs alike are extremely reluctant to talk about these cases or refuse to do this.

The cases concerning the universal jurisdiction in the context of the events in Belarus can be divided into two categories – the first concerns Polish citizens whose rights were violated on the territory of Belarus by agents of the Belarusian regime, while the second is related to citizens of Belarus. While cases against Polish citizens appear to have better prospects and seem to enjoy support from

[93] W. Zontek. Op. cit.

[94] Ibid.

[95] Ibid.

the Prosecutor General's office of Poland, in cases concerning Belarusians, state bodies are passive or reluctant.

From the analysis of two cases in which the victims are citizens of Belarus, on which relatively more information has become available, it is possible to draw certain conclusions. Both cases were filed with the District Prosecutor's Office of Środmejście (according to the provisions of the criminal procedural legislation, cases are filed there if it is not possible to determine the competent authority on the grounds of jurisdiction specified in the law). The prosecutor's office accepted the cases for preliminary consideration, thereby recognising its jurisdiction over them. It should be noted that cases involving Polish citizens were accepted by the National Prosecutor's Office, which occupies a higher position in the hierarchy of the prosecutor's office.[96]

No investigation has been initiated in both cases of Belarusian nationals. In the first case, the refusal was explained by the lack of "the interest of the Republic of Poland" in it. Moreover, the investigative authorities came to this conclusion without conducting any investigative actions (interviews of victims and witnesses). The decision not to initiate an investigation was appealed to the court. The court found this decision in violation with the law and obliged the prosecutor's office to accept the application, conduct interviews with victims and witnesses, and decide on jurisdiction on the merits of the case. After conducting investigative actions, the prosecutor's office closed the case again. This decision was also appealed to the court. The court considered it necessary to obtain information on the case from Lithuania where official investigation on other universal jurisdiction cases from Belarus has progressed, and therefore Lithuanian investigators may have information relevant for the case in Poland. However, the court obliged to make an inquiry not the relevant Polish prosecutors, who have the opportunity to make official requests within the framework of international cooperation agreement with Lithuanian authorities, but a lawyer for the victims, who is presently trying to obtain it. Apparently, in the absence of a decision to open an official investigation into the case and the court's order, Polish prosecutors do not have powers to send an inquiry to Lithuanian authorities. At the same time, it is unlikely that the latter would respond to a request from the applicant's lawyer, given the absence of the official investigation. The circle is complete.

The opening of investigation of the second case within the framework of the universal jurisdiction in relation to the citizens of Belarus was also refused, however, this time due to the "inability to conduct an investigation," in particular, to receive information from the state bodies of Belarus. This decision of the

[96] It is however not entirely clear on what stage is the investigation of these cases due to the imposition of the "non-disclosure clause" on universal jurisdiction cases by the authorities.

prosecutor's office was appealed to the court. As far as we know, in the end of November the court ruled to deny the appeal. The argumentation of this decision was not available at the time of the completion of this report.

Thus, as of the end of 2023, there is no progress with opening an official investigation in Poland in cases of alleged crimes against Belarusian citizens, covered by universal jurisdiction. Given the fact of the initiation of criminal cases in situations affecting citizens of Poland who had their rights violated by the Lukashenka regime in Belarus and citizens of Ukraine (in the framework of investigation of war crimes committed in this country), this discrepancy shows that the legislative provisions of Poland, as stated by the Polish authorities, allow its broad interpretation and implementation. Some NGOs concerned believe that the apparently different treatment of nationals of various states in the application of the universal jurisdiction may be interpreted as discrimination on the grounds of citizenship.

Situation looks dramatically different for the cases involving Polish citizens. In October 2023, Polish and independent Belarusian media reported that the Polish Prosecutor's Office issued a European arrest warrant for six Belarusian law enforcement officers, including the head of Akrestsina detention centre and his deputy, as well as for a number of other Belarusian security officials who are suspected of committing crimes on the territory of Belarus in 2020. They are on the international wanted list. Their surnames and positions at the time of the alleged crimes are as follows: Yevgeny Shapetko – Major, head of Akrestsina Offender Isolation Center; Gleb Drill – Major, Deputy Head of Akrestsina Offender Isolation Center; Dmitry Strebkou – Head of the correctional institution "Prison No. 8 of Zhodino"; Evgeny Savich – police ensign, the Special Purpose Police Detachment of the Main Department of Internal Affairs of the Minsk City Executive Committee; Yulia Sakalova – Senior Police Lieutenant, Office of Citizenship and Migration of the Main Department of Internal Affairs of the Minsk City Executive Committee; Karina Valuyskaya – police ensign, patrol and sentry service of the Frunzensky police department of Minsk. They are suspected of committing crimes under Part 3 of Article 189 of the Polish Criminal Code "Committing a crime related to the deprivation of liberty of a person committed with extreme cruelty." Information about the suspects and the charges brought against them was published by the state TV channel of Poland on the basis of data from the Polish Prosecutor's Office.[97] It has become known that the applicants in this case are Polish citizens.

[97] Преступников режима Лукашенко впервые объявили в международный розыск. 20.10.2023 (https://belsat.eu/ru/news/20-10-2023-prestupnikov-rezhima-lukashenko-vpervye-obyavili-v-mezhdunarodnyj-rozysk).

The main obstacles to progress in the universal jurisdiction cases in relation to citizens of Belarus in Poland appear to be the following:

- the secrecy surrounding the review of cases related to international crimes committed in Belarus, appearing to go beyond reasonable measures to protect the rights of victims, witnesses, and suspects;
- the absence of a single specialised body that would be responsible for the investigation of crimes falling under the scope of universal jurisdiction and the lack of prosecutors' expertise in relevant international law, leading to their apparent lack of willingness to open such criminal cases;
- lack of guidance on the interpretation of the provisions of the criminal and criminal procedure legislation applicable to the cases of universal jurisdiction, including the interpretation of provisions of Art. 110 of the Criminal Code, indicating that an offense should be committed "against the interests of the Republic of Poland or of the Polish nationals";
- the absence of any (financial, advocacy or psychological) state and public support for lawyers conducting such cases pro bono, following which they cannot take a lot of cases and cannot devote much time to the cases already taken.

In addition, the passivity of Polish investigative bodies suggests that they do not consider international crimes committed in Belarus against Belarusian citizens as violations of international law and threats to international public order. The main arguments of the Polish prosecutor's office when refusing to investigate cases within the universal jurisdiction framework in relation to citizens of Belarus are "the absence of Polish jurisdiction due to the lack of Polish interest in such cases" and "the inability to conduct an investigation and receive information from the relevant state bodies of Belarus." In relation to the cases of the universal jurisdiction concerning citizens of Ukraine, such arguments are not used, however, and cases are initiated.

Finally, imposition of the "non-disclosure clause" in respect of the applicants and their representatives, which excludes the dissemination of information not only related to the identities of the victims, witnesses or suspects, which is a standard practice, but also to the course of the proceedings, the stage of the investigation and the procedural actions taken contradicts public interest. It deprives civil society and the democratic forces of Belarus, as well as their allies in Poland, from effectively advocating for a more efficient application of the universal jurisdiction principle in Poland aimed at progressive changes in legislation and practices, and undermines prospects of provision of support to the law enforcement bodies such as capacity building and training. It also discourages thousands of other survivors of international crimes of the Lukashenka regime to seek justice in Poland.

Lithuania

In accordance to Article 7 (Criminal Liability for the Crimes Provided for in Treaties) of the Lithuanian Criminal Code,[98] there are certain crimes for which "persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime". These are: 1) crimes against humanity and war crimes (Articles 99-113); 2) trafficking in human beings (Article 147); 3) purchase or sale of a child (Article 157); 4) production, storage or handling of counterfeit currency or securities (Article 213); 5) property laundering (Article 216); 6) bribery (Article 225); 7) trading in influence (Article 226); 8) graft (Article 227); 9) piracy (Article 2511); 10) acts of terrorism and crimes related to terrorist activity (Article 2521(1) and (2); 11) unlawful handling of nuclear or radioactive materials or other sources of ionising radiation (Articles 256, 2561 and 257); 12) the crimes related to possession of narcotic or psychotropic, toxic or highly active substances (Articles 259-269); 13) crimes against the environment (Articles 270, 2701, 2702, 2703, 271, 272 and 274).

Importantly, torture and enforced disappearances as stand-alone crimes are not included in the provisions of Article 7 and therefore are not covered by the universal jurisdiction in Lithuania. However, if they are committed as part of crimes against humanity or war crimes, they fall under provisions of Article 100 (Treatment of Persons Prohibited under International Law), Article 100[1] (Enforced Disappearance) and Article 103 (Causing Bodily Harm to, Torture or Other Inhuman Treatment of Persons Protected under International Humanitarian Law or Violation of Protection of Their Property). They are included in the remit of Article 7 as crimes against humanity and war crimes. Therefore, perpetrators of these crimes may be held liable only if prosecutors provide the court with convincing evidence that crimes against humanity or war crimes were committed by the accused.

Article 7 does not mention any precondition to the application of the universal jurisdiction. These often include the impossibility to extradite or surrender the offender to the state where a crime was committed. Absent in Article 7 is also the priority jurisdiction of the state in the territory of which a crime was perpetrated or the state whose national committed a criminal act who in some jurisdictions have the priority right to punish the offender for international crime. The possibility to try and prosecute a perpetrator *in absentia*, adopted in 2010, is

[98] Law No VIII-1968 of 26 September 2000, as amended in 2015. https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD)

an important provision of the Criminal Code, and Lithuanian diplomats take pride in the fact that it is effectively implemented.[99]

Case-law

Investigation and several trials in the 2010s of suspects in assaults on Lithuanian border and customs posts in 1990-91 in the period after Lithuania had declared its independence from the Soviet Union in March 1990 may be seen as important precursors of the current work on the universal jurisdiction cases in Lithuania, providing useful experience of investigation and prosecution of crimes against humanity, committed by foreign nationals and covered by the universal jurisdiction clauses in the Criminal Code.[100]

At the time of these events, the Soviet government did not recognise independence of Lithuania and viewed these border and customs posts as illegal. The OMON (Special Purpose Police Unit) troops, subordinate to the Soviet Ministry of the Interior, repeatedly attacked the posts and harassed Lithuanian customs staff and police officers acting as border guards. In several instances, unarmed Lithuanian customs officers and armed policemen were intimidated, beaten or killed, their cars were stolen or bombed, the posts were burned down or wrecked, and work of the checkpoints was otherwise disrupted. The series of attacks between December 1990 and August 1991 resulted in the deaths of a total of eight Lithuanian citizens; about 60 officers were attacked and injured, and 23 border posts were burned or destroyed. No investigation was held by the Soviet and Russian authorities.

Several trials of suspects in these crimes were held in Lithuania, one in person and several *in absentia*. First, in December 2006, the Lithuanian prosecutors issued a European arrest warrant for Latvian citizen Konstantin Nikulin (who later changed his surname to Mikhailov under the witness protection programme in the framework of another case in Latvia). On 28 January 2008, the Supreme Court of Latvia decided to extradite Mikhailov to Lithuania. On 11 May 2011, Mikhailov was found guilty of murder of several "Lithuanian officials guarding the Lithuanian state border" and sentenced to life imprisonment. He appealed against the decision claiming innocence while Lithuanian prosecutors appealed against the decision hoping to convict Mikhailov of crimes against humanity. On 6 June 2016, the Appeals Court upheld the life imprisonment sentence and reclassified the crime from murder to "treatment of persons prohibited under

[99] Submission No. SN78-144 of 7 May 2021 pursuant to the General Assembly resolution 75/142 of 15 December 2020 "The Scope and Application of the Principle of Universal Jurisdiction". Permanent Mission of the Republic of Lithuania to the United Nations. Pp, 3, 4. (https://www.un.org/en/ga/sixth/76/universal_jurisdiction/lithuania_e.pdf).

[100] J. H. Anderson. Why Lithuania is at the Forefront of the Ukrainian Lawfare. 9 September 2022 (https://www.justiceinfo.net/en/106188-why-lithuania-forefront-ukrainian-lawfare.html)

international law" (Article 100 of the Criminal Code of Lithuania, Chapter XXV, Crimes against humanity and war crimes). Mikhailov appealed the decision to the Supreme Court of Lithuania which later upheld the conviction.

Other suspects in the attacks, Czeslaw Mlynnik, Alexander Ryzhov, and Andrei Laktionov, are citizens of Russia and have not been extradited. In December 2010, Lithuania amended its Criminal Code to allow *in absentia* trials in cases of crimes against humanity. In June 2013, Lithuania completed pre-trial procedures *in absentia* for a trial of the three men for crimes against humanity and issued European arrest warrants for them. All three were sentenced *in absentia* to life imprisonment in October 2016. Finally, another *in absentia* trial concerned Vilnius OMON commanders Boleslav Makutynovich and Vladimir Razvodov. Initially, in July 2015, Vilnius District Court found them not guilty. The decision was appealed by Lithuanian prosecutors. According to unconfirmed reports, Makutynovich died in November 2015. On 24 January 2017, the Appeals Court ruled that the District Court improperly interpreted that crimes against humanity could be committed only in a time of war or other armed conflict and sentenced Razvodov to 12 years imprisonment. Razvodov is believed to live in Russia, and Lithuania issued a European arrest warrant for him.[101]

In March 2022, the Lithuanian Prosecutor General's Office opened an investigation into crimes committed in Ukraine following Russia's invasion, including military attacks on civilians, doctors, destruction of homes, hospitals, educational institutions and other civilian facilities, which lead to deaths of adults and children.[102] The investigation was initiated under Article 100 of the Criminal Code (Treatment of Persons Prohibited under International Law), Article 110 (Aggression) and Article 111 (Prohibited Military Attack). It will be conducted not only against Vladimir Putin, but also Aliaksander Lukashenka. According to the Prosecutor's office, the purpose of the investigation is to collect and document the statements of people fleeing from Ukraine to other European countries, collecting all possible materials that could be used to bring the perpetrators to justice. "Realizing that it is the Prosecutor's Office of Ukraine that has the primary right to bring to criminal responsibility persons for military aggression carried out in their country, we also understand that they need help in carrying out such criminal prosecution," the Lithuanian prosecutor's office said in a statement. At the same time, it is noted that a criminal trial of war criminals in Lithuania is possible only if it is not possible to ensure it in Ukraine or in international courts.[103]

[101] Information on these trials is based on numerous media reports.

[102] Lithuania prosecutors launch Ukraine war crimes investigation. March 3, 2022 (https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/).

[103] Pradėtas ikiteisminis tyrimas dėl nusikaltimų žmoniškumui Rusijai užpuolus Ukrainą. 2022 m. kovo 3 d. (https://www.delfi.lt/news/daily/lithuania/pradetas-ikiteisminis-tyrimas-del-nusikaltimu-zmoniskumui-rusijai-uzpuolus-ukraina.d?id=89606209).

Situation with the review of cases from Belarus

In 2020, the Lithuanian Prosecutor General opened a pre-trial investigation into the crime of torture committed against Belarusian citizen Maxim Kharoshyn. Maxim Kharoshyn claims that on 13 October 2020, after attending a pro-democracy protest in Minsk, he was attacked and tortured by security officers of the Lukashenka regime. A petition for the investigation of acts of torture in detention in Minsk was filed by Kharoshyn on 30 November 2020. Names of the suspects are currently withheld; reportedly, they include Belarusian Deputy Minister of Interior Nikolai Karpenkov.[104]

The President of the Lithuanian Constitutional Court, Dainius Žalimas, described the potential of the universal jurisdiction principle in respect to the situation in Belarus in the following way: "The conditions must not be created for avoiding punishment for international crimes, including those currently committed in Belarus, including crimes against humanity, i.e. mass torture and mass persecution for political reasons against the Belarusian people who defend the rule of law and democracy. Universal jurisdiction is based on mandatory international legal norms defining international crimes as crimes against the entire international community and, thus, against the whole of humanity. Liability for them arises irrespective of whether the law of the state in which the crimes are committed provides for relevant criminal liability. The international community has assumed the obligation to persecute the persons who commit these crimes. Therefore, universal jurisdiction can be a viable and effective instrument to prevent impunity, as well as an instrument for the prevention of international crimes."[105]

A special investigative group was created by a decision of the Prosecutor General's Office on the basis of the Police Department for Especially Dangerous Crimes (Criminal police bureau) to consider cases within the framework of the universal jurisdiction; it also includes two investigators of the Prosecutor's Office. This group was created immediately after the beginning of the investigation under the Kharoshyn case. According to the lawyers concerned, the decision to launch an investigation was made at a high political level; the political will to investigate and prosecute international crimes was demonstrated. According to representatives of state structures, since the beginning of the investigation, the authorities had no doubt that these were not isolated incidents, but the result of state policy, and that victims of torture would not be able to achieve justice in Belarus itself. At the same time, the main problem is not to initiate an

[104] Universal Jurisdiction Annual Review 2022. Universal jurisdiction, an overlooked tool to fight conflict-related sexual violence. Trial International. Geneva, 2022. P. 70.

[105] Dainius Žalimas: there can be no impunity for international crimes. 04-11-2020 (https://lrkt.lt/en/news/other-news/dainius-zalimas-there-can-be-no-impunity-for-international-crimes/1636).

investigation, but to collect evidence of the commission of crimes against humanity necessary to refer the case to the court, as well as the challenge of detaining the perpetrators.

The Group actively cooperates with Belarusian and Lithuanian NGOs and lawyers that interview victims, study their documents, and on the basis of available materials prepare written explanations and victim recognition statements for the special investigation team, help them establish contacts with former law enforcement officers, so that they could give statements on the structure of institutions, the chain of command, etc. as witnesses.

Maxim Kharoshyn case is the leading case concerning the events in Belarus. The statements of other victims are combined by the investigators into one large case, with the exception of situations that are clearly different from it from a legal point of view (for example, the Palchys case, prepared in the context of violations of the rights of the child, was submitted directly to the prosecutor's office),. According to various sources, today the case unites up to 55 victims. A significant number of applicants live in the territories of other countries (for example, Poland), since the authorities of those countries do not open an investigation.

In the opinion of the officials, the Special Investigation Team approaches the investigation of cases pro-actively and searches additional information about the suspects, the circumstances of the alleged crimes and the chain of command. As was underlined by a representative of the Prosecutor General's Office, it was the Team's staff who recommended NGOs to report not only cases of torture, but also of violations of other rights and freedoms on political grounds as they fall under the crime against humanity of persecution.

It should be noted that the assessments of the interaction of state bodies and NGOs vary. NGO representatives talk about the problem of the closeness of the investigation and the lack of feedback from the law enforcement bodies. They see apparent stagnation in the investigation: for example, NGOs claim that often no investigative actions have been undertaken after initial interviews of the victims, cases are not investigated for mutual complementarity, no action by investigators to call as witnesses victims who suffered from torture and inhuman treatment in the same place in the same period of time. Likewise, no requests are made to NGOs for assistance, including for the search of witnesses and description of particular situations and moments when alleged crimes were committed, while NGOs have a lot of information that could help the investigation. NGOs are doubtful that their reports sent to the investigation team, including those that contain information on particular situations, are studied and used by the investigation.

In their turn, state officials comment that, in general, there is progress in the investigation – a number of specific suspects who may have been involved in crimes have been identified, work is underway to obtain strong evidence (which is a challenge in all universal jurisdiction cases where it is impossible to collect information on the ground) and concretise charges. All materials submitted by NGOs are being studied, claim officials. In the beginning of summer 2023, there were plans to submit the case involving several dozen applicants to court towards the end of the year, with a prospect of holding a trial *in absentia*. Later, however, it was decided that a trial *in absentia* may not be the best option, considering the Lukashenka regime's expanding practice of *in absentia* politically motivated trials against opposition members, and instead to possibly issue arrest warrants and wait until culprits visit one of the countries ready to detain and extradite them.

As another problem, NGOs and officials cite the need to send an indictment to Belarus before taking the case to court. Apparently, this is interpreted as a formal requirement of the agreement on cooperation in criminal matters. However, this appears to some interviewees as unnecessary since suspects are agents of the state to whom the indictment should be sent, and when committing crimes, they were taking their orders from officials of that very state. The main problem here is that not only sending the indictment will alert the suspects and prevent their travel abroad where they could be theoretically detained. Most importantly, disclosure of information about the applicants creates security risks for the relatives of the applicants who reside in Belarus.

This requirement also creates a serious procedural obstacle: a letter with indictment sent to Belarusian authorities cannot include the names of victims (applicants) who are under international protection in Europe since their names cannot be revealed to the authorities of the country they fled from due to persecution. It should be noted that the problem of impossibility of including the names of persons under international protection in official letters to Belarusian authorities is being discussed by both representatives of NGOs and state bodies not only in Lithuania, but also in other countries. Many believe that the names of victims can be simply not disclosed, based on ECtHR case law, similar to the names of secret witnesses.

Still, there is another approach. Thus, according to one of the interviewed employees of the Lithuanian Prosecutor General's Office, "there is no obligation to send documents to Belarus when its officials are put on the wanted list. Arrest warrants should be simply sent to Interpol, but they should not be detailed to avoid the possible leakage of information about victims to Belarusian authorities through Belarusian or Russian national bureaus of Interpol."

The most serious challenge, in the eyes of both officials and NGOs, is that even if strong evidence is collected, charges against suspects are brought, and arrest warrants for them are issued through the Interpol or the Europol, a chance that they will ever appear on the territory of states that would be willing and able to apprehend them is quite small. They very rarely travel to EU member states these days. This problem is exacerbated by travel bans imposed on a number of Belarusian law enforcement officials, including police officers, staff of detention centres, prosecutors, and judges, as part of international sanctions. The apparent conflict between the need to impose and expand personal sanctions as an important tool of holding perpetrators accountable, and the necessity to ensure their arrest during their travel to countries whose authorities would be willing to detain and extradite them, is actively discussed by Lithuanian officials and civil society alike and has no clear solution.

Therefore, the question of whether to go ahead with a trial *in absentia* or not is actively debated both among the officials and NGO members. On the one hand, Lithuania has positive experience of such trials resulting several years ago in the conviction *in absentia* of former officers of Soviet police guilty of attacks on the Lithuanian border posts in 1990-91. These investigations and trials are considered an important symbol of the restoration of justice in Lithuania. On the other hand, in the current circumstances, when the Lukashenka regime holds numerous show trials of exiled Belarusian opposition leaders on fabricated charges and rubber stamps their guilty verdicts *in absentia*, using this judicial mechanism in Lithuania may appear as a tit-for-tat. As a result, such trials and verdicts may be easily dismissed as a revenge and a mere political gesture. Officials and NGO representatives alike lean towards the approach of issuing arrest warrants, without going for a trial, and waiting for the day when some of the suspects let their guard down and travel to a country where they could be apprehended. The very fact of issuance of arrest warrants may serve as deterrence to prevent the commission of new crimes and may even cause a split in the elites, believe some NGO members.

Despite of the progress made in the investigation in Lithuania, especially in comparison with other countries, NGOs are rather critical about the lack of information from the law enforcement bodies about the ongoing proceedings and their plans. NGOs also believe that the investigation group would benefit from additional human resources and expert support from the academic and expert community, as it seems that it is difficult for a small group to handle a rather large case with many victims and suspects, and new applications from other victims may potentially arrive. Finally, NGOs note that there seems to be no clear strategy for long-term actions on the affairs of the universal jurisdiction. This is confirmed by the lack of openness and publicity in such cases.

The Czech Republic

In Czech criminal law, the principle of universal jurisdiction is contained in sections 7 and 8 of the Criminal Code.[106] According to Section 7 (Principle of Protection and Principle of Universality) of the Criminal Code of the Czech Republic, the law of the Czech Republic shall apply to assessment of criminality of torture and other cruel and inhumane treatment (Section 149), forgery and alteration of money (Section 233), uttering forged and altered money (Section 235), manufacture and possession of forgery equipment (Section 236), unauthorised production of money (Section 237), subversion of the Republic (Section 310), terrorist attack (Section 311), terror (Section 312), sabotage (Section 314), espionage (Section 316), violence against public authority (Section 323), violence against a public official (Section 325), forgery and alteration of public documents (Section 348), participation in organised criminal group pursuant to Section 361 (2) and (3), genocide (Section 400), attack against humanity (Section 401), apartheid and discrimination against groups of people (Section 402), preparation of offensive war (Section 406), use of prohibited means and methods of combat (Section 411), war cruelty (Section 412), persecution of population (Section 413), pillage in the area of military operations (Section 414), abuse of internationally and state recognised symbols (Section 415), abuse of flag and armistice (Section 416), and harming a conciliator (Section 417). Universal jurisdiction can be applied even when such a criminal offence was committed abroad by a foreign national or a person with no nationality, who has not been granted permanent residence in the territory of the Czech Republic. Moreover, the law of the Czech Republic shall also apply to assessment of criminality of an act committed abroad against a Czech national or a person without a nationality, who has been granted permanent residence in the territory of the Czech Republic, if the act is criminal in the place of its commission, or if the place of its commission is not subject to any criminal jurisdiction.

It is worth noting that unlike in Lithuania, the Criminal Code of the Czech Republic provides for the application of the universal jurisdiction principle for torture as a stand-alone crime (Section 149) rather than only as part of the crimes against humanity which are also covered (Section 401). This opens prospects for investigation of a larger number of cases from Belarus in Czechia without a need to prove that crimes against humanity have been committed in Belarus.

Para. 1 of section 8 ("Subsidiary principle of universality"), provides that "the Czech law shall be applied to determine the liability to punishment for an act committed abroad by a foreign national or a stateless person with no permanent residence permit on the territory of the Czech Republic, if: (a) the act is also

[106] Act No. 40/2009 Coll., of 08 January 2009.
(https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=84824&p_country=CZE&p_count=246).

punishable under the law in force on the territory where it was committed; and (b) the offender is apprehended on the territory of the Czech Republic and was not extradited or surrendered for criminal prosecution to a foreign state or other subject authorised to conduct criminal prosecution. The third condition, (c), for the application of this provision will be the request of a foreign state or other competent subject (international court), which requested the extradition of the alleged offender, to prosecute the offender in the Czech Republic. In addition, the above sections 7 and 8 are supplemented by section 9, which provides that (para. 1) criminality of an act shall be assessed according to the law of the Czech Republic also if an international treaty incorporated into Czech law stipulates so; and (para. 2) that the provisions of sections 4 to 8 shall not apply if it is not admissible according to an international treaty. It is worth noting that the Czech Republic is a party to a number of above mentioned multilateral conventions and bilateral treaties containing the principle of *aut dedere aut iudicare* and "contractual universal jurisdiction".[107]

Case-law

In 2010, in the information provided by the Czech Republic to the United Nations it was stated that "the attempts have been made to apply the subsidiary principle of universality in practice, but these have failed to succeed (usually for reason of failure of the state that had requested extradition to provide evidence sufficient for prosecuting the requested person in the Czech Republic, following the denial of extradition; often also for the reason of a lapse of time under the statutes of limitation)."[108] Since 2010, the situation with cases in the universal jurisdiction has not changed, according to available information, not a single case is being investigated. At the same time, NGOs say that there is no political will to investigate such cases though there were formal statements of readiness to work in this direction and thematic meetings held in the Ministry of Justice.

Situation with the review of cases from Belarus

In February 2021, a lawyer working *pro bono*, with support of a Belarusian NGO, filed a first application for investigation under universal jurisdiction in a case related to Belarus. It is handled by the NCOZ (Department of the Ministry of Internal Affairs for Combating Organized Crime). The investigators of this department do not specialise in international law and are not familiar with the doctrine and standards in this area. This case was entrusted to them insofar as it relates to criminal law and procedure. The treatment of the applicant was more similar not to the treatment of the victim, but to the treatment of a suspect in a crime, according to an NGO. He had to undergo lengthy and biased

[107] P. Caban. Op. cit. P. 198.

[108] Ibid. P. 200.

examinations, including body examination, and was asked sceptical questions. His failed attempt to seek justice in Belarus was put into question. A few months later, a decision was made by the police to “postpone the consideration of the case”, with a justification of only few pages. The following reasons were provided:

1. The applicant was not active in politics and protest movement before the commission of the crime; therefore, violence against him was not related to his political views.
2. Violence against the victim was not intense enough to be considered torture, and a reference to a definition of torture from the 1958 textbook of the Czechoslovak Socialist Republic was cited.
3. Knee injuries may not have been caused by violence against the victim, but could be the result of other processes (age-related changes, consequences after previous injuries, etc.).
4. The applicant had already filed an application for investigation of violence against him to the law enforcement bodies in Belarus.
5. There is no systematic character of illegal actions in Belarus.
6. The victim's international protection status does not allow to initiate proceedings because a mandatory letter to Belarusian authorities with a request for cooperation on criminal matters cannot be sent since his name cannot be disclosed.

Most of the above arguments do not stand up to any criticism, since they are refuted by information readily available in open sources, including facts about consistent participation of the applicant in the protest movement since at least a few months before his detention, the decision of the Investigation Committee of Belarus to turn his application down, along with complaints of several hundred other victims of violence in the hands of the police, a comprehensive up-to-date definition of what constitutes torture based on international standards, as well as the evidence of systematic and massive violation of human rights and crimes against humanity in Belarus. In addition, there is medical documentation confirming the applicant's torture, both from Belarus and the Czech Republic, where he was treated; it is also possible to conduct a new forensic medical examination.

The decision of the NCOZ to “postpone the consideration of the case” based on these arguments demonstrates apparent unwillingness – or the inability – of its investigators to deal with this case seriously. Clearly, police officers who in their professional duties catch bandits and fight organised crime rings, lack competence in dealing with torture and international crimes. In the final account, it is not their fault that the case is stuck. It is the responsibility of the State, in this case the Prosecutor’s Office, to forward the application to a body

properly staffed and having appropriate competence. The fact that this has not happened for more than two years, demonstrates the lack of political will.

The only serious obstacle to the resumption of proceedings in the case is the fact of the applicant's international protection. According to the NGO that works with the case, its possible resolution depends on the Ministry of Justice, because it is this body that should send a request within the framework of bilateral cooperation in criminal cases to Belarus that X is a suspect in the case. According to general provisions of the Czech law, the name of the applicant must be indicated there. Finding a way not to specify it is the prerogative of the Ministry of Justice. To find a way out of this dilemma is not impossible since there is a practice of hiding the names of secret witnesses in criminal proceedings. For this, however, an administrative decision of the relevant officials is necessary.

Human rights activists are ready to submit 10 more cases to the prosecutor's office. They have not been submitted so far due to the fact that all the applicants in these cases have also received international protection. Thus, the filing of these cases has been postponed until this legal conflict is resolved. The Ministry of Justice is aware of it from meetings with representatives of the Belarusian democratic forces and NGOs dedicated to the issues of the universal jurisdiction, and its representatives promised to look into possibility to find a solution.

The problem of the lack of special knowledge of the staff of the department responsible for investigating the case within the framework of the universal jurisdiction could be solved by drafting a manual on how to investigate cases of torture and other international crimes, similar to the one that was recently created in the Czech Republic by the order of the Ministry of Justice to investigate cases of war crimes in Ukraine. Now it can be found in every police department and is considered very useful both by the police and the lawyers representing victims. The idea of drafting some kind of a guidance for investigators is now supported by representatives of government agencies.

Germany

Germany has the most advanced experience in applying the universal jurisdiction principle in its law enforcement practice among all states studied in this report. However, with all the progress made in recent years, including landmark cases of trying and convicting perpetrators of serious international crimes, serious challenges remain both in law and practice in Germany.

States have adopted very different models in dealing with universal jurisdiction In many cases, states have implemented universal jurisdiction in such a way that its exercise is subject to additional conditions, e.g. residence and presence

requirements. However, under the German Code of Crimes against International Law (CCAIL)[109], prosecutors are in principle authorised to start investigations even if the crime was committed abroad by and against foreign nationals and has no other link to Germany. However, this broad authorisation to investigate is combined with discretionary provisions that make it possible to refrain from investigations if the suspect is not in Germany and if there are no indications that he or she will enter the country in the future. At the same time, the executive branch has a high degree of control over universal jurisdiction cases.[110] The same year the CCAIL was adopted (2002), legislators amended the Code of Criminal Procedure[111] to provide the federal prosecutor with a possibility to refrain from investigating when certain requirements are not met. According to Section 153f of the Code of Criminal Procedure, the prosecutor's office may refrain from prosecuting international crimes committed abroad if the suspect is not resident in Germany and is not expected to reside. Pursuant to paragraph 2, the prosecutor may in particular refrain from prosecuting an offense if the following cumulative conditions are met:

- no German national is suspected to have committed the offence;
- the offence was not committed against a German national;
- no suspect is, or is expected to be staying in Germany;
- the offence is being prosecuted by an international court or by the state where the offence was committed, or whose citizen committed the offence, or was injured by the offence.

The wording of Section 153f para. 1 and 2 of the Code of Criminal Procedure clearly states that the prosecutor has the discretion to decide whether or not to pursue the case, i.e. even if the suspect is not in Germany and not likely to enter soon, the prosecutor may still choose to investigate and prosecute. In practice, the exercise of prosecutorial discretion has shown that prosecutors are most likely to investigate cases where they can gather evidence in Germany or where victims or witnesses are present in German territory. At the same time, they usually refrain from starting an investigation where there is no chance to gather evidence without resorting to mutual legal assistance, unless the suspect is of German nationality. Prosecutors use mutual legal assistance, but do not rely only on this evidence to build their cases.

[109] Code of Crimes against International Law (CCAIL) of 26 June 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of 22 December 2016 (Federal Law Gazette I, p. 3150) (https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html).

[110] L. Reydams. Op. cit. P. 19.

[111] Code of Criminal Procedure as published on 7 April 1987 (Federal Law Gazette I, p. 1074, 1319), as last amended by Article 2 of the Act of 25 March 2022 (Federal Law Gazette I, p. 571) (https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html).

Where evidence is not available in Germany, it remains a discretionary decision, meaning that the prosecutor could continue investigations, but prosecutors will in practice only do so in atypical cases, especially where there is a risk that effective prosecution by another state or the ICC cannot be guaranteed.[112] Over 60 complaints were submitted to the Office of the Federal Prosecutor between 2002 and 2011 and every single one was dismissed.[113] Scholars suggest extending the scope of judicial review or introducing the requirement for judicial approval of decisions to suspend an investigation. By analogy, a preliminary examination would make the exercise of this practice more transparent and enhance quality control will promote discussion and awareness.[114]

The quality of German universal jurisdiction legislation is accessed differently by scholars. Though generally it is considered to be effective from the point of view of existence of the principle of mandatory prosecution and a possibility to launch investigations even where suspects are not present in Germany, which allows to secure evidence and to start the proceedings immediately once the accused enters Germany, uncover the role of 'other actors' and, finally, support other accountability mechanisms, including civil litigation,[115] experts note its inconsistency with regard to persecution of sexualised violence. Scholars and international justice practitioners Silke Studzinsky and Alexandra Lily Kather underline, in particular, that the umbrella term "any other form of sexualized violence of comparable gravity" has not been incorporated in a verbatim manner from the Rome Statute into the CCAIL and was instead replaced by "sexualised coercion," a term transposed from para. 177 of the German Criminal Code.[116] Due to its narrow, outdated, and discriminatory requirements — violence, threat, and impossibility to resist — which need to be met for an act to constitute sexualised coercion, only some forms and acts of sexualised violence could be accounted for and definite impunity gaps existed for others. Though a reform of the German Criminal Code was brought about in 2016, for international crimes allegedly committed before this the old version is sought in the application of the law.

[112] Universal Jurisdiction Law and Practice in Germany. Briefing paper. Open Society Justice Initiative, Trial International. New York, 2019. Pp. 18-19.

[113] L. Reydams. Op. cit. P. 19.

[114] M. Neuner. German Preliminary Examinations of International Crimes. In: Quality Control in Preliminary Examination: Volume 1. M. Bergsmo, C. Stahn (eds). Brussels: Torkel Opsahl Academic EPublisher, 2018. P. 176-177.

[115] A. M. Pelliconi, F. Sironi De Gregorio. New Universal Jurisdiction Case Filed in Germany for Crimes Committed in Myanmar Before and After the Coup: On Complementarity, Effectiveness, and New Hopes for Old Crimes. March 7, 2023 (ejiltalk.org/new-universal-jurisdiction-case-filed-in-germany-for-crimes-committed-in-myanmar-before-and-after-the-coup-on-complementarity-effectiveness-and-new-hopes-for-old-crimes/).

[116] S. Studzinsky, A. L. Kather. Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-based Crimes? A View from Within on Progress and Challenges in Germany // German Law Journal. 2021. Vol. 22. Pp. 894–913. Pp. 906-909.

There are, however, hopes that the reform of CCAIL, which is underway, will amend many of the shortcomings.[117]

Case-law

Germany initially had a slow start to prosecutions based on universal jurisdiction. In the first years after the entry into force in 2002 of the comprehensive legislation concerning crimes under international law, hardly any investigations were initiated in Germany. As Jeßberger notes, there seemed to be some reluctance on the part of the federal prosecutor to open cases, based on criminal complaints targeting high-ranking officials such as former U.S. Defense Secretary Donald H. Rumsfeld. But lower-level cases gradually made it to the courts as Germany poured resources into its war crimes investigation units.[118] The expansion of investigative capacities and, in 2009, the addition of a dedicated international crimes department at the office of the Federal Prosecutor and a central office for combating war crimes and other crimes under the CCAIL at the German Federal Criminal Police Office, led to some of the first breakthroughs.[119] Between 2009 and 2017, the numbers of cases dealt with constantly grew, from three investigations in 2009 to 46 in 2017. Of these, six were so-called structural investigations – "a novel invention in terms of criminal procedure law".[120]

The number of complaints and information submitted to the Prosecutor's Office grew dramatically, from 25 in 2013 and 200 in 2015 to 600 in 2017. This was closely connected with the conflict in Syria and the ensuing migration to Germany; the majority of information was submitted to the Prosecutor's Office and the police by the Federal Office for Migration and Refugees. At the same time, the number of prosecutors assigned to the specialized unit within the Federal Prosecutor's Office, as well as the number of officers working at the Central Unit for the fight against war crimes and further offences grew constantly.

In sum, Germany seems to be a good example of a 'learning curve' regarding the exercise of UJ in recent years.[121] Experts note that Syrian victim diaspora in Germany played an important role in pressing for the related investigations and trials. The German prosecutor's decision to start the Al-Khatib case was informed

[117] A new draft law is currently being debated in the Bundestag. The law, if adopted, will close existing impunity gaps (among other things, sexual slavery will be introduced as a crime against humanity) (Geplante Anpassungen im Völkerstrafrecht in erster Lesung beraten. https://www.bundestag.de/dokumente/textarchiv/2023/kw48-de-voelkerstrafrecht-979660).

[118] L. Morris. Why Germany is Becoming a Go-to Destination for Trials on the World's Crimes. March 6, 2021 (https://www.washingtonpost.com/world/europe/germany-war-crimes-justice/2021/03/05/b45372f4-7b78-11eb-8c5e-32e47b42b51b_story.html).

[119] P. Kroker. Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under Code of Crimes against International Law. Berlin: European Center for Constitutional and Human Rights e.V. (ECCHR), 2016. P. 6.

[120] L. Morris. Op. cit.

[121] F. Jeßberger. P. 9.

by the fact that many Syrians live in Germany, and by the many complaints which were filed by civil society organizations and Syrian survivors.[122]

FDLR case

In September 2015 (13 years after the introduction of the relevant legislation), the Higher Regional Court in Stuttgart convicted Ignace Murwanashyaka and Straton Musoni, the President and Vice- President of the Forces Démocratiques de Libération du Rwanda (FDLR), a rebel group active in Democratic Republic of Congo (DRC), for war crimes and leadership of a terrorist group. This was the first trial held in Germany based on the universal jurisdiction. Spanning 320 days of proceedings, it was also the longest trial ever held before the Higher Regional Court in Stuttgart. Over 50 witnesses were heard and more than 300 motions to admit evidence were filed. The trial is reported to have cost over 4.8 million euro.[123] The trial proved that a German court can, even under difficult circumstances, deal with international crimes committed abroad.[124] It is noted, however, that the Trial Chamber dropped two-thirds of the charges related to sexualized violence. The presiding judge gave as a reason for the dismissal that the proceedings would otherwise never come to an end.[125]

Anwar Raslan case (The Al-Khatib prison trial)

On 13 January 2022, the Higher Regional Court in Koblenz convicted Anwar Raslan, a former senior officer of the General Syrian Intelligence Service in Damascus, of the crimes against humanity of killing, torture, severe deprivation of liberty, rape and sexual assault, in combination with 27 counts of murder, 25 counts of dangerous bodily injury, particularly serious rape, two counts of sexual assault, 14 counts of deprivation of liberty for over a week, two counts of hostage-taking, and three counts of sexual abuse of prisoners. The Court sentenced Raslan to life imprisonment for his role as a co-perpetrator of these crimes. The fact that the trial became possible and successful was partly due to the defendant's unwitting collaboration, who in the believe that he had no repercussions to fear, was open about his past in Syria's secret service when interacting with German authorities prior to the trial.[126] Another remarkable feature of the trial was the evidentiary contribution of UN-mandated

[122] C. Ryngaert. Germany's Universal Jurisdiction over War Crimes and the Al-Khatib Trial. Blog of the Utrecht Centre for Accountability and Liability Law. August 27, 2021 (https://blog.ucall.nl/index.php/2021/08/germanys-universal-jurisdiction-over-war-crimes-and-the-al-khatib-trial/).

[123] P. Kroker. Op. cit. P. 2.

[124] P. Kroker, A. L. Kather. Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany. August 12, 2016. (ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/).

[125] S. Studzinsky, A. L. Kather. Op. cit. P. 903.

[126] S. Aboueldahab, F.-J. Langmack. Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice // Minnesota Journal of International Law. 2022. Vol. 31, N.2. P. 8.

mechanisms. Three reports prepared by the Independent International Commission of Inquiry on the Syrian Arab Republic (COI)[127] were read into evidence. The prosecution almost certainly also received assistance from the International, Impartial and Independent Mechanism, which was established by the UN General Assembly in 2016 to assist in the investigation and prosecution of individuals responsible for international crimes committed in Syria.[128]

The cases above were the result of structural investigations which allowed to collect evidence and identify particular perpetrators. There are at least three other structural investigations being conducted by Germany presently into the:

- *crimes committed against the Yazidi*. A structural investigation proceeding since August 2014 against unknown members of the Islamic State (ISIS). One focus of the proceeding is on the crimes committed by ISIS against the Yazidi in the Sinjar district from August 3, 2014 involving charges of genocide, crimes against humanity, and war crimes;[129]
- *crimes committed by Liberation Tigers of Tamil Eelam[130] in Sri Lanka* against German nationals that survived the merciless shelling in Sri Lanka's no fire zones and against Tamil survivors who came to Germany to seek refuge from wartime atrocities, torture, constant surveillance, and lasting repression. Despite the extensive evidence collected, the German Federal Prosecutor and the war crimes unit claim to have no capacity to investigate those cases to date;[131]
- *crimes committed in Ukraine* due to the aggression by the Russian Federation. Investigation initiated in March 2022 initially concerned the war crimes, but was later extended to crimes against humanity; currently evidence is being gathered, including statements by Ukrainian refugees.[132] An additional specialized unit has been created within the Federal Public Prosecutor General to support this investigation.[133]

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[127] The COI was established by the UN Human Rights Council in August 2011 to document violations of international law in Syria.

[128] C. Sweeney. Justice Prevails over Realpolitik at Koblenz: International Law offers a Rare Glimmer of Hope after a Decade of Disappointments for Syrians. 14.02.22 (http://opiniojuris.org/2022/02/14/justice-prevails-over-realpolitik-at-koblenz-international-law-offers-a-rare-glimmer-of-hope-after-a-decade-of-disappointments-for-syrians/).

[129] S. Studzinsky, A. L. Kather. Op. cit. P. 903.

[130] B. Burghardt. Zwischen internationaler Solidarität und „not in my backyard" Eine Bilanz der bisherigen Strafverfolgung von Völkerrechtsverbrechen auf der Grundlage des VStGB // Kritische Justiz. 2018. Vol. 51, N. 1. P. 29.

[131] A. Schüller. Universal Jurisdiction — the Most Difficult Path to Achieve Justice for Sri Lanka. February 24, 2021. (https://www.justsecurity.org/74941/universal-jurisdiction-the-most-difficult-path-to-achieve-justice-for-sri-lanka/).

[132] Speakers Disagree on How, When, Where Universal Jurisdiction Should Be Engaged, as Sixth Committee Takes up Report on Principle. Op. cit.

[133] Statement by the Federal Republic of Germany. Sixth Committee – Agenda item 85. The Scope and Application of the Principle of Universal Jurisdiction. 12 October 2022. (https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf). P. 1.

According to the German authorities, prosecutors are currently running over 100 investigations into international crimes. “The message is clear: those who commit atrocities cannot feel safe. They will eventually be held accountable. There is no safe haven for perpetrators of international crimes against criminal prosecution in Germany. Justice will be served for the victims and survivors”, said a statement by the Federal Republic of Germany during the UN GA on the universal jurisdiction in 2022.[134]

Situation with the review of cases from Belarus

In November 2021, two major international human rights NGOs, the European Center for Constitutional and Human Rights (ECCHR) and the World Organisation Against Torture (OMCT) filed an application under universal jurisdiction for investigation of crimes in Belarus in 2020.[135] A case involving high-ranking members of the Belarusian security apparatus as suspects was filed as a crimes against humanity case, in a hope that a “structural case” will be opened, similar to those launched earlier in Germany in the cases of ISIS crimes against the Yazidi, of Liberation Tigers of Tamil Eelam crimes in Sri Lanka and crimes committed in Ukraine in the course of the Russian aggression. After initiating a so-called monitoring process, a sort of preliminary investigation procedure, and interviewing a witness in Germany, the prosecutor's office decided in the summer of 2023 not to initiate personal investigations against the suspects named in the complaint filed by the NGOs, making use of its discretionary powers. To justify its decision under Section 153f of the German Code of Criminal Procedure, the prosecutor argued that that there were no further possibilities to successfully investigate the facts of the case in Germany. According to NGOs, however, this assessment does not sufficiently take into account the availability of evidence gathered by bodies such as the International Accountability Platform for Belarus and the OHCHR examination of the human rights situation in Belarus, which were not contacted in the course of the monitoring process.

Earlier, in May 2021, several German lawyers filed a lawsuit on behalf of 10 Belarusian nationals against Aliaksandr Lukashenka and his security apparatus, alleging their clients were victims of crimes against humanity during the government’s crackdown on protests since August 2020.[136] A few weeks later, the lawyers stated that a monitoring process was initiated by the prosecutors following the complaint.[137] This decision can be understood as a decline by the

[134] Ibid. P.2.

[135] Germany: Complaint filed against six members of the Belarus security apparatus. Press release by OMCT and ECCHR. 1 November 2021 (https://www.omct.org/en/resources/news-releases/germany-complaint-filed-against-6-members-of-the-belarus-security-apparatus).

[136] Lawyers file suit against Belarus' Lukashenko in Germany. DW, 5 May 2021 (https://www.dw.com/en/lawyers-file-suit-against-belarus-lukashenko-in-germany/a-57432482).

[137] M. Koch. Anwalt stellt Strafanzeige gegen Lukaschenko. June 21, 2021 (https://www.rnd.de/politik/anwalt-stellt-strafanzeige-gegen-lukaschenko-H2TTVJ5JARBNPB7CWDZJDFKB7Q.html).

prosecutor to open personal investigation against Lukashenka. This would be hardly surprising given that German authorities tend to interpret personal immunity very narrowly, including in cases of highly contested legitimacy such as in Belarus. The lawyers in the case admitted that "Lukashenka could still claim immunity as acting head of state. After a change of power, however, he should expect to be held criminally responsible."[138] No further information on the status of these applications is publicly available.

As in all cases of international crimes, one reason for the reluctance to investigate might lie in the high evidentiary threshold that needs to be met when proving the contextual elements of the crime – e.g. the commission of a widespread or systematic attack against a civilian population. Reports such as by the UN High Commissioner for Human Rights[139] or by NGOs[140] could, however, help in evidencing this requirement.

Another challenge lies in the fact that high-ranking perpetrators are currently not likely to travel to Germany due to sanctions imposed against them. Prosecutors might therefore be inclined to allocate their limited resources elsewhere. NGOs generally note that only in very few cases does the German public prosecutor's office pursue a so-called global enforcer approach, i.e. in most cases authorities only take action if a suspect is in Germany.

As for the lack of political will, it, to a certain extent, can be demonstrated by the fact that staff-members of the war crimes units and prosecutors' offices do not take into consideration political calls for international justice and are concentrated on the availability of perpetrators. Meanwhile, although no high-ranking suspects are known to be travelling to Germany at the moment, it would be possible to open a structural investigation in order to secure all evidence available and prepare for future proceedings in Germany or elsewhere.

[138] Ibid.

[139] Situation of Human Rights in Belarus in the Run-up to the 2020 Presidential Election and in its Aftermath. Report of the United Nations High Commissioner for Human Rights. UN doc. A/HRC/52/68 (3 February 2023).

[140] See, for example, M. de Hoon, A. Vasilyeu, M. Kolesava-Hudzilina, Crimes against Humanity in Belarus: Legal Analysis and Accountability Options. Law and Democracy Center. July 2023(https://ldc-jh.eu/wp-content/uploads/2023/07/Report-on-Crimes-against-humanity-.pdf).

IV. Challenges: General critique of the universal jurisdiction implementation

Investigation and prosecution of international crimes under universal jurisdiction remain limited in number. This is due to many reasons. First, the universal jurisdiction framework varies from one country to another. Second, cases of extraterritorial jurisdiction require an enormous capacity of human and monetary resources. If states do not have the man-power and allocated funds to ensure safe and transparent judicial process, it can limit the number of cases.

Apart from these obvious reasons, there are several problematic areas that minimise the scope of universal jurisdiction that can be addressed to increase the amount and value of universal jurisdiction trials. These are areas of witness protection and treatment, trial documentation and access of the public to it, optimal structures and target financing, and international and national cooperation. Challenges in the practice of implementation of universal jurisdiction could be studied best by looking at the experience in Germany due to a high number of cases in this country.

Witness protection and treatment

The nature and scale of international crimes make them among the most complex to prosecute. These difficulties are multiplied when investigations or trials take place far away from where the crimes were committed. Because of the difficulty of accessing crime scenes, forensic evidence is often scarce in universal jurisdiction cases. Therefore, a case is often heavily reliant on witnesses' statements.[141] At the same time, witnesses are often only prepared to give evidence if their identities are carefully protected, as they or their relatives are, and in some cases remain to be, subject to constant threats and danger and are feared revenge attacks for giving evidence.[142]

Based on the German experience, expert analysis demonstrates that criminal justice system is not ready to provide witnesses with effective protection. Experts agree that the courts have displayed little ability to protect survivors, both from external threats and the psychological distress that resulted from reliving their sometimes-traumatic experiences in court. At the Al-Khatib trial, experts note, at times the court seemed to learn about threats against witnesses in real time during their testimony.[143] Several Syrian torture survivors and witnesses of human rights violations expressed concerns for their safety and their family members to join the trial. Though the court hid from the public personal

[141] Evidentiary Challenges in Universal Jurisdiction Cases. Universal Jurisdiction Annual Review. Trial International. Geneva, 2019. P. 9.

[142] P. Kroker. Op. cit. Pp. 18-20.

[143] S. Aboueldahab, F.-J. Langmack. Op. cit. Pp. 17, 19.

information of those who testified in an open court, gave them tow initials and instructed them to wear a mask during the provision of testimony, some of the witnesses claimed that the measures to ensure their protection were not enough and withdrew; others preferred to submit their testimony remotely. It was not clear if the court understood the concerns raised by witnesses or if the court just addressed them on a case by case as they arose. There were no specific guidelines to preserve confidentiality outside the courtroom. Some witnesses stepped outside the courtroom making phone calls and named other protected witnesses. At some point in the legal proceeding, the names of the witnesses were leaked to the press.[144]

Problems with anonymisation were noted earlier in the other German universal jurisdiction case – the FDLR case, where the real names of eight witnesses could still be gleaned from the letters requesting judicial assistance, which formed part of the case file. Accordingly, a defence counsel revealed two names in public trial. This clearly questions the quality of the anonymisation.[145] Despite the fact that German law contains a robust set of rights for the participation of victims, there was no victim participation in this case, partly due to unresolved questions of witness and victim protection.[146]

Apart from the issues with protection, experts claim that the overall treatment of witnesses can be called inappropriate. Silke Studzinsky and Alexandra Lily Kather refer to the feedback given by a special prosecutor, who was hired by the Office of the German Federal Prosecutor General of the Federal Court of Justice for this case as there were no female prosecutors in the Office. She reported that she had no access to the case file to prepare for the questioning of the witnesses. She was instructed to conduct each examination in no more than one day, which included the retranslation of the transcript of the interview. Some of the witnesses had completed a journey of several days to arrive at the place of the interview. Since the questioning had to be completed before nightfall, the actual time for the examinations was very limited. The net time for each interview averaged to about five hours per person. The witnesses did not receive any information on their rights as victims in criminal proceedings in a case in Germany and, in particular, that they could have joined the proceedings as civil parties and could have received further assistance and legal representation free of charge. And finally, psychological support was available – not for the victims, but for the prosecutor, the Federal Police Officer and the interpreter.[147]

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[144] M. Masadeh. One Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice: Lessons Learned Through Al-Khatib Trial. Völkerrechtsblog. 24.01.2022 (https://voelkerrechtsblog.org/one-court-at-a-time-challenges-of-universal-jurisdiction-and-enhancing-international-justice/).

[145] S. Studzinsky, A. L. Kather. Op. cit. P. 900.

[146] P. Kroker, A. L. Kather. Op. cit.

[147] S. Studzinsky, A. L. Kather. Op. cit. P. 898.

It is obvious that the universal jurisdiction trials would benefit from as many testimonies and pieces of evidence as possible to expose complex networks of perpetrators. This can only be possible when witnesses are protected and fear no vengeance, stresses Masadeh. It would be beneficial to create an anonymity protocol and simple guidelines for trial participants in their mother tongue to propel safe conduct and anonymity inside and outside the court room. International tribunals offer rich guidelines on witness protections which could be used as a basis.[148]

Trial documentation and access of the public to it

Another stronger point of critique is access of public, in the broadest possible sense, including those outside of the country administering universal jurisdiction, to documentation in universal jurisdiction cases. It is presently assessed as very limited, being restricted to the verdict, which may be published in anonymized form in case-law registries. However, this is not always the case and it may be difficult to obtain even a copy of the verdict.[149]

There is no unified approach to the issue of trial recording and public access to them in different countries. It would be logical to assume that bearing in mind the historical value of universal jurisdiction proceedings, they will be recorded in details and later widely publicized as happened with the Nuremberg Trials. It is, however, not the case in Germany. At the Al-Khatib trial, as well as at other universal jurisdiction trials, proceedings were not recorded while a court protocol only contained a minimum amount of information. The judges therefore had to draw their conclusions from their memory and notes – inaccessible to other trial parties or higher courts.[150] In spite of numerous requests from national and international law scholars, academic institutions, human rights organisations, the court refused to allow recording, claiming that audio recordings could influence and intimidate survivors. At the trial of Alaa M., a Syrian doctor accused of torture, the competent court even forbade note-taking in the courtroom.[151]

These courts decisions were not due to the absence in law of a possibility to record the trial– shortly before that the German legislator introduced the possibility to record trials of historical significance for the Federal Republic of

[148] M. Masadeh. Op. cit.

[149] P. Kroker, F. Lüth. One Year On – Remembering the Al-Khatib Syrian Torture Case and Reflecting on the Documentation of International Crimes Cases in German Courts. January 12, 2023 (ejiltalk.org/one-year-on-remembering-the-al-khatib-syrian-torture-case-and-reflecting-on-the-documentation-of-international-crimes-cases-in-german-courts/)

[150] S. Aboueldahab, F.-J. Langmack. Op. cit. P. 29.

[151] A. Polakiewicz. No Justice, No Security: International Criminal Law Enforcement's Rightful Place in the German National Security Strategy. 7 Dec. 2022 (https://fourninesecurity.de/2022/12/07/no-justice-no-security)

Germany for archival purposes (section 169 para. 2 Courts Constitution Act[152]) and the Higher Regional Court Naumburg recorded the entire trial concerning a right-wing terrorist attack on a Synagogue in the city of Halle that shocked German society in 2019.[153] It should be noted that Germany acknowledges obvious historical significance of universal jurisdiction trials – the Federal Ministry of Justice recently published a draft law according to which, trials involving international crimes would be audio- and video-recorded from 2026 onwards, and an automated written transcript would be produced. This documentation would be made available to the parties to the proceedings as a resource. It is, however, to be deleted once the procedure has been completed and its publication would constitute a criminal offence.[154] Kroker notes that the draft law would therefore not change the fact that the already existing possibility for courts to audio-record trials for academic and historical purposes is not used in trials involving international crimes in Germany. For this to happen, it would seem necessary to amend said provision in a way that recordings are the rule in these trials and not solely subject to the discretion of the trial court.

Another issue is a deletion of the recording once the procedure has been completed and a prohibition to make it public. In this regard, another stance was taken by France. In the case of Kunti K, who was convicted by the Paris Cour d'assises in November 2022 for complicity in crimes against humanity committed in the context of the first Liberian civil war, the President of the Court authorized, "in light of the exceptional nature of this trial", its full recording for the purpose of constituting historical archives.[155]

In terms of public outreach, it can be stated that universal jurisdiction trials courts in Germany have demonstrated ignorance of the need to communicate information about the trials towards general public and the affected population.[156] For instance, in the trial of Moafak D, involving war crimes under the siege of the Yarmouk neighbourhood in Damascus, which is currently pending before the Higher Regional Court of Berlin (Kammergericht), the Court has not even issued a press release.[157] Not only "wide public" has no understanding of what is happening during the trial: at the Al-Khatib trial non-German speakers in the public hall could not follow the trial due to the lack of translation (translators were available for the accused, but not to families and

[152] Courts Constitution Act in the revised version published on 9 May 1975 (Federal Law Gazette I p. 1077), as last amended by Article 8 of the Act of 7 July 2021 (Federal Law Gazette I, p. 2363) (https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html)

[153] S. Aboueldahab, F.-J. Langmack. Op. cit. P. 29.

[154] P. Kroker, F. Lüth. Op. cit.

[155] P. Kroker, F. Lüth. Op. cit.

[156] P. Kroker, A. L. Kather. Op. cit.

[157] P. Kroker, F. Lüth. Op. cit.

journalists).[158] The instance of the FDLR trial proved there was no official communication with the affected region. The brief updates from the press office of the Stuttgart court were published in German and related mainly to organisational aspects such as the scheduling of court dates. The failure to provide information in French or in any other local language mean that even organizations in the Democratic Republic of Congo working with victims of conflict violence and who actively sought updates, were unable to transmit any information about the trials. In some instances, European partner organisations like the ECCHR provided them with information that they could disseminate locally. The little information available was received with great interest in the region.[159]

German practice of non-recording of the proceedings and prohibition of publication of information on universal jurisdiction cases raises the question with regard the purpose of universal jurisdiction implementation. As Polakiewicz notes, if the goal of universal jurisdiction cases is deterrence, then, as deterrence presumes effective communication, every universal jurisdiction trial and its result should be communicated widely. If the goal is establishing a historical record, then why are universal jurisdiction trials not being taped? If the goal is to practice retribution on behalf of the victims, then why are the trials not being simultaneously translated into a language that affected persons in the courtroom can understand?[160]

Meanwhile, a quality information supply would inform debates in and about the situation in diaspora communities, which appear to be an important factor when it comes to universal jurisdiction activity in Germany as well as in the country of commission, provide important testimony to victims that their suffering and resistance does not go unseen, may support and shape in-country (transitional) justice efforts, may also serve as a reminder to the international community of unaddressed injustice and prevent the creeping 'normalisation' of relations with national regimes that are responsible for the commission of international crimes.[161] It can also provide an account of the universal jurisdiction underlying processes and legal challenges to support universal jurisdiction litigation in other countries and regions. Moreover, Kroker and Lüth note that documentation of universal jurisdiction trial can be presented as a responsibility of the state that conducts proceedings on behalf of the world community to make these proceedings accessible to said community as part of a common historical heritage.[162]

[158] M. Masadeh. Op. cit.
[159] P. Kroker. Op. cit. P. 27.
[160] A. Polakiewicz. Op. cit.
[161] P. Kroker, F. Lüth. Op. cit.
[162] Ibid.

Lack of optimal structures and target financing

The "poster child" of the universal jurisdiction, Germany, made such a progress in the field due to the fact that it is, at the moment, at the intersection of willing and able prosecution services, highly skilled civil society organisations and justice-craving diaspora communities. Even so, it has a relatively moderate number of trials. One of the reasons which is relevant undoubtedly for other countries willing to prosecute international crimes is that, even 20 years after the adoption of the Code of Crimes Against International Law, Germany has still not instituted optimal conditions for national-level international criminal law enforcement.[163]

One example is the lack of institutional structures. Certain progress in this field can be seen as a seemingly positive result of the collaboration between the German Federal Office for Migration and Refugees (BAMF) and prosecution services. Interviews at the BAMF, conducted as part of asylum applications, featured questions aimed at identifying witnesses, victims and perpetrators of international crimes that would then be handed to Germany's War Crimes Unit.

While this partial re-dedication of the asylum application procedure worked well with regards to Syria, the fact that there is no specific institution or process through which refugees can testify is now proving problematic. Ukrainian refugees do not have to apply for asylum. The major source of evidence on international crimes within the frame of the instituted structural investigation of crimes committed in the course of the aggression in Ukraine is, thus, not used. At present, the testimony of Ukrainians who fled to Germany is only recorded if the refugees proactively file their statements at local police stations – a solution whose effectiveness is highly dubious. Structures need to be built that fill this and other gaps: ideally in a way that will benefit more than just Ukrainian refugees.[164]

In spite of the considerable budget allocated in Germany for the universal jurisdiction investigation and trials, this money is still not enough to cover all the necessary costs. The same need is mentioned repeatedly by government and non-governmental experts.[165] Money are needed for witness-related expenses, including psychological and legal counselling, translation, and last, but not least – for the specialised training of all the legal professionals involved in universal jurisdiction cases investigation and trials. According to Judge Daniel Fransen (Special Tribunal for Lebanon, formerly Belgian investigating judge), the training

[163] A. Polakiewicz. Op. cit.

[164] A. Polakiewicz. Op. cit.

[165] Universal jurisdiction and international crimes: Constraints and best practices. Workshop paper. Policy Department for External Relations. Directorate General for External Policies of the European Union. September 2018. P. 11.

of investigators, prosecutors and judges is also key to reducing the time for investigating such cases.[166] Organisation of special international crimes' units in countries where they are non-existent was advised by experts and will also require serious funding.[167]

Lack of cooperation on a practical level

Effective investigation and prosecution of international crimes at national level depends on "strong cooperation regime"[168] between the states ("as knowledge and evidence are usually scattered"[169]) and between the relevant authorities of different states, including between immigration authorities, law enforcement, prosecution, and units dealing with counter-terrorism, smuggling of migrants and money laundering.[170] To this end, the European Union set up in 2002 a European network for investigation and prosecution of genocide, crimes against humanity and war crimes, hosted by Eurojust ("Genocide Network").[171] It is a network of practitioners specialised within their national authorities, to investigate and prosecute genocide, crimes against humanity and war crimes. The mandate of the network is to exchange and share best practices, experiences, knowledge but also operational information. Its members are EU Member States, but there are also observer states, namely the U.S., Canada, Norway, Switzerland and, recently, also Bosnia and Herzegovina.

In addition, in accordance with Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, EU Member States are obliged to take all necessary measures to inform law enforcement authorities of the presence of alleged perpetrators and to ensure the exchange of information between national law enforcement and immigration authorities. This measure is aimed at increasing cooperation between the national authorities of EU member states, and thus to maximize the ability of law enforcement authorities in different member states to cooperate effectively in the field of investigation and prosecution of alleged perpetrators of serious international crimes.[172]

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[166] Ibid.

[167] Ibid. P. 11, 14.

[168] Statement of Indonesia, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 73rd session of the UN General Assembly, 11 October 2018.

[169] Universal jurisdiction and international crimes: Constraints and best practices. Workshop paper. Op. cit. P. 11.

[170] Ibid.

[171] Web page of the Genocide network on the website of Eurojust: https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network.

[172] EU Statement. UN Sixth Committee: the Principle of Universal Jurisdiction. 21.10.2021 (https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-united-nations-6th-committee-principle-universal_en?s=63&page_lang=en).

Finally, to address a legal gap in the mutual legal assistance and extradition between states for the national adjudication of genocide, crimes against humanity and war crimes confirmed by the states on the expert meeting organized by the Netherlands, Belgium and Slovenia in the Hague in November 2011, a Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (MLA Convention) was adopted at the 18th Plenary Session of the MLA Diplomatic Conference in Ljubljana on 26 May 2023.[173] The MLA Convention represents a landmark international treaty that will help to deliver justice to victims of genocide, crimes against humanity and war crimes. It is expected to significantly reduce impunity for perpetrators of crimes**.** The Convention shall be open to all States for signature in 2024 for a period of two weeks from the date of the Signing Conference in The Hague, which is scheduled for 14-15 February 2024.[174] Even if not widely accepted, it might influence and shape creation of new (or amendment to the relevant existing) principles of universal jurisdiction contained in customary international law.

In spite of considerable effort put in reaching formal agreements in cooperation, experts note that there is a need for more practical/methodological cooperation. Apart from widely acknowledged necessity in database on universal jurisdiction cases,[175] it is suggested to develop a toolkit on universal jurisdiction, including common standards or practices in order to ensure that evidence can be used around the world. This should be paired with more specialised training for investigators, prosecutors, judges and law enforcement staff for universal jurisdiction cases and more cooperation at EU and international level.[176]

Another field of cooperation in need of improvement is the cooperation with non-governmental organisations. The example of Germany proves how fruitful this cooperation can be. Only within the frame of investigation of crimes in Syria, such NGOs as the Commission for International Justice and Accountability, European Centre for Constitutional and Human Rights and others investigated and collected evidence (over 800,000 security-intelligence, military, and political documents) in Syria since 2011 despite the risks inherent to armed conflict and war, prepared ten case briefs against the top fifty people in the Syrian

[173] The Diplomatic Conference for the Adoption of the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes (https://www.gov.si/en/registries/projects/mla-initiative/diplomatic-conference-for-formal-negotiations/#:~:text=As%20a%20result%20of%20the,the%20Crime%20of%20Genocide%2C%20Crimes).

174 MLA (Mutual Legal Assistance and Extradition) Initiative. (https://www.gov.si/en/registries/projects/mla-initiative).

[175] F. Jeßberger. Op. cit. P. 10.

[176] Universal jurisdiction and international crimes: Constraints and best practices. Workshop paper. Op. cit. P. 19.

government[177]; supported 17 torture survivors who gave witness testimony to the German Federal Criminal Police prior to Al-Khatib trial[178]; prepared legal interventions requesting an inclusion of charges under Section 7(1)(6) of the CCAIL, and later – legal argumentation to the court, following which the first conviction in Germany involving sexualised violence as a crime against humanity was handed down.[179] The interaction between NGOs and justice institutions, as was noted, should be framed to avoid further problems during trials.[180]

Wrapping up available expert critique of the universal jurisdiction implementation, it can be argued there are several success factors in universal jurisdiction cases. Those are:

1) A political will of the state to pursue justice and not to become a safe haven for international criminals;
2) Legislative framework defining core international crimes in the national law;
3) Setting up specialised units, appointment of staff trained to deal with international crimes, and allocating necessary resources;
4) Holding preliminary structural investigation;
5) Presence of a strong diaspora in the country, administering universal jurisdiction;
6) Strong cooperation of the law enforcement bodies with civil society;
7) Presence of an accused on the territory of the country, administering universal jurisdiction.

[177] Responsibility to Prosecute'? The Case of German Universal Jurisdiction, CIJA and the Arrest of Syrian Perpetrators. March 2019 (https://lawlog.blog.wzb.eu/2019/03/13/responsibility-to-prosecute-the-case-of-german-universal-jurisdiction-cija-and-the-arrest-of-syrian-perpetrators/).

[178] M. Masadeh. Op. cit.

[179] K. Theurer. German Code of Crimes Against International Law: Gender Bias and the Need for Reform. 14 March 2023 (https://www.boell.de/en/2023/03/07/voelkerstrafgesetzbuch-gender-bias-und-reformbedarf).

[180] Universal jurisdiction and international crimes: Constraints and best practices. Workshop paper. Op. cit. P. 11.

V. Lessons from the application of the universal jurisdiction principle to cases from Belarus

The lessons that can be learned from the process of the universal jurisdiction implementation in respect of cases concerning the events in Belarus simultaneously reflect the general problems in this area (see chapter IV, "General critique of the universal jurisdiction implementation" of this report) and emphasise the specifics of Belarusian cases.

1. First of all, it should be noted that in relation to cases regarding Belarus, there is currently no problem of lack of applicants or of evidence of the physical elements of crimes against humanity committed in this country. NGOs document cases according to the standards of the International Accountability Platform for Belarus (IAPB). It is estimated that human rights defenders have more than 5,000 potential cases at their disposal. There are about 200 potential suspects who can be identified, including employees of the Ministry of Internal Affairs of Belarus, employees of isolation wards, and high ranking officials. Information on them can be provided and is currently provided to both national authorities and the IAPB, to which, in turn, some states send requests about particular situations as part of their investigation.

A lot of information is also available providing evidence of contextual elements of crimes against humanity committed in Belarus since the summer of 2020. Intergovernmental organisations have already published reports covering the issue (including two UN HCHR reports (in March 2022 and March 2023). Detailed reports providing evidence of physical and contextual elements of crimes against humanity in Belarus have been also produced by NGOs.[181]

At the same time, as it turned out, this and more specific information, accumulated by NGOs, is not available to the national law enforcement bodies authorised to investigate crimes within the framework of the universal jurisdiction. There is an obvious lack of vital communication and coordination between government agencies and civil society, as well as between the relevant government agencies of different countries. Our research has shown that representatives of the relevant agencies in some countries researched are aware of this and expressed hope that an interstate investigation team will be created.

[181] See, for example, M. de Hoon, A. Vasilyeu, M. Kolesava-Hudzilina. Op. cit.; Communication submitted under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes against Humanity of Deportation and Persecution. IPHR, Global Diligence LLP, Truth Hounds, and NHC, May 2021 (https://truth-hounds.org/wp-content/uploads/2021/05/by_icc_submission.pdf); Belarus: Crimes against Humanity Committed by the Government from August 2020 onwards. Paper by OMCT SOS-Torture Network, November – December 2021 (https://www.omct.org/site-resources/legacy/Crimes-against-humanity_analysis-Belarus.pdf).

Opening a preliminary structural investigation to compile the necessary information on crimes against humanity in Belarus could be one of the solutions of the problem.

2. The problem of the lack of regular information exchange between the investigative authorities and NGOs, leading to the insufficient use of the available evidence contained in the documentation by civil society and the UN examination, is compounded by the lack of publicity on universal jurisdiction cases. It is observed in all, without exception, countries studied. In Poland, as was mentioned above, the non-publicity clause covers not only the identity of the applicant and the accused, but also the entire investigation process. At the same time, as noted in chapter IV, "General critique of the universal jurisprudence implementation", the lack of access to information for general public and NGOs hinders both the popularisation of the universal jurisdiction among potential applicants and the pursuance of the goal of deterring international crimes. Potential input of Belarusian diaspora in these countries also remains untapped as a result of the policy of secrecy.

3. The absence of a special department authorised to investigate cases within the framework of the universal jurisdiction, or, if established, the lack of resources and qualifications of its employees, was identified as one of the key problems by all respondents.

4. In connection with the problem of qualification, the lack of methodological guidelines was also mentioned, which could be used by employees working with cases within the framework of the universal jurisdiction, starting from the lowest level, including police officers who receive initial statements from applicants.

5. Another obstacle to the investigation of a number of filed cases, as well as the filing of new cases, noted in different countries, is the problem of the applicant having international protection preventing the disclosure of information about him or her, allegedly necessary when communicating information about the opening of investigation to the state bodies of Belarus. This problem is not only legal (there is a fundamentally different interpretation of the existing provisions of interstate agreements on cooperation in criminal matters in the absence of a mandatory norm on the disputed issue), but also administrative, since the interpretation of the relevant norms is the prerogative of state bodies, and the adoption of an official interpretation that allows concealing the applicant's name by analogy with the protection measures used in criminal proceedings, could be a solution and would open the doors to dozens of new cases.

6. The lack of political will to investigate cases concerning the events in Belarus is evidenced by the absence of an initiative by states to clarify the applicable

legislation. Our analysis shows that where the decision to prosecute made at a high political level, the investigation is carried out more effectively. With regard to Belarus, we have to admit that most of the states researched are not yet fully ready to recognise the crimes carried out by the Lukashenka regime as a threat to the global rule of law and security and therefore are of direct national interest of the countries concerned. This is especially demonstrative in comparison with the efforts that the same countries undertake to investigate cases related to war crimes and crimes against humanity in Ukraine.

7. And finally, respondents from different countries, including civil servants, lawyers, and representatives of NGOs, refer to the unavailability of the suspects. A conflict between the need to impose and expand personal sanctions, including travel bans, as an important tool of holding perpetrators accountable, and the necessity to ensure their arrest during their travel to countries whose authorities would be willing to detain and extradite them, has no clear solution. The absence of visible opportunity to arrest and try them has a significant cooling effect on the investigative authorities who do not want to open a case with no prospects, although collecting sufficient evidence, issuing arrest warrants, and waiting for the moment when the suspects arrive in countries where they can be detained, appears as a reasonable approach. Refusal to open investigations, collect evidence, and issue arrest warrants indicates not only a lack of understanding of the essence of the universal jurisdiction, one of the goals of which is to send a strong deterring signal to perpetrators that justice is in the work, but also the lack of a clear strategy, including a long-term one, in the field of universal jurisdiction, which was noted by respondents.

VI. Recommendations

Taking into account lessons learned from the application of the universal jurisdiction principle in various countries over the last decades, the experience of presenting and proceeding on cases from Belarus within the framework of universal jurisdiction in four European countries studied in the course of the research, and the feedback given by representatives of state structures, civil society representatives, and lawyers, the following recommendations could be given to national authorities and law enforcement bodies in order to facilitate prompt and effective investigation and prosecution of culprits, as well as to motivate more survivors of international crimes committed by the Lukashenka regime to submit their applications:

1. to amend legislation, where relevant, in order to eliminate provisions unduly restricting the scope of application of the universal jurisdiction principle or giving too broad discretion to the law enforcement officials such as the requirement to prove that the crime threatens national interests; expand the list of crimes covered by the universal jurisdiction to include torture, enforced disappearances and sexualised violence as stand-alone crimes; and bring the definitions of international crimes fully in line with the provisions of the Rome Statute;

2. to create specialised bodies to investigate international crimes within the framework of the universal jurisdiction, including international crimes committed in Belarus; in case of existence of such bodies, allocate necessary resources and strengthen them both numerically and in terms of expertise;

3. to strengthen inter-country cooperation on cases of universal jurisdiction covering international crimes committed in Belarus by creating a joint interstate investigation team to exchange expertise and data on suspects and specific situations;

4. to build up expertise of the relevant personnel dealing with the universal jurisdiction cases, including by regular exchange of experience with specialists from the countries that have strong experience in investigating cases under universal jurisdiction;

5. to build up expertise of relevant personnel dealing with the universal jurisdiction cases by producing and widely disseminating methodological guidelines on working with international crimes and organising corresponding educational programmes and trainings;

6. to increase the knowledge of the investigation team's staff about the criminal procedure, methods of working with evidence in situations of

lack of interaction on the part of the authorities of the respondent state, protection of victims and witnesses, etc., including by taking into account the experience of the European Court of Human Rights and the UN Human Rights Committee;

7. to deepen the interaction of state bodies with NGOs, including by holding regular face-to-face meetings to discuss the available and required information on cases;

8. to agree on the interpretation of the norms of inter-state cooperation agreements providing for the need to report information about the case under investigation to the state bodies of Belarus, to ensure the safety of applicants and their relatives;

9. to compile a list of documents of intergovernmental and non-governmental organisations containing evidence of physical and contextual elements of crimes against humanity committed on the territory of Belarus for their use by investigative groups of different countries;

10. to compile a non-public database of evidence of alleged crimes committed in a certain location during a certain period of time, with information on linkages with suspects and the chain of command, that would be made available to investigators in different states;

11. to provide access to information that does not disclose the identity of the applicant and witnesses in cases of universal jurisdiction for NGOs and the academic community, and, at a certain stage of the investigation, for the general public, including outside the state administering universal jurisdiction;

12. to provide for the obligation of competent authorities to publish an annual report on the progress in investigation of cases of universal jurisdiction, including reasons for refusal to initiate or discontinue an investigation.

While the financing and staffing of special investigation teams, as well as the adoption of legislation and the implementation of inter-state agreements are within the jurisdiction of states, the problem of methodological and expert support to address a number of issues identified above can be solved with the participation of civil society. Thus, the recommended guidelines could be developed with the involvement of specialised non-governmental experts. The experience and knowledge of NGOs could also be useful in organising trainings for employees of specialised investigative groups.

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