

Using Universal Jurisdiction to Combat Impunity for Atrocity Crimes

A potent weapon in global accountability

Acknowledgements

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First Published May 2010

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“Universal jurisdiction appears as a potent weapon: it would cast all the world’s courts as a net to catch alleged perpetrators of serious crimes under international law. It holds the promise of a system of global accountability—justice without borders—administered by the competent courts of all nations on behalf of humankind”.¹

INTRODUCTION

Universal jurisdiction can be an effective tool for combating impunity for atrocity crimes and widespread human rights violations. This is notwithstanding a popular view amongst international criminal law scholars that domestic prosecutions of international crimes on the basis of universal jurisdiction is a declining—if not dying—practice.² Such a view no longer accords with the reality of State practice, if it ever did. Indeed, recent research in the area makes clear that universal jurisdiction is far from on its ‘way out’ of international relations—prosecutions under universal jurisdiction have, over recent years, been steadily rising. Universal jurisdiction is not disappearing; it presents an increasingly popular and effective mechanism for pursuing justice. This report provides a summary of universal jurisdiction concepts, developments and challenges in an attempt to bridge the gap between the popular “rise and fall” narrative of universal jurisdiction and the reality of its practice today. The report shows that universal jurisdiction can be a strong tool for combatting impunity, which is increasingly being wielded by domestic courts around the world. Governments should be encouraged by this evidence and use it to bolster mechanisms for pursuing universal jurisdiction cases in domestic courts. In the latter end of the report, specific recommendations are made as to the steps States should take therein.

What is universal jurisdiction?

The principle of universal jurisdiction, put simply,³ holds that a state’s national courts may prosecute certain crimes notwithstanding the absence of territorial, nationality, or national-interest connections between that state and the crimes in question.⁴ Instead, the State’s jurisdiction is based on the nature of the crime itself. Some crimes are said to be ‘so harmful to international interests that states are entitled—even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator of the victim’.⁵ In modern times, there is broad consensus that the ‘core crimes’ enshrined in customary international law—those of genocide, crimes against humanity, and breaches of the laws of war—attract universal jurisdiction.⁶ Arguably, universal jurisdiction also attaches to torture within the meaning of the 1984 Torture Convention.⁷

What is the source of universal jurisdiction?

International law

The basis of universal jurisdiction as a matter of public international law is somewhat elusive. In practice, States exercising universal jurisdiction over one or more core international crimes typically rely upon two international sources of authority: (1) treaties; and (2) customary international law.⁸ Commonly invoked treaties include the Geneva Conventions of 1949 and Additional Protocol I of 1977, the Genocide Convention, the Convention Against Torture, and the Rome Statute. Though popular bases for invoking universal jurisdiction, whether these treaties actually provide for universal jurisdiction is contested, as are the precise contours of universal jurisdiction under customary international law.⁹ Many agree that ‘the exercise of universal jurisdiction regarding the three core crimes—genocide, crimes against humanity and war crimes—is indeed based on broad State practice’,¹⁰ but there is not consensus. It seems that although there is agreement that there is a principle of universal jurisdiction, its precise scope and source remain unclear.

National laws

In practice, pinning down the relevant, or strongest, source of international law allowing for the exercise of universal jurisdiction is often unnecessary. This is because for most States, before a national court can exercise jurisdiction, the State must pass national law providing for it. The majority of States do in fact have such legislation allowing for universal jurisdiction to be exercised over certain international crimes, often due to ratification of the Rome Statute.¹¹ In the most comprehensive study of domestic legislation providing for universal jurisdiction, Amnesty International reported in 2012 that almost 90% of States allow for the exercise some form of universal jurisdiction over some international crimes.¹² The implementation of such domestic laws largely alleviates issues of identifying positive international law sources of universal jurisdiction—as there is at least no international rule prohibiting States from incorporating universal jurisdiction over the most serious international crimes into their domestic law, States are permitted under international law to do so.¹³

THE ‘QUIET EXPANSION’ OF UNIVERSAL JURISDICTION

Recent work in the field of universal jurisdiction highlights that universal jurisdiction prosecutions in domestic courts are increasing, that State commitments to and endorsements of universal jurisdiction are rising, and that States are pursuing mechanisms to heighten the potential utility of universal jurisdiction as a means for pursuing accountability.

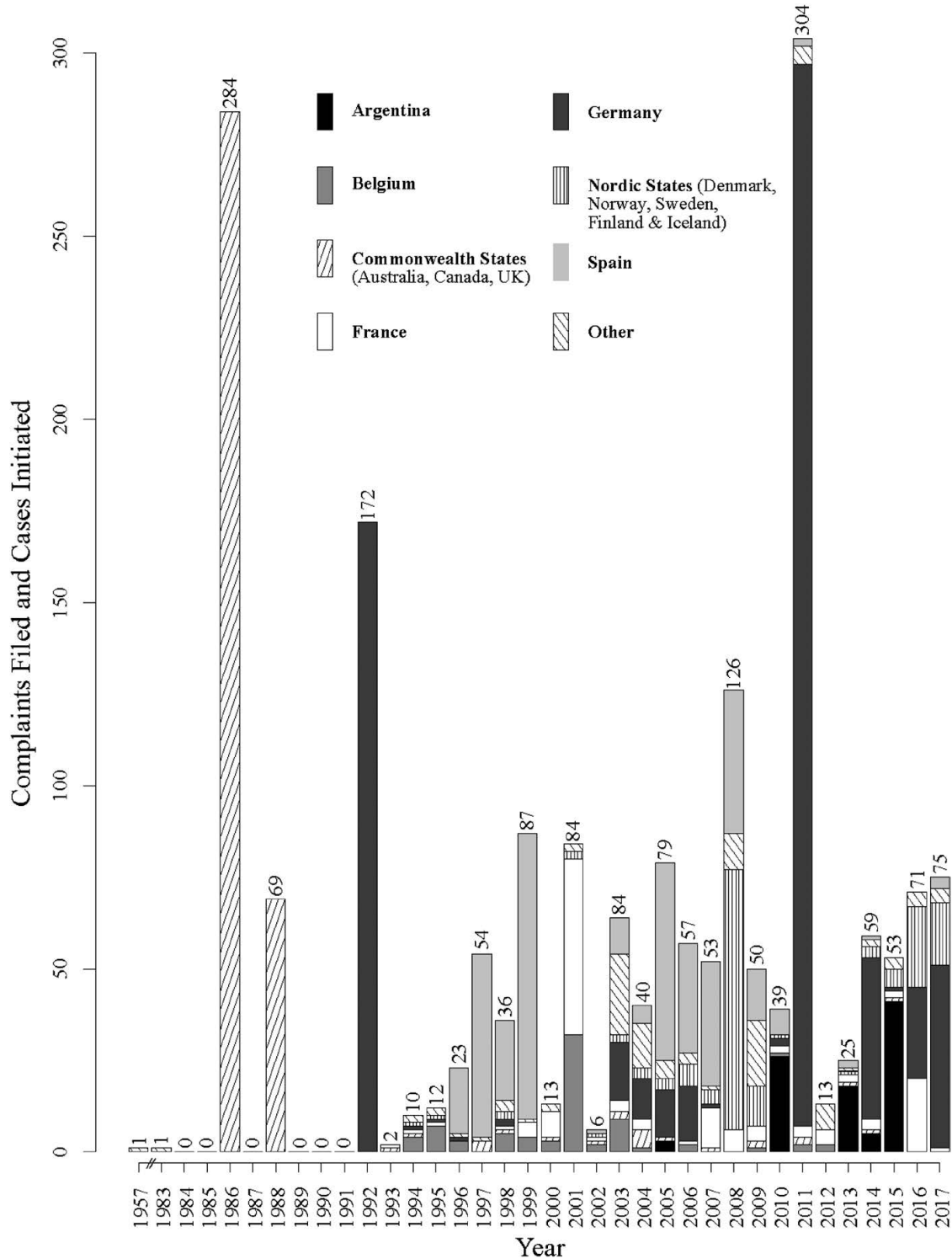
1. Rising universal jurisdiction litigation

A recent survey of universal jurisdiction complaints over core international crimes from 1961 to 2017 worldwide shows that ‘universal jurisdiction practice has been quietly expanding as there has been a significant growth in the number of universal jurisdiction trials, in the frequency with which these trials take place year by year, and in the geographical scope of universal jurisdiction litigation’.¹⁴ The steady rise in universal jurisdiction cases is depicted in **Figure 1**, and broken down by year and country in **Figure 2**.¹⁵

Figure 1: Universal jurisdiction cases initiated

Year	Cases Initiated
Prior to 1988	286
1988 – 1997	342
1998 – 2007	503
2008 – 2017	815

Figure 2: Universal jurisdiction complaints by year and prosecuting State



Prior to 2009, universal jurisdiction complaints were brought primarily in ‘Western Europe and the developed Commonwealth’, with some outliers in Israel, Senegal, South Korea, Poland, and Russia.¹⁶ Although Germany and France remain the most active in the space of universal jurisdiction, cases have been brought in a variety of States.¹⁷ Notable examples include the trial of Hissène Habré in the Senegalese court system,¹⁸ and the ongoing case in Argentina for crimes perpetrated by the France regime pre-1975.¹⁹

CASE STUDY: Using universal jurisdiction to prosecute Myanmar's military leaders

The increasing recourse to, and potential of, universal jurisdiction prosecutions in domestic courts is clearly illustrated by the current case before the Argentine federal courts against members of Myanmar's government.

What is the case? On 13 November 2019, the Burmese Rohingya Organisation (United Kingdom) ('BROUK') filed a case under universal jurisdiction in Argentina against members of the Myanmar military and civilian leaders—including Aung San Suu Kyi—for genocide and crimes against humanity committed against the Rohingya in Rakhine State.

How does it relate to the ICJ and ICC cases? The Argentine universal jurisdiction case complements the parallel proceedings that are currently on foot against Myanmar in the International Court of Justice ('ICJ') and the International Criminal Court ('ICC'). The ICJ case is limited to State responsibility and cannot consider individual responsibility. The ICC case does relate to individual responsibility for atrocity crimes committed in Myanmar, however, because Myanmar is not a State Party to the Rome Statute—the ICC can only consider crimes that occurred on Bangladesh's territory (a State party). In contrast, BROUK's filing in the Argentine courts relates directly to the alleged responsibility of Myanmar's leaders and military personnel for genocide and crimes against humanity committed in Myanmar. It is the only case taking up the responsibility of these individuals for these crimes. Until now, 'no national or international judicial jurisdiction exist[ed] for dealing with the case as regards the crimes committed in the territory of Myanmar'.²⁰

Why Argentina? Argentina's domestic laws provide for a universal jurisdiction basis: section 118 of the Argentine Constitution allows for prosecution of crimes 'committed outside the territory of the nation against public international law' and other domestic legislation explicitly confirms that this allows for universal jurisdiction to be exercised over the Rome Statute crimes.

What next? Myanmar has refused to recognise the Argentine court's jurisdiction in this case, but if the case is successful it may have important practical consequences for accountability. For example, Argentina could issue arrest warrants for those found guilty of atrocity crimes in Myanmar which would then limit the ability of those individuals to travel internationally.

2. Increasing commitment to universal jurisdiction

Beyond actually instituting cases, States are also making increasingly strong commitments to universal jurisdiction as a necessary means to end impunity for atrocity crimes. For example, the European Parliament's resolution of 15 March 2018 on the situation in Syria adopted unprecedentedly strong wording on the merits of universal jurisdiction. The resolution noted 'the obligation of the international community and individual states to hold to account those responsible for violations of international human rights and humanitarian law committed during the Syrian conflict, including through the application of the principle of universal jurisdiction as well as national law'.²¹ Similarly strong wording was used by the Constitutional Court of South Africa in a 2014 decision that stated that South Africa had a legal duty to investigate allegations of crimes against humanity committed in Zimbabwe.²²

3. Rise in the creation of Special Investigation Units ('SIUs')

To address the increase in the number of complaints and increase in universal jurisdiction cases, States are increasingly adopting Special Investigation Units ('SIUs'). SIUs are highly specialised taskforces created by States dedicated to 'bringing to justice war criminals present on their soil, regardless of where the alleged crimes were committed'.²³ Recognising that the investigation and prosecution of international crimes pose unique 'legal, practical and political complexities', these units are equipped with expertise and resources specific to prosecuting crimes of an international character.²⁴

SIUs exist or are being set up in a number of States. The United States has an SIU in the form of its 'Human Rights and Special Prosecutions Section'.²⁵ SIUs were set up in the Netherlands in 1998,²⁶ Germany in 2009,²⁷ France in 2010,²⁸ and Sweden in 2008.²⁹ Canada, Norway, Belgium, Denmark, South Africa, Switzerland, Croatia, the UK, and Denmark also have SIUs, with the latter two States having personnel working on atrocity crimes within a larger 'international crimes unit'.

DEBUNKING FEARS AND MISPERCEPTIONS

Notwithstanding the expansion in universal jurisdiction practice over recent years, there are persistent fears that threaten inhibiting States from maximising universal jurisdiction as a mechanism for pursuing international justice. Many of these fears relate to the modalities of universal jurisdiction practice, rather than principle. However, breaking down common perceived limitations of universal jurisdiction and measuring them against universal jurisdiction practice suggests that most fears are 'somewhat overblown'.³⁰

1. Fear: Universal jurisdiction is too political to be effective.

The literature voices a common presumption that States are reluctant to utilise universal jurisdiction due to 'fear that their military strategy will be second-guessed by ill-disposed foreign courts that are ready to violate the sacrosanct principle of sovereign equality and non-interference'.³¹ However, the cases that have gone to trial suggest that this is not generally the case—defendants are generally 'low level perpetrators' who have sought safe-harbour in a bystander State and have lost the support of their territorial State.³² The state of practice under universal jurisdiction suggests that, for the most part, 'the cases that have reached the trial phase have not turned out to be political reckonings' because States generally bring cases 'when the chances of international conflict [are] low'.³³

2. Fear: Foreign protest and pressure prevent universal jurisdiction cases being brought.

The exercise of universal jurisdiction has not gone unopposed. The archetypal example is the foreign protest that led to the restriction of Belgium³⁴ and Spain's³⁵ expansive universal jurisdiction laws. African States have also taken issue with the exercise of universal jurisdiction. After a joint European Union and African Union expert group was appointed some 10 years ago, the sixth committee of the United Nations General Assembly took on the topic of universal jurisdiction, where discussions

seem to have stalled.³⁶ However, the statistics on increased utilisation of universal jurisdiction internationally suggests that, when utilised conscientiously, foreign protest and pressure are not prohibitive herein. Increasing engagement by Argentina and South Africa, and the trial of Habré in Senegal, constitutes a positive development in the space of universal jurisdiction, and partly addresses the criticism that universal jurisdiction is an ‘imposition of Western States over their former colonies’.³⁷

3. Fear: Universal jurisdiction prosecutions rarely result in convictions.

Although in absolute terms the number of convictions based on universal jurisdiction is low, the number of convictions is not the best measure of the effectiveness of universal jurisdiction. For instance, using the number of completed trials and convictions in States that exercise universal as a measure of success ‘disregards the stimulating and complementing function of universal jurisdiction’.³⁸ An important function of universal jurisdiction is to ‘stimulate or to support investigations and prosecutions in another jurisdiction closer to the crime’.³⁹ The exercising State may thus facilitate accountability but not secure a conviction in its national court.

CONCLUSION AND RECOMMENDATIONS: OVERCOMING THE CHALLENGES OF UNIVERSAL JURISDICTION

Investigating and prosecuting crimes that have occurred in another country raises a number of practical challenges for the prosecuting State. For example:

- the crimes may have been committed many years ago and outside the State’s territory;
- the crime scene and relevant evidence may no longer exist, or be difficult to access;
- the evidence collected by the State in which the crime was committed or other actors may not conform to the prosecuting State’s laws of evidence;
- the individuals responsible for crimes, or possessing information relevant to their prosecution, may be difficult to locate and/or access; and
- the State in which the crimes occurred may still be the site of an active conflict or otherwise unwilling to assist in the investigation of the crimes.⁴⁰

There are many ways of addressing these challenges. The following are examples that have been borne out in practice.

1. Establish and support Special Investigation Units.

SIUs are a direct response to many of the challenges raised by universal jurisdiction prosecutions. They ‘effectively institutionalize... the investigation and prosecution of grave international crimes by bringing together the necessary resources, staff, and expertise’.⁴¹ Recourse to universal jurisdiction practice shows that SIUs are often pivotal to the effective investigation and prosecution of international crimes domestically. A 2010 report found that SIU assistance played a pivotal role in securing 18 of the 24 considered domestic convictions for international crimes.⁴² Other reports confirm that the majority of States that are actively prosecuting international crimes domestically have SIUs.⁴³

Though SIUs vary in size and composition across jurisdictions, it is clear that SIUs will only be effective where they are adequately staffed and resourced.⁴⁴ In addition to this baseline, the experiences of effective SIUs show that it is useful to equip SIUs with:

- Diverse and multidisciplinary skillsets. For example, the Netherlands, which has been described as having ‘the most robust and well-resourced units in the world’,⁴⁵ has dedicated units within its police, prosecution, and immigration services, a specialised department within its Ministry of Justice, and specialised judges.⁴⁶ The Dutch units draw on staff from various backgrounds, including historians, lawyers, anthropologists, military experts, and financial analysts.⁴⁷
- A structural focus. In Germany, ‘structural investigations’ that focus on ‘whole situations or conflicts’ rather than individual suspects, and gather evidence during conflicts rather than after they have occurred (where possible), have proved very effective.⁴⁸
- Targeted location and resourcing. For example, specialised units can be established in immigration departments, noting that immigration officials are usually the first to interview new arrivals in a country and are ‘in a unique position to obtain relevant information concerning crimes under international law’.⁴⁹ In 2005, this approach in the Netherlands led to the successful prosecution of two Afghan nationals.⁵⁰

2. Foster international cooperation through multilateral treaties and international evidence-gathering mechanisms.

The experiences of France, Germany, and the Netherlands highlight that cooperation between is critical to overcoming the challenges associated with prosecuting universal jurisdiction cases. There are various ways to pursue such cooperation in practice, such as:

- Cooperative initiatives. In the European Union, there is a cooperative agency called Eurojust which includes national authorities of all EU member States. In 2002, Eurojust established the ‘Genocide Network’ alongside the establishment of the ICC to focus cooperation around fulfilling the obligations of States under the Rome Statute.⁵¹
- Information sharing. States and NGOs can engage in greater exchange of information and expertise useful to universal jurisdiction cases.⁵²
- Joint Investigations. States can structure their investigations around collaboration, as seen clearly in France and Germany’s joint investigation team for war crimes and crimes against humanity committed in Syria.
- Independent fact-finding missions. International fact-finding missions, such as the recent UN Independent International Fact-Finding Mission on Myanmar, can help bridge the evidential gaps in universal jurisdiction cases.
- Mutual Legal Assistance Treaties for war crimes. Various groups have proposed States pursue ‘a modern procedural multilateral treaty on MLA and extradition which would facilitate better practical cooperation between States investigating and prosecuting these crimes’.⁵³ Such a treaty would likely improve the efficiency and effectiveness of universal jurisdiction prosecutions.

CASE STUDY: Prosecution of alleged Syrian secret service officers in Germany

The importance of international cooperation in ensuring universal jurisdiction cases are investigated and prosecuted effectively is clearly illustrated in the recent charges brought against Syrian nationals in Germany.

What are the cases? In 2019, Anwar Raslan and Eyad al-Gharib were arrested for crimes against humanity allegedly perpetrated in Syria. Anwar Raslan has been charged with 59 counts of murder, as well as rape, and aggravated sexual assault, perpetrated during his time leading the infamous 'Branch 251' investigative unit and prison in Damascus. Eyad al-Gharib allegedly reported to Raslan and faces charges of complicity in torture. The trial began on 23 April 2020 at the Higher Regional Court in Koblenz, Germany and is the first prosecution in the world of State-sponsored torture in Syria.⁵⁴

How have practical challenges been overcome to bring the cases? The arrests were made possible by 'unprecedented levels of cooperation and coordination among diverse actors, including states, war crimes units, civil society, survivors, defectors, privately funded investigations, NGOs, the EU and UN accountability mechanisms'.⁵⁵ For example, challenges raised by investigators and prosecutors not having access to the country where the crimes were committed have been overcome through the evidence of 'Caesar', a defecting military police officer, and the NGO known as 'CIJA', which recovered 800,000 original documents that regime units abandoned during the conflict. The new UN Syria Mechanism is also consolidating and verifying material from CIJA, the Caesar group and other NGOs to build further cases.

3. Build prosecution capacity.

For those States that lack the experience and resources in universal jurisdiction prosecutions, efforts should focus on capacity building. Important actions in this regard include:

- Increasing the capacity of States to bring universal jurisdiction cases. Strategic partnerships between States can be particularly useful in this regard. States can also be assisted with the drafting of Rome State implementation legislation, and specific universal jurisdiction legislation.⁵⁶
- Increasing capacity building for the training of law enforcement. For example, the Institute for International Criminal Investigation and INTERPOL has provided specific training courses for SIU employees in Germany and the Netherlands and Danish, Swedish, and Norwegian units have run joint cross-training sessions regarding evidence and research gathering.⁵⁷
- Increasing capacity building for the training of prosecutors and investigative judges. This is required due to the complexity of criminal prosecutions in universal jurisdiction cases. It has been suggested that the DG JUST Criminal Procedural Law Unit of the European Commission can 'contribute to address knowledge gaps of judiciary, for instance concerning sexual and gender-based violence'.⁵⁸

4. Increase collaboration with, and support for, NGOs.

In many cases, NGOs play a pivotal role in precipitating universal jurisdiction prosecutions. NGOs not only raise awareness of cases that should be investigated, they also conduct important research into how investigations and prosecutions can be more effective, and educate the public on the limitations and potential of universal jurisdiction as a means for combatting impunity.⁵⁹ Supporting NGOs in this function is therefore important in promoting effective utilisation of universal jurisdiction.

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