

Investigative Mechanisms and Tools for Ukraine: Exploring the Consequences for Universal Jurisdiction

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I. INTRODUCTION

Russia's invasion of Ukraine in February 2022 has prompted a vigorous response from the international community seeking to ensure that those who

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have committed—and continue to commit—horrendous atrocities in the country are held accountable.¹ Ukraine has pledged to investigate and prosecute crimes perpetrated on its territory and has already completed some trials.² The International Criminal Court (ICC)³ has indicted Russian President Vladimir Putin and Maria Lvova-Belova (Putin’s Commissioner for Children’s Rights) for war crimes in connection with the forced deportation and transfer of children to Russia and has indicated that additional charges will likely be forthcoming.⁴ Various stakeholders are debating proposals for the creation of an institution that may be able to prosecute the crime of aggression given the ICC’s lack of jurisdiction over that crime.⁵ Finally, numerous jurisdictions have announced

¹ Human Rights Watch makes this same point, noting that “[a]s part of an unprecedented response to Russia’s full-scale invasion of Ukraine, multilateral organizations and foreign governments swiftly engaged a range of accountability mechanisms and tools, underscoring the importance of accountability for serious crimes.” *Ukraine: Events of 2022*, HUM. RTS. WATCH [hereinafter HRW Ukraine 2022], <https://www.hrw.org/world-report/2023/country-chapters/ukraine> [<https://perma.cc/YQ27-5RJN>].

² See Q & A: *Justice Efforts for Ukraine*, HUM. RTS. WATCH (Mar. 29, 2023) [hereinafter HRW Q & A Ukraine], <https://www.hrw.org/news/2023/03/29/qa-justice-efforts-ukraine#whatother> [<https://perma.cc/FV8N-6X8N>] (noting that as of early February 2023, Ukraine’s prosecutor general reported that 20 Russian military personnel had been convicted in Ukrainian courts of war crimes committed since the February 2022 invasion (some *in absentia*) out of 92 total indictments).

³ A permanent, treaty-based international criminal court, the ICC, was created in 2002 after the required 60 states ratified the Rome Statute—the treaty creating the Court. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Court has jurisdiction over genocide, crimes against humanity, war crimes, and aggression in certain circumstances. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 48 (5th ed. 2017).

⁴ See Karim A. A. Khan, Prosecutor, Int’l Crim. Ct., Statement on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms. Maria Lvova-Belova (Mar. 17, 2023) (transcript available at <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> [<https://perma.cc/7BG6-5T5D>]) (reporting on the issuance of the arrest warrants and also quoting Prosecutor Karim Khan as stating that his office “continues to develop multiple, interconnected lines of investigation” and “will not hesitate to submit further applications for warrants of arrest when the evidence requires us to do so”).

⁵ See, e.g., Michael Scharf, Paul R. Williams, Yvonne Dutton & Milena Sterio, *High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine*, OPINIO JURIS (July 29, 2022), <https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/> [<https://perma.cc/Y8YR-DJ6B>] (proposing a High War Crimes Court for Ukraine to prosecute aggression, genocide, crimes against humanity, and war crimes to aid in filling the accountability gap); Beth Van Schaack, Ambassador-at-Large, Off. of Glob. Crim. Just., Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression (Mar. 27, 2023) (transcript available at <https://www.state.gov/ambassador-van-schaacks-remarks/> [<https://perma.cc/8UZK-D7PK>]) (indicating that the United States may consider supporting the creation of an internationalized domestic court in Ukraine to prosecute the Russian crime of aggression); Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*, JUST SEC. (Mar. 7,

their intention to prosecute the serious international crimes occurring in Ukraine in their own national courts using some form of universal jurisdiction.⁶

Also notable is the commitment by so many states and organizations—both governmental and non-governmental—to ensure that resources are available and employed to collect and preserve evidence of crimes for use in future criminal trials. For example, in March 2022, the United Nations Human Rights Council (HRC) established an independent international commission of inquiry for Ukraine (Ukraine COI).⁷ The Ukraine COI's mandate calls upon it to investigate violations of human rights and international humanitarian law committed in Ukraine following Russia's invasion, to collect and analyze such evidence, to identify individuals and entities responsible for violations, and to record and preserve evidence for use in future legal proceedings.⁸ Ukraine, Poland, and Lithuania created a Joint Investigation Team (JIT), with the participation of other states as well as the ICC's Office of the Prosecutor (OTP), to gather and share evidence to support accountability efforts in Ukraine, the ICC, and other domestic jurisdictions.⁹ Numerous civil society organizations are also investigating and collecting evidence of criminal activity relating to Russia's war in Ukraine—much of it digital records from open source material—for potential use in future trials to hold perpetrators accountable.¹⁰

2022), <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/> [https://perma.cc/JGH7-WLRX] (suggesting the creation of an aggression tribunal established between the United Nations and Ukraine to prosecute leaders responsible for Russia's war of aggression); David M. Crane, Irwin Cotler & David Scheffer, *Working Together Toward Accountability: How the International Criminal Court and a Special Tribunal on Aggression Can Work Together on the Ukraine Conflict*, JURIST (Apr. 19, 2023), <https://www.jurist.org/commentary/2023/04/un-icc-ukraine-aggression/> [https://perma.cc/4FXD-QURU] (proposing a special aggression tribunal to fill the gap given the ICC's lack of jurisdiction over Russia's aggression).

⁶ See, e.g., Yvonne M. Dutton, *Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?*, 55 CASE W. RES. J. INT'L L. 391, 391–93 (2023) (listing the states that have indicated they are or will be launching universal jurisdiction prosecutions of crimes being committed in Ukraine); *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT'L L. 631, 637–38 (2022) (noting that Poland and Germany had opened investigations of crimes being perpetrated since Russia's invasion of Ukraine).

⁷ See *Independent International Commission of Inquiry on Ukraine*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/iicuhr-ukraine/index> [https://perma.cc/DU3Y-WX3U].

⁸ See *id.*; see also Human Rights Council Res. 49/1, U.N. Doc. A/HRC/RES/49/1, ¶ 11 (Mar. 4, 2022) (stating the mandate of the Commission).

⁹ See, e.g., Michele Caianiello, *The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?*, 30 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 219, 228–29 (2022) (stating that the JIT serves as a forum where results of investigations conducted in parallel can be exchanged).

¹⁰ See, e.g., Justin Hendrix, *Ukraine May Mark a Turning Point in Documenting War Crimes*, JUST SEC. (Mar. 28, 2022), <https://www.justsecurity.org/80871/ukraine-may-mark->

Will the existence of these various mechanisms and tools that are available to gather and preserve evidence of crimes in Ukraine positively influence states' willingness to invoke universal jurisdiction to bring justice to the victims of the many atrocities that have been perpetrated since Russia's invasion? Some commentators suggest as much. Mark Kersten argues that because of the many ongoing investigations into Ukraine, states should be able to "pool resources, intelligence, and evidence to make the exercise of universal jurisdiction more economical."¹¹ Anya Neistat similarly notes that at least evidentiary difficulties often present when a foreign state seeks to prosecute an offense with which it has no nexus should not be present in the case of Ukraine.¹² She points out that many organizations are documenting atrocities and that Ukrainian citizens are actively sharing information through social media and other digital channels.¹³

National prosecutions based on universal jurisdiction can help fill accountability gaps and aid in the fight to end impunity for serious international crimes.¹⁴ This Article, however, does not foresee a watershed moment for universal jurisdiction because of these new mechanisms and tools for gathering and preserving evidence documenting atrocities in Ukraine. As discussed below, evidentiary challenges are but one obstacle preventing states from exercising universal jurisdiction. Thus, consistent with the historical evidence, this Article expects that the number of universal jurisdiction cases will continue to be relatively small and that the bulk of those cases will include some nexus to the offense or be against lower-level perpetrators who are found present in the foreign state.¹⁵

Part II begins with some background, explaining the concept of universal jurisdiction in more detail and reviewing the evidence concerning states' historical invocation of universal jurisdiction, particularly concerning serious

a-turning-point-in-documenting-war-crimes/ [https://perma.cc/ZLC4-RA22] (reporting on various efforts to collect and analyze data of crimes being committed in Ukraine for use in future criminal proceedings).

¹¹ Mark Kersten, *Universal Jurisdiction in Ukraine: States Should Commit to Using Their Own Courts to Address Russian Atrocities*, JUST. IN CONFLICT (Oct. 17, 2022), <https://justiceinconflict.org/2022/10/17/universal-jurisdiction-in-ukraine-states-should-commit-to-using-their-own-courts-to-address-russian-atrocities/> [https://perma.cc/A8MJ-WE7S].

¹² Anya Neistat, *Victims of War Crimes in Ukraine Have an Unprecedented Chance to Seek Justice*, GUARDIAN (July 24, 2022), <https://www.theguardian.com/commentisfree/2022/jul/24/war-crimes-ukraine-investigations-justice> [https://perma.cc/Z6WC-5DVZ].

¹³ *Id.*

¹⁴ See, e.g., HOWARD VARNEY & KATARZYNA ZDUŃCZYK, INT'L CTR. FOR TRANSITIONAL JUST., *ADVANCING GLOBAL ACCOUNTABILITY: THE ROLE OF UNIVERSAL JURISDICTION IN PROSECUTING INTERNATIONAL CRIMES* 1 (Dec. 2020), <https://www.ictj.org/resource-library/advancing-global-accountability-role-universal-jurisdiction-prosecuting> [https://perma.cc/PRD3-GEAN] ("Although universal jurisdiction faces serious challenges at the conceptual, legal, political, and practical levels, it often remains the only avenue for victims to pursue justice and address the 'impunity gap.'").

¹⁵ See *infra* Part III.

international crimes. Part III explores how the existence of the Ukraine COI and other cooperative efforts to gather and preserve evidence of atrocities committed in Ukraine may influence states' willingness to invoke universal jurisdiction to prosecute perpetrators of those atrocities. It then explores the other significant challenges that have historically caused states to refrain from regularly invoking universal jurisdiction. The final section in Part III considers the Ukraine situation specifically and suggests reasons why we should expect that as a result of the challenges outlined, the likely result is that although some states will bring cases against perpetrators of atrocities committed in Ukraine, those cases will most likely be primarily against lower-level suspects who are found on their territory or where the state has some nexus to the offense—such as a national who was a victim of a crime.

The Article concludes on an optimistic note. First, to the extent that states bring any cases against perpetrators of atrocities committed in Ukraine—even if against lower-level defendants or where there is a nexus to the offense—they are contributing to ending impunity for international crimes and providing some justice for victims. Moreover, should the future fail to produce an overwhelming number of universal jurisdiction prosecutions, this commitment to documentation while the conflict in Ukraine is ongoing is certainly worthwhile. As has been noted in the context of accountability efforts for atrocities committed in Syria, such documentation efforts can also provide the basis for a deep historical narrative of the crimes being committed and of the persons who are victims to these crimes—a narrative which can also be used to advocate for supporting Ukraine in its efforts to fight off its aggressor and to aid in making future decisions regarding post-conflict transitional justice measures.

II. UNIVERSAL JURISDICTION FOR SERIOUS INTERNATIONAL CRIMES: DEFINITION AND HISTORICAL STATE PRACTICE

A. *The Unique Nature of Universal Jurisdiction*

Universal jurisdiction refers to a state's ability to exercise jurisdiction over an offense without any nexus: where the crime did not occur on the state's territory and where neither the perpetrator nor the victim is a national of the state.¹⁶ This type of jurisdiction is distinct from other forms of extraterritorial

¹⁶ See, e.g., David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903, 935 (2019) (defining a state's exercise of extra-territorial jurisdiction without any nexus to the offense as "pure" universal jurisdiction); Eugene Kontorovich, *The Parochial Uses of Universal Jurisdiction*, 94 NOTRE DAME L. REV. 1417, 1418–21 (2019) (explaining that universal jurisdiction authorizes states to prosecute core international crimes without demonstrating any nexus to the offense); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 753 (2004) (explaining that universal jurisdiction permits states to prosecute crimes without demonstrating a connection to the offense); Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW

jurisdiction that states can exercise, such as jurisdiction based on active or passive personality or protective jurisdiction.¹⁷ In those instances, the state will be asserting a specific nexus to the offense even though the offense itself did not occur on the state's territory.¹⁸ For example, in the case of jurisdiction based on passive personality, the state will assert jurisdiction on the grounds that the alleged perpetrator committed offenses against a state's citizens while those citizens were abroad.¹⁹ States' ability to exercise universal jurisdiction, however, is not unfettered: it can only be exercised over a contained category of international crimes whose commission is considered to impact the world community as a whole.²⁰ Although the list of the included crimes is not set in stone, there is some consensus that states may exercise universal jurisdiction

ENG. L. REV. 399, 400 (2001) (stating that universal jurisdiction fills a gap where other doctrines of jurisdiction do not permit national proceedings since the crime need not occur on the state's territory, nor do the perpetrator or victim need to be state nationals); Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 243 (2001) (defining universal jurisdiction as a principle of international law permitting states to apply their laws to acts that occur outside their territory, even if perpetrated by a non-national and even though its nationals have not been directly harmed by those acts).

¹⁷ See AMNESTY INT'L, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE, at 8, AI INDEX IOR 53/019/2012 (Oct. 9, 2012) [hereinafter AMNESTY INT'L UJ REPORT] (defining active personality, passive personality, and protective jurisdiction as the types of extraterritorial jurisdiction that states may assert); see also Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 159 (2006) (listing the traditional bases for jurisdiction grounded on territoriality, as well as the bases for exercising jurisdiction over acts that may not occur on the state's territory, such as active and passive personality and protective jurisdiction); Stephen J. Rapp, *Achieving Accountability for Atrocity Crimes in an Era of Resistance to International Justice and Human Rights*, 21 WASH. U. GLOB. STUD. L. REV. 137, 140 n.9 (2022) (explaining active and passive personality jurisdiction as two types of jurisdiction states can exercise extraterritorially based on citizenship).

¹⁸ Universal jurisdiction is an exception to the general jurisdictional rule, based on the sovereign equality of states and the principle of noninterference in the domestic affairs of other sovereign states, which requires the state to show some connection to its territory, nationality, or national security interests before exercising jurisdiction. *Universal Jurisdiction*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> [<https://perma.cc/EB2G-Z63Y>]; see also VARNEY & ZDUŃCZYK, *supra* note 14, at 7 (noting that under traditional jurisdictional rules, “states enjoy ‘exclusive sovereignty over their own territories, and no sovereignty over other States’ territory”).

¹⁹ See AMNESTY INT'L UJ REPORT, *supra* note 17, at 8.

²⁰ See, e.g., *Universal Jurisdiction*, *supra* note 18 (“Universal Jurisdiction is based on the idea that since perpetrators who commit such heinous crimes are *hostes humani generis*—‘enemies of all mankind’—any nation should have the authority to hold them accountable, regardless of where the crime was committed or the nationality of the perpetrator or the victim.”).

over piracy, slavery, war crimes, crimes against humanity, genocide, torture, and terrorism.²¹

Máximo Langer describes two underlying rationales for the exercise of universal jurisdiction. The first is the idea of states as “global enforcers” where, because of the heinousness of the crimes committed and their impact on mankind, states are authorized to step in despite their lack of a jurisdictional hook to ensure that such serious international crimes do not go unpunished.²² The second is the “no safe haven” conception of universal jurisdiction, which as defined by Langer, emphasizes states’ interest in not becoming a refuge for those who have committed heinous crimes.²³ In other words, under this conception, universal jurisdiction reduces the ability of perpetrators of atrocity crimes to find safe havens where they can settle and enjoy impunity.²⁴

Why do we need states to step in to prosecute perpetrators who are not their citizens and who committed crimes on foreign territory? The short answer is because universal jurisdiction cases can help fill an impunity gap. Some countries that would otherwise be able to exercise territorial jurisdiction may “lack adequate judicial systems to prosecute” serious international crimes.²⁵ Some countries may refuse to prosecute, oftentimes because their own government or others in powerful positions are responsible for the atrocities

²¹ See, e.g., *Basic Facts on Universal Jurisdiction*, HUM. RTS. WATCH (Oct. 19, 2009) [hereinafter HRW Basic Facts UJ], <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction> [<https://perma.cc/9GLV-CVUF>]; Colangelo, *supra* note 17, at 151.

²² Máximo Langer, *Universal Jurisdiction is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction*, 13 J. INT’L CRIM. JUST. 245, 247 (2015) (stating that the “global enforcer” conception of universal jurisdiction allows states to exercise jurisdiction because they have a “role in preventing and punishing core international crimes committed anywhere in the world”). Others similarly stress the nature of the crimes committed and their impact on humankind to explain states’ authority to exercise universal jurisdiction. See, e.g., Colangelo, *supra* note 17, at 151 (asserting that states are authorized to exercise universal jurisdiction over certain crimes because those crimes are universally condemned and “all states have a shared interest in proscribing such crimes and prosecuting their perpetrators”); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 112, 153 (2001) (explaining that slavery was included as a crime over which states had universal jurisdiction due to its “heinous[ness]”); VARNEY & ZDUŃCZYK, *supra* note 14, at 8 (The principle of universal jurisdiction “is based on the premise that international crimes are so heinous and destructive of the international order that any state may exercise jurisdiction in respect of them and has a legitimate interest in doing so.”); Sadat, *supra* note 16, at 244 (explaining that universal jurisdiction is premised on the “notion that some crimes are so heinous that they offend the interest of all humanity—indeed, they imperil civilization itself”).

²³ Langer, *supra* note 22, at 247; see also Mandel-Anthony, *supra* note 16, at 939 (explaining the “no safe haven” approach to universal jurisdiction).

²⁴ HRW Basic Facts UJ, *supra* note 21.

²⁵ Rick Gladstone, *An Old Legal Doctrine That Puts War Criminals in the Reach of Justice*, N.Y. TIMES, <https://www.nytimes.com/2021/02/28/world/europe/universal-jurisdiction-war-crimes.html> [<https://perma.cc/5QHM-2L9U>] (Aug. 10, 2021).

committed.²⁶ These are also some of the reasons why states created the ICC—so that it can exercise jurisdiction where the state that would otherwise have jurisdiction to prosecute serious international crimes is “unwilling or unable genuinely to carry out the investigation or prosecution.”²⁷ However, the ICC was created to serve as a court of last resort, and is functionally and practically able to only investigate and prosecute a limited number of cases.²⁸

B. *Universal Jurisdiction: An Overview of State Practice*

The historical record demonstrates that states have infrequently invoked this pure conception of universal jurisdiction without any nexus to the offense, especially over the three core international crimes that many commentators have suggested are being committed in Ukraine and that are the subject of the ICC’s jurisdiction.²⁹ In one study, Máximo Langer found that in the twenty-five years preceding 2010, “only twenty-six people around the world have been criminally convicted on the basis of universal jurisdiction despite the end of the Cold War, the unprecedented position of human rights on the agenda of many societies, and the passing of universal jurisdiction statutes by many states” in this time period.³⁰ Human Rights Watch reached a similar conclusion, finding that in the fifteen years before 2009, states had brought fewer than twenty universal jurisdiction cases worldwide to trial.³¹ It is true that some evidence indicates

²⁶ *Id.*

²⁷ See Rome Statute, *supra* note 3, art. 17(1)(a) (describing the ICC’s ability to exercise only complementary jurisdiction should the Court find that the state that could ordinarily exercise jurisdiction over the perpetrator be unwilling or unable to do so).

²⁸ See, e.g., Yvonne Dutton & Milena Sterio, *The War in Ukraine and the Legitimacy of the International Criminal Court*, 72 AM. U. L. REV. 779, 785–86 (explaining the Court’s jurisdictional restrictions in terms of complementarity and also the budget and personnel constraints which necessitate that the Court can only handle a limited number of cases in any given year).

²⁹ See, e.g., Hum. Rts. Council, Rep. of the Indep. Int’l Comm’n of Inquiry on Ukr., U.N. Doc. A/HRC/52/62 (2023) [hereinafter March 2023 Ukraine COI Report] (concluding that Russian forces had committed numerous violations of international human rights law and international humanitarian law); HRW Ukraine 2022, *supra* note 1 (concluding that Russian forces had committed violations of international humanitarian law, including indiscriminate attacks against civilians, and war crimes, including “torture, summary executions, sexual violence, and enforced disappearances”); Tara Law, *Is Russia Committing Genocide in Ukraine? Here’s What Experts Say*, TIME (Mar. 15, 2023), <https://time.com/6262903/russia-ukraine-genocide-war-crimes/> [https://perma.cc/2E48-8RWR] (discussing whether the evidence available demonstrates that Russia has committed genocide in Ukraine).

³⁰ Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 45 (2011).

³¹ HRW Basic Facts UJ, *supra* note 21; see also Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, in HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337, 358 (William A. Schabas & Nadia Bernaz eds., 2010) (“All in all some two dozen individuals have been

that the use of universal jurisdiction may not be declining as some commentators have argued.³² Langer and Eason found that between 2010 and 2017, states worldwide had completed twenty-nine universal jurisdiction cases.³³ Nevertheless, the numbers still show that over the course of decades, few defendants have been convicted of war crimes, crimes against humanity, or genocide by states invoking universal jurisdiction where they otherwise have no specific nexus to the offense.³⁴

In fact, many states have not fully incorporated into their domestic legislation universal jurisdiction over the core international crimes of war crimes, crimes against humanity, or genocide.³⁵ According to a study conducted by Amnesty International in 2012, “147 (approximately 76.2%) states have provided universal jurisdiction over one or more crimes under international law.”³⁶ For instance, only recently, in response to the war in Ukraine, was the United States finally persuaded to amend its war crimes statute to allow for the exercise of jurisdiction over perpetrators found on its soil, “regardless of the perpetrator or victim’s nationality or where the crime took place.”³⁷ Lest the fact

tried by courts in Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for ‘war crimes’ committed abroad.”).

³² See Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT’L L. 779, 780 n.1 (2019) (citing to commentators referencing a decline in the use of universal jurisdiction).

³³ *Id.* at 788. This Article focuses on completed trials for the same reasons that Langer and Eason argue that they are the best indicator of states’ commitment to the exercise of universal jurisdiction. As they note “[g]iven the relatively low cost of receiving and reviewing criminal complaints, an increase in the number of complaints gives us little insight into the level of support for universal jurisdiction among state officials in the venue state. Indeed, since private individuals and organizations may file criminal complaints, any attempt to use this rate as a measure of state support would need to account for the confounding effects of the preferences and choices of private complainants and advocacy organizations. By contrast, seeing such cases through the process of formal investigation, indictment and trial is an expensive and difficult task for prosecuting states and the decision to do so rests more squarely in the hands of state officials.” *Id.* at 790.

³⁴ See generally *id.*

³⁵ States seeking to exercise universal jurisdiction over these international crimes must do so in accordance with their domestic legislation. See, e.g., Sadat, *supra* note 16, at 256; *Universal Jurisdiction*, INT’L JUST. RES. CTR., <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> [<https://perma.cc/3YQR-4ZNU>].

³⁶ AMNESTY INT’L UJ REPORT, *supra* note 17, at 12.

³⁷ Elise Baker, *Closing the Impunity Gap for War Crimes*, JUST SEC. (Jan. 12, 2023), <https://www.justsecurity.org/84737/closing-the-impunity-gap-for-war-crimes/> [<https://perma.cc/2WZC-MZYF>] (explaining the amendment of the war crimes statute in late 2022); see also Paras Shah, *Congress Passes Justice for Victims of War Crimes Act*, JUST SEC. (Dec. 22, 2022), <https://www.justsecurity.org/84588/senate-passes-justice-for-victims-of-war-crimes-act/> [<https://perma.cc/4C2V-U6EA>] (discussing the passage of the Justice for Victims of War Crimes Act). Previously, the United States’ provision for war crimes allowed for the exercise of jurisdiction over acts that occurred abroad only “if the victim or perpetrator is a U.S. national or member of the U.S. Armed Forces.” STEPHEN P. MULLIGAN,

that at least some states possessing the requisite jurisdictional regime create the impression that universal jurisdiction cases are a regular feature of international justice, the evidence shows that “[t]he vast majority of states have never exercised universal jurisdiction despite having included it in their legal framework.”³⁸

III. EXPLORING THE EFFECT OF THE UKRAINE COI AND OTHER COOPERATIVE EFFORTS TO GATHER AND PRESERVE EVIDENCE ON STATES’ WILLINGNESS TO INVOKE UNIVERSAL JURISDICTION

A. Overcoming Evidentiary Difficulties Associated with Prosecuting Universal Jurisdiction Cases for Atrocities Committed in Ukraine

There is little doubt that the existence of the Ukraine COI and other cooperative efforts to gather and preserve evidence of atrocities committed in Ukraine could make it easier than it might otherwise be for states to prosecute perpetrators of those crimes.³⁹ One oft-noted obstacle preventing states from pursuing universal jurisdiction cases is the difficulty of obtaining sufficient evidence to convict.⁴⁰ Serious international crimes, such as genocide, war crimes, and crimes against humanity, are already extremely complex crimes to prosecute.⁴¹ The complexity multiplies, as does the financial burden, when the evidence is located far away from where the crimes were committed.⁴² Indeed, as Trial International notes: “In some cases, prosecuting authorities are unable to enter the states where atrocities were committed; unstable contexts mean witnesses are hard to find and may be too afraid to testify; evidence may be hard to collect.”⁴³ Evidentiary challenges will be even more profound when the

CONG. RSCH. SERV., LSB10747, INTERNATIONAL ATROCITY CRIMES AND THEIR DOMESTIC COUNTERPARTS 2 (2022).

³⁸ SHOSHANA LEVY, TRIAL INT’L, UNIVERSAL JURISDICTION ANNUAL REVIEW 12 (Apr. 2023), https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf [<https://perma.cc/CW4Z-B5FZ>].

³⁹ See discussion *supra* notes 12–14 (citing to blog posts by Mark Kersten and Anya Neistat).

⁴⁰ Christoph Safferling & Gorgen Petrossian, *Universal Jurisdiction and International Crimes in German Courts—Recent Steps Towards Exercising the Principle of Complementarity After the Entry into Force of the Rome Statute*, 11 EUR. CRIM. L. REV. 242, 262 (2021) (indicating that some states may refrain from bringing universal jurisdiction cases if they do not receive sufficient cooperation to obtain the necessary evidence of crimes located in a foreign jurisdiction).

⁴¹ VALÉRIE PAULET, TRIAL INT’L, EVIDENTIARY CHALLENGES IN UNIVERSAL JURISDICTION CASES: UNIVERSAL JURISDICTION ANNUAL REVIEW 2019, at 9 (Mar. 2019), https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf [<https://perma.cc/54B2-H4J6>].

⁴² *Id.*

⁴³ *Id.*; see also NEHAL BHUTA & JRGEN SCHURR, HUM. RTS. WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 5 (June 2006) [hereinafter HRW UJ in

evidence the prosecuting state seeks is within the control of a state whose government officials were involved in committing the crime or are protective of the perpetrators.⁴⁴ There is also the matter of witnesses who “may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests.”⁴⁵

1. *Coordinated Efforts to Gather and Preserve Evidence of Atrocities in Ukraine*

As noted in the Introduction, the international community has committed significant resources to coordinate efforts to gather, record, and preserve evidence from Ukraine so that it may be available for future legal proceedings, including by national authorities willing to invoke universal jurisdiction. For example, the Human Rights Council created the Ukraine COI in March 2022 with a mandate to, among other things, investigate alleged crimes committed in the context of Russia’s invasion of Ukraine, to collect and analyze evidence of such crimes, and to record and preserve such evidence, including tangible and witness evidence, “in view of any future legal proceedings.”⁴⁶ The Ukraine COI has already issued two reports of its findings—one in October 2022⁴⁷ and another in March 2023.⁴⁸ The Commission explained that its investigation involved traveling eight times to Ukraine, where it visited “56 cities, towns, and settlements,” as well as meeting with individuals in Estonia and Georgia who had fled areas of conflict.⁴⁹ During its investigation period prior to the issuance of its March 2023 Report, it “conducted 610 interviews with 595 persons (348 women and 247 men) in person and remotely; inspected sites of destruction, graves, places of detention and torture, as well as weapon remnants; and consulted documents, photographs, satellite imagery and videos.”⁵⁰ Based on that investigation, the Commission concluded that “[t]he body of evidence collected shows that Russian authorities have committed a wide range of

Europe], <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf> [https://perma.cc/654A-3TCU]. (“Because the acts in question will have occurred in a foreign country, and often many years earlier, cases rarely arise in the manner to which local authorities are accustomed—such as through a victim simply reporting to a police station.”).

⁴⁴ Broomhall, *supra* note 16, at 412 (referencing the difficulty of obtaining evidence to prosecute universal jurisdiction cases when leaders of the foreign state are the target of the prosecution).

⁴⁵ HRW UJ in Europe, *supra* note 43.

⁴⁶ Human Rights Council Res. 49/1, *supra* note 8.

⁴⁷ See generally Rep. of the Indep. Int’l Comm’n Inquiry on Ukraine, U.N. Doc. A/77/533 (Oct. 18, 2022). The October 2022 report was submitted in response to resolution S-34/1, requesting the Commission to focus on the events occurring in Kyiv, Chernihiv, Kharkiv and Sumy regions during late February and in March 2022. See *id.*

⁴⁸ See March 2023 Ukraine COI Report, *supra* note 29.

⁴⁹ *Id.* ¶ 4.

⁵⁰ *Id.* The Commission noted that the Russian Federation did not respond to its requests for information. *Id.* ¶ 5.

violations of international human rights law and international humanitarian law in many regions of Ukraine and in the Russian Federation,” many of which “amount to war crimes and include willful killings, attacks on civilians, unlawful confinement, torture, rape, and forced transfers and deportations of children.”⁵¹ In April 2023, the Human Rights Council extended the mandate of the Ukraine COI for an additional year.⁵²

In March 2022, the Organization for Security and Cooperation in Europe (OSCE) invoked the Moscow Mechanism at the behest of 45 states and in consultation with Ukraine, triggering the establishment of an ad hoc mission of independent experts to investigate “the humanitarian and human rights impacts on the people of Ukraine caused by Russia’s further invasion with the support of Belarus.”⁵³ The experts’ mandate called upon them to “impartially...establish the facts and circumstances surrounding possible contraventions of OSCE commitments and violations and abuses of international human rights law and international humanitarian law by Russia’s forces” and to “prepare a report that will be shared with all OSCE participating States and relevant accountability mechanisms, including national, regional, and international courts and tribunals.”⁵⁴ States again invoked the Moscow Mechanism in June 2022⁵⁵ and

⁵¹ *Id.* at 1. The Report shares details on this summary conclusion in the body of the Report. In a separate report, the Ukraine COI “listed the names of perpetrators and military units responsible for the above-mentioned crimes.” Farnaz Desfouli Asl & Max Lesch, *From Facts to Norm Violations and Accountability? The Independent International Commission of Inquiry on Ukraine*, PRIF BLOG (Apr. 11, 2023), <https://blog.prif.org/2023/04/11/from-facts-to-norm-violations-and-accountability-the-independent-international-commission-of-inquiry-on-ukraine/> [<https://perma.cc/XT2E-QEGY>].

⁵² See Human Rights Council Res. 52/32, U.N. Doc. A/HRC/Res/52/32, ¶ 18 (Apr. 11, 2023).

⁵³ Press Release, U.S. Dep’t of State, Moscow Mechanism Invoked by 45 OSCE States to Review Reported Abuses by Russia (Mar. 3, 2022), <https://www.state.gov/moscow-mechanism-invoked-by-45-osce-states-to-review-reported-abuses-by-russia/> [<https://perma.cc/3G7M-H66V>]; see also *Human Dimension Mechanisms*, ORG. FOR SEC. & COOP. IN EUR., <https://www.osce.org/odihr/human-dimension-mechanisms> [<https://perma.cc/ZM5B-TC96>] (listing all of the instances where the Moscow Mechanism has been invoked). The Moscow Mechanism was adopted in 1991 and “provides the option of sending missions of experts to assist participating States in the resolution of a particular question or problem relating to the human dimension.” *Moscow Mechanism*, ORG. FOR SEC. & COOP. IN EUR. (Dec. 1, 1991), <https://www.osce.org/odihr/20066> [<https://perma.cc/B2AT-D38W>].

⁵⁴ Press Release, U.S. Dep’t of State, *supra* note 53.

⁵⁵ *Ukraine Appoints Three Experts to be Part of a Mission Under the OSCE’s Moscow Mechanism*, ORG. FOR SEC. & COOP. IN EUR. (June 7, 2022), <https://www.osce.org/odihr/519834> [<https://perma.cc/7B9E-X7C8>] (calling upon the appointment of experts to “consider, follow up and build upon the findings of the Moscow Mechanism report received by OSCE participating States on 12 April” addressing “the human rights and humanitarian impacts of the Russian Federation’s invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine’s internationally recognized borders and territorial waters”).

March 2023, similarly calling upon experts to investigate alleged violations of international humanitarian law committed by Russian forces.⁵⁶ As to accountability efforts, the March 2023 mandate explicitly called upon the experts to “collect, consolidate, and analyze this information with a view to offer recommendations, as well as provide the information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction.”⁵⁷ The OSCE has since released several expert reports, detailing numerous violations of international humanitarian law committed by Russian forces since the February 2022 invasion.⁵⁸

Significant other coordinated efforts are also underway to gather and preserve evidence of crimes being committed in Ukraine to make it available for future prosecutorial efforts, including by states willing to invoke universal jurisdiction.⁵⁹ As mentioned in the Introduction, the European Union is playing

⁵⁶ Press Release, U.S. Mission to the OSCE, Joint Statement on the Invocation of the Moscow Mechanism to Address the Forced Transfer and Deportation of Children by the Russian Federation (Mar. 30, 2023), <https://osce.usmission.gov/joint-statement-on-the-invocation-of-the-moscow-mechanism-to-address-the-forced-transfer-and-deportation-of-children-by-the-russian-federation/> [<https://perma.cc/54C5-6VYG>] (calling upon the appointment of experts to “build upon previous findings and establish the facts and circumstances surrounding possible contraventions of relevant OSCE commitments, violations and abuses of human rights, and violations of international humanitarian law and international human rights law, as well as possible cases of war crimes and crimes against humanity, associated with or resulting from the forcible transfer of children within parts of Ukraine’s territory temporarily controlled or occupied by Russia and/or their deportation to the Russian Federation”).

⁵⁷ *Id.*

⁵⁸ See generally WOLFGANG BENEDEK, VERONIKA BÍLKOVÁ & MARCO SASSÒLI, ORG. FOR SEC. & COOP. IN EUR., REPORT ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY COMMITTED IN UKRAINE SINCE 24 FEBRUARY 2022 (Apr. 2022), <https://www.osce.org/odihr/515868> [<https://perma.cc/2JUC-H88G>]; VERONIKA BÍLKOVÁ, LAURA GUERCIO & VASILKA SANCIN, ORG. FOR SEC. & COOP. IN EUR., REPORT ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY COMMITTED IN UKRAINE (1 APRIL – 25 JUNE 2022) (July 2022), <https://www.osce.org/files/f/documents/3/e/522616.pdf> [<https://perma.cc/TX67-H4WJ>]; VERONIKA BILKOVA, CECILIE HELLESTVEIT & ELĪNA ŠTEINERTE, ORG. FOR SEC. & COOP. IN EUR., REPORT ON VIOLATIONS AND ABUSES OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY, RELATED TO THE FORCIBLE TRANSFER AND/OR DEPORTATION OF UKRAINIAN CHILDREN TO THE RUSSIAN FEDERATION (May 2023), https://www.osce.org/files/f/documents/7/7/542751_0.pdf [<https://perma.cc/UJQ9-RHMS>].

⁵⁹ ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes in Ukraine, EUROJUST (Apr. 25, 2022), <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> [<https://perma.cc/JRY8-8ZEJ>].

a significant role in these efforts with Eurojust⁶⁰ providing operational, legal, and financial support⁶¹ to the JIT established by Ukraine, Poland, and Lithuania.⁶² The ICC Prosecutor and other countries within Europe are also participating in the JIT.⁶³ And in March 2023, the United States signed a Memorandum of Understanding, enabling “practical arrangements for cooperation, information exchange and the participation of the United States’ authorities in coordination meetings organised with Eurojust’s support.”⁶⁴

As part of its support role to the JIT, in 2023, Eurojust created a Core International Crimes Database (CICED), a secure data storage tool, which is designed to “preserve, store and analyse evidence of core international crimes (genocide, crimes against humanity, and war crimes)” so that they may be used in national and international investigations.⁶⁵ The creation of the CICED was made possible as a result of a new EU Regulation, entitling Eurojust to

⁶⁰ Eurojust (the European Union Agency for Criminal Justice Cooperation), based in The Hague, is supporting this JIT with “operational, analytical, legal, and financial assistance.” *Id.*

⁶¹ For more on the types of support to JITs provided by Eurojust, see *Joint Investigation Teams*, EUROJUST, <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams> [<https://perma.cc/MW4R-YRUF>].

⁶² Eurojust explains the concept of a JIT as follows: it “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. Made up of prosecutors and law enforcement authorities as well as judges, JITs are established for a fixed period, typically between 12 and 24 months, such as is necessary to reach successful conclusions to investigations.” *Id.*

⁶³ *National Authorities of the Ukraine Joint Investigation Team Sign Memorandum of Understanding with the United States Department of Justice*, EUROJUST (Mar. 4, 2023), <https://www.eurojust.europa.eu/news/national-authorities-ukraine-joint-investigation-team-sign-memorandum-understanding-usa> [<https://perma.cc/7Z4K-8YWT>].

⁶⁴ *Id.*; see also Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Remarks at the United for Justice Conference (Mar. 3, 2023), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-lviv-ukraine> [<https://perma.cc/G3UG-AWJD>] (explaining the mission of the War Crimes Accountability Team, which includes providing advice and assistance to Ukraine’s Prosecutor General’s Office). Like these efforts by the War Crimes Accountability Team, other efforts are also underway to provide specific support to Ukraine in its accountability efforts. For example, the United States, the European Union, and the United Kingdom have established the Atrocity Crimes Advisory Group (ACA) which provides experts to assist Ukraine’s Office of the Prosecutor in documenting, preserving, and analyzing “of war crimes and other atrocities committed in Ukraine, with a view toward criminal prosecutions.” Press Release, Antony J. Blinken, U.S. Sec’y of State, Launch of the Atrocity Crimes Advisory Group (ACA) for Ukraine (May 25, 2022), <https://www.state.gov/launch-of-the-atrocity-crimes-advisory-group-aca-for-ukraine/> [<https://perma.cc/Y2UY-BTBT>].

⁶⁵ *Core International Crimes Evidence Database (CICED)*, EUROJUST (Feb. 23, 2023), <https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced> [<https://perma.cc/4QVL-L8Y4>]; see also *Core International Crimes*, EUROJUST, <https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes> [<https://perma.cc/B3TJ-C7MJ>].

support Member States' action in combating genocide, crimes against humanity, war crimes and related criminal offences, including by preserving, analysing and storing evidence related to those crimes and related criminal offences and enabling the exchange of such evidence with, or otherwise making it directly available to, competent national authorities and international judicial authorities, in particular the International Criminal Court.⁶⁶

The CISED will store evidence submitted by “[c]ompetent national authorities from EU Member States and countries with Liaison Prosecutors at Eurojust,” though Eurojust notes that submission of evidence to the database is voluntary and the “submitting authority remains in control of how the evidence or information about the evidence is shared.”⁶⁷

Civil society organizations are also gathering evidence for use in future criminal proceedings.⁶⁸ They are interviewing witnesses and collecting tangible evidence when the security situation permits, but they are also assembling, evaluating, and storing open source digital intelligence.⁶⁹ Open source digital intelligence refers to the data that is collected from publicly available sources and that can be used in the context of a criminal investigation.⁷⁰ It can include material from the internet (such as social media posts), traditional media (such

⁶⁶ Caianiello, *supra* note 9, at 230–31 (quoting the text of new EU Regulation 2022/838, amending Regulation (EU) 2018/1727).

⁶⁷ *Core International Crimes*, *supra* note 65.

⁶⁸ See *infra* notes 70–74 and accompanying text.

⁶⁹ Hendrix, *supra* note 10 (quoting one expert working with Truth Hounds as stating that “new limitations on investigations in the active war zone mean investigators are focusing more on collecting open source information to provide leads to pursue interviews with witnesses”); see also Brian Dooley, *Tracking War Crimes in Ukraine with the Truth Hounds*, HUM. RTS. FIRST (Mar. 21, 2022), <https://humanrightsfirst.org/library/tracking-war-crimes-in-ukraine-with-the-truth-hounds-2/> [<https://perma.cc/N7MR-4AJC>] (reporting on the work of the Ukrainian civil society organization Truth Hounds, which, among other things works to corroborate open source digital information with witness interviews); Milica Stojanovic, *As War Grinds on in Ukraine, Investigators Doggedly Track Crimes*, BALKAN INSIGHT (Dec. 30, 2022), <https://balkaninsight.com/2022/12/30/as-war-grinds-on-in-ukraine-investigators-doggedly-track-crimes/> [<https://perma.cc/CP4W-6HWW>] (reporting that the Ukrainian civil society organization Truth Hounds “gathered testimonies, photos, evidences about weapons used in the Chernihiv attack, which they later combined with open-source materials about armaments and the Russian army”).

⁷⁰ See EUROJUST, PROSECUTING WAR CRIMES OF OUTRAGE UPON PERSONAL DIGNITY BASED ON EVIDENCE FROM OPEN SOURCES—LEGAL FRAMEWORK AND RECENT DEVELOPMENTS IN THE MEMBER STATES OF THE EUROPEAN UNION 3–4 (Feb. 2018), https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_EN.pdf [<https://perma.cc/683P-QTXY>]; see also U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. & HUM. RTS. CTR., U.C. BERKELEY SCH. OF L., BERKELEY PROTOCOL ON DIGITAL OPEN SOURCE INVESTIGATIONS, at 3, U.N. Doc. HR/PUB/20/2, U.N. Sales No. E.20.XIV.4 (2022) [hereinafter BERKELEY PROTOCOL] (stating that open source digital information is digital information “that any member of the public can observe, purchase or request, without requiring special legal status or unauthorized access,” usually acquired from the Internet).

as newspapers), photos and videos taken by private individuals, and geospatial information (such as maps and commercial imagery products).⁷¹ Indeed, the crimes committed in Ukraine could be “one of the most documented through digital evidence.”⁷² For instance, Mnemonic, an NGO based in Berlin, has collected approximately three million records of potential human rights violations or war crimes committed in Ukraine since Russia’s February 2022 invasion, much of which is user-generated content from Telegram, YouTube, Twitter, and Facebook posts.⁷³

2. *Considering How the Coordinated Efforts to Investigate and Preserve Evidence in Ukraine Assists with Evidentiary Difficulties*

All these various efforts to document serious international crimes occurring in Ukraine while the conflict is ongoing may prove useful to those willing to mount legal proceedings to hold perpetrators accountable—including national jurisdictions invoking universal jurisdiction. The fact that some evidence is available and has been properly stored and secured, such as in Eurojust’s CISED,⁷⁴ means that national jurisdictions may be able to prepare stronger court cases more quickly than they otherwise would. Indeed, commentators note

⁷¹ See EUROJUST, *supra* note 70, at 6; see also BERKELEY PROTOCOL, *supra* note 70, at 3 (explaining that open-source digital information “comprises both user-generated and machine-generated data, and may include, for example: content posted on social media; documents, images, videos and audio recordings on websites and information-sharing platforms; satellite imagery; and government-published data”).

⁷² Caianiello, *supra* note 9, at 231; see also ANN NEVILLE, EUR. PARL. RSCH. SERV., RUSSIA’S WAR ON UKRAINE: INVESTIGATING AND PROSECUTING INTERNATIONAL CRIMES 4 (June 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733525/EPRS_BRI\(2022\)733525_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733525/EPRS_BRI(2022)733525_EN.pdf) [<https://perma.cc/JL7D-86S2>] (noting the “unprecedented amounts of information flooding from Ukraine from NGOs, the media and social media, as well as individual Ukrainians, documenting acts which may constitute breaches of international humanitarian law”); Lauren Baillie, *How to Achieve Accountability for Atrocities in Ukraine*, U.S. INST. OF PEACE (Apr. 21, 2022), <https://www.usip.org/publications/2022/04/how-achieve-accountability-atrocities-ukraine> [<https://perma.cc/QRZ5-RR56>] (“The Russian invasion of Ukraine is perhaps the most documented conflict of the 21st century.”).

⁷³ See Joanna York, ‘Accountability and Justice’: Gathering Digital Evidence of War Crimes in Ukraine, FRANCE 24 (Feb. 28, 2023), <https://www.france24.com/en/europe/20230228-accountability-and-justice-gathering-digital-evidence-of-war-crimes-in-ukraine> [<https://perma.cc/R9VN-6Y4L>]. Mnemonic also archives digital information relevant to human rights abuses committed in Syria, Sudan, and Yemen. See Hendrix, *supra* note 10.

⁷⁴ As Professor McGonigle Leyh also noted, “new technological and digital advances, including new online collection tools, encryption software and cloud storage,” has allowed some of the organizations documenting atrocities in Ukraine “to collect, store, manage and share information in unprecedented ways.” Brianne McGonigle Leyh, *Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes*, 16 INT’L J. TRANS. JUST. 363, 369 (2022).

that the quality of the information being gathered in the Ukrainian context may be of higher quality than that gathered in connection with past conflicts. Many organizations now gathering and analyzing evidence in Ukraine are apparently utilizing the Berkeley Protocol, created in 2020, and containing “standards and a practical guide to the collection and use of open source information in the investigation of human rights violations.”⁷⁵ Some organizations are employing documentation standards that comport with those followed by criminal investigators.⁷⁶ Civil society organizations have also benefited from the learning acquired in documenting other atrocities, such as those in Syria and Sudan.⁷⁷ A lawyer with one civil society organization, in fact, explains that those documenting atrocities in Ukraine immediately focused on gathering the evidence necessary to link certain perpetrators to crimes (such as determining chain of command or identification of specific military units), something that “in the Syrian context, nobody looked at for years after the events.”⁷⁸

Nevertheless, we should not assume that simply because information is being gathered and preserved it will necessarily be admissible in criminal proceedings brought by different countries willing to invoke universal jurisdiction. Even within the European Union, countries have different rules and procedures regulating the admissibility of evidence in criminal proceedings.⁷⁹ Because each state has different standards for evidence collection and admissibility in criminal trials, there are limits on whether and how the evidence collected by the various mechanisms, bodies, organizations, or individuals will be used.⁸⁰ Some commentators, in fact, suggest that “one has to consider the fact that prosecutorial and investigative authorities, particularly in European countries with an inquisitorial model, seek to and are often even obliged to conduct investigations themselves”—suggesting that those national authorities will not necessarily be able to rely on evidence collected by, for example, the Ukraine COI.⁸¹ Further, while much evidence may have been collected using

⁷⁵ Hendrix, *supra* note 10.

⁷⁶ See McGonigle Leyh, *supra* note 74, at 369.

⁷⁷ See Hendrix, *supra* note 10 (quoting the Executive Director of Mnemonic as stating that because of experience documenting other atrocities, the organization was able to quickly act in a very concrete way with documenting atrocities in Ukraine).

⁷⁸ *Id.* (quoting Steve Kostas, a lawyer with the Open Society Justice Initiative).

⁷⁹ See, e.g., Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová & Margarete von Galen, *Admissibility of Evidence in Criminal Proceedings in the EU*, 3 EUCRIM 201, 201 (2020) (stating that EU Member States’ rules on the collection, use, and admissibility of evidence in criminal trials differ extensively presenting a possible obstacle to the use of cross-border evidence).

⁸⁰ See Baillie, *supra* note 72; see also PAULET, *supra* note 41, at 9 (“An additional challenge is that these standards vary from one country to another, and there is sometimes no telling in advance where the trial will take place,” thus “[entities] gather evidence without knowing which court will examine it, and the rules of admissibility of evidence may be widely different.”).

⁸¹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 J. INT’L CRIM. JUST. 165, 170 (2018).

proper methods and according to criminal justice standards, we should not assume that all evidence from civilians, such as photos or videos from mobile devices, will be sufficiently authenticated to permit its introduction.⁸²

As to witness testimony specifically, the fact that witnesses have been identified and, in some instances, provided statements or testimony may be both a positive and negative development. A benefit, of course, is that jurisdictions wishing to prosecute atrocities committed in Ukraine may be able to access those witnesses themselves or at least obtain leads and useful information from the statements and testimony already collected. On the other hand, that a witness has been willing to speak to an investigator in the past does not necessarily mean that witness will later be available to testify at trial. For example, the witness may be afraid of testifying in some cases against some defendants.⁸³ To the extent that the witness is a foreign national residing outside the prosecuting state, the prosecuting state likely will not be able to force them to travel to testify and may not even be able to convince them to travel to testify.⁸⁴ Furthermore, especially in the Ukraine situation, commentators have expressed concerns about the risk of “over-documentation, particularly when it comes to the collection of statements.”⁸⁵ As Professor McGonigle Leyh explains:

Over-documentation involves situations where victims are repeatedly asked to recount their experiences to different individuals, often without fully understanding who is recording their story or what it will be used for. Two main concerns associated with over-documentation have to do with the safety

⁸² See Baillie, *supra* note 72 (noting, however, that some applications, such as EyeWitness, allow “civilians to capture evidence on an app that collects and securely stores data relevant to its authenticity for use in future court proceedings”).

⁸³ Swedish prosecuting authorities, for example, have found that Syrian citizens who have relocated to Sweden have not typically been willing to talk to authorities about the atrocities committed in the country. Rather, they “tend to want to distance themselves from what happened in Syria and focus on being a part of Swedish society. They are afraid of the consequences for their family back in Syria, but they also want to forget the traumas they went through. They want to go on with their lives.” Lena Bjurström, *Sweden on the Frontline with Syria Cases*, JUSTICEINFO.NET (Feb. 11, 2021), <https://www.justiceinfo.net/en/73587-sweden-frontline-syria-cases.html> [<https://perma.cc/XA3L-4ZQF>]; see also MARIA ELENA VIGNOLI, HUM. RTS. WATCH, “THESE ARE THE CRIMES WE ARE FLEEING”: JUSTICE FOR SYRIA IN SWEDISH AND GERMAN COURTS 3 (Oct. 2017), https://www.hrw.org/sites/default/files/report_pdf/ij Syria1017_web.pdf [<https://perma.cc/4462-ELWV>] (explaining that Germany and Sweden have had some difficulties gathering evidence relevant to crimes committed in Syria because, among other things, the Syrian refugee population in their countries fears possible retribution against loved ones in Syria and mistrusts police and government officials due to their experiences in Syria).

⁸⁴ Amnesty Int’l, *Universal Jurisdiction: Questions and Answers*, AI Index IOR 53/020/2001 (Dec. 2001), at 7.

⁸⁵ Brianne McGonigle Leyh, *Ukraine Symposium—Documentation and Investigation Responses to Serious International Crimes*, LIEBER INST. W. POINT (July 13, 2022), <https://lieber.westpoint.edu/documentation-investigation-responses-serious-international-crimes> [<https://perma.cc/W5UZ-P547>].

and wellbeing of statement providers as well as with the accuracy of the information provided.⁸⁶

Indeed, for victims and witnesses, requiring the repeated telling of their stories can be traumatic, but can also create a situation where they may be less useful as trial witnesses if their various statements contain inconsistencies that will have to be explained at trial.⁸⁷

Even if these cooperative efforts to collect and preserve evidence assuage states' concerns about the evidentiary difficulties associated with prosecuting perpetrators of atrocities committed in Ukraine, other challenges associated with exercising universal jurisdiction remain. Those challenges are discussed below and help to explain why we tend to see that most states invoke universal jurisdiction only sparingly and often only against lower-level suspects who appear in their territory, or when the state otherwise has a nexus to the offense—such that the state is not exercising pure universal jurisdiction in the global enforcer model.

B. Other Challenges to the Exercise of Universal Jurisdiction

Why might states choose to pursue lower-level defendants or those found on their territory or require some nexus to the offense? Several reasons: (1) the political costs associated with prosecuting universal jurisdiction cases; (2) difficulties obtaining custody over perpetrators; and (3) the limited nature of state prosecutorial resources. Each of these obstacles is discussed below.

1. Political Costs

First, to the extent that the state seeks to prosecute higher-level offenders, history has shown that the state may be exposed to significant political costs and drawn into foreign relations conflicts.⁸⁸ One example involving a Belgian prosecutor's decision to charge former President George W. Bush and Vice

⁸⁶ *Id.*

⁸⁷ See, e.g., Lauren Wolfe, *Ukraine's True Detectives: The Investigators Closing in on Russian War Criminals*, GUARDIAN (Oct. 20, 2022), <https://www.theguardian.com/world/2022/oct/20/ukraine-true-detectives-investigators-closing-in-on-russian-war-crimes> [https://perma.cc/62AA-433H] (quoting one expert as stating that prior inconsistencies in witness statements can cause witnesses to be “ruled out or called ‘complicated witnesses’”); Alexa Koenig, Jennifer Easterday & Jacqueline Geis, *There's an Urgent Need to Probe Russian War Crimes in Ukraine — But How?*, BERKELEY BLOG (June 3, 2022), <https://blogs.berkeley.edu/2022/06/03/responsibly-documenting-war-crimes-in-ukraine/> [https://perma.cc/L7NQ-Q7QM] (discussing over-documentation and concerns about traumatizing witnesses or the risks of possibly conflicting testimonies).

⁸⁸ Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 325 (2001); see also ICTJ REPORT 2020, *supra* note 14, at 23 (suggesting that some critics of universal jurisdiction argue that it has been “used as a method to advance political agendas”).

President Dick Cheney with war crimes based on the bombing of a civilian shelter during the Persian Gulf War in 1991 should serve to illustrate this point.⁸⁹ The United States did not take this news well, threatening Belgium that it may “los[e] its status as host to NATO’s headquarters if it did not rescind its law authorizing the exercise of pure universal jurisdiction.”⁹⁰ Belgium succumbed to these and other diplomatic pressures, amending its laws so that it presently can only exercise universal jurisdiction without any nexus to the offense where a treaty such as the Convention against Torture requires.⁹¹

The issues associated with targeting higher-level offenders, especially those from powerful states who are well-poised to impose costs on the prosecuting state, may help to explain why the evidence shows that most universal jurisdiction cases are against low-cost defendants.⁹² According to Máximo Langer, “low-cost” perpetrators are individuals whose prosecution would not impose significant diplomatic or other costs to the prosecuting state—for example, because the defendant hails from a weak home state or because that home state would not be prepared to intervene to fight against the prosecution.⁹³ Commentators, in fact, seem to agree that most universal jurisdiction cases have been brought against low- to mid-level offenders, as opposed to high-level perpetrators that might cause the state of nationality of the perpetrator or the international community to intervene to protect.⁹⁴ Langer offers a hypothesis to

⁸⁹ Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES (Apr. 1, 2003), <https://www.nytimes.com/2003/04/01/world/belgium-rethinks-its-prosecutorial-zeal.html?pagewanted=all> [https://perma.cc/AFB8-6J34].

⁹⁰ *Belgium: Universal Jurisdiction Law Repealed*, HUM. RTS. WATCH (Aug. 1, 2003), <https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed> [https://perma.cc/Y2BP-34BM].

⁹¹ See, e.g., Malvina Halberstam, *Belgium’s Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?*, 25 CARDOZO L. REV. 247, 251 (2003).

⁹² The possibility that a high-level official will claim immunity from prosecution is another reason that states may be wary of pursuing such defendants. See, e.g., HRW UJ in Europe, *supra* note 43 (citing to various universal jurisdiction cases that were dismissed on head of state immunity grounds); see also Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> [https://perma.cc/YT32-7YSW] (discussing status and functional immunity defenses in the context of prosecuting individuals for committing the crime of aggression against Ukraine). A larger discussion of the various types of immunity defenses and how they might apply in state prosecutions of serious international crimes using universal jurisdiction is beyond the scope of this Article.

⁹³ See, e.g., Langer & Eason, *supra* note 32, at 782 n.6, 788 (stating the number of universal jurisdiction trials completed between July 2010 and 2017); see also Langer, *supra* note 30, at 5 (suggesting that “low-cost” defendants are those “who can impose little or no international relations, political, economic, or other costs on potential prosecuting states”).

⁹⁴ See, e.g., HRW Basic Facts UJ, *supra* note 21; Langer, *supra* note 30, at 5; Langer & Eason, *supra* note 32, at 782; see also Jeremy A. Rabkin & Craig S. Lerner, *Criminal Justice is Local: Why States Disregard Universal Jurisdiction for Human Rights Abuses*, 55 VAND. J. TRANSNAT’L L. 375, 379 (2022) (“Commentators generally agree that universal

explain this phenomenon: namely, that states are more likely to mount universal jurisdiction cases against “low-cost” defendants, because doing so aligns with the incentives of states’ political branches; by pursuing “low-cost” defendants, the positive “incentives for political branches outweigh the [negative ones].”⁹⁵ Because the state exercising universal jurisdiction over low-cost defendants faces few diplomatic or other costs for pursuing the case, it is more willing to undertake the resources and other burdens associated with bringing justice to victims of atrocities that occurred on foreign soil.

Langer’s findings provide evidence to support this point. He examined every single universal jurisdiction criminal complaint presented by victims, human rights groups, or any other actor—or universal jurisdiction cases considered by public authorities on their own motion—for one or more of the four core international crimes⁹⁶ presented around the world since the case brought against Eichmann⁹⁷ and before 2010.⁹⁸ Based on that research, he found that of the thirty-two cases brought to trial, twenty-four were “Rwandans, former Yugoslavs, and Nazis”—all of whom Langer explains fit the criteria for categorizing as “low-cost” defendants.⁹⁹ Specifically, they are “defendants about whom the international community has broadly agreed that they may be prosecuted and punished, and whose state of nationality has not defended.”¹⁰⁰ They were typically charged with genocide, and by the time they were prosecuted, their home states did not protest their prosecution.¹⁰¹

Langer’s later work with Eason reaches a similar conclusion with respect to universal jurisdiction cases brought to trial between July 2010 and 2017.¹⁰² Although the scholars found that states had mounted twenty-nine universal jurisdiction cases during that time, they also found that the cases tended to involve “low-cost” defendants—as opposed to the kinds of defendants who would tend to make “noise” in international legal circles.¹⁰³ They explain:

many of the defendants against whom a universal jurisdiction verdict has been issued have come from states that were unable to exert pressure on prosecuting

jurisdiction for human rights offenses has been invoked only infrequently and rarely, if ever, against senior political leaders.”); Langer, *supra* note 30, at 3 n.4 (suggesting that the perpetrators in the universal jurisdiction cases brought against pirates should be characterized as “low-cost”).

⁹⁵ Langer, *supra* note 30, at 7.

⁹⁶ Langer classifies war crimes, crimes against humanity, genocide, and torture as the four core international crimes for the purposes of his study. *Id.* at 1–2.

⁹⁷ Gladstone, *supra* note 25 (explaining that in 1961 Israel prosecuted Adolf Eichmann, the former Nazi SS leader, who had escaped to Argentina after the war, using universal jurisdiction).

⁹⁸ Langer, *supra* note 30, at 7.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 28.

¹⁰² Langer & Eason, *supra* note 32, at 788.

¹⁰³ *Id.* at 782, 788.

states because they were still in the midst of conflict at the time of trial. In the remaining cases, the defendant's nationality state either had insufficient influence over the prosecuting state to exert such pressure, was unwilling to do so or even supported the prosecution. Thus, if we take nationality as a proxy for how politically costly prosecuting a defendant is for the prosecuting state, universal jurisdiction trials have concentrated on low-cost defendants.¹⁰⁴

2. *Difficulties Obtaining Custody Over the Alleged Perpetrator*

The potential difficulty of obtaining custody over the alleged perpetrators of atrocity crimes committed on foreign soil is another challenge states seeking to exercise universal jurisdiction may face.¹⁰⁵ The cases against former President Bush and Vice President Cheney provide just one example of cases that did not move forward because the state could not obtain custody over the accused—in that case, because the United States intervened to object to the prosecution.¹⁰⁶ This difficulty may help to explain, at least in part, why most states require the presence of the perpetrator to proceed with such prosecutions.¹⁰⁷

For example, the United States' newly amended war crimes statute permits the government to exercise jurisdiction over war crimes “regardless of their nationality or the location of the offenses, as long as they are located within U.S. territory.”¹⁰⁸ The Netherlands' laws permit it to exercise jurisdiction without any territorial nexus to the offense as long as either (1) the perpetrator or victim is a Dutch citizen or (2) the perpetrator is present on Dutch soil (or expected to

¹⁰⁴ *Id.* at 809.

¹⁰⁵ See Langer, *supra* note 30, at 14 (describing efforts by states to prosecute individuals for serious international crimes using universal jurisdiction that did not proceed because the state was unable to obtain custody over the accused); PAULET, *supra* note 41, at 10 (describing the challenge of trying to locate a perpetrator of atrocities occurring on foreign soil as “a needle-in-a-haystack task”).

¹⁰⁶ Halberstam, *supra* note 91, at 250–51.

¹⁰⁷ See, e.g., Rapp, *supra* note 17, at 140 (stating that the “statutes of most countries limit the scope of [universal jurisdiction] to permit prosecution of perpetrators ‘present in’ their territory”); Mandel-Anthony, *supra* note 16, at 939 (stating that many states adopt the “no safe haven” approach to the exercise of universal jurisdiction, often requiring territorial presence of the perpetrator); VARNEY & ZDUŃCZYK, *supra* note 14, at 14 (“Most states have adopted the conditional approach to universal jurisdiction requiring the presence of suspects on their soil to assume jurisdiction.”); McGonigle Leyh, *supra* note 74, at 367 (reporting that “most states have now adopted domestic universal jurisdiction legislation that limits the exercise of the principle to those situations where there is a clear link with the state, such as where the suspect is present on the territory of the prosecuting state” and that this “approach is sometimes referred to as conditional university jurisdiction, as opposed to a more absolute approach”).

¹⁰⁸ Grace Lin, *Expanding U.S. Prosecutorial Power Over International War Crimes*, COLUM. J. TRANSNAT'L L. ONLINE (Feb. 14, 2023), <https://www.jtl.columbia.edu/bulletin-blog/expanding-us-prosecutorial-power-over-international-war-crimes#:> [https://perma.cc/4MAQ-TTM9].

be present shortly).¹⁰⁹ France's presence requirement is even more strict than those outlined above. Although France has incorporated war crimes, crimes against humanity, and genocide into domestic legislation, when those crimes occur on foreign soil, prosecutors can only exercise jurisdiction where the accused is a "habitual resident" of France (such that accused who are, for example, on vacation in France, would not qualify).¹¹⁰

The evidence examining the totality of universal jurisdiction cases commenced over the years also supports a conclusion that states tend to bring cases against perpetrators found on their territory.¹¹¹ This behavior makes practical sense from the state's perspective: if the perpetrator is already on the state's soil, the state need not expend resources to locate him or encourage his surrender to stand trial.¹¹² Furthermore, in such cases, the state has a real incentive to prosecute so as not to be a safe haven for serious international criminals¹¹³—especially if other avenues, such as deportation,¹¹⁴ are not available (for example, if the perpetrator is a non-national who may have to be returned to a state experiencing significant violent conflict).¹¹⁵

¹⁰⁹ SYRIA JUST. & ACCOUNTABILITY CTR., A GUIDE TO NATIONAL PROSECUTIONS IN THE NETHERLANDS FOR CRIMES COMMITTED IN SYRIA 2–3 (2020).

¹¹⁰ See Roger Lu Phillips, *2nd Time's the Charm: France's Cour de Cassation Broadens Universal Jurisdiction Law*, JUST SEC. (May 24, 2023), <https://www.justsecurity.org/86689/2nd-times-the-charm-frances-cour-de-cassation-broadens-universal-jurisdiction-law/> [<https://perma.cc/TL5S-26JH>]. France's law also includes a limitation requiring that the crime for which the perpetrator is being prosecuted is also prohibited by the state where the offense occurred (the double-criminality limitation). See *id.*

¹¹¹ See, e.g., Langer & Eason, *supra* note 32, at 782 (stating that in addition to being against "low cost" defendants, most universal jurisdiction cases are against "defendants who were already residing in the prosecuting state"); Mandel-Anthony, *supra* note 16, at 940 (discussing the trend amongst states to pursue universal jurisdiction against persons already on their territory).

¹¹² See ICTJ REPORT 2020, *supra* note 14, at 24 (explaining the difficulties of applying universal jurisdiction, because it can rely on mutual assistance among states that have no duty to assist in the investigation, provide evidence, or extradite suspects).

¹¹³ See, e.g., discussion *supra* Part II.A (discussing the "global enforcer" and "no safe haven" rationales for the exercise of universal jurisdiction); see also Langer & Eason, *supra* note 32, at 783 (suggesting that most universal jurisdiction cases are proceeding based on the "no safe haven" rationale).

¹¹⁴ See, e.g., MULLIGAN, *supra* note 37, at 3–4 (listing deportation as an option a state can sometimes pursue to address the potential impunity that a defendant might enjoy should the state fail to prosecute using universal jurisdiction); Mandel-Anthony, *supra* note 16, at 939 (noting that to fulfill the "no safe haven" rationale, states may also remove or deport individuals).

¹¹⁵ See, e.g., Langer & Eason, *supra* note 32, at 798 (explaining that in most cases, states can avail themselves of the option to deport non-nationals who are suspected of committing serious international crimes, but that the state would violate international human rights treaties if it were to deport or extradite an individual back to a home state in the midst of a violent civil war).

Commentators have noted that requiring the presence of the perpetrator to exercise universal jurisdiction produces some selectivity effects: namely, a reactive, rather than proactive prosecutorial posture, such that the trials conducted may not “reflect the seriousness of international crimes committed by the different sides in a given situation but, rather, just the international and involuntary mobility of these groups.”¹¹⁶ In other words, states may not select which perpetrators of international crimes to prosecute based on the heinousness of their crimes or their place in the leadership hierarchy, but rather choose to prosecute primarily because the defendant was found on the state’s territory. As Langer and Eason argue, “[t]his concentration in residents may reflect an understanding of the role of universal jurisdiction states as not being safe havens for perpetrators of international crimes rather than being global enforcers of international human rights.”¹¹⁷

3. *Limited Prosecutorial Resources*

Another challenge relating to the exercise of universal jurisdiction for states is that prosecutorial and other state resources are typically not limitless.¹¹⁸ As a result, domestic audiences may demand that the state’s limited resources be at least primarily devoted to accountability efforts that will have a direct impact on the state’s populace¹¹⁹ and may insist that the state address international crimes in some other less costly way, such as by deporting offenders who appear on the state’s territory.¹²⁰ As some commentators put it, “governments and their national war crimes units face the onerous task of justifying why taxpayers should support investigations of atrocity crimes that took place extraterritorially.”¹²¹

These resource concerns may contribute to the reasons why national courts “tend to give prevalence to cases which have some link to the national state.”¹²² For instance, both Belgium and Spain retreated from their previous positions as

¹¹⁶ *Id.* at 783.

¹¹⁷ *Id.*; see also Mandel-Anthony, *supra* note 16, at 940 (stating that “prosecutions in European countries of atrocities committed in Syria may disproportionately target lower-level foreign fighters present on their territory, rather than senior regime officials, in part because these individuals more readily fit within the ‘no safe haven’ approach—investigations were triggered by the territorial presence of the suspect,” but noting that “[s]uch outcomes, while understandable from an evidentiary perspective, may negatively affect perceptions of the priorities of prosecuting governments”).

¹¹⁸ See, e.g., Safferling & Petrossian, *supra* note 40, at 262 (questioning whether national jurisdictions will be able to sufficiently address international crimes or whether “a lack of finances for investigations, a lack of finances within the judicial system and, of course, a lack of will and interest” will pose challenges).

¹¹⁹ See Langer, *supra* note 30, at 6.

¹²⁰ *Id.* (mentioning the possibility of deportation in some cases).

¹²¹ Elise Baker et al., *Joining Forces: National War Crimes Units and the Pursuit of International Justice*, 42 HUM. RTS. Q. 594, 600 (2020).

¹²² Safferling & Petrossian, *supra* note 40, at 262.

leaders in the exercise of universal jurisdiction, amending their laws to avoid further diplomatic pressures from countries who took issue with their courts' willingness to indict their high-level government officials.¹²³ Belgium's parliament amended its law in 2003, such that now Belgium can only exercise jurisdiction over international crimes committed on foreign soil using the principles of active or passive personality; universal jurisdiction is only permitted for criminal offenses if a treaty, such as the Convention Against Torture, requires Belgium to prosecute.¹²⁴ Spain's legislature amended its laws such that courts can only adjudicate international crimes occurring on foreign soil if the victim is a Spanish citizen.¹²⁵

Nevertheless, when the state preferences proceeding with cases where there is a link to the state—such as where the victim is a citizen of crimes occurring abroad—the state is not exercising universal jurisdiction in its pure form. Moreover, as where states prioritize investigating and prosecuting offenders who appear on the state's territory, by requiring a nexus to the offense, states are essentially retreating from the idea of states as “global enforcers” of human rights norms.

C. These Many Challenges Will Likely Significantly Constrain States' Willingness to Pursue Universal Jurisdiction Cases in the Ukraine Situation

This Article suggests that the challenges explored in detail above are significant enough that we should not expect that states will greatly alter their historical behavior as regards the willingness to pursue universal jurisdiction cases in the Ukraine situation. Some states will bring cases against perpetrators of atrocities committed in Ukraine; however, many will most likely be against lower-level suspects who are found on their territory or where the state has some

¹²³ See, e.g., *Belgium: Universal Jurisdiction Law Repealed*, *supra* note 90 (describing the conflict with the United States in response to a Belgian prosecutor's universal jurisdiction cases against former President and Vice President of the United States, George Bush and Dick Cheney); Sarah Morris & Teresa Larraz Mora, *China Dismisses as Absurd Spanish Arrest Warrants over Tibet*, REUTERS (Nov. 20, 2013), <https://www.reuters.com/article/uk-china-tibet-spain/china-dismisses-as-absurd-spanish-arrest-warrants-over-tibet-idUKBRE9AJ06420131120> [<https://perma.cc/6ATD-D3LA>] (describing China's response to a Spanish judge's issuance of arrest warrants against five high-ranking Chinese officials charging them with committing human rights abuses in Tibet).

¹²⁴ See Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 934 (2009).

¹²⁵ See *Spain Amends Law to Abolish Court's Universal Justice Power*, TIBETAN REV. (May 21, 2014), <https://www.tibetanreview.net/spain-amends-law-to-abolish-courts-universal-justice-power/> [<https://perma.cc/62XQ-X8ZS>] (explaining that in 2014, the Spanish legislature amended its universal jurisdiction law to require that victims be Spanish nationals and that the amendment would require the dismissal of the cases brought against the Chinese officials); see also ICTJ REPORT 2020, *supra* note 14, at 24.

nexus to the offense. In other words, we may not see many states acting as “global enforcers.”

In fact, the evidence shows that even amongst states that have announced investigations into international crimes being committed in Ukraine, some are seemingly focused on pursuing cases where the victim of the offense is a national of the investigating state.¹²⁶ For example, in March 2022, Lithuania opened an investigation into war crimes committed in Ukraine.¹²⁷ In April, Lithuania’s Prosecutor General’s office confirmed that as part of that investigation, it would seek accountability for the death of Lithuanian filmmaker Mantas Kvedarvicius, who was killed during an attack by Russian forces near Mariupol.¹²⁸ As of writing, France has opened seven investigations into war crimes committed in Ukraine since Russia’s invasion in February 2022.¹²⁹ All, however, involve French citizens as victims,¹³⁰ including a journalist killed by rocket fire in Eastern Ukraine.¹³¹ Spain is another country reportedly investigating crimes committed in Ukraine with the intention of later potentially launching a universal jurisdiction prosecution.¹³² Recall, however, that Spain’s amended laws do not permit it to exercise “pure” universal jurisdiction: its courts can only adjudicate international crimes occurring on foreign soil if the victim is a Spanish citizen.¹³³

¹²⁶ See, e.g., Dutton, *supra* note 6, at 393 n.9 (citing to news reports indicating that Germany, Estonia, Lithuania, Spain, Poland, Slovakia, Latvia, Sweden, Norway, France, and Switzerland had all commenced universal jurisdiction investigations into crimes committed in Ukraine); Michael Plachta, *European Parliament Adopts a Resolution Against Impunity for War Crimes in Ukraine*, 38 INT’L ENF’T L. REP. 250, 252 (2022) (stating that as of April 13, 2022, prosecutors in Poland, Germany, Lithuania, Latvia, Estonia, France, Slovakia, Sweden, Norway, and Switzerland had all opened investigations in their respective prosecutorial systems utilizing universal jurisdiction).

¹²⁷ See HRW Q & A Ukraine, *supra* note 2 (stating that 40 prosecutors, police, and other officials were working on the Lithuanian team to investigate crimes committed in Ukraine, efforts which involved interviewing some 300 witnesses).

¹²⁸ See *Lithuanian Prosecutors to Probe Filmmaker’s Killing in Ukraine as War Crime*, LRT (Apr. 5, 2022), <https://www.lrt.lt/en/news-in-english/19/1662906/lithuanian-prosecutors-to-probe-filmmaker-s-killing-in-ukraine-as-war-crime> [https://perma.cc/64D3-9MXL].

¹²⁹ *France Launches War Crime Investigation After Reporter Arman Soldin Killed in Ukraine*, CBS NEWS (May 10, 2023), <https://www.cbsnews.com/news/arman-soldin-reporter-killed-ukraine-france-war-crime-investigation/> [https://perma.cc/GW2X-65SE].

¹³⁰ See, e.g., *id.*; HRW Q & A Ukraine, *supra* note 2.

¹³¹ See Tassilo Hummel, *France Opens War Crime Investigation After AFP Journalist Died in Ukraine*, REUTERS (May 10, 2023), <https://www.reuters.com/world/europe/france-opens-war-crime-investigation-after-afp-journalist-died-ukraine-2023-05-10/> [https://perma.cc/KJ57-L4LL].

¹³² *How Universal Jurisdiction Can Punish Putin and His Minions for War Crimes in Ukraine*, EUR. PRAVDA (June 6, 2022), <https://www.eurointegration.com.ua/eng/news/2022/06/6/7140690/> [https://perma.cc/98BF-X9BW].

¹³³ See *supra* note 123 and accompanying text.

Furthermore, as discussed above, the laws in the great majority of states allow them to exercise jurisdiction over serious international crimes committed in foreign territories only if the suspect is present on the state's territory.¹³⁴ This is true for some of the states that have already announced they are pursuing investigations of crimes committed in Ukraine.¹³⁵ France's law requires that it exercise universal jurisdiction only over "habitual residents."¹³⁶ Switzerland requires that to exercise universal jurisdiction over war crimes, crimes against humanity, or genocide, the crime be committed by a person now present in Switzerland who has not been extradited to another state or delivered to an international criminal court whose jurisdiction is recognised by Switzerland.¹³⁷ To exercise universal jurisdiction over foreign perpetrators, Norwegian law requires that:

(1) The alleged perpetrator is domiciled in Norway (Section 5, first paragraph, lit. b, Penal Code); or (2) The alleged perpetrator is a national of or domiciled in another Nordic country and is present in Norway (Section 5, second paragraph, lit. b, Penal Code); or (3) The alleged perpetrator is present in Norway (Section 5, third paragraph, Penal Code). Where the alleged foreign perpetrator is neither domiciled nor present in Norway, s/he can only be investigated and prosecuted if the victim is a Norwegian national or domiciled

¹³⁴ See *supra* Part II.

¹³⁵ Of the states that have announced the launch of universal jurisdiction investigations into crimes committed in Ukraine, Poland also seems to require presence of the suspect to prosecute foreigners committing serious international crimes abroad. See, e.g., Amnesty Int'l UJ Report, *supra* note 17, at 93 (indicating that Poland will apply universal jurisdiction for serious international crimes committed abroad by foreign nationals who are present and not extradited); Statement from Przemyslaw Saganek, Adviser to the Minister of Foreign Affs., Sixth Comm. U.N. G.A., to Chairman, Sixth Comm. U.N. G.A. (Oct. 19, 2015), https://www.un.org/en/ga/sixth/70/pdfs/statements/universal_jurisdiction/poland.pdf [<https://perma.cc/8SCN-RBJK>] (indicating that Poland will exercise jurisdiction over foreigners who committed abroad offenses "against the interests of the Republic of Poland or of the Polish nationals" or to other offenses committed abroad where the perpetrator remains in Poland and is not to be extradited).

¹³⁶ See Phillips, *supra* note 110.

¹³⁷ See AMNESTY INT'L UJ REPORT, *supra* note 17, at 110 (setting out Switzerland's universal jurisdiction provisions over serious international crimes); see also U.N. Secretary-General, *The Scope and Application of Universal Jurisdiction*, at 16, U.N. Doc. A/66/93 (June 20, 2011) (explaining that "Switzerland subscribes to the 'conditional' or 'limited' interpretation of universal jurisdiction. The exercise of universal jurisdiction is subject to (a) the presence of the suspect in Swiss territory; (b) and his or her non-extradition to another competent jurisdiction"); Julia Crawford, *International Crimes: Spotlight on Switzerland's War Crimes Unit*, JUST. INFO (Feb. 15, 2019), <https://www.justiceinfo.net/en/40328-international-crimes-spotlight-on-switzerland-s-war-crimes-unit.html> [<https://perma.cc/5DJM-SKW2>] (noting that the universal jurisdiction provisions were enacted in 2011) (stating that unfortunately Switzerland's presence requirement has resulted in the great majority of the cases referred to its specific war crimes unit being dismissed).

in Norway (Section 5, fifth paragraph, Penal Code), which is referred to as passive personality jurisdiction.¹³⁸

Even for countries without express presence requirements, presence of the suspect remains a deciding factor influencing whether the country will proceed with a universal jurisdiction prosecution.¹³⁹ Germany and Sweden provide excellent examples in this regard. Neither country requires the presence or residence of the suspect for their courts to exercise jurisdiction over serious international crimes, nor to commence an investigation of such crimes.¹⁴⁰ In fact, both Germany and Sweden have taken the initiative to open “structural investigations” into the serious international crimes being committed in Ukraine, gathering evidence so that it may be available for future legal

¹³⁸ OPEN SOC’Y JUST. INITIATIVE & TRIAL INT’L, UNIVERSAL JURISDICTION LAW AND PRACTICE IN NORWAY 20–21 (Jan. 2019) (emphasis omitted), <https://www.justiceinitiative.org/uploads/aa5925fb-0c95-4f5f-a1b9-3e56da17c7b3/universal-jurisdiction-law-and-practice-norway.pdf> [<https://perma.cc/E695-7T7F>]; see also AMNESTY INT’L UJ REPORT, *supra* note 17, at 89 (setting out Norway’s universal jurisdiction provisions over serious international crimes).

¹³⁹ News reports indicate that Canada is also gathering evidence from Ukrainians who have relocated to Canada for potential use in future legal proceedings. See Jim Bronskill & Mike Blanchfield, *RCMP Collects Evidence of Possible War Crimes in Ukraine from People Fleeing Invasion*, CTV NEWS (Apr. 7, 2022), <https://www.ctvnews.ca/politics/rcmp-collects-evidence-of-possible-war-crimes-in-ukraine-from-people-fleeing-invasion-1.5852885> [<https://perma.cc/7JNK-YBHE>]. Although its laws only specifically state when presence is *not* required, “Canada generally conditions its universal jurisdiction on presence of the perpetrator in Canada after the commission of the alleged offence. Due to limited resources and investigative challenges, Canadian officials will not open an investigation where the alleged perpetrator is not present in the country or where he or she has not been identified.” *Scope and Application of Universal Jurisdiction in Canada*, U.N., https://www.un.org/en/ga/sixth/75/universal_jurisdiction/canada_e.pdf [<https://perma.cc/MQ3P-9SMD>]; see also OPEN SOC’Y JUST. INITIATIVE & TRIAL INT’L, UNIVERSAL JURISDICTION LAW AND PRACTICE IN CANADA 15–16 (Apr. 2020), <https://www.justiceinitiative.org/uploads/e198cccb-40c4-4061-a7fc-937645218c8f/universal-jurisdiction-law-and-practice-canada.pdf> [<https://perma.cc/3PSU-L33A>] (setting out the circumstances where presence of the suspect is *not* required and noting that in practice presence is a decisive factor influencing whether Canada will commence a universal jurisdiction investigation and prosecution).

¹⁴⁰ OPEN SOC’Y JUST. INITIATIVE & TRIAL INT’L, UNIVERSAL JURISDICTION LAW AND PRACTICE IN SWEDEN 12 (Apr. 2020) [hereinafter SWEDEN UJ BRIEFING PAPER], <https://www.justiceinitiative.org/uploads/550b6548-a951-425f-84b3-d75e5d78688c/universal-jurisdiction-law-and-practice-sweden.pdf> [<https://perma.cc/6UX9-9JPG>] (explaining that Sweden does not have a presence requirement for the exercise of universal jurisdiction); OPEN SOC’Y JUST. INITIATIVE & TRIAL INT’L, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY 17 (Mar. 2019) [hereinafter GERMANY UJ BRIEFING PAPER], <https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf> [<https://perma.cc/QPK3-43M4>] (“The presence of the suspect in Germany is not generally necessary for the investigation of core international crimes.”).

proceedings in their national courts or elsewhere.¹⁴¹ Structural investigations do not target specific individuals, but rather “are 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.”¹⁴² Germany, however, has a procedural rule that allows prosecutors to refrain from pursuing cases involving serious international crimes committed abroad if the suspect is not present in Germany and such presence is not expected.¹⁴³ In Sweden, prosecutors will not initiate an investigation if the absence of the suspect “prevents the crime from being effectively investigated,” nor will they commence a case if “there is no reasonable chance of apprehending the suspect in Sweden.”¹⁴⁴ Nor can a trial in either jurisdiction be commenced unless the accused is present before the court.¹⁴⁵

Finally, evidence in connection with the Syria situation demonstrates that even Germany and Sweden have brought most of their universal jurisdiction cases against lower-level suspects who have been found in their territories.¹⁴⁶ These two countries have commenced the greatest number of cases against foreign nationals committing crimes in Syria in part because of their specialized war crimes units conducting structural investigations into crimes committed in

¹⁴¹ See *How Sweden Is Working to Hold Russia Accountable for Crimes in Ukraine*, GOV'T OFFS. OF SWEDEN (Mar. 30, 2023), <https://www.government.se/government-policy/swedens-support-to-ukraine/how-sweden-is-working-to-hold-russia-accountable-for-crimes-in-ukraine/> [<https://perma.cc/N9DV-Q9BT>] (explaining that Sweden launched a preliminary structural investigation into crimes being committed in Ukraine and in March 2022, “the Swedish Prosecution Authority has been conducting a ‘structural preliminary investigation’ on serious war crimes in Ukraine,” with investigators gathering evidence and witness testimonies to be used in future legal proceedings in Sweden, in other states, or at the ICC); Nadine Schmidt, *German Federal Prosecutor Launches Probe into Ukraine War Crimes*, CNN (Mar. 8, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-putin-news-03-08-22/h_5103d1e880299f3da035fc41528cbf76 [<https://perma.cc/W27F-CNRA>] (explaining that Germany launched a structural investigation into crimes being committed in Ukraine for use in future legal proceedings in Germany or elsewhere). Both Germany and Sweden also opened structural investigations into the serious international crimes committed in Syria. See, e.g., Kaleck & Kroker, *supra* note 81, at 180 (explaining that Germany has opened two structural investigations into crimes committed in Syria—one focused on crimes committed by the Syrian government and one focused on crimes committed by non-state actors, such as ISIS and other armed opposition groups); SWEDEN UJ BRIEFING PAPER, *supra* note 140, at 13 (explaining that in 2015, Sweden for the first time opened a structural investigation—into Syria and Iraq).

¹⁴² LEVY, *supra* note 38, at 10; see also Kaleck & Kroker, *supra* note 81, at 179 (stating that structural investigations entail investigations not yet directed at specific persons that exist to investigate and collect evidence on specific structures “within which international crimes have been allegedly committed”).

¹⁴³ See GERMANY UJ BRIEFING PAPER, *supra* note 140, at 17.

¹⁴⁴ SWEDEN UJ BRIEFING PAPER, *supra* note 140, at 13.

¹⁴⁵ See *id.*; GERMANY UJ BRIEFING PAPER, *supra* note 140, at 17.

¹⁴⁶ See VIGNOLI, *supra* note 83.

Syria and their broad universal jurisdiction laws.¹⁴⁷ Also, Germany and Sweden have been the two largest destination countries for Syrians seeking asylum within Europe.¹⁴⁸ In terms of the cases that each has brought to trial, however, nearly all have been directed against lower-level suspects who have been found present on the state's territory.¹⁴⁹

There are reasonable explanations for why this might be the case. Cases against higher-level accused can be more difficult to prove as they require strong linkage evidence connecting the leaders to the crimes committed by those on the ground.¹⁵⁰ Apparently fewer high-level officials of senior military commanders have left Syria seeking to relocate. In some cases, higher level officials will be able to claim immunity from prosecution.¹⁵¹ Nevertheless, while all efforts by national jurisdictions to provide accountability for crimes committed in foreign jurisdictions should be applauded, the evidence from Germany and Sweden demonstrates the same selectivity effect that has been noted when reviewing state behavior in mounting universal jurisdiction cases: a generally more reactive prosecutorial posture that is associated with states acting in accordance with the “no safe haven” approach.¹⁵²

¹⁴⁷ *Id.* (explaining the competence of German and Swedish authorities to prosecute serious international crimes committed in Syria).

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g., id.* (stating that the cases in Germany and Sweden seeking accountability for atrocities committed in Syria “are usually brought against people present in the territory of the prosecuting country”; chart showing that as of 2017, only seven cases relating to serious international crimes committed in Syria had been brought to trial in Germany and Sweden, two of which were based on the active personality principle); Kaleck & Kroker, *supra* note 81, at 181 (stating that the proceedings in Germany seeking justice for crimes committed in Syria that have advanced beyond the stage of initial investigations “are those directed against low- or mid-level suspects who were accidentally present on Germany territory, the authorities thus following a ‘no-safe-haven approach’”); Safferling & Petrossian, *supra* note 40, at 262 (“In Germany too there are only very few cases upon which the jurisdictional basis rests solely on universality.”); NOHA ABOUELDAHAB, BROOKINGS DOHA CTR., WRITING ATROCITIES: SYRIAN CIVIL SOCIETY AND TRANSITIONAL JUSTICE 17 (May 2018) (stating that of the seven cases regarding the Syria situation that have gone to trial in Germany and Sweden, only one addressed crimes committed by a member of the Syrian Army); Susann Aboueldahab & Fin-Jasper Langmack, *Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice*, 31 MINN. J. INT’L L. 1, 21 (2022) (suggesting that Germany’s cases against Anwar R. and Eyad A. were against lower-level suspects who had turned their backs on the Syrian regime and deserted); LEVY, *supra* note 38, at 55–70, 76–79 (describing the cases brought in Germany and Sweden concerning crimes committed in Syria, showing that in most cases, the suspect was a resident of Germany, a German national, or a Swedish national).

¹⁵⁰ *See* McGonigle Leyh, *supra* note 85.

¹⁵¹ *See* VIGNOLI, *supra* note 83.

¹⁵² A report by Human Rights Watch outlining the efforts in Germany and Sweden to bring perpetrators of atrocities committed in Syria to justice made this very observation:

IV. CONCLUSION

This Article suggests that the existence of the Ukraine COI and other cooperative documentation efforts will not markedly change state behavior and make states more willing to mount pure universal jurisdiction cases—particularly against high-level offenders. Rather, for the many reasons explored above, this Article argues that while the cooperative documentation efforts may assist in relieving some of the evidentiary difficulties associated with pursuing universal jurisdiction cases, numerous challenges remain which may negatively influence state behavior. Consistent with the historical evidence and other evidence of state behavior explored above in connection with the Ukraine and Syria situations, this Article expects that states will continue to proceed more from a “no safe haven” approach and pursue cases against lower-level perpetrators found in their territory, or where they have some nexus to the offense. Such cases may not fully reflect the totality of the serious international crimes being committed in Ukraine, and some higher-level suspects may escape justice—at least in the near term. On the other hand, every prosecution that states are willing to commence will contribute to ending impunity for the serious international crimes being committed in Ukraine and provide justice to some of the many victims of these atrocities.

Moreover, the cooperative documentation efforts described above relating to the Ukraine situation can serve many worthwhile purposes in addition to facilitating criminal accountability—whether for universal jurisdiction prosecutions or otherwise. As one commentator argues in connection with the similarly large-scale documentation efforts centered on the Syria situation, we can view documentation as a method of “non-violent resistance to ongoing, violent conflict” that “resists the hijacking of narratives and the destruction of

The few cases to reach trial have mostly implicated low-level members of ISIS, Jabhat al-Nusra, and non-state armed groups opposed to the government while only one has addressed alleged crimes committed by a low-level member of the Syrian army. In Germany, practical and jurisdictional limitations, such as difficulties finding evidence linking alleged perpetrators to underlying crimes, have also made it easier to bring terrorism charges rather than prosecute for war crimes or crimes against humanity. Terrorism offenses are easier to prosecute because authorities only have to prove connection between the accused and a labeled terrorist organization. However, terrorism charges do not reflect the extent of crimes committed. Terrorism prosecutions, or prosecutions of low-ranking members of armed groups, should not substitute for efforts to successfully prosecute grave crimes committed by senior officers that are likely to more directly promote compliance with international humanitarian law and ensure justice for grave crimes.

Id.

evidence, history, and memory.”¹⁵³ In the case of Ukraine, the ongoing cooperative documentation efforts can provide the basis for a deep historical narrative of the crimes that are being committed and of the persons who are victims to these crimes—a narrative which can also be used to advocate for supporting Ukraine in its efforts to fight off its aggressor and to aid in making future decisions regarding post-conflict transitional justice measures.¹⁵⁴

¹⁵³ ABOUELDAHAB, *supra* note 149, at 1.

¹⁵⁴ *See, e.g.*, McGonigle Leyh, *supra* note 74, at 369 (explaining generally that documentation efforts can be useful for purposes in addition to providing accountability for serious international crimes, such as “advocating for policy changes around human rights; building a collective memory that supports community building and reconciliation; or providing direct services, such as psycho-social support, to victims and their families”).