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Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?

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PROSECUTING ATROCITIES COMMITTED IN UKRAINE: A NEW ERA FOR UNIVERSAL JURISDICTION?

*By Yvonne M. Dutton**

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I. INTRODUCTION

Numerous countries have announced their intention to domestically prosecute crimes being committed following Russia's invasion in Ukraine using their version of universal jurisdiction. In early March 2022, Germany confirmed that it had commenced an investigation into international crimes being committed in

Ukraine under the principle of universal jurisdiction.¹ Estonia followed suit, stating that it was launching a universal jurisdiction investigation into war crimes and crimes against humanity committed in Ukraine.² Lithuania,³ Spain,⁴ Poland,⁵ Slovakia,⁶

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1. Bojan Pancevski, *Germany Opens Investigation into Suspected Russian War Crimes in Ukraine*, WALL ST. J. (Mar. 8, 2022, 12:06 PM), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi> [<https://perma.cc/6997-4MN3>].
2. *Estonia's Internal Security Service Also Investigating War Crimes Committed in Ukraine*, THE BALTIC TIMES (Mar. 30, 2022), https://www.baltictimes.com/estonia_s_internal_security_service_also_investigating_war_crimes_committed_in_ukraine/ (indicating that criminal proceedings were opened on the basis of universal jurisdiction) [<https://perma.cc/6S93-5EGJ>].
3. *Lithuania Prosecutors Launch Ukraine War Crimes Investigation*, REUTERS (Mar. 3, 2022, 3:21 AM), <https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/> (stating that investigations on crimes against humanity and war crimes began following Russian's invasion of Ukraine) [<https://perma.cc/7HH2-FLHW>].
4. *Spain Opens Probe into 'Serious Violations' by Russia in Ukraine*, THE LOCAL (Mar. 8, 2022, 4:12 PM), <https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine/> (stating the Spanish public prosecutor's office opened a probe to "determine the criminal nature" of Russian's invasion of Ukraine) [<https://perma.cc/V9J7-4VUE>].
5. *Polish Prosecutors Launch Investigation into Russia's Attack on Ukraine*, THE FIRST NEWS (Mar. 1, 2022) <https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331> (indicating Polish prosecutors will investigate and document criminal activities taking place in Ukraine, including the possibility of "the crime of offensive warfare" by Russia) [<https://perma.cc/E5X2-AQ24?type=image>].
6. European Union Agency for Criminal Justice Cooperation Press Release, *Estonia, Latvia and Slovakia Become Members of Joint Investigation Team on Alleged Core International Crimes in Ukraine* (Mar. 31, 2022), <https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international> (pointing out Estonia, Latvia and Slovakia will become members of the joint investigation team on

Latvia,⁷ Sweden,⁸ Norway,⁹ France,¹⁰ and Switzerland¹¹ also have jumped on board, indicating that they will aid accountability efforts by commencing investigations using the concept of universal jurisdiction.¹²

What role, though, can we expect these efforts to play in providing justice to victims of the already vast number of crimes

“alleged core international crimes”) [<https://perma.cc/Y2DQ-6SUZ>].

7. *Latvia Commences Criminal Procedure over Crimes Committed by Russian forces in Ukraine*, BALTIC NEWS NETWORK (Mar. 17, 2022), <https://bnn-news.com/latvia-commences-criminal-procedure-over-crimes-committed-by-russian-forces-in-ukraine-233233> (stating Latvia’s State Security Service initiated a criminal procedure for crimes against humanity, crimes against peace and war crimes, in accordance with its national Criminal Law) [<https://perma.cc/P7RK-RBJM>].
8. *Swedish Prosecutors Open Preliminary Investigation into War Crimes in Ukraine*, U.S. NEWS (Apr. 5, 2022), <https://www.usnews.com/news/world/articles/2022-04-05/swedish-prosecutors-open-preliminary-investigation-into-war-crimes-in-ukraine> (noting the purpose of the investigation is “to secure evidence as early as possible that could be used in Swedish or international courts”) [<https://perma.cc/3EXC-YASK>].
9. Sergey Vasiliev, *The Future of Justice for Ukraine is Domestic*, JUSTICEINFO.NET (Mar. 29, 2022), <https://www.justiceinfo.net/en/89434-future-justice-for-ukraine-domestic.html> (stating that prosecutors in Estonia, France, Latvia, Lithuania, Germany, Norway, Poland, Slovakia, Spain, Switzerland and Sweden have all opened investigations in their respective prosecutorial systems utilizing universal jurisdiction) [<https://perma.cc/BYV7-JNXY>].
10. *See id.*
11. *Switzerland Investigates War Crimes in Ukraine*, SWISSINFO.CH (June 12, 2022, 10:56 AM), <https://www.swissinfo.ch/eng/switzerland-investigates-war-crimes-in-ukraine/47667430> (indicating that the Federal Office of the Police, along with the Office of the Attorney General of Switzerland and the State Secretariat for Migration (SEM), is collecting testimonial evidence from Ukrainian refugees for subsequent criminal proceedings or requests of mutual cooperation with ICC or states) [<https://perma.cc/FM6B-QY23>].
12. Erika Kinetz, *How Would Those Accused of Ukraine War Crimes Be Prosecuted?*, FRONTLINE (Mar. 25, 2022), <https://www.pbs.org/wgbh/frontline/article/what-are-war-crimes-russia-ukraine/> (stating that Estonia, Lithuania, Germany, Poland, Slovakia, Sweden and Switzerland all opened independent investigations into Russia’s activity in Ukraine under the legal concept of universal jurisdiction) [<https://perma.cc/ZUW6-FZJ3>].

that have been reportedly committed in Ukraine since Russia's February 2022 invasion?¹³ On the one hand, there is every reason to believe that without states playing such an active role in providing accountability, a significant number of perpetrators will escape justice despite the other mechanisms that are currently being employed or under discussion.¹⁴ For example, the International Criminal Court¹⁵ has already opened an investigation after a record number of states referred the matter to the Court for prosecution.¹⁶ The ICC, however, operates as a court of last resort and typically cannot prosecute more than a few cases each year.¹⁷ It is true that since the Russian invasion,

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13. *Documenting Atrocities in the War in Ukraine*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/05/22/world/europe/ukraine-war-crimes.html> (pointing out the enormous amount of evidence the N.Y. Times has been able to collect since the beginning of the war on Feb. 24, 2022) [<https://perma.cc/64KQ-JFFR>].
 14. *See* Kinetz, *supra* note 12.
 15. The ICC is a permanent treaty-based international criminal court which became operable in 2002 after the required 60 states ratified the Rome Statute—the treaty creating the Court. *See* Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. As of August 2022, the Court has 123 member states. *State Parties to the Rome Statute*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties> [<https://perma.cc/5FUF-BJ59>]. The Court has jurisdiction over genocide, crimes against humanity, war crimes, and also aggression in certain circumstances. *See generally* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 82 (3rd ed. 2007).
 16. *Ukraine*, INT'L CRIM. CT., <https://www.icc-cpi.int/ukraine> (stating the referrals amount to 43 States) [<https://perma.cc/2ZC-N-BDDW>]; *With State Party Referrals, ICC Prosecutor Opens an Investigation into the Ukraine Situation*, COAL. FOR INT'L CRIM. CT. (Mar. 8, 2022), <https://www.coalitionfortheicc.org/news/2022-0308/state-party-referrals-icc-prosecutor-opens-investigation-ukraine-situation> (noting that between March 1 and 11, 41 state parties to the ICC referred the situation of Ukraine to the OPT; one referral was submitted jointly by 38 countries) [<https://perma.cc/VGK8-FJ63>].
 17. *See* Douglas Guilfoyle, *This Is Not Fine: The International Criminal Court in Trouble*, EJIL TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/> (noting that ICC supporters have begun to express concerns that the ICC's goals to end impunity will not be reached without changes in how the Court operates)

states have provided the ICC with additional funding and seconded investigators to assist it in its work.¹⁸ Nevertheless, it likely will not be able to prosecute more than a few dozen higher-level suspects. Moreover, the ICC does not have jurisdiction in this instance over the crime of aggression.¹⁹

In addition, Ukraine has commenced domestic prosecutions of the atrocity crimes occurring on its soil and has pledged to continue its efforts to bring justice to victims.²⁰ However, it may

[<https://perma.cc/4BZT-KXXJ>]; see also *Human Rights Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of States Parties*, HUM. RTS. WATCH (Nov. 18, 2019), <https://www.hrw.org/news/2019/11/18/human-rights-watch-briefing-note-eighteenth-session-international-criminal-court> (explaining that several countries have pushed for zero growth in the ICC's budget, hampering its effective delivery of justice) [<https://perma.cc/23HW-PMUL>].

18. Lisa Bryant, *Countries Pledge Funds, Coordination for Ukraine War Crimes Investigations*, VOA NEWS (July 14, 2022, 2:41 PM), <https://www.voanews.com/a/countries-pledge-funds-coordination-for-ukraine-war-crimes-investigations/6659001.html> [<https://perma.cc/JS7H-FU8C>]; Anthony Deutch & Robin Emmott, *Forty-five Nations Pledge to Coordinate Evidence of War Crimes in Ukraine*, REUTERS (July 14, 2022, 11:26 AM), <https://www.reuters.com/world/west-seeks-coordinate-evidence-war-crimes-ukraine-2022-07-14/> (explaining that 45 countries will pledge an additional 20 million euros to the ICC for the Ukraine investigation) [<https://perma.cc/V66X-9VGK>].
19. Alexander Komarov & Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SEC. (Apr. 5, 2022), <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/> (explaining that the ICC cannot exercise jurisdiction over the crime of aggression for non-State Parties) [<https://perma.cc/A6TB-9JGR>]; Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SEC. (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/> (stating ICC's definition and jurisdiction over the crime of aggression are narrowly defined and, hence, difficult to prosecute) [<https://perma.cc/VY73-QNJC>].
20. See Monique Beals, *Ukraine's Prosecutor General Says Office Investigating Thousands of Russian War Crime Cases*, THE HILL (Apr. 11, 2022, 10:23 PM), <https://thehill.com/news/3264594-ukraines-prosecutor-general-says-office-investigating-thousands-of-russian-war-crime-cases/> [<https://perma.cc/D3YT-C4E5>]; see also Masha Gessen, *The Prosecution of Russian War Crimes in Ukraine*, NEW YORKER (Aug. 1, 2022), <https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes->

not have the capacity to handle the significant number of cases that will need to be tried.²¹ Ukraine has implemented some of the core international crimes into its domestic legislation, though not all, meaning that there may be some gaps as to which crimes it can prosecute.²² Also, some evidence suggests Ukraine may not at present have the necessary resources to allow it to prosecute significant numbers of wrongdoers.²³

in-ukraine (discussing the work of Ukrainian local investigators and prosecutors in twenty-five thousand cases) [<https://perma.cc/V4DX-VZ7F>].

21. See Komarov & Hathaway, *supra* note 19.
22. *National Implementation of International Criminal Law: Ukraine*, EQUIPO NIZKOR, <https://www.derechos.org/intlaw/ukr.html> (noting that Ukraine's criminal code includes the crime of aggression, genocide and war crimes, but that crimes against humanity is not included in the criminal code) [<https://perma.cc/CUR8-3SXY>]; Michael Scharf et al., *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/> (explaining that in 2021 Ukraine adopted a bill to incorporate core international crimes nationally that still awaits presidential signature) [<https://perma.cc/4S6B-TYM9>].
23. See, e.g., Lauren Egan, *Coordination Struggles Could Hamper Ukraine War Crimes Investigations*, NBC NEWS (May 7, 2022, 4:30 AM), <https://www.nbcnews.com/news/world/coordination-struggles-hamper-ukraine-war-crimes-investigations-rcna27100> (noting that the amount of evidence and criminal investigations in Ukraine could impact on the quality and efficiency of investigations, evidence handling and analysis, and re-traumatization, among other issues) [<https://perma.cc/6CN5-WEMV>]; Nils Adler, *Inside Ukraine's War Crimes Investigations*, AL-JAZEERA (June 21, 2022), <https://www.aljazeera.com/features/2022/6/21/inside-ukraine-war-crimes-investigations> (mentioning how a human rights defender explains how it has become "impossible to cope" with the number of testimonies that come in every day) [<https://perma.cc/BJ7L-F2TD>]; *Professor Says War Crimes Investigation in Ukraine Could Take Years*, VCU NEWS (June 3, 2022), <https://news.vcu.edu/article/2022/06/professor-says-war-crimes-investigation-in-ukraine-could-take-years> (explaining how previous cases of war crimes are different from the current situation in Ukraine as this case is very public and the information flow is enormous, thus requiring higher coordination efforts) [<https://perma.cc/N5AX-Q3YY>].

Finally, scholars, diplomats, and government leaders are debating the possibility of creating an international tribunal for aggression or other internationalized domestic tribunals to provide additional avenues to prosecute perpetrators.²⁴ At this point, we do not know for certain whether any such proposed tribunal will be created.²⁵

To explore the question of whether universal jurisdiction prosecutions are likely to help close the impunity gap for atrocity crimes being committed in Ukraine, this article looks to the past. It shows that states have not regularly invoked universal jurisdiction in its pure form which assumes prosecuting offenses where the state has no nexus to the offense; where the crimes were not committed on its territory or by or against its

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24. See, e.g., Scharf et al., *supra* note 22 (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); Komarov & Hathaway, *supra* note 19 (mentioning Ukraine's constitutional requirements for the establishment of a court with jurisdiction over the crime of aggression because the ICC does not have jurisdiction over that crime in this situation); 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, 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/> (proposing an aggression tribunal established between the United Nations and Ukraine to prosecute leaders responsible for Russia's war of aggression) [<https://perma.cc/JGH7-WLRX>]; Larry D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SEC. (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/> (noting that according to Resolution 377 of 1950, referred as "Uniting for Peace," U.N. General Assembly could recommend the creation of a hybrid tribunal as per request of Ukraine) [<https://perma.cc/2E29-ENJD>]; see also Carrie McDougal, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022), <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> (considering that an "*ad-hoc* international tribunal is both legally possible and politically desirable" to prosecute Russia's leadership for the crime of aggression) [<https://perma.cc/8TKT-D5AF>].
25. See Komarov & Hathaway, *supra* note 19 (describing potential risks and benefits of several proposals for tribunals).

nationals.²⁶ Nor have states frequently invoked universal jurisdiction against high-level perpetrators.²⁷ In other words, concluding that universal jurisdiction prosecutions will substantially change the accountability landscape in regard to crimes committed in Ukraine may prove overly optimistic.

This article proceeds as follows. Part II discusses the concept of universal jurisdiction and the rationale behind its use. Part II then turns to examining universal jurisdiction in practice, pointing out some of the political, economic, and other challenges that help to explain why universal jurisdiction has not been frequently invoked. In Part III, this article turns to analyzing the potential use of universal jurisdiction in the Ukraine situation. The article concludes on a cautionary note. It commends states for stepping up to announce their intention to mount universal jurisdiction prosecutions to aid in ending impunity in the Ukraine situation. Indeed, it encourages those and other states to be willing to invoke universal jurisdiction over offenders. Nevertheless, it suggests that these proposed universal jurisdiction prosecutions, while helpful, may not be able to meaningfully close any impunity and accountability gap in the Ukraine situation.

II. UNIVERSAL JURISDICTION: THEORY AND PRACTICE

A. *Universal Jurisdiction Explained*

Universal jurisdiction refers to the authority of every state to prosecute crimes in their own domestic courts, regardless of where the crime occurred or the nationality of either the victim or the perpetrator.²⁸ In other words, states are permitted to prosecute

26. See discussion *infra* Part II(A).

27. See discussion *infra* Part II(C).

28. See, e.g., Eugene Kontorovich, *The Parochial Uses of Universal Jurisdiction*, 94 NOTRE DAME L. REV. 1417, 1417-21 (2019) (explaining that universal jurisdiction authorizes states to prosecute without any nexus, however in practice countries have used it almost exclusively in cases where there is some sort of connection to the crime, e.g., jurisdiction *rationae personae* of victims); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 752-53 (2004) (noting that universal jurisdiction allows States to prosecute crimes with which they have no connection); *Universal Jurisdiction*, CTR. FOR JUST. AND ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> (informing the meaning of

certain crimes without demonstrating any particular “nexus” to the crime committed.²⁹ The rationale for the exercise of universal jurisdiction points to states acting on behalf of the international community and protecting values and norms recognized by that community.³⁰ This underlying rationale also helps to explain why universal jurisdiction is only available for prosecutions involving certain serious international crimes that have risen to the level of *jus cogens* crimes³¹—meaning that the crimes are recognized by the international community as being so severe and contrary to accepted norms that the individuals who commit them are deserving of no safe haven.³² Typical *jus cogens* crimes over which

universal jurisdiction and its applicability without any nexus to the crime) [<https://perma.cc/C85N-T658>].

29. Piracy on the high seas was the original universal jurisdiction crime which all states could prosecute without any nexus to the offense on the grounds that the offense occurred on the high seas—a territory which is shared by all sovereign states and to which no one state may lay claim. *See, e.g.*, Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT’L L. 436, 437 (2010) (stating that piracy is the original universal jurisdiction crime); Joshua M. Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT’L L. 973, 973 (2006). States thereafter agreed that the heinousness of the crime of slavery required that states be able to prosecute it without any nexus to the offense. *See, e.g.*, M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 112 (2001) (stating that slavery followed piracy as a *jus cogens* crime that produced universal condemnation).
30. *See* Bassiouni, *supra* note 29, at 96-97; *see also* Int’l L. Comm’n., Rep. on the Work of Its Seventieth Session, U.N. Doc A/73/10, at 308 (explaining two rationales for the exercise of universal jurisdiction: that the crimes occur outside state’s territory and because the crimes committed “violate universal values and humanitarian principles”).
31. Article 53 of the Vienna Convention on the Laws of Treaties establishes the meaning of *jus cogens*, also referred to as peremptory norm: “[. . .] a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.
32. *See, e.g.*, *Basic Facts on Universal Jurisdiction*, HUM. RTS. WATCH (Oct. 19, 2009), <https://www.hrw.org/news/2009/10/19/basic->

states can exercise this form of jurisdiction are genocide, crimes against humanity, and war crimes:³³ the same crimes over which the ICC has jurisdiction, and which have allegedly been committed in Ukraine.³⁴

For states to exercise universal jurisdiction over any of these crimes, however, they must incorporate them into their domestic legislation and define them to provide that the state can exercise jurisdiction without demonstrating any nexus to the offense.³⁵ Such legislative authority is required because, as one judge from a common law jurisdiction has explained, the legislature alone has

facts-universal-jurisdiction [hereinafter HRW Basic Facts UJ] (explaining that universal jurisdiction provides a safety net where the territorial state is unwilling or unable to prosecute and reduces the ability of perpetrators of atrocity crimes to find safe havens where they can enjoy impunity) [<https://perma.cc/965P-9GX3>]; Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 150-51 (2006).

33. See, e.g., Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, UNIV. ILL. L. REV. 389, 394-95 (2008) (noting that universal jurisdiction crimes are congruent with *jus cogens* crimes); Colangelo, *supra* note 32, at 151 (stating the crimes for which universal jurisdiction can be triggered); HRW Basic Facts UJ, *supra* note 32 (stating the crimes which would trigger the use of universal jurisdiction: war crimes, torture, crimes against humanity, genocide, piracy, hijacking, acts of terrorism, and attacks on UN personnel); see also RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 402-04 (AM. LAW INST. 1987).
34. See Scharf et al., *supra* note 22.
35. See, e.g., Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Updated*, AI Index IOR 53/019/2012, at 12 (Oct. 2012) [hereinafter Amnesty Int'l UJ Report] (assessing the existence of national legislation to authorize national courts to exercise universal jurisdiction over international crimes); Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 256 (2001) (noting that states seeking to exercise universal jurisdiction do so in accordance with their internal legislation); Scharf et al., *supra* note 22 (explaining that in the context of the Ukrainian conflict, different states have affirmed they will open universal jurisdiction based on domestic legislation permitting the prosecution of certain atrocity crimes); *Universal Jurisdiction*, INT'L JUST. RES. CENTER, <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (stating that countries exercising universal jurisdiction must adopt national legislation recognizing the crimes and authorizing their prosecution) [<https://perma.cc/W79C-MTKK>].

the power to confer jurisdiction over crimes.³⁶ Therefore, judges should be reluctant to assume universal jurisdiction over international criminals in the absence of specific authorizing national legislation. This is particularly so in the case of universal jurisdiction that has been referred to as the exercise of “awesome power” over the accused.³⁷

B. State Practice: Laws and Prosecutions Using Universal Jurisdiction

Although some commentators claim that universal jurisdiction is an essential tool of international justice necessary to close an impunity gap that would otherwise exist as relates to international crimes,³⁸ state practice does not necessarily reflect this sentiment. First, the evidence shows that many states have not incorporated into their domestic legislation all the relevant international crimes—aggression, genocide, crimes against humanity, and war crimes— or incorporated them in a way that allows the state to exercise jurisdiction with no nexus to the offense.³⁹ For example, the United States has no statute

36. See Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points”* 13 (Aug. 12, 2002), https://www.michaelkirby.com.au/images/stories/speeches/2000s/vol50/2002/1809-P RINCETON_PROJECT_AUGUST_2002.doc [<https://perma.cc/5DX4-HBYU>].

37. *Id.*

38. See, e.g., Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 1 (2011) (stating that defenders of using universal jurisdiction argue that it is necessary to “establish[] a minimum international rule of law by substantially closing the ‘impunity gap’ for international crimes”); Amnesty Int’l UJ Report, *supra* note 35, at 1.

39. See, e.g., Amnesty Int’l UJ Report, *supra* note 35, at 1-2 (showing that although approximately 75% of states provide for universal jurisdiction over at least one of the crimes of genocide, crimes against humanity, war crimes, or torture, states have not necessarily provided for jurisdiction over all relevant international crimes). Sixteen countries and four international NGOs replied to a UN General Assembly call for information on universal jurisdiction. All 16 countries have explicitly listed at least one crime that traditionally falls under universal jurisdiction, but most have not done so for all potential crimes. U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, at 2, U.N. Doc. A/76/203 (July 21, 2021). 133 countries were identified as having some form of universal jurisdiction over

specifically criminalizing crimes against humanity.⁴⁰ The United States does have jurisdiction over war crimes, but the legislation provides that jurisdiction may be exercised over acts that occurred abroad only “if the victim or perpetrator is a U.S. national or member of the U.S. Armed Forces.”⁴¹ Spain previously had laws on the books allowing it to exercise universal jurisdiction over certain international crimes without any nexus to the offense.⁴² In 2015, though, Spanish legislators amended their laws to require that the victim or perpetrator of the international crime be a Spanish national for Spain to exercise what it is calling universal jurisdiction over international crimes that occurred on foreign soil.⁴³

Second, the evidence also shows that despite the existence of laws authorizing the use of universal jurisdiction over certain crimes, states infrequently proceed with prosecutions.⁴⁴ In the case of piracy, even at the height of the Somali piracy crisis, an empirical study by Kontorovich and Art⁴⁵ found that “in the

international crimes in 2013. Many states allowed for only one of fifteen possible universal jurisdiction criteria, though many were more inclusive. *See generally War Crimes Research Office: Universal Jurisdiction Project*, AM. U. WASH. COLL. OF L., <https://www.wcl.american.edu/impact/initiatives-programs/warcimes/our-projects/universal-jurisdiction-project/> [<https://perma.cc/F89S-ZN98>].

40. STEPHEN MULLIGAN, CONGR. RSCH. SERV., LSB10747, INTERNATIONAL ATROCITY CRIMES AND THEIR DOMESTIC COUNTERPARTS 3 (2005) [hereinafter CRS 2022 Report].
41. *Id.* at 2.
42. Spanish Ministry of Foreign Affs., Contribution of Spain on the Topic “The Scope and Application of the Principle of Universal Jurisdiction” (Feb. 22, 2016), https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf [<https://perma.cc/XU27-HWGH>].
43. *See* B.O.E. 2014, 2709. Even in states that provide for universal jurisdiction over international crimes, as Amnesty International points out, in many instances the definitions are not consistent with the strictest requirements of international law—the result being that states will necessarily not be able to prosecute certain offenses. Amnesty Int’l UJ Report, *supra* note 35, at 2.
44. *See* TRIAL INT’L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2022 13 (2022).
45. Eugene Kontorovich is one of the world’s preeminent experts on universal jurisdiction and maritime piracy, as well as international law and the Israel-Arab conflict. *Eugene Kontorovich*, GEO.

twelve-year period between 1998 and 2009, the incidence of universal enforcement over piracies was so low as to be trivial—well under 1.5% of reported cases.”⁴⁶ In another study, Maximo Langer⁴⁷ found that in the twenty-five years before 2010, states had only convicted twenty-six perpetrators of international crimes based on universal jurisdiction.⁴⁸ Other studies have reached similar conclusions: namely, that states rarely invoke universal jurisdiction to prosecute international crimes without any nexus to the offense, despite the gravity of the alleged conduct.⁴⁹

Finally, as several studies have shown, historically states have invoked universal jurisdiction only against “low-cost” defendants.⁵⁰ Many have remarked that universal jurisdiction has been rarely, if ever, invoked against senior political leaders.⁵¹ Maximo Langer explains why this is the case: low-cost

MASON UNIV., https://www.law.gmu.edu/faculty/directory/fulltime/kontorovich_eugene [<https://perma.cc/Q95L-H85A>]. Steve Art is a partner at Loevy & Loevy who works on civil rights cases concerning wrongful convictions, deaths in jails and prisons, police killings, and other violations of the Constitution. *Steve Art*, LOEVY & LOEVY, <https://www.loevy.com/attorneys/steve-art/> [<https://perma.cc/P4TL-SEY4>].

46. Kontorovich & Art, *supra* note 29, at 444.
47. Máximo Langer holds the David G. Price and Dallas P. Price Chair in Law at UCLA School of Law and is a leading authority on domestic, comparative and international criminal law and procedure *Maximo Langer*, UCLA L., <https://law.ucla.edu/faculty/faculty-profiles/maximo-langer> [<https://perma.cc/22ER-QKHH>].
48. Langer, *supra* note 38, at 45.
49. *See, e.g.*, Kontorovich, *supra* note 33, at 395 (citing a study by Luc Reydemans to support the proposition that very few states have ever exercised universal jurisdiction and only “over a miniscule fraction of cases that might be subject to it”); CRS 2022 Report, *supra* note 40, at 1-3 (stating that the US had never exercised a universal jurisdiction prosecution over any suspect accused of genocide or war crimes, and that the US does not criminalize crimes against humanity specifically); HRW Basic Facts UJ, *supra* note 32 (stating that in the 15 years before 2009, fewer than 20 universal jurisdiction cases worldwide had been brought to trial).
50. Langer, *supra* note 38, at 5.
51. *See* Jeremy Rabkin & Craig Lerner, *Criminal Justice is Local: Why States Disregard Universal Jurisdiction for Human Rights Abuses*, 55 VAND. J. TRANSNAT’L L. 375, 379 (2022).

defendants, as opposed to senior leaders, pose few or no political or economic costs on the prosecuting state.⁵² Specifically, low-cost defendants have (1) committed crimes so heinous that the international community broadly agrees they should be prosecuted and (2) even their country of nationality tends to be unwilling to defend them or intervene on their behalf.⁵³ For example, defendants prosecuted using universal jurisdiction include a significant number of Nazi war criminals, Rwandan genocidaires, and perpetrators of serious international crimes in the former Yugoslavia.⁵⁴ One could make a similar argument about the use of universal jurisdiction in the context of prosecuting Somali pirates where a large number of the universal jurisdiction prosecutions were instituted by Kenya.⁵⁵ One might call the defendants there “low cost” because they hailed “from a failed state that has little ability to prosecute or to oppose judicial intervention by outside states” (which may be regarded as an affront to sovereignty).⁵⁶ A study by Human Rights Watch⁵⁷ offers additional support for this conclusion about the prevalence of “low-cost” defendants amongst those prosecuted using universal jurisdiction. According to that study, most cases involved low- to mid-level offenders,⁵⁸ not the high-level perpetrators one might expect would cause the state of nationality or the international community to intervene to protect.⁵⁹

52. Langer, *supra* note 38, at 5.

53. *Id.* at 9.

54. *See id.* (showing that of the 32 defendants brought to trial using universal jurisdiction before 2010, 24 have were former Yugoslavs, Nazis, and Rwandans).

55. Eugene Kontorovich, “A *Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, CAL. L. REV. 243, 263, 268 (2010).

56. *See* Kontorovich & Art, *supra* note 29, at 438.

57. *About Us*, HUM. RTS. WATCH, <https://www.hrw.org/about/about-us> [<https://perma.cc/4TV6-CTTD>].

58. HRW Basic Facts UJ, *supra* note 32.

59. *See generally id.*

C. *Exploring the Reasons States May Refuse to Exercise Universal Jurisdiction Over High-Level Suspects*

The risk of impunity for perpetrators of international crimes provides an incentive for states to exercise universal jurisdiction.⁶⁰ However, as hinted to above, there are many reasons states may choose not to exercise universal jurisdiction—particularly as against individuals who hold, or have held, high-level government positions. Several of the most prominent reasons states may refuse to exercise universal jurisdiction over high-level suspects are the associated political costs, inability to gain custody over the defendant, difficulties surrounding obtaining evidence and witnesses, and limited state prosecutorial resources, as discussed below.

1. Political Costs

First, states invoking universal jurisdiction may find that they face political costs for doing so. Commentators have noted the risk of undermining peaceful international relations when a state chooses to prosecute foreign citizens under universal jurisdiction—especially high-level foreign leaders.⁶¹ The overarching concern is that the prosecuting state might be drawn into foreign relations conflicts.⁶² This concern is not merely theoretical.

A few concrete examples will help to illustrate. For example, in October 2000, the Democratic Republic of Congo sued Belgium at the International Court of Justice after it commenced a

60. See Bassiouni, *supra* note 29, at 97 (explaining that part of the underlying rationale for encouraging the exercise of universal jurisdiction is to expand enforcement mechanisms needed to counter serious transgressions of the international community's shared interests and to produce deterrence and prevention and ultimately to enhance world order).

61. Curtis A. Bradly, *Universal Jurisdiction and U.S. Law*, 2001 UNIV. CHI. LEGAL F. 323, 325 (2001); see also Langer, *supra* note 38, at 2.

62. H.R. REP. NO. 104-698, at 8 (1996) (explaining that permitting prosecutions of war crimes “based on universal jurisdiction could draw the United States into conflicts in which [the] country has no place and where [its] national interests are slight”); see also Charlie Savage, *Russian Atrocities Prompt Bipartisan Push to Expand U.S. War Crimes Law*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/senate-bill-war-crimes-ukraine.html> [<https://perma.cc/7KRQ-6XXC>].

prosecution against Abdoulaye Yerodia Ndombasi—the DRC’s Minister of Foreign Affairs—who Belgium had charged with “grave violations of international humanitarian law.”⁶³ The DRC argued before the Court that not only was the exercise of universal jurisdiction improper, but also that in national courts, Yerodia enjoyed immunity from prosecution based on his governmental position as a sitting high-level official.⁶⁴ Explaining that immunity from criminal prosecution by another sovereign and equal state was necessary to ensure the effective performance of one’s duties as a sitting official, the Court concluded that Yerodia’s position required that Belgium’s arrest warrant against him be dismissed.⁶⁵ Indeed, the *Yerodia* decision⁶⁶ solidified one reason that states often choose not to pursue universal jurisdiction cases against high-level government officials.⁶⁷

63. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 13 (Feb. 14, 2002).

64. *Id.* ¶ 17.

65. Importantly, the Court distinguished the application of the immunity defense in national and international courts, recognizing that the defense of head of state immunity would not likely be available in international courts. *Id.* ¶¶ 52, 54, 70, 76-77. See generally Alain Winants, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT’L L. 491, 491-509 (2003) (in-depth discussion of the *Yerodia* case).

66. *Yerodia* involved head of state immunity. Some countries may also decline to prosecute on the grounds of diplomatic immunity. See Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. OF INT’L L. 927, 963 (2009) (referencing Germany’s decision to refuse to investigate the Uzbek Chief of Intelligence Service on the grounds of diplomatic immunity since he had been visiting Germany as part of an official delegation).

67. See, e.g., Langer, *supra* note 38, at 25 (explaining that French prosecutors cited immunity as the grounds for dismissing a complaint filed by civil society organizations charging former U.S. Secretary of Defense Donald Rumsfeld with torture in Guantanamo and Iraq); *French Prosecutors Throw Out Rumsfeld Torture Case*, REUTERS, <https://www.reuters.com/article/us-france-rights-rumsfeld-idUSL238169520071123> (Nov. 23, 2007, 12:29 PM) [<https://perma.cc/85GV-KEK7>]; *Universal Jurisdiction in Europe: The State of the Art*, HUM. RTS. WATCH (June 27, 2006), <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art> [hereinafter HRW UJ in Europe] (citing to various universal jurisdiction cases that were dismissed on head of state

Another oft-repeated example of political costs being imposed in response to the exercise of universal jurisdiction over high-level leaders concerns Palestine and Israel. In 2001, a group of Palestinians brought an action in Belgian courts pursuant to its universal jurisdiction law at the time accusing Israeli Prime Minister Ariel Sharon of playing a critical role in the massacre of Palestinian refugees in Lebanon in 1982.⁶⁸ Israel initially retaliated against Belgium, with the Israeli Prime Minister refusing to visit European Union headquarters in Brussels, thus harming relations between the two countries just as the world community was engaged in a post-911 push for peace in the Middle East.⁶⁹ The political costs mounted further when a group of Israelis filed a complaint in Belgium—again using its universal jurisdiction laws—seeking to hold Palestinian leader Yasser Arafat responsible for a series of bomb attacks and murders that occurred decades before.⁷⁰ Though the complainants in that case have denied that they acted in retaliation for the suit against Sharon,⁷¹ the timing of the suit is telling: the suit against Arafat was filed a day before a Brussels court was due to consider whether to proceed with the lawsuit against the Israeli Prime Minister.⁷²

Belgium's willingness to allow individuals to broadly pursue universal jurisdiction actions in its courts also made it the target

immunity grounds, including cases against former Chinese President Jiang Zemin and Zimbabwean President Robert Mugabe) [<https://perma.cc/KTM5-H67M>].

68. *Belgium to Amend Controversial War Crimes Law*, DW.COM (June 23, 2006), <https://learnerman.dw.com/en/belgium-to-amend-controversial-war-crimes-law/a-899778> [<https://perma.cc/Y85W-D67L>]. At the time these lawsuits were filed, Belgium permitted criminal investigations based on universal jurisdiction to be initiated at the request of victims from anywhere in the world who had suffered injury by anyone who had allegedly committed crimes against humanity, war crimes, and genocide. *See* Kaleck, *supra* note 66, at 932.

69. *See* Brian Kenety, *RIGHTS: Israelis File Complaint Against Arafat, Palestinians in Belgium*, INTER PRESS SERV. (Nov. 28, 2001), <http://www.ipsnews.net/2001/11/rights-israelis-file-complaint-against-arafat-palestinians-in-belgium/> [<https://perma.cc/PCF4-CGPU>].

70. *Id.*

71. *Id.*

72. *Id.*

of the United States' ire. In the early 2000s, Belgium's prosecutor instituted universal jurisdiction lawsuits against a range of high-level leaders, including against former President and Vice President of the United States, George Bush and Dick Cheney.⁷³ Apparently, the United States government responded to these charges with a stern warning that if Belgium continued to assert itself in this manner, it would be risking its status as an international meeting place and the NATO headquarters.⁷⁴ Indeed, Defense Secretary Donald Rumsfeld vowed to freeze the US \$352 million in funding for the new NATO headquarters if Belgium refused to amend its laws permitting its broad exercise of universal jurisdiction.⁷⁵ Because of these and other diplomatic pressures employed by the United States and others, Belgium's parliament amended its law to allow the exercise of universal jurisdiction only in cases where a treaty such as the Convention against Torture requires it to do so.⁷⁶

Of course, Belgium has not been the only country to embrace universal jurisdiction prosecutions, nor has it been the only country to provoke diplomatic disputes. For instance, in 2006, a French judge issued arrest warrants against nine politicians close to Rwandan President Paul Kagame alleging their involvement in the assassination of the former Rwandan President on the eve of the genocide which commenced in April 1994.⁷⁷ Kagame's response was swift: he broke off Rwanda's diplomatic relations with France and released a report in 2008 alleging that French politicians were complicit in the 1994 genocide.⁷⁸ Similarly,

73. 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/7SNW-XT72].

74. *Belgium: Universal Jurisdiction Law Repealed*, HUM. RTS. WATCH (Aug. 1, 2003, 8:00 PM), <https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed> [https://perma.cc/5B6Q-2AFX].

75. *Belgium to Amend Controversial War Crimes Law*, *supra* note 68.

76. *See e.g.*, Kaleck, *supra* note 66, at 933-34.

77. *Id.* at 933.

78. *Id.* at 938; Bernard Hibbitts, *Rwanda Cuts Diplomatic Ties with France in Wake of Kagame Trial Bid*, JURIST (Nov. 24, 2006, 12:42 PM), <https://www.jurist.org/news/2006/11/rwanda-cuts-diplomatic-ties-with/> (noting that Kagame cut diplomatic ties with France after a French judge issued arrest warrants against nine Rwandans who allegedly played a role in downing a plane in 1994).

diplomatic disputes arose with China in 2013 after a Spanish judge issued arrest warrants against five high-ranking Chinese officials charging them with committing human rights abuses in Tibet.⁷⁹ China immediately issued a statement warning Spain that it would face consequences if the charges were not withdrawn.⁸⁰ Concerned that China might pursue economic reprisals against Spain, the Spanish government responded by seeking to amend Spain's law to restrict the use of universal jurisdiction.⁸¹ The law was thereafter amended, requiring that for Spain to have jurisdiction over crimes such as those charged in the cases against the Chinese officials, the victims must be Spanish nationals.⁸²

These situations described above—where political costs are considerable—contrast sharply with situations where the state pursues only “low-cost” defendants. For instance, in 2001 Belgium convicted four Rwandans who had been residing in in the country for crimes committed in Rwanda during the 1994 genocide.⁸³ There were no challenges to Belgium's exercise of

that carried then-President Habyarimana of Rwanda)
[<https://perma.cc/54SR-AG3P>].

79. *China Dismisses as Absurd Spanish Arrest Warrants over Tibet*, REUTERS, <https://www.reuters.com/article/uk-china-tibet-spain/china-dismisses-as-absurd-spanish-arrest-warrants-over-tibet-idUKBRE9AJ06420131120> (Nov. 19, 2013, 10:46 PM) [<https://perma.cc/565R-UK6M>].
80. *Id.*
81. Soeren Kern, *Spain Rethinks Universal Jurisdiction*, GATESTONE INST. (Jan. 31, 2014, 5:00 AM), <https://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction> [<https://perma.cc/3CXB-HERW>].
82. *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/95P9-TZAX>] (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 Rts. Int'l Spain, *Death of Universal Jurisdiction in Spain Has Taken Away Plaintiffs' Rights*, LIBERTIES (Dec. 14, 2020), <https://www.liberties.eu/en/stories/spanish-universal-jurisdiction/18997> [<https://perma.cc/D2JU-YHNV>].
83. Agence France-Presse, *Belgian Jury Convicts 4 in '94 Rwanda Massacre*, N.Y. TIMES (June 8, 2001), <https://www.nytimes.com/>

universal jurisdiction over them, nor did Rwanda or the International Criminal Tribunal for Rwanda intervene to seek their transfer or release.⁸⁴ In short, because it pursued defendants who did not hold high-level government positions whose state of nationality and the international community agreed had committed heinous crimes worthy of being prosecuted, Belgium faced no political costs as a result of its exercise of universal jurisdiction.

2. Obtaining Custody Over the Defendant

In other instances, states cannot proceed with a universal jurisdiction case because they are not able to obtain custody over the defendant.⁸⁵ Two particular examples concerning Spain illustrate this point. In 1998, Judge Baltazar Garzon of Spain issued an arrest warrant based on universal jurisdiction against former Chilean dictator Augusto Pinochet, charging him with human rights violations committed in Chile.⁸⁶ Pinochet was arrested on the warrant shortly thereafter in London, where he was seeking medical treatment, and placed under house arrest.⁸⁷ Although in the litigation that followed, the United Kingdom determined that it had the authority to extradite Pinochet to Spain to stand trial, it declined to do so, citing Pinochet's poor health.⁸⁸ As a result, and because Spain requires the accused to

2001/06/08/world/belgian-jury-convicts-4-in-94-rwanda-massacre.html [https://perma.cc/MZ9F-W8DL].

84. Kaleck, *supra* note 66, at 933.

85. *See generally* Langer, *supra* note 38, at 5 (describing the many efforts to prosecute individuals under universal jurisdiction that did not go forward because the state could not obtain the accused for various reasons including because the state of the national objected and threatened consequences against the prosecuting state).

86. *Id.* at 35.

87. David Connett et al., *Pinochet Arrested in London*, THE GUARDIAN (Oct. 17, 1998, 8:29 PM), <https://www.theguardian.com/world/1998/oct/18/pinochet.chile> [https://perma.cc/UL8U-D24B].

88. *See Belgium Begins Pinochet Challenge*, BBC NEWS (Jan. 25, 2000, 2:27 PM), http://news.bbc.co.uk/2/hi/uk_news/politics/618166.stm [https://perma.cc/8VQ5-288Q]. Notably, former-President Bush went on record opposing Pinochet's extradition to Spain, arguing that he should be permitted to return to Chile. *Former Bush Calls for Pinochet Release*, IRISH TIMES (Apr. 12, 1999, 1:00 PM), <https://www.irishtimes.com/news/bush-calls-for-pinochet-release-1.172711> [https://perma.cc/FCR8-4RDC].

be present for the oral phase of the trial, the case against Pinochet in Spain did not proceed.⁸⁹ In another case, Judge Garzon of Spain⁹⁰ issued about 50 arrest warrants in cases that were based on atrocities committed in Argentina during the 1970s.⁹¹ Of those 50, only one individual—retired Argentine Captain Adolfo Scilingo—was tried, after he traveled to Spain, where he was thereafter arrested.⁹²

3. Difficulties Pertaining to Evidence and Witnesses

Potential evidentiary difficulties present another reason why states may choose to decline to exercise universal jurisdiction or to rarely invoke it. A Human Rights Watch Report well-explains the unique challenges:

From the initial complaint to the conclusion of the trial and any appeal, cases involving universal jurisdiction present special demands on police, prosecutors, defense counsel and courts. 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. Investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime, and the applicable international law.

Witnesses may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests. For similar reasons, a defendant may also face considerable problems gaining access to witnesses or evidence that exculpates him or her.⁹³

89. See Kaleck *supra* note 66, at 955; Langer, *supra* note 38, at 36.

90. See generally Heather Campbell, *Baltasar Garzón*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Baltasar-Garzon> (Oct. 22, 2022) [<https://perma.cc/ADW7-S54C>].

91. Langer, *supra* note 38, at 34.

92. See *id.*

93. HRW UJ in Europe, *supra* note 67, at 5; see also CRS 2022 Report, *supra* note 40, at 4; Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 412 (2001) (noting that special evidentiary challenges arise in universal jurisdiction cases because the evidence usually lies in another jurisdiction and

Evidentiary challenges will be even more profound when the 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.⁹⁴ In such cases, obtaining documents, witnesses, and other evidence may be essentially impossible.⁹⁵

Protecting witnesses both during and after any trial is also a matter that is not easily resolved. Many witnesses may still reside in the place where the atrocity occurred and where powerful factions may be able to intimidate them or threaten harm to them and their families.⁹⁶ In some instances, the prosecuting state may have to prepare to entertain petitions for amnesty, as happened with some Rwandan witnesses who had testified in a trial in Belgium.⁹⁷ States may be able to ameliorate some of these dangers by permitting testimony by video-link.⁹⁸ The United Kingdom, in fact, permitted witnesses from Afghanistan to testify by video-link in its case against Faryadi Zardad, an Afghan warlord charged with conspiracy to torture based on his conduct in Afghanistan during the 1990s.⁹⁹ The state pursuing the universal jurisdiction case, however, would have to conclude that such a method satisfied fair trial standards and also that video testimony could be conveyed in a place where the witness's participation in the trial would not become widely known—thus exposing the witness to potential retaliation. In short, protecting witnesses who

can be especially difficult to obtain when state leaders are the target of the prosecution).

94. See Broomhall, *supra* note 93.

95. See Kaleck, *supra* note 66, at 961-62.

96. HRW UJ in Europe, *supra* note 67, at 19-20 (explaining the difficulties that Belgian authorities faced in protecting Rwandan witnesses who traveled to Belgium to testify against defendants charged with participating in the Rwandan genocide); Broomhall, *supra* note 93, at 414 (noting that the prosecuting state is not usually in the position to protect witnesses from the home state during trial or after and that measures must be taken to ensure the home state can protect them).

97. HRW UJ in Europe, *supra* note 67, at 44-45 (noting that both prosecution and defense witnesses sought asylum arguing that they would be in danger if they returned to Rwanda after having testified at trial).

98. *Id.* at 19-20

99. *Id.* at 99.

are not nationals of the prosecuting state and who live in a state over which they have no control can require significant thought and effort.

4. Limited State Prosecutorial Resources

Finally, as some commentators have noted, domestic audiences may have little tolerance for a state's decision to devote its limited prosecutorial resources to cases that have no direct relationship with the state.¹⁰⁰ As Maximo Langer has remarked, while domestic constituencies may value human rights in foreign countries, they may nevertheless demand that the state devote its limited resources to domestic matters that can impact the well-being and day-to-day functioning of the domestic populace.¹⁰¹ This is not to suggest that these audiences do not care about the atrocities committed in other countries or that they do not value holding perpetrators accountable. Nevertheless, they may wish to have the impunity gap closed via another avenue—one that does not impact the state's available resources to hold accountable the perpetrators that have harmed the state's own nationals.¹⁰² In fact, one reason the United States has to date not permitted the exercise of universal jurisdiction over war crimes is because other methods exist to deal with the potential impunity.¹⁰³ Those methods include trying individuals before international courts—a venue where defendants are likely unable to claim the immunity defense.¹⁰⁴

100. Langer, *supra* note 38, at 5.

101. *Id.* at 6.

102. *Id.* at 6. These universal jurisdiction prosecutions can be costly; reportedly, the United Kingdom's lengthy investigation and prosecution of Afghan warlord Zardad cost approximately 3 million pounds. See *Afghan Warlord Found Guilty at Old Bailey*, THE TIMES (July 18, 2005, 1:00 AM), <https://www.thetimes.co.uk/article/afghan-warlord-found-guilty-at-old-bailey-htblrvv9c8l> [<https://perma.cc/K3PT-CX47>; <https://perma.cc/55AG-LSMJ>].

103. See Langer, *supra* note 38, at 6; CRS 2022 Report, *supra* note 40, at 3-4 (listing trials in international tribunals, deportation, and symbolic gestures as other ways in which a country may address the potential impunity that a defendant might enjoy should the state fail to exercise universal jurisdiction).

104. For example, Article 27 of the Rome Statute creating the International Criminal Court states that immunity is not a defense to prosecution even for sitting heads of state. Rome Statute, *supra* note 15, art. 27. A discussion of the legal challenges that various

III. ANALYZING THE POTENTIAL USE OF UNIVERSAL JURISDICTION IN THE UKRAINE SITUATION

This section analyzes the potential use of universal jurisdiction in the Ukraine situation, particularly as concerns the possibility of bringing successful prosecutions against higher-level Russian nationals who have committed any of the core atrocity crimes since the 2022 invasion. It concludes that although there are reasons to believe that some states will mount successful universal jurisdiction prosecutions against Russian nationals, the balance of the evidence indicates that universal jurisdiction cases are unlikely to meaningfully close any impunity and accountability gap in the Ukraine situation.

A. *Reasons to Believe Universal Jurisdiction Prosecutions Against Russian Nationals Might Be Successful*

As an initial matter, the international community's present commitment to supporting accountability for atrocities being committed in Ukraine is a circumstance that may enhance the likelihood of successful universal jurisdiction prosecutions against Russian nationals.¹⁰⁵ In other words, presently the evidence

heads of state have raised regarding the application of that provision to, for example former President al-Bashir of Sudan, is beyond the scope of this Article. For a discussion of some of the issues raised, see generally Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 96, 96-127 (Margaret DeGuzman & Valerie Oosterveld, eds., 2020).

105. See, e.g., *Accountability for War Crimes and Other Atrocities in Ukraine: Recent Reporting and the Commitment of Additional Funding*, U.S. EMBASSY IN UKR. (Aug. 25, 2022), <https://ua.usembassy.gov/accountability-for-war-crimes-and-other-atrocities-in-ukraine-recent-reporting-and-the-commitment-of-additional-funding/> [<https://perma.cc/F957-G4G7>]. This article only considers the possibility of universal jurisdiction prosecutions based on conduct following the February 2022 invasion. The author understands that there are many individuals in and outside of Ukraine who believe that individuals should also be held accountable for crimes that have been committed on behalf of the Russian state since Russia's annexation of Crimea and its occupation of Eastern Ukraine in 2014. See, e.g., Steven Pifer, *Five Years After Crimea's Illegal Annexation, the Issue Is No Closer to Resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/> (discussing

suggests that most of the world's states will not seek to impose political costs on any state that chooses to exercise universal jurisdiction in this situation.¹⁰⁶ Indeed, one might even expect that the international community would be willing to step in to aid states exercising universal jurisdiction should Putin threaten them.

Since the February 2022 invasion, in fact, the great majority of states have condemned Russia's actions and called for accountability.¹⁰⁷ On March 3, 2022, after convening its first emergency session since 1997, the General Assembly issued a resolution—with 141 states voting in favor—which, among other things, “[deplored] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the [UN] Charter.”¹⁰⁸ On March 16, 2022, the ICJ—with all judges but those from Russia and China voting in favor—ruled that Russia must immediately suspend the military actions that it commenced on February 24, 2022.¹⁰⁹ Following news of the grave crimes being committed in Ukraine, on April 7, 2022, the UN General Assembly—with 93 states voting in favor—voted to suspend Russia from the Human Rights Council.¹¹⁰ Leaders of the

Russia's annexation of Crimea and its launch of the conflict in the Donbas) [<https://perma.cc/6C8M-H7VH>].

106. See generally McDougall, *supra* note 24.

107. See, e.g., Karen Donfried, Assistant Sec'y Bureau of Eur. and Eurasian Affs., Foreign Press Center Briefing Condemning Russia's Illegal Attempts to Annex Ukrainian Territory (Oct. 18, 2022), <https://www.state.gov/briefings-foreign-press-centers/condemning-russias-illegal-attempts-to-annex-ukrainian-territory> [<https://perma.cc/T4YD-XD9W>].

108. *UN General Assembly Demands Russia Withdraw Troops from Ukraine*, ALJAZEERA (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/un-general-assembly-demands-russia-withdraw-troops-from-ukraine> [<https://perma.cc/E2HH-FMNJ>]; see also G.A. Res. A/ES-11/L.1 (Mar. 3, 2022).

109. *International Court Orders Russia to 'Immediately Suspend' Military Operations in Ukraine*, UN NEWS (Mar. 16, 2022), <https://news.un.org/en/story/2022/03/1114052> [<https://perma.cc/4DWP-YV3N>].

110. *UN General Assembly Votes to Suspend Russia from the Human Right Council*, UN NEWS (Apr. 7, 2022); <https://news.un.org/en/story/2022/04/1115782> [<https://perma.cc/4SWZ-H4BN>].

world's most influential democracies have similarly condemned Russia's actions and called for accountability.¹¹¹

Furthermore, in this situation, states pursuing universal jurisdiction cases against Russian nationals who have committed atrocities in Ukraine may not face the same level of evidentiary difficulties often experienced by states pursuing universal jurisdiction cases.¹¹² First, this is not a case where states must recreate historical events or gather evidence involving atrocities committed years before.¹¹³ The world is well-aware of the

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111. See, e.g., Elizabeth Whatcott, *Compilation of Countries' Statements Calling Russian Actions in Ukraine "Genocide"*, JUST SEC. (May 20, 2022), <https://www.justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/> (collecting statements by country representatives deploring Russia's actions in Ukraine and sometimes referring to the crimes being committed as genocide) [<https://perma.cc/38SJ-2DF7>]; Francesca Ebel & Yuras Karmanau, *Macron Says Russia Can't Win in Ukraine After Strike on Mall*, AP NEWS (June 28, 2022), <https://apnews.com/article/russia-ukraine-politics-united-nations-terrorist-attacks-be890f11b0a5abfb41ddb1cfc8d5b212> (citing President Macron as stating that a Russian strike on a shopping mall constituted a "new war crime" and that G7 nations must support Ukraine and continue sanctions on Russia) [<https://perma.cc/U3UG-NHVV>]; Julian Borger, *Macron Declines to Follow Biden and Call Russian Acts in Ukraine 'Genocide'*, THE GUARDIAN (Apr. 13, 2022), https://www.theguardian.com/world/2022/apr/13/emmanuel-macron-genocide-ukraine-russia-biden?utm_term=Autofeed&CMP=tw_t_gu&utm_medium&utm_source=Twitter (noting that while some leaders have refused to call Russia's actions in Ukraine a genocide, that the leaders of the United States, France, and Australia called for sanctions against Russia and an investigation by the ICC) [<https://perma.cc/Z5C6-MBKL>].
112. See Lauren Sanders, *Accountability and Ukraine: Hurdles to Prosecuting War Crimes and Aggression*, LIEBER INST. W. POINT (Mar. 9, 2022), <https://lieber.westpoint.edu/accountability-ukraine-hurdles-prosecuting-war-crimes-aggression/> (discussing capacity to track progress of conflict via social media) [<https://perma.cc/8CVT-CQNX>].
113. See Stefan Schmitt, *Proving War Crimes Isn't Simple – A Forensics Expert Explains What's Involved with Documenting Human Rights Violations During Conflicts, from Afghanistan to Ukraine*, THE CONVERSATION (Aug. 5, 2022, 8:17 AM), <https://theconversation.com/proving-war-crimes-isnt-simple-a-forensics-expert-explains-whats-involved-with-documenting-human-rights-violations-during-conflicts-from-afghanistan-to-ukraine-182579> [<https://perma.cc/TX5T-X8MX>]; see also Ronan McGreevy,

atrocities being committed in Ukraine¹¹⁴ and numerous entities are involved in gathering and preserving evidence to be used in later trials against perpetrators.¹¹⁵ Second, it appears that the ICC and states have agreed that evidence will be shared with various accountability mechanisms, including domestic jurisdictions willing to prosecute using universal jurisdiction.¹¹⁶ Third, at least for states within Europe who choose to mount universal jurisdiction prosecutions, access to witnesses and evidence may prove relatively uncomplicated given Ukraine's location on the continent.¹¹⁷ Fourth and finally, as to witness protection, this situation differs from some mentioned above where witnesses testified against persons aligned with the government in power in their state of nationality—such that they

Researchers Aim to Recreate History Lost in 1922 'War Crime', THE IRISH TIMES (Feb. 8, 2018, 12:01 AM), <https://www.irishtimes.com/culture/heritage/researchers-aim-to-recreate-history-lost-in-1922-war-crime-1.3383955> [<https://perma.cc/NC7X-RT9V>].

114. *See, e.g., Ukraine: Apparent War Crimes in Russia-controlled Areas*, HUM. RTS. WATCH (Apr. 3, 2022, 1:00 AM), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> [<https://perma.cc/22EW-ETG2>]; Carlotta Gall & Andrew E. Kramer, *In a Kyiv Suburb, 'They Shot Everyone They Saw'*, N.Y. TIMES (Apr. 3, 2022), <https://www.nytimes.com/2022/04/03/world/europe/ukraine-russia-war-civilian-deaths.html> [<https://perma.cc/SR3N-N534>].
115. *See, e.g., Lauren Baillie, Ukraine: Justice for War Crimes Must Begin with Evidence*, U.S. INST. OF PEACE (Apr. 7, 2022), <https://www.usip.org/publications/2022/04/ukraine-justice-war-crimes-must-begin-evidence> (outlining various efforts to gather evidence of atrocity crimes committed in Ukraine to be preserved for accountability mechanisms) [<https://perma.cc/LV4P-NDXW>].
116. *Id.* (referencing joint investigations and cooperative sharing of evidence between the ICC and states).
117. Of course, gathering evidence and transporting witnesses while the conflict is ongoing makes matters more difficult. With that said, investigators have been gathering evidence and speaking with witnesses to atrocity crimes in Ukraine since only shortly after Russia's invasion. *See ICC Sends 42-Member Team to Probe Alleged War Crimes in Ukraine*, ALJAZEERA (May 17, 2022), <https://www.aljazeera.com/news/2022/5/17/icc-sends-largest-ever-investigative-team-to-war-torn-ukraine> (noting that the ICC had sent 42 investigators to Ukraine to gather evidence of atrocity crimes) [<https://perma.cc/Z754-4QWX>].

or their families might be in danger of retaliation.¹¹⁸ Here, one can expect the Ukrainian government to protect Ukrainian witnesses given the country's stated commitment to accountability for crimes perpetrated following Russia's invasion.¹¹⁹

B. Reasons To Be Concerned That Universal Jurisdiction Prosecutions Will Not Close the Accountability or Impunity Gap

One overarching reason that individuals should not expect a great number of perpetrators to be tried via universal jurisdiction cases deriving from Ukraine is because the evidence shows that many states do not have domestic legislation that would permit the state to exercise universal jurisdiction over some or all the core international crimes.¹²⁰ Nor should one necessarily expect that landscape to change significantly in the short term given the political costs of proceeding with universal jurisdiction cases. The evidence from Belgium and Spain is telling in this regard. Two countries that had apparently embraced the exercise of universal jurisdiction amended their laws to narrow them after they experienced the very real political costs that flowed after their judges issued arrest warrants against high-level suspects whose countries of origin leaped to their defense.¹²¹

118. For example, in the ICC's cases brought against Kenyan leaders who allegedly instigated deadly inter-ethnic violence following the country's 2007 presidential elections, numerous witnesses who the ICC could not protect refused to testify at trial, arguing that they had been intimidated by persons representing the government in power. See Wanja Gathu, *Big Questions About Witness Protection in Kenya*, INST. FOR WAR & PEACE (May 27, 2014), <https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya> [<https://perma.cc/C8Y5-JU2F>].

119. See, e.g., Rachel Treisman, *Zelenskyy Urges U.N. Security Council to Boot Russia or Dissolve for the World's Sake*, NPR (Apr. 5, 2022, 1:18 PM), <https://www.npr.org/2022/04/05/1091050554/zelenskyy-un-security-council-speech> (reporting on President Zelensky's speech to the United Nations Security Council calling for accountability for Russian crimes committed in Ukraine) [<https://perma.cc/JFG4-JFSR>].

120. See *Universal Jurisdiction*, GLOB. POL'Y F., <https://archive.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html> [<https://perma.cc/85EA-RR37>].

121. See *The World Needs Spain's Universal Jurisdiction Law*, HUM RTS. WATCH (May 27, 2009, 9:55 AM), <https://www.hrw.org/news/2009/05/27/world-needs-spains-universal-jurisdiction-law> [<https://perma.cc/7P2G-S86V>]; see also Associated Press, *Belgium Scales Back Its War Crimes Law Under U.S. Pressure*, N.Y. TIMES

Also, should a state decide to exercise jurisdiction over Russian perpetrators, that state might have to consider the possibility that doing so will cause it to incur political costs, especially if the target is a higher-level leader that the Russian state will seek to protect. Putin has already demonstrated that he will use whatever resources he has at his disposal to make states pay for their willingness to back Ukraine.¹²² For example, in a speech declaring that Russia would not lose the war in Ukraine, Putin threatened to halt all energy supplies if Brussels imposes a cap on the price of Russian gas.¹²³ Putin has also threatened to restrict grain exports to Europe.¹²⁴ As a result, commentators have already questioned whether Europe will hold steady in backing Ukraine when it faces the possibility of “a bleak winter of rising food prices, limited energy to heat homes and the real possibility of recession.”¹²⁵ Some have also suggested that potential political costs help explain why some leaders are retreating from their more hawkish stances and speaking in terms of a negotiated solution to the conflict.¹²⁶ In addition, the

(Aug. 2, 2003), <https://www.nytimes.com/2003/08/02/world/belgium-scales-back-its-war-crimes-law-under-us-pressure.html> [<https://perma.cc/LBF8-7VWZ>].

122. Vladimir Isachenkov et al., *Russia Attacks Ukraine as Putin Warns Countries Who Interfere Will Face ‘Consequences You Have Never Seen’*, PBS NEWS HOUR (Feb. 24, 2022, 5:37 AM), <https://www.pbs.org/newshour/world/russia-launches-attacks-ukraine-as-putin-warns-countries-who-interfere-consequences-you-have-never-seen> [<https://perma.cc/HPQ6-66MA>].
123. Reuters, *Russia Threatens to Stop Exporting Energy to Europe; Ukraine Claims Advances in the East*, THE ECON. TIMES, <https://economictimes.indiatimes.com/news/international/business/russia-threatens-to-stop-exporting-energy-to-europe-ukraine-claims-advances-in-the-east/articleshow/94067762.cms> (Sept. 8, 2022, 11:57 AM) [<https://perma.cc/RW2W-G4A3>].
124. Teele Rebane et al., *Putin Threatens to Restrict Ukrainian Grain Exports for European Countries, Accusing Them of Acting ‘Like Colonial Powers’*, CNN, <https://www.cnn.com/2022/09/07/europe/russia-ukraine-grain-ports-intl> (Sept. 18, 2022, 10:18 PM) [<https://perma.cc/248P-GHTP>].
125. Luke McGee, *A Grim Winter Will Test Europe’s Support for Ukraine Like Never Before*, CNN, <https://www.cnn.com/2022/08/22/europe/six-months-of-ukraine-russia-war-intl-cmd/index.html> (Aug. 22, 2022, 4:57 AM) [<https://perma.cc/TA2D-CNK6>].
126. See generally Victor Rud, *No, Russia’s War Against Ukraine Is Not “Complicated”*, KYIV POST (May 25, 2022, 11:48 AM),

possibility that Russia may threaten the use of nuclear weapons has caused some in the United States to question whether bipartisan support for continuing to back Ukraine in its fight against Russian aggression is guaranteed.¹²⁷

Even putting political costs aside, states seeking to exercise universal jurisdiction might find they have difficulty obtaining custody over the defendant or that the defendant claims immunity from prosecution. Commentators have already noted that the Russian government is unlikely to comply with arrest warrants issued against its nationals.¹²⁸ No doubt, Russians who have committed serious international crimes will not be able to travel freely because, as some have stated, the threat of prosecution will forever hang over them.¹²⁹ In addition, some Russians may be captured in Ukraine and thereafter possibly surrendered or extradited to a foreign jurisdiction to stand trial for crimes committed in Ukraine.¹³⁰ However, many who have

<https://www.kyivpost.com/article/opinion/op-ed/no-russias-war-against-ukraine-is-not-complicated.html> [<https://perma.cc/S69T-MPFA>].

127. See Editorial Board, *The War in Ukraine is Getting Complicated, and America Isn't Ready*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/opinion/america-ukraine-war-support.html> [<https://perma.cc/Z9N8-ERH8>].
128. See, e.g., Jacqueline Thomsen & Mike Scarcella, *Explainer: How Could Russia's Putin Be Prosecuted for War Crimes in Ukraine?*, REUTERS (Apr. 4, 2022, 5:41 AM), <https://www.reuters.com/world/how-could-russias-putin-be-prosecuted-war-crimes-ukraine-2022-03-22/> (stating that Moscow certainly will refuse to comply with arrest warrants) [<https://perma.cc/P589-J6TH>].
129. See Gabriela Baczynska, *Threat of Prosecution Hangs 'Forever' over Ukraine War Crimes Perpetrators – EU*, REUTERS, <https://www.reuters.com/world/europe/threat-prosecution-hangs-forever-over-ukraine-war-crimes-perpetrators-eu-2022-07-18/> (July 18, 2022, 11:00 AM) [<https://perma.cc/H5NV-U2PR>].
130. Under international law, states have a duty to extradite or prosecute (*aut dedere aut judicare*) in some circumstances. See generally Matthew Garrod, *Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and "Universal Jurisdiction" in the Light of the Habré Case*, 59 HARV. J. INT'L L. 125, 132–35 (2018) (discussing the treaty-based duty to extradite or prosecute); Amnesty Int'l, *International Law Commission: The Obligation to Extradite or Prosecute (aut Dedere aut Judicare)*, AI Index IOR 40/001/2009, at 8 (Feb. 2009) (stating that the principle *aut dedere aut judicare* obligates a state with custody over a person suspected of certain categories of crimes must

committed atrocities in Ukraine will likely seek to return to Russia where Putin will welcome and protect them. This is especially true if these perpetrators know that traveling to other countries could cause them to risk arrest and prosecution. In other words, the current situation differs from that following the Rwandan genocide where the genocidaires could expect that if they remained in Rwanda, the new Rwandan government would seek to hold them accountable.¹³¹ Those Rwandan defendants might be willing to risk the possibility of a universal jurisdiction prosecution to avoid the likelihood of prosecution in Rwanda. Moreover, some high-level Russian defendants would surely seek to invoke the immunity defense, which as noted above, has been successfully invoked in national proceedings.

Finally, if the past is any guide, we might also expect that the international community's enthusiasm for supporting international justice for the atrocities being committed in Ukraine may wane over time. Again, this is not to suggest that the international community is not fundamentally committed to ending impunity for international crimes. Yet, the experience with the international ad hoc tribunals and the ICC shows that states sometimes appear to tire of further funding these mechanisms.¹³²

either exercise jurisdiction—including universal jurisdiction—or surrender or extradite that person to a state able and willing to do so or to an international criminal court with jurisdiction). An in-depth exploration of the contours of the duty to extradite or prosecute is beyond the scope of this brief article.

131. See Helena Cobban, *The Legacies of Collective Violence*, BOS. REV. (Apr. 1, 2002), <https://www.bostonreview.net/articles/helena-cobban-legacies-collective-violence/> [<https://perma.cc/CEB8-MAHA>].

132. See, e.g., Dafna Gozani, *Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court*, 36 LOY. L.A. INT'L & COMPAR. L. REV. 331, 348, 361 (2015) (noting that the two ad hoc tribunals have been heavily criticized on the grounds of being extremely costly, among other things); Cynthia Cline, *Trial Without Undue Delay: A Promise Unfulfilled in International Criminal Courts*, 8 BRAZ. J. PUB. POL'Y 55, 82 (2018) (stating that the ad hoc tribunals have been criticized on the grounds of costs and delays related to administrative bloat); Michael Scharf & Laura Graham, *Bridging the Divide Between the ICC and UN Security Council*, 52 GEO. J. INT'L L. 977, 983 (2021) (stating that the UN Security Council has criticized the creation of ad hoc tribunals as overly costly, among

IV. CONCLUSION

Presently, states seem to be committed to ensuring accountability for the atrocities committed since the Russian invasion in 2022. The research described above, though, demonstrates that states have infrequently invoked universal jurisdiction, particularly as against high-level leaders. As Maximo Langer explains, in the twenty-five years before 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 in the agenda of many societies, and the passing of universal jurisdiction statutes by many States” in this period.¹³³ His conclusion, in fact, is that having “a limited potential to convict international criminals seems to be a structural feature of the universal jurisdiction enforcement regime.”¹³⁴ Nothing in the years that have followed suggests that universal jurisdiction is staging a comeback. Indeed, as described above, Belgium and Spain had at one time enthusiastically embraced the concept of universal jurisdiction, yet later amended their laws to restrict its application.¹³⁵

The states that have announced their intention to commence universal jurisdiction prosecutions against perpetrators of atrocities in Ukraine should be commended. One should not necessarily conclude, however, that numerous other states will follow, or indeed that the committed states will prosecute some great number of cases or significant numbers of high-level perpetrators.

other things); Jonathan O’Donohue, *Financing the International Criminal Court*, 13 INT’L CRIM. L. REV. 269, 280 (2013) (explaining that after the 2008 economic crisis some of the Court’s largest funders launched a campaign to restrict the ICC’s budget to “zero growth”).

133. See Langer, *supra* note 38, at 45.

134. *Id.*

135. See *The World Needs Spain’s Universal Jurisdiction Law*, *supra* note 121; see also Associated Press, *supra* note 121.