STUDY

Requested by the DROI subcommittee

European Parliament

WORKSHOP

Universal jurisdiction and international crimes: Constraints and best practices

Policy Department for External Relations
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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT

European Parliament

WORKSHOP

Universal jurisdiction and international crimes: Constraints and best practices

ABSTRACT

This report summarises the proceedings of a workshop organised by the European Parliament's Subcommittee on Human Rights (DROI), in association with the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE). Academics and practitioners discussed international trends as regards the concept of universal jurisdiction and the EU's approach to promoting universal jurisdiction through its external relations, as well as practical experience in applying universal jurisdiction in the fight against impunity in Europe. The experts agreed that universal jurisdiction can play a role as part of a wider accountability strategy, complementary to international courts and prosecutions on other jurisdictional bases. They recommended more specialised training for investigators, prosecutors, judges and law enforcement staff for universal jurisdiction cases and more cooperation at EU and international level. Speakers supported the initiative for a multilateral treaty on mutual legal assistance and extradition. Special attention in universal jurisdiction cases must be given to victims seeking justice, including for sexual and gender-based crimes.

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Workshop report: Universal jurisdiction and international crimes: Constraints and best practices

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POLICY DEPARTMENT, DG EXPO
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European Parliament

Thursday 28.06.2018 – **09:00-11:00**
PAUL-HENRI SPAAK BUILDING – ROOM **4B001**

Contacts and registration: **poldep-expo@ep.europa.eu**

UNIVERSAL JURISDICTION AND INTERNATIONAL CRIMES:

Constraints and best practices

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Programme of the workshop

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

European Parliament

For the Subcommittee on Human Rights (DROI), in association with the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE)

WORKSHOP

Universal jurisdiction and international crimes: Constraints and best practices

Thursday, 28 June 2018, 09.00-11.00

Interpretation: EN, ES, FR, DE, PL

Brussels **Paul-Henri Spaak** building, **room 4B001**

FINAL PROGRAMME

09.00 **Introductory remarks**

- **Barbara Lochbihler**, MEP, Vice-Chair of the Subcommittee on Human Rights
- **Heidi Hautala**, MEP, Committee on Legal Affairs

09.10 **Academic expert presentations**

- **Cedric Ryngaert**, Professor of Public International Law, University of Utrecht: *International trends and the EU's approach to promoting universal jurisdiction through its external relations*
- **Florian Jeßberger**, Professor of Criminal Law, University of Hamburg: *Towards ‚complementary preparedness': trends and best practices in universal criminal jurisdiction in Europe*

09.30 **Stakeholders' and practitioners' contributions**

- **Daniel Fransen**, Pre-Trial Judge, Special Tribunal for Lebanon, The Hague (formerly Belgian investigating judge in the case against Hissène Habré)
- **Matevž Pezdirc**, Head of Secretariat, EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes, Eurojust
- **Akila Radhakrishnan,** President and Legal Director, Global Justice Center, New York (via Skype)
- **Charlie Loudon**, International Legal Advisor, REDRESS UK, London
- **Andreas Schüller**, Program Director International Crimes and Accountability, European Center for Constitutional and Human Rights (ECCHR), Berlin

10.10 **Debate**

10.50 **Concluding remarks by the Chairs**

11.00 **End**

1 Introductory remarks

This report summarises the proceedings of a workshop jointly organised by the European Parliament's Subcommittee on Human Rights (DROI), the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE). The workshop took place in Brussels on 28 June 2018 and was chaired by Member of the European Parliament (MEP) Barbara Lochbihler (Greens/EFA, Germany, Vice-Chair of the DROI Subcommittee, and by MEP Heidi Hautala (Greens/EFA, Finland, Vice-Chair of the LIBE Committee).

The aim of the workshop was to discuss a) international trends as regards the concept of universal jurisdiction and the EU's approach to promoting universal jurisdiction through its external relations, and b) concrete and practical experiences with the application of universal jurisdiction in the fight against impunity in Europe. To this end, two academic experts, stakeholders and practitioners were invited to share their views on the subject.

In her introductory remarks, MEP Barbara Lochbihler underlined the European Parliament's (EP) commitment to universal jurisdiction, which can be seen in its recent resolution of 15 March 2018 on the situation in Syria[1] where it adopted unprecedentedly strong wording on the merits of universal jurisdiction. On 25 May, the EU Day Against Impunity, the EU and international stakeholders came together at a high-level meeting in The Hague to discuss ways forward for the EU to realise its commitment to the fight against genocide, crimes against humanity and war crimes. Bringing perpetrators to justice is one of the key demands all victims have, but in many cases neither the national court nor international courts can provide justice.

MEP Heidi Hautala stated that how international justice can respond to grave violations of human rights and in particular women's rights is of great interest to the LIBE Committee. In 2016, the LIBE Committee organised, together with the Committee on Women's Rights and Gender Equality (FEMM), a hearing on the subject of 'public international law and the prosecution of Daesh crimes against women and girls'. On this occasion, universal jurisdiction was discussed as one of the avenues that could bring justice to the Daesh crimes, but the challenges it presents when it comes to gender-based violence were also raised. The situation since then has evolved, argued Ms Hautala. New sources of evidence are available, concrete cases have been taken forward by human rights organisations, and there is discussion on a new multilateral treaty on mutual legal assistance and extradition. She then invited the experts and practitioners to offer their recommendations on how to move forward in such a dynamic context.

2 Academic experts' presentations

The invited academic experts were Prof Cedric Ryngaert, Professor of Public International Law at the University of Utrecht, and Prof Florian Jeßberger, Professor of Criminal Law at the University of Hamburg.

2.1 Cedric Ryngaert (University of Utrecht): International trends and the EU's approach to promoting universal jurisdiction through its external relations

Universal jurisdiction, according to Prof Ryngaert, is a form of extraterritorial jurisdiction exercised by states which do not have a strong nexus with the crime. It is a mechanism to offer accountability for gross human rights violations and to offer remedy for victims.

[1] European Parliament (2018), Resolution of 15 March 2018 on the situation in Syria (2018/2626(RSP), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0090+0+DOC+XML+V0//EN&language=EN (last accessed 11.07.2018)

Universal jurisdiction prosecutions, he argued, are often brought forward by victim or diaspora communities located on the territory of EU Member States. By exercising universal jurisdiction, the EU and its Member States can show hospitality to newly arrived migrants and integrate them, which in turn also contributes to societal stability.

According to Prof Ryngaert, given the EU's violent past there is little doubt that accountability for gross human rights violations, including the exercise of universal jurisdiction, is a European value. The EU can promote universal jurisdiction in relations with the wider world for example, article 3.5 and article 21 of the Treaty on the EU refer to human rights and international law in relation to external relations... Universal jurisdiction has also been recognised by the EP's resolution of 4 July 20172. Also, the European Commission (EC) has defended universal jurisdiction, for example in its amicus curiae brief which was filed by the EC before the United States Supreme Court in 2012.

The exercise of universal jurisdiction by EU Member States has not gone unopposed internationally, and the EP should take that into account when devising its strategy. Notably African states have taken issue with the exercise of universal jurisdiction. Ten years ago, a joint EU-African Union (AU) expert group was appointed, which identified some common ground, but was not able to overcome all tensions. The discussion then moved to the 6th committee of the United Nations General Assembly (UN GA), but also there the discussions have stalled. While there seems to be an agreement that there is some principle of universal jurisdiction, its scope and content remain unclear, for example, it is unclear if universal jurisdiction falls under customary international law.

When looking at what is happening on the ground, as Prof Ryngaert underlined, one can see that universal jurisdiction is sometimes exercised by non-EU Member States. Examples are the trial of Hissène Habré which was supported by Senegal, the establishment of universal jurisdiction by the South African constitutional court in the 2014 Zimbabwe case, and the ongoing case in Argentina for crimes committed by the Franco regime before 1975. He stated that the EU should not only focus on universal jurisdiction, but on preventing impunity in a broad sense. As a last resort option, the EU should support universal jurisdiction as complementary or subsidiary protection.

Prof Ryngaert then presented a set of recommendations to the EU:

1. The EU should support universal jurisdiction and accountability efforts in non-EU Member States through, among others, financial support, sharing best practices, creating specialised units within the police and prosecution, better cooperation between immigration authorities and prosecutors, establishing transnational international joint investigation teams and through a replication of the EU Genocide Network outside of the EU.
2. The EU should use sanctions as a last resort, in case of a country not wanting to offer accountability. The EU should implement targeted sanctions that do not severely affect the population given the human rights obligations that the EU has vis-à-vis third countries.
3. The EU should support better international cooperation arrangements, for example, regarding evidence.
4. The EP should support a very focused treaty regarding the initiative on a multilateral treaty on mutual legal assistance and extradition on international crimes.
5. Eurojust should involve more non-EU states within the EU Genocide Network.
6. The EP should consider a follow-up resolution to the resolution of 4 July 2017 on addressing human rights violations, that would focus specifically on accountability offered by states at the domestic level

[2] European Parliament (2017), Resolution of 4 July 2017 on addressing human rights violations in the context of war crimes, and crimes against humanity, including genocide (2016/2239(INI)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0288+0+DOC+XML+V0//EN&language=EN (last accessed 11.07.2018)

not only at the International Criminal Court (ICC) or other international tribunals. This would also offer the possibility to elaborate on universal jurisdiction and on how the EU can strengthen investigation and prosecution in non-EU Member States.

7. The EP should ask the European External Action Service (EEAS) to develop a human rights guidance on the issue of universal jurisdiction.

2.2 Florian Jeßberger (University of Hamburg): Towards 'complementary preparedness': Trends and best practices in universal criminal jurisdiction in Europe

Prof Florian Jeßberger stated that universal jurisdiction is based on the nature of the crime which affects the international community as a whole. Such crimes are genocide, crimes against humanity and war crimes. Because universal jurisdiction aims at the protection of supranational legal interests, it is derivative jurisdiction. The state exercising universal jurisdiction acts as an agent of the international community.

Universal jurisdiction is exercised within the broader context of the global system of international criminal justice. Prosecution and punishment of genocide, crimes against humanity and war crimes are achieved through a transnationally organised sharing of labour. The exercise of universal jurisdiction by so-called third states is a major tool in the global fight against impunity of crimes under international law, with international courts or tribunals often being unavailable and with territorial states often being unwilling or unable to hold perpetrators accountable. An important function of the exercise of universal jurisdiction is to stimulate or to support investigations and prosecutions in another jurisdiction closer to the crime such as the territorial state, the state of the nationality of the offender or an international tribunal. It follows from this complementary nature of universal jurisdiction that its exercise need not necessarily result in the completion of a criminal trial or the conviction of a perpetrator in a court of the state exercising universal jurisdiction.

Contrary to the common narrative that claims the fall or the decline of universal jurisdiction, he argued, empirical data shows an increase of universal jurisdiction in the past decade, reflecting institution building and improved legislation, institutional learning, as well as better opportunities to successfully investigate and prosecute war crimes in Europe. In absolute terms, however, the number of convictions based on universal jurisdiction is low. Using the number of completed trials and convictions in the states exercising universal jurisdiction as a benchmark to measure success, however, disregards the stimulating and complementing function of universal jurisdiction. In addition to the general increase in universal jurisdiction cases, two further trends can be observed, according to Prof Jeßberger. First, the regionalisation of universal jurisdiction has been demonstrated through the prosecution of former dictator Habré before the Extraordinary African Chambers in Senegal on behalf of Africa. Secondly, the reversion of universal jurisdiction on European perpetrators – the boomerang effect – can be observed as it is demonstrated by the efforts of the Argentinian prosecutors to prosecute crimes committed under the Franco regime in Spain. Both these trends have the chance to address and ease the prosecution of universal jurisdiction as a post-colonial tool for European justice systems dealing with crimes committed in the global South.

Traditionally the development of universal jurisdiction, as Prof Jeßberger noted, has been described along the lines of two approaches: the 'global enforcer approach' and the 'no safe haven approach'. The 'global enforcer approach' is a more offensive conception in which states have a pro-active role in preventing and punishing core crimes committed anywhere in the world. The 'no safe haven approach' on the other hand, which has been prevalent in the practice of states in recent years, embodies a more defensive conception according to which states act in their own interests by not becoming a refuge for perpetrators of war crimes. Recently a shift from the prevalent 'no safe haven approach' to a 'complementary preparedness

approach' can be observed, according to Prof Jeßberger. It refers to prosecutorial activity focusing on the collection, consolidation, preservation and analysis of available evidence in order to facilitate criminal proceedings in a national or international court that exercises or may exercise in the future jurisdiction of the crime.

Regarding sharing best practices, Prof Jeßberger argued, it is obvious that the chances of completing a trial in a third state are high if the state exercising jurisdiction has comprehensive legislation, a well-functioning specialised war crimes unit with previous experience, access to the necessary evidence including witnesses and, most importantly, the suspect. More specifically, best practices also include a relatively low threshold for initiating preliminary investigations. In particular, it should not be required that the suspect is present in the territory to open a preliminary trial stage.

Prof Jeßberger concluded that when it comes to genocide, crimes against humanity and war crimes, impunity is still the rule and accountability the exception, despite considerable progress at the international level resulting in the establishment of international institutions like the ICC and the implementation of specific domestic legislation during the past 20 years. A comprehensive approach for accountability of crimes under international law is crucial, he argued. This includes continued support to the ICC and to initiatives to exercise jurisdiction on a regional level such as the Extraordinary African Chambers.

The EU Genocide Network's 2014 strategy and the 2017 resolution of the EP are strong starting points for further action, according to Prof Jeßberger. More specifically he recommended:

1. The EU and its Member States should consider acknowledging the fight against impunity as an issue of justice and home affairs and reshape its commitments accordingly.
2. The EU should draft and implement a toolkit on universal jurisdiction which reflects, inter alia, a 'complementary preparedness approach' to universal jurisdiction and to encourage Member States to review their national jurisdiction accordingly.
3. The EU should initiate the establishment of a European database on universal jurisdiction cases.

3 Stakeholders' and practitioners' contributions

The Chair handed the floor to five stakeholders and practitioners, namely: Daniel Fransen, Pre-Trial Judge, Special Tribunal for Lebanon, (formerly Belgian investigating judge in the case against Hissène Habré); Matevž Pezdirc, Head of Secretariat, EU Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, Eurojust; Akila Radhakrishnan, President and Legal Director, Global Justice Center (GJC); Charlie Loudon, International Legal Advisor, REDRESS UK; and Andreas Schüller, Program Director International Crimes and Accountability, European Center for Constitutional and Human Rights (ECCHR).

3.1 Daniel Fransen (Special Tribunal for Lebanon, formerly Belgian investigating judge)

Daniel Fransen presented his work as investigating judge on the Hissène Habré case. He noted that without the principle of universal jurisdiction it would not have come to the conviction of a Head of state for criminal atrocities committed during his mandate. Belgian legislation, which in 2000 provided for universal jurisdiction for international crimes, led to Mr Habré being taken to court. Mr Habré was accused between 1982 and 1990 of using his political police to torture, to kill and to summarily execute around 40 000 civilians and military because they were not of his ethnicity.

The first complaint was filed against Mr Habré on 25 January 2000. An investigating judge from Senegal accused him of crimes against humanity, torture and barbarianism. After an appeal the Senegalese justice

system refused jurisdiction because the case was carried out under universal jurisdiction, which was not provided for under the Senegalese legal system. Some victims went to Belgium and in November 2000, the case was referred to Judge Fransen in Belgium, who started the investigation. It became clear very quickly that to continue with the case there had to be an investigation in Chad. Judge Fransen sent an international rogatory letter to Chad on the basis of the Convention against torture and went to the scene of the crime to investigate the case. After the investigation, Judge Fransen issued an international arrest warrant asking Senegal to extradite Mr Habré, but Senegal refused to comply with it. That meant that Belgium referred this case to the International Court of Justice which on 28 July 2012 decided that Senegal had to extradite or prosecute Mr Habré. One month later, the Extraordinary African Chambers were created and they sentenced Mr Habré to life imprisonment on 27 April 2017.

The role of Belgium in the context of universal competence was absolutely crucial in bringing about these changes. In terms of legitimacy, even if Belgium was not the natural judge of this case, considering that there was an attack on universal principles and values of the international community, Belgium was legitimate in investigating this case and pursuing Hissène Habré, argued Judge Fransen.

He added that the reason why the Hissène Habré case took a lot of time is partly because of the length of procedures before the International Court of Justice to make Senegal meet its international obligations. However, the time invested in investigations could have been shortened considerably had there been sufficient resources, for example, for more specialised investigators and judges. Also, the training of investigators, prosecutors and judges is key to reducing the time for investigating such cases, according to Judge Fransen.

Judge Fransen concluded by referring to the role of non-governmental organisations (NGOs). From the very start, NGOs supported victims and made sure that evidence was obtained and secured. However, Judge Fransen considered that this interaction between NGOs and justice institutions should be framed to avoid further problems during trials.

3.2 Matevž Pezdirc (EU Genocide Network)

Matevž Pezdirc first presented the EU Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, hosted by Eurojust. It is a network of practitioners specialised within their national authorities, to investigate and prosecute genocide, crimes against humanity and war crimes. The mandate of the network is to exchange and share best practices, experiences, knowledge but also operational information. Its members are EU Member States, but there are also observer states, namely the United States of America (USA), Canada, Norway, Switzerland and, recently, also Bosnia and Herzegovina.

Mr Pezdirc argued that universal jurisdiction is part of a broader concept of international criminal justice and can, next to preventing safe haven and upholding common values of the international community, also render justice to victims who have been denied access to justice in their home country.

However, there are also limitations in the exercise of universal jurisdiction, Mr Pezdirc noted. Many EU Member States require the presence of a suspect on their territory. Moreover, there needs to be appropriate legislation in place which is not the case in some Member States. As a recent example of the use of universal jurisdiction, Mr Pezdirc offered Germany's international arrest warrant against the Head of Air Force Intelligence in Syria, explaining how states can fill the complete gap of accountability in Syria.

Mr Pezdirc recommended to:

1. Create specialised units. In order to be effective and efficient in terms of investigating and prosecuting these crimes specialised units and dedicated staff with sufficient resources, training, knowledge and sensitivity are needed.
2. Foster better cooperation on national and international level. On a national level, there is a need for increased cooperation between immigration authorities, law enforcement, prosecution, and units

dealing with counter-terrorism, smuggling of migrants and money laundering. On an international level, cooperation is required between states as knowledge and evidence are usually scattered. Within the EU there is Eurojust, Europol, the European Arrest Warrant, the European Investigation Order and other successful tools, but broader initiatives are needed, such as multilateral treaties.

3. Promote capacity-building both in the EU and in third states, which should include training of law enforcement, prosecutors but also of judges.

4. Streamline the EU's external dimension and internal justice and home affairs dimension. What the EU is promoting worldwide should also be in place internally.

5. Strengthen relations between the EU Genocide Network and the EP through regular reporting as it is envisaged in Art 3 of the Council decision 2002/494/JHA[3].

6. Improve the financial situation of Eurojust and the EU Genocide Network.

3.3 Akila Radhakrishnan (Global Justice Center)

Akila Radhakrishnan stated that sexual and gender-based crimes characterise nearly all conflicts and mass atrocities that happen today. However, despite the important precedents that have come out of the international tribunals for Rwanda and the former Yugoslavia, there remains a significant impunity gap for these crimes both at international and domestic levels, she argued. It is becoming clear that justice needs to happen at multiple and complementary levels including in third states.

The EU and Member States with their commitment to justice and accountability and near universal adaption of legislation enabling universal jurisdiction, including for sexual and gender-based crimes, are in a unique position to help close this impunity gap, argued Ms Radhakrishnan.

A report by TRIAL international found that in 2017 there were 44 instances where EU Member States invoked universal jurisdiction in nine states. Nine of these cases involved allegations of sexual violence, rape or gender-based crimes. While progress can be noted, according to Ms Radhakrishnan, concerted efforts must be made to ensure that any such proceedings are pursued proactively and with respect to sexual and gender-based violence.

On 27 June 2018, the case of Theodore Tabaro who was involved in the Rwandan genocide was decided in Sweden. The court found Mr Tabaro guilty of constituted genocide, murder, attempted murder and kidnappings. However, he was acquitted of rape charges due to lack of evidence. The complexities associated with universal jurisdiction proceedings are exacerbated when it comes to sexual and gender-based crimes, argued Ms Radhakrishnan. Common difficulties relate to the collection of evidence and lack of investigators and prosecutors with specialised gender expertise who could identify instances of sexual and gender-based crimes. Ms Radhakrishnan noted that successful prosecutions also require a nuanced understanding of how sexual and gender-based crimes are connected to planned violence.

Some models have emerged which can provide guidelines for further action by the EU and its Member States. In 2014, the ICC's office of the prosecutor adopted a policy paper on sexual and gender-based crimes which can act as a model for Member States, according to Ms Radhakrishnan. The policy makes sexual and gender-based crimes a priority for the court, commits the office of the prosecutor to bring charges for sexual and gender-based violence wherever there is sufficient evidence to support such charges and defines a progressive and comprehensive gender lens to be applied to all crimes within its jurisdiction.

[3] Council of the European Union (2002), Council Decision of 13 June 2002, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, https://publications.europa.eu/en/publication-detail/-/publication/71d3044a-1821-4c7c-a784-4ef89c4eaef8/language-en (last accessed 11.07.2018)

In June 2017, the EU Genocide Network put together a contextual overview of sexual and gender-based crimes perpetrated by Daesh to serve for Member States as a resource should suspects of these crimes come under their jurisdiction. As the EU considers how to better comply with its commitment to ensure justice to international crimes, Ms Radhakrishnan urged to ensure that sexual and gender-based crimes are at the core of any efforts or strategies.

Ms Akila Radhakrishnan then presented a set of recommendations:

1. The EU should support the development and institutionalisation of a concerted gender policy for the investigation and prosecution of international crimes.
2. The EU should facilitate support, including through Europol and the EU Genocide Network, the sharing of best practices and cooperation between Member States in investigating and prosecuting gender-based international crimes.
3. The EU should encourage Member States who do not have enabling legislation for universal jurisdiction that covers the full range of sexual and gender-based crimes to adopt such legislation.
4. The EU should ensure that where it provides support to justice efforts, at international, regional or domestic levels, investigation and prosecution of sexual and gender-based crimes is prioritised in those efforts.
5. The EU should provide dedicated resources for gender expertise to any such efforts.
6. The EU should provide support to civil society experts and victim communities who are able to supplement and enhance capacity of domestic prosecutorial efforts.

3.4 Charlie Loudon (REDRESS)

REDRESS works directly with victims of torture and other atrocities crimes across the world to help them seek justice and reparations, stated Charlie Loudon.

Mr Loudon commended the broad support that the workshop had received from three Parliamentary Committees. He commented that this rightly reflects that universal jurisdiction is not just an issue for the EU's external relations but is very much also an issue of justice and home affairs.

Mr Loudon argued that one of the fundamental goals of universal jurisdiction is to provide justice for the victims of the crime. It needs to be ensured that in every universal jurisdiction case victims' rights are being respected. This includes ensuring that victims are dealt with in a sensitive way, that they are protected from potential reprisals, proactively informed on the progress of the case, given the chance to make their voices heard in the proceedings and the possibility to seek reparations.

Mr Loudon underlined that Member States and their authorities should implement policies and practices that ensure that victims benefit from universal jurisdiction prosecutions. The 2012 EU victims' rights Directive[4] is a good starting point, but it is crucial that Member States tailor the application of this Directive to the specific circumstances of prosecutions of international crimes.

Overall the EP should be commended for its work to date. Mr Loudon then raised three points on how the EU could promote universal jurisdiction more internally:

1. Universal jurisdiction needs to be firmly on the agenda of the EU's justice and home affairs policy. REDRESS especially supports the development of an action plan and toolkit on universal jurisdiction and the need to provide continued support to NGOs and Member States that work on universal

[4] European Parliament and Council of the European Union (2012), Directive of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029 (last accessed 11.07.18)

jurisdiction. Other steps could include the Justice and Home Affairs Council issuing annual conclusions on universal jurisdiction. Moreover, the EP could also convene an annual hearing on this issue. This would allow the EU Genocide Network to report back on its activities to parliamentarians and would give the EP an opportunity to interact on future policy on universal jurisdiction.

2. The EP should commission a study to examine the use of universal jurisdiction by Member States. This study should focus on one or a small number of specific aspects of the application of universal jurisdiction. The rights of victims of universal jurisdiction prosecutions would be a key area of examination.

3. The EU should assess how Member States implement the EU victims' rights Directive, specifically in the context of international crimes and how the victims of international crimes have benefited so far. Best practices could be identified, and it could be determined what more can be done to ensure that the victims of international crimes are having their voices heard.

3.5 Andreas Schüller (European Center for Constitutional and Human Rights)

The European Center for Constitutional and Human Rights (ECCHR) has been at the forefront of developing and submitting strategic universal jurisdiction cases in different European jurisdictions together with civil society of affected countries. Most recently, based on the ECCHR's work on Syria, Germany issued an arrest warrant of Air Force Intelligence Chief Jamil Hassan from Syria.

Andreas Schüller then presented a set of recommendations to the EU and its Member States:

1. Member states with no or few legal limitations shall be role models for all Member States.

2. International crimes need an international judiciary response. All Member States must secure evidence available on their territories and share it with international courts, domestic courts or courts in other states that prosecute international crimes.

3. A 'structural investigation' concept, securing evidence against unknown perpetrators is needed to start investigations which in turn can lead to prosecutions.

4. The focus should not be only on suspects in the EU but also on those who are bearing the most responsibility for the crime.

5. Investigations should also include those profiting from a war economy, such as businesses from Europe. At the same time, specific crimes such as sexualised and gender-based crimes should have special attention to also succeed in prosecutions. States should apply no double-standards and investigate all cases also from allied and powerful states.

6. The EP should have annual meetings on the application of universal jurisdiction in Member States, which could give important room for updates and debate.

7. Member States need specialised prosecutors, judges and war crimes' units.

8. The EC and EP should support the EU Genocide Network in its activities and strengthen Europol and joint investigation teams with regard to international crimes.

9. Member States should cooperate in arresting suspects. ECCHR has filed a complaint on 28 June because Italy did not arrest Syrian Intelligence Chief Ali Mamluk who travelled to Italy. Those who are most responsible for international crimes should not enter the EU without being arrested and questioned.

To conclude, Mr Schüller suggested to put the focus on victims and witnesses as well as lawyers from affected communities and civil society, as they are crucial to collect evidence. Witnesses and victims need a protected status within the EU and access to legal and social assistance.

4 Debate

One of the key challenges, **Lotte Leicht** (Human Rights Watch) noted, is that over the past several years most EU countries have gradually restricted their universal jurisdiction laws, which prevents many prosecutors to initiate criminal investigations. She recommended that if there is digression in the laws, prosecutors and investigators shall still act on behalf of preparedness and gather information.

Internationally there is a new mechanism in the United Nation, Ms Leicht explained, the International Independent Impartial Mechanism for Syria (IIIM), effectively a standing prosecutor without a court. She also mentioned that there are efforts happening to create a similar mechanism for atrocity crimes committed in Myanmar. This would be a very important step that the EP has supported in its most recent urgency resolution of June 2018[5] in which the EP called on the EEAS and EU Member States to take lead in the upcoming sessions of the UN GA and Human Rights Council to ensure the establishment of an IIIM for Myanmar/Rakhine state. She recommended that the EP keep up the pressure in this regard working to ultimately make this mechanism a standing one for all situations where atrocity crimes are committed with impunity.

Finally, for many years the EP has called on the EU and its Member States to establish a Special Representative on International Humanitarian Law and International Justice. This call has become even more urgent, according to Ms Leicht, as atrocity crimes are happening with a method and with utter impunity. The EU needs to be an international leader in the field of respect for international law and ensuring justice for grave crimes. To succeed, there is an urgent need for advancing the capacity within the EU institutions. A number of Member States are openly supporting the call for a new dedicated Special Representative and, according to Ms Leicht, the EP should make an ambitious effort to ensure the establishment of such a Special Representative in 2018.

Barbara Lochbihler, referring to Lotte Leicht's comment on Myanmar, stated that the EP will vote in plenary shortly on its recommendations to the Council on the 73rd session of the UN GA.

She asked Professor Ryngaert and Professor Jessberger to clarify whether they considered Universal Jurisdiction to be customary international law. She welcomed the concrete recommendations of both academic experts and asked to what extent they think that Member States would follow up on such recommendations of having a new set of EU guidelines, recommended by Prof Ryngaert, and of establishing a toolkit for Member States, recommended by Prof Jeßberger.

She further asked Prof Ryngaert to elaborate on how one could promote the initiative of a multilateral treaty on mutual legal assistance and extradition for the most serious international crimes and on his observations of diaspora in European countries when it comes to universal jurisdiction cases.

The EP has asked the High Representative Federica Mogherini to appoint a Special Representative on International Humanitarian Law and International Justice, Ms Lochbihler stated. She expressed hope that upcoming Council conclusions on 16 July 2018 would take up this initiative. She elaborated that for many years there has been a Special Representative on Human Rights, which is very helpful for the EU's presence and work in multilateral or bilateral fora because it strengthens the voice of the EU.

[5] European Parliament (2018), Resolution of 14 June 2018 on the situation of Rohingya refugees, in particular the plight of children (2018/2756(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0261+0+DOC+XML+V0//EN&language=EN (last accessed 11.07.2018)

She then inquired further about possible developments of genocide networks in other regions such as Africa and Latin America and how this could be supported.

Ms Lochbihler asked what potential the academic experts and practitioners see in the EP's diplomacy tools. She then underlined that so far only one African country, Burundi, had withdrawn from the ICC, even though there was the threat of a mass withdrawal from the ICC by African Union states.

Referring to the stalemate of the universal jurisdiction debate at the UN GA, she asked if the experts see a possibility that the UN GA will find consensus to refer this issue to the International Law Commission (ILC).

Ms Lochbihler asked Prof Ryngaert to elaborate on his point that the failure to prosecute international crimes could be considered a procedural human rights violation under the human rights clauses in the EU's international agreements.

She further stated that the EP will take note of the recommendation of a new resolution, but also added that passing resolutions is a long process, so NGOs and experts should maintain their advocacy efforts.

Referring to Prof Jeßberger, who mentioned that Europol has seen its mandate expanded to include also international crimes, she asked if he sees any practical action that could be taken in this regard, especially in relation to universal jurisdiction.

Ms Lochbihler asked if there was a risk that in the current political climate a successful case like that of Hissène Habré would remain extraordinary.

In her final question, Ms Lochbihler addressed Mr Schüller to ask where the case of CIA director Gina Haspel, that had been filed with the German Federal Public Prosecutor, could lead.

When discussing universal jurisdiction, **Roberta Dariol** (Desk Officer on Human Rights, European External Action Service) stated, it must always be kept in mind that the exercise of jurisdiction on the matters of criminal laws falls to a large extent under the national competence of Member States.

Still the fight against impunity is one of the key priorities in EU external action, she argued, which is why the EU has always tried to encourage and enhance cooperation among law enforcement authorities in Member States on national and transnational level. The creation of the EU Genocide Network in 2002 is an example of this work.

In this context, she highlighted the importance of the support that the EU has provided and continues to provide to the ICC because until a consensus emerges on the concept, the scope and modality of universal jurisdiction, the ICC remains one of the main tools in the fight against impunity for crimes under international law. That is why it is important that all developments in the area of universal jurisdiction happen in coordination and complementarity with the ICC. She underlined that the use of universal jurisdiction should always be seen as a last resort option. Efforts should be focussed on adopting a more integrated approach based on complementarity and aimed at developing capacities of states to conduct their own investigations and prosecutions. In order to avoid duplication and to maximise results, more cooperation among institutions, Member States and civil society organisations is key.

She concluded by welcoming the recommendations put forward by the experts and practitioners. The recommendations will be very useful for the EEAS in its ongoing debate on how to enhance the role of the EU in the fight against impunity and criminal justice.

DG JUST (represented by **Sara Chrzanowska**, DG JUST Criminal Procedural Law Unit, European Commission) stated that when it comes to victims' rights, the EU can be proud of the fact that since November 2015 it has a horizontal Directive 2012/29/EU on victims' rights (the Victims' Rights Directive), that reinforces the rights of the victims at every stage of the criminal proceeding, from the investigation to the post-trial situation. This act provides for a set of rights for all victims of crime and their family members, including a right to be recognised and treated in a respectful, sensitive, tailored, professional and non-

discriminatory manner. Member States have to ensure that all victims of all crime are offered a wide range of information, a set of procedural rights including a right to be heard, protection, support and access to justice in criminal proceedings. The Directive applies if the crime was committed in the European Union or if the proceeding takes place in the European Union and it would apply in cases related to crimes committed long time ago, if the proceedings take place after 16 November 2015 or continue after that date. It applies to criminal proceedings in the EU for crimes that occurred outside of EU territory (also known as extraterritorial offences), where the national law provides for this.

The new rules are applicable to all victims of crime, without discrimination, and not limited to EU citizens. This means that third country nationals and stateless persons who have been victims of crime on EU territory benefit from the rights granted by the Directive. The Directive does not, however, address the conditions of the residence of victims of crime in the territory of the Member States. Reporting a crime and participating in criminal proceedings do not create any self-standing rights regarding the stay or entry of the victim in the territory of the Union. The Commission is closely monitoring the implementation and application of Directive 2012/29/EU and it is now analysing whether the notified provisions are transposing the Directive completely and correctly, including if the Directive is applied regardless the resident status of the victim.

DG JUST stated that if no Member State is interested to prosecute the EC cannot intervene. The EC acts through providing resources for funding for research and awareness raising for organisations that are active in the field of international crimes and human rights violations. Regarding the recommendation on capacity-building and training for prosecutors and investigative judges, which is needed because of the complexity of criminal prosecutions in universal jurisdiction cases, the DG JUST representative stated that this is an area where the EC can contribute to address knowledge gaps of judiciary, for instance concerning sexual and gender-based violence. Such recommendations will be passed on to colleagues working on European judicial training.

The EC welcomes the initiative for a multilateral mutual legal assistance treaty. The initiative was already presented by the Member States in the Council the previous year and at that time, 18 Member States were supporting the initiative. The issue of common definitions of crimes is challenging but crucial for ensuring that legal assistance or extradition would actually and effectively take place, it was argued.

Akila Radhakrishnan stated that the Global Justice Center has been working in Myanmar since 2005 including around issues of sexual and gender-based violence that predated the transition to democracy. One important point for the legitimacy of setting up an IIIM there is that the capacity is not limited in scope solely to the recent crimes that occurred in the Rakhine state. Rather, it should be defined like the mandate of the Human Rights Council's fact-finding mission for Myanmar which also looks at potential crimes committed by the military in other ethnic states.

Having attended several discussions of the ILC and the UN GA's 6th Committee in New York, she argued that there was support from certain UN Member States for a limited referral of the question of universal jurisdiction to the ILC and that it was suggested that a focused legal analysis by the ILC could help to break the stalemate that exists at the moment in the 6th Committee.

She concluded by commending the ECCHR on their work to hold people, like Gina Haspel, accountable. It is important to show, she underlined, that no one is exempt from accountability of international crimes. The USA is a country that has committed a large range of such crimes across the world and until today there has been little to no justice or accountability. Thinking about legitimacy, it is important to show that this is not about less favoured countries or tackling heads of state in those countries, but it is about holding those in power accountable who have the ability to shield themselves.

Prof Ryngaert, referring to Lotte Leicht's comment, agreed that universal jurisdiction laws have been restricted over the past years in EU Member States. He argued that this also has major consequences for

EU external relations because universal jurisdiction can only be promoted internationally if Member States themselves have such a legislation.

Regarding customary international law, he explained that there has been very little protest initially concerning universal jurisdiction, but in the previous years there seems to be a lot of opposition against universal jurisdiction by a number of countries in the UN GA.

He stated that, regarding the EU human rights guidance, one of the issues is that not all the Member States exercise universal jurisdiction. Member States would only promote a human rights guidance internationally depending on how such a guidance would be formulated.

On the question of how a multilateral treaty on mutual legal assistance and extradition for the most serious crimes could be promoted by the EU, he mentioned a resolution, knowing that it would be difficult to adopt. He welcomed the fact that 18 Member States are interested or are actively supporting such a multilateral treaty.

The symbolic value of universal jurisdiction is something that has been emphasised quite often recently in the literature. With regard to Germany, this is an important point also with the large numbers of refugees or migrants. He argued that this contributes to the formation of an identity as European citizens, as a society which brandishes universal rights and welcomes migrants.

Referring to the expansion of the EU Genocide Network, he stated that in Latin America there are a number of networks, but none of them deals with international crimes. However, these networks could provide a starting point to build something more.

Prof Jeßberger elaborated on the three different functions of universal jurisdiction: to stimulate, to collect evidence and, what had not been mentioned so far, to exercise political pressure. When looking at recent and not so recent practice of international criminal justice (though not exercising universal jurisdiction in the strict sense), such as IIIM, ICC or the United Nations War Crimes Commission during the Second World War, he argued, all these three functions are demonstrated.

On the question whether universal jurisdiction is part of customary international law, Prof Jeßberger reiterated that his definition of universal jurisdiction is a quite narrow one. He agreed with Prof Ryngaert that there is a debate in the 6th Committee and in some parts of the literature, but generally it is firmly settled that universal jurisdiction is part of customary international law.

Regarding a possible ILC report, he stated that the reason why discussions stalled in the 6th Committee was because universal jurisdiction is a political issue and he was not sure if the ILC would be helpful in this respect.

The ICC, he stated, is in a similar crisis situation like universal jurisdiction with Burundi and the Philippines withdrawing and other states threatening to follow. The unanimous position of the EU Member States on the ICC was weakened with the crime of aggression being included.

On the perception of universal jurisdiction outside of Europe, Prof Jeßberger noted that local civil society plays a crucial role in this, for example, African civil society organisations advocating in African states. Similarly, he recalled, civil society has played a major role in universal jurisdiction cases in Europe. He underlined that it is necessary to support civil society that is active in the field.

On the question about the Habré case, **Daniel Fransen** answered that the legal system authorised such a case, so it is possible to have another case like this. He underlined that EU support in training of prosecutors, judges and law enforcement agencies would be beneficial for this goal. He added that the success of such cases also depends largely on the motivation of persons working on the case, such as NGOs, law enforcement, prosecutors and judges.

Regarding IIIM and other investigation commissions, Mr Fransen highlighted that there is the need for common standards or practices in order to ensure that evidence can be used around the world.

Matevž Pezdirc acknowledged Mr Fransen's comment regarding IIIM and added that this was one of the reasons why IIIM became part of the EU Genocide Network recently. The EU Genocide Network organised a workshop to discuss these cooperation modalities between national authorities and IIIM in order to already recognise requirements of each individual jurisdiction and certain conditions for effective work and sharing of information and evidence, collected by the IIIM.

He stated that sexual and gender-based violence is an extremely relevant issue. The EU Genocide Network has organised a one-day training on this topic in 2016 and also included it in its training programme that was developed together with the European judicial training network. However, more should be done in this respect, he argued. He underlined that judges are used to national cases and it is difficult for them to judge war crimes or crimes against humanity that have such a magnitude of victims and violence and such a different setting compared to domestic cases.

The EU Genocide Network had foreseen the development of an action plan for the EU and its Member States in its strategy in 2014. Recently, the EU Genocide Network disseminated a questionnaire to national authorities to see what kind of measures have been implemented.

Mr Pezdirc underlined that the discussions on a mutual legal assistance treaty have first started within the EU Genocide Network when states realised that there were very few tools to share evidence when it comes to genocide, war crimes and crimes against humanity in the absence of bilateral agreements. Consequently, the need arose for a comprehensive tool that would help states to cooperate beyond the EU.

He explained that the EU Genocide Network has been created by the Council of the EU and it is not envisaged to incorporate other regions within this forum. Norway and Switzerland are part of the Network as observers due to their closeness to the EU. The membership of USA and Canada as observers is based on their long-standing war crimes programme and on their experience from the Second World War. On the other side, the Network is very supportive of establishing similar networks in other regions and an initiative within the AU could offer a great partner for the EU Genocide Network. He acknowledged that in Africa there are currently a few initiatives, which could gravitate and expand to more states in the future.

Charlie Loudon welcomed the proposal for a Special Representative on International Humanitarian Law and International Justice. Moreover, he thanked the representative of the EC for her comments on victim's rights with which REDRESS agrees. Replying to Ms Lochbihler's question on the difficulties due to the political climate, he underlined that one method to address this issue is a greater focus on the rights of the victims. That would offer an opportunity to change the narrative from universal jurisdiction being portrayed as the countries of the global North imposing justice on the global South to what it should be, which is that universal jurisdiction provides access to justice to the victims of unimaginable harm.

On the case of Hissène Habré, Mr Loudon argued that one of the reasons why it was so successful was that the process was led by victims from the start of the prosecution and they had a very active role in the proceedings. With that in mind, there can be another Hissène Habré case if victims are placed at the centre of the process again.

He concluded by encouraging the EU both in its internal and external policy to promote the rights of victims in order to ensure that universal jurisdiction is more effective.

Andreas Schüller agreed with Mr Loudon in terms of putting the victims at the centre of any process that will lead to investigation and prosecution.

He underlined that it is always a complex endeavour to build such cases and to have a Special Representative would be highly important. Since there are many different levels involved, like the ICC, a potential UN mechanism, IIIM, such a position would be crucial to coordinate these efforts.

With regards to ECCHR's criminal complaint on USA torture in USA oversea detentions, which ECCHR's has been actively working on in the past ten years, there are still open investigations on Guantanamo in France but also in Germany. When the report by the Central Intelligence Agency on torture came out, the ECCHR has submitted further information on command structures. It is extremely important, Mr Schüller argued, to have equal standards. If there is suspicion of torture, then according to the United Nations Convention against torture there is an obligation for states to question and potentially arrest, extradite and prosecute. To enforce the absolute prohibition of torture, but also to give international criminal justice the legitimacy it needs to be demonstrated that no one is above the law and that there is no selectivity when it comes to perpetrators from powerful states vis-à-vis perpetrators who lost their powers or from less powerful states. Accountability is necessary, he highlighted, to also address critique of universal jurisdiction on all levels.

The ECCHR hopes that the ICC will soon start an investigation on the situation of Afghanistan, which might also include war crimes of torture by the USA. EU Member States could support the ICC also in concrete, investigative support as well as strong diplomatic support.

MEP Barbara Lochbihler concluded the debate by thanking all for their contributions. She confirmed that the Committees responsible would reflect upon the recommendations in their future work.

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Biographical notes

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

European Parliament

For the Subcommittee on Human Rights (DROI) in association with the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE)

WORKSHOP – Universal Jurisdiction and International Crimes: Constraints and best practices

Thursday, 28 June 2018, 09.00 – 11.00

Brussels, Paul-Henri Spaak building, room 4B001

Biographical notes

Daniel Fransen

After working as a defence lawyer at the Brussels Bar from 1989 to 1993 and subsequently as a lawyer in the public service at the Société régionale du Port de Bruxelles (1994 to 1995), Judge Fransen entered the judiciary, where he served as an investigating judge at the Brussels District Court for more than ten years. He dealt with serious and organised financial and economic crimes before specialising in international humanitarian law and terrorism cases. Until his appointment as the pre-trial judge of the Special Tribunal for Lebanon, Judge Fransen was dean of the investigating judges specialising in terrorism in Belgium (2006 to 2009). He has participated in many international conferences and written several publications on terrorism.

Florian Jeßberger

Florian Jeßberger is Professor of Law at the Faculty of Law, Universität Hamburg, where he holds the Chair in Criminal Law, Criminal Procedure, International Criminal Law, and Modern Legal History and serves as the Vice Dean for Research & International Affairs. Before joining Universität Hamburg in 2010, he was the Lichtenberg Professor of International and Comparative Criminal Law at the Faculty of Law, Humboldt-Universität zu Berlin. He has been a visiting professor or scholar at a number of universities, including the University of Ferrara (Cattedra Letizia Gianformaggio, 2016), the China University of Political Science and Law (Beijing), the University of Naples (Feodor Lynen Fellow, 2005-2006), and the University of California at Berkeley, and serves on the Advisory Board of the European Center for Constitutional and Human Rights. Jeßberger's research focuses on substantive criminal law including its international, comparative, and historical dimensions. He is a co-editor of the Journal of International Criminal Justice (Oxford University

Press), and a co-author of the 'Principles of International Criminal Law' published by Oxford University Press (4th ed. forthcoming).

Charlie Loudon

Charlie Loudon represents REDRESS and its clients in cases before international courts and tribunals, including the African human rights bodies, the European Court of Human Rights and the UN treaty bodies. He also co-ordinates REDRESS's work at the UN on strengthening international rules against torture. Charlie is a UK-qualified solicitor advocate. He practised for six years at an international law firm, where he acted in disputes against foreign states. He previously spent time at the International Criminal Tribunal for Rwanda and the Ghana Center for Democratic Development. Charlie studied Law at Oxford (BA) and International Law and African Politics at the London School of Oriental and African Studies (MA).

Matevž Pezdirc

Matevž Pezdirc has been with Eurojust since July 2011 and was appointed Head of the Secretariat to the European Network of contact points for the investigation and prosecution of genocide, crimes against humanity and war crimes in May 2013. Before he joined Eurojust, Mr Pezdirc was the Head of the Criminal Law Unit at the Department for International Cooperation and International Legal Assistance of the Ministry of Justice in Slovenia. Prior to this, he served as a Counsellor for Justice and Home Affairs at the Slovenian Permanent Representation in Brussels, worked with the Constitutional Court in Slovenia, and with the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. He holds a Master's Degree in Public International Law, with International Criminal Law Specialisation, from Leiden University.

Akila Radhakrishnan

Akila Radhakrishnan is the President of the Global Justice Center. She directs GJC's strategies and efforts to establish legal precedents protecting human rights and ensuring gender equality. In 2010, she helped to conceptualize GJC's August 12th Campaign to ensure access to abortion services for girls and women raped in war as a matter of right and has since led legal and advocacy efforts on the project. Akila also leads GJC's Gender and Genocide project, including to ensure justice and accountability for the Yazidi genocide and is a key member of GJC's Burma project team. In her role, Akila has authored numerous shadow reports, legal briefs and advocacy documents and provided legal expertise to domestic and international stakeholders and policymakers, including the International Criminal Court, the United Nations, the European Union and state governments. Akila has been published widely on issues of international law, gender equality and human rights, including in the New York Times, Time, The Atlantic, Women Under Siege, Ms. Magazine, and Rewire. Prior to the Global Justice Center, she has worked at the International Criminal Tribunal for the Former Yugoslavia, DPK Consulting and Drinker, Biddle & Reath, LLP. Akila received her J.D. with a concentration in international law from the University of California, Hastings and holds a B.A. in Political Science and Art History from the University of California, Davis.

Cedric Ryngaert

Cedric Ryngaert (1978) is professor of public international law and programme leader of the master public international law. He studied law at Leuven University (2001) and obtained his PhD from the same university in 2007. He subsequently became a lecturer at Utrecht University. Between 2010 and 2013, he carried out research concerning non-state actors on the basis of a subsidy provided by NWO (VENI). Since November 2013, he is heading two research projects concerning jurisdiction, on the basis of subsidies provided by NWO (VIDI) and the European Research Council (ERC Starting Grant). In these projects, he examines to what extent states and regional organizations can apply their own legislation beyond their borders with a view to realizing international values. He works on these projects together with 7 PhD students.

Andreas Schüller

Andreas Schüller joined ECCHR in 2009 and directs the International Crimes and Accountability Program. He graduated from law school in Trier, Germany, studied in Orléans (France), holds a LL.M. advanced degree from Leiden University, Netherlands, in Public International Law and International Criminal Law and is admitted to the Berlin bar. Andreas Schüller works on US torture and drone strikes, UK torture in Iraq, war crimes in Sri Lanka and Syria as well as further international crimes cases. He publishes and lectures on international criminal law and human rights enforcement.

Part B:

Briefing: Universal jurisdiction and international crimes - constraints and best practices

BRIEFING

Universal Jurisdiction and international crimes – constraints and best practices

Author: Cedric RYNGAERT

ABSTRACT

This briefing examines the role which the EU has played, and could play with respect to universal jurisdiction, in particular in its external relations. Although universal jurisdiction is exercised by EU Member States, it also represents an EU value which the EU may want to promote in its relations with the wider world, by means of a variety of mechanisms, including funding, capacity-building, and knowledge-sharing. The EU should nevertheless embed its support for Universal Jurisdiction in a wider international accountability strategy. In this strategy, the EU should also support international crimes prosecutions in the state with territorial jurisdiction, as well as enhanced mechanisms of international cooperation, consultation, and legal assistance with respect to international crimes.

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1 Introductory remarks

This briefing outlines the recent international debates regarding the concept of universal jurisdiction and addresses the EU's international engagement. It proceeds in four parts. The first part defines universal jurisdiction and summarises its different functions. The second part discusses the EU's position on universal jurisdiction. The third part gives an overview of the main developments in the recent international political debate (in particular at the UN - Sixth Committee of the UNGA) about the definition and scope of universal jurisdiction. The fourth and final part offers recommendations on how the EU could contribute to the international debate on universal jurisdiction and promote the concept in its external relations.

2 Nature and rationale(s) of universal jurisdiction

Universal jurisdiction (UJ) is jurisdiction exercised by a state on the basis of the gravity of the offense rather than on the basis of a territorial, personality, or security nexus of the offense with the state. UJ is a form of extraterritorial jurisdiction in that it is exercised over events which have not taken place on the state's territory. Other forms of extraterritorial jurisdiction are jurisdiction based on the nationality or personality principle (exercised over offences committed abroad by or against a state's nationals), or jurisdiction based on the protective principle (exercised over offences committed abroad against the security and political independence of the state). There is no hierarchy in the principles of jurisdiction. This means that, as a matter of international law, states exercising UJ need not defer to states exercising territorial jurisdiction. Nevertheless, there are good policy reasons for states exercising UJ to defer to good faith investigative and prosecutorial efforts of state with territorial jurisdiction, and for the former to only exercise complementary (or subsidiary) jurisdiction where there is a risk of impunity (see further sections 4 and 5) (Ryngaert, 2008).

The exercise of UJ by states should be distinguished from the jurisdiction exercised by the International Criminal Court (ICC). The ICC does not exercise universal jurisdiction. In principle, it has jurisdiction over crimes committed on the territory of, or by a national of a state party to the Rome Statute establishing the ICC (Article 12(2) ICC Statute), although exceptionally the UN Security Council can refer a situation committed on the territory of (or by a national of) a state not party to the ICC Statute (Article 13(b) ICC Statute). Under the complementarity principle (Article 17 ICC Statute), the ICC defers to good faith efforts of states, which may include states exercising universal jurisdiction[6].

A distinction is made between UJ in criminal matters, and UJ in civil (tort) matters. In this briefing, only universal criminal jurisdiction will be examined.

The international legal ground of universal criminal jurisdiction can be found in either treaties or (unwritten) customary international law. A large number of treaties provides for 'qualified' UJ on the basis of an *aut dedere aut judicare* clause[7]. This clause requires that a Contracting State exercise jurisdiction if it does not extradite the suspect, which in turn presumes the territorial presence of the suspect. It is not fully clear whether UJ can be exercised on the basis of customary international law. Still, some state criminal codes provide for UJ over crimes of genocide and crimes against humanity, the prosecution of which is not based on a treaty. A report by Amnesty International documented that a large number of national criminal codes provided for some form of UJ (Amnesty International, 2012, p. 2)[8]. It remains that very few cases have

[6] Article 17(1)(a) ICC Statute provides that 'the Court shall determine that a case is inadmissible where … [t]he case is being investigated or prosecuted by a State which has jurisdiction over it'. This logically includes a state which has universal jurisdiction.
[7] See regarding war crimes: Arts. 49, 50, 129, and 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions 1949, entry into force 21 October 1950, 75 UNTS 31, 85, 135, 287 and 1977 Additional Protocol 1. See regarding torture: UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entry into force 26 June 1987, 1465 UNTS 85.
[8] 163 of the 193 UN Member States 'can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law'.

been brought under the universality principle (Langer, see also Hovell p. 8)[9]. There are or could be different rationales for the existence and actual exercise of UJ. For a number of offences, the rationale lies in the protection of the joint interests of the community of *states*. This applies in particular to piracy and terrorist offenses, which are typically committed by non-state actors and threaten (security) interests of states. When one state exercises UJ over a presumed perpetrator of such offenses, it confronts a threat posed to all states. For other offences, the rationale lies in the protection of international community values rather than state interests *stricto sensu*. These are the 'core crimes' against international law which shock the conscience of mankind and have a strong relationship with human rights: genocide, war crimes, crimes against humanity.[10] This briefing mainly addresses these offenses. When states prosecute presumed perpetrators of core crimes, they can be considered to act as 'agents of the international community' (*AG v Eichmann*, para 12). In doing so, they provide accountability for international crimes and send a signal that (future) atrocities will not go unpunished (prevention and deterrence function of UJ). Also, the exercise of UJ may strengthen the rule of law abroad in that 'complementary' prosecutions by bystander states puts pressure on states with territorial jurisdiction to create an adequate legal framework for the prosecution of core crimes and to initiate good faith investigations, if they do not want to see territorial crimes adjudicated abroad (see further on complementarity: section 5.1),

The idealistic 'global enforcer' paradigm of the universality principle may not be borne out by reality, however. In practice, the exercise of UJ has been severely conditioned. States apply several legal limitations, such as the requirements that the presumed perpetrator be present, that deference be paid to a more closely connected state, that only higher law-enforcement agencies can initiate a prosecution, that a prosecution can only be brought insofar as mandated by international law, and that international immunities be respected (ICJ, *Arrest Warrant*). When exercising prosecutorial discretion, state prosecutors may be guided by parochial rather than cosmopolitan considerations and focus their enforcement efforts on the denial of territorial 'safe havens' to presumed perpetrators of core crimes (Langer). By applying these (domestic and international) legal as well as extra-legal limitations, states may prevent diplomatic tension. Such tension is not unlikely to arise bearing in mind that core crimes are often, although not exclusively, committed by foreign state actors. Also, states may want to make the most efficient use of scarce prosecutorial resources, and on that ground focus on territorial rather than extraterritorial crime.

When national prosecutors exercise UJ, in most cases, territorially present victim communities (of the diaspora) have played a major role in building cases, gathering evidence, and convincing prosecutors to take up cases. The rationale of UJ may then ultimately lie in offering a remedy to the victims of core crimes (remedy understood broadly, as including a criminal conviction of the offender) (Hovell). Limiting the exercise of UJ to serve the interests of diaspora communities has been normatively justified on the ground that such jurisdiction assists in the national integration of these communities, which may salute their new home state's seriousness to address the impunity of, and provide accountability for the crimes which befell their community (Mégret). From that perspective, the exercise of UJ in a given case may represent a national 'constitutional' moment (Mann). When prosecutors and courts exercise UJ, they reconstitute a territorially bounded community composed of members with different ethnic and national backgrounds. In particular, they demonstrate the state's hospitality to newly arrived migrants who have gone through hard times (Ryngaert, 2018). Translating this theoretical argument into more practical terms, this means that the EU may want to support Member States' exercise of UJ over core crimes perpetrated in the context of current war zones, such as Syria, Iraq, Libya and Afghanistan. A large number of citizens of these

[9] According to Hovell's survey, 'there have been a total of 52 completed universal jurisdiction trials world-wide since the *Eichmann* trial in 1961', and '[u]niversal jurisdiction trials have run to completion in only 16 states, 15 of which are in the 'Western European and Others' regional grouping, hardly reflective of a representative international practice' (Hovell, p. 8).

[10] See also European Parliament resolution of 4 July 2017 on addressing human rights violations in the context of war crimes, and crimes against humanity, including genocide (2016/2239(INI)), available http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0288+0+DOC+XML+V0//EN&language=EN (accessed 25 May 2018).

countries, including perpetrators of core crimes, have fled to the EU, have become residents in the EU, or even obtained refugee status. The societal integration of refugee communities from these countries could be enhanced if Member States prosecute crimes committed against these communities, especially if the alleged perpetrator is still in their midst, on EU territory.

3 The European Union and universal jurisdiction

It appears legitimate for the EU to actively disseminate the universality principle in its external relations. This would be in keeping with Article 3(5) of the Treaty on European Union (TEU), which provides that '[i]n its relations with the wider world, the Union shall uphold and promote its values', and that it shall contribute to, *inter alia*, 'the protection of human rights', and 'the strict observance and the development of international law'. It is also in keeping with the general principles of the EU's external action under Article 21(1) TEU, pursuant to which '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. In the specific context of combating impunity and bringing about accountability in respect of core crimes, it is recalled that the European Parliament, in the aforementioned 2017 Resolution, has (re)affirmed that 'it should be of paramount importance for the EU to address and hold accountable those responsible for severe violations of human rights reaching the gravity threshold of crimes against humanity and genocide and grave breaches of international humanitarian law reaching the level of war crimes' (European Parliament resolution 2017, para 1).

It remains nevertheless that UJ is not exercised by the EU, but by the Member States. The EU does not have a particular competence to directly regulate the exercise of UJ by the Member States. Still, *per* Article 82 TFEU, the EU has a general competence with respect to judicial cooperation in criminal matters based on the principle of mutual recognition of judgments and judicial decisions, which includes the approximation of the laws and regulations of the Member States in a number of areas[11]. In criminal matters, the EU has not exercised a legislative or regulatory competence regarding universal jurisdiction, but it has coordinated and facilitated the exercise of such jurisdiction by its Member States via Eurojust[12]. Eurojust coordinates the EU Genocide Network, and, in that context, adopted a strategy 'to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States' on 30 October 2014 (Eurojust). Although not strictly a position on UJ, the Strategy concerns how EU Member States seek to combat impunity for certain international crimes by, *inter alia*, Member States legislating to place these crimes under UJ in their domestic legal systems. It provides guidance on what measures EU

[11] Article 83 TFEU lists the areas of particularly serious crime with a cross-border dimension that lend themselves to the adoption of EU directives with the ordinary legislative procedure. This provision does not include core crimes, however. See for a call to amend Article 83 TFEU to include them: European Parliament resolution of 4 July 2017 on addressing human rights violations in the context of war crimes, and crimes against humanity, including genocide (2016/2239(INI)), para. 31.
Per Article 81 TFEU, the EU also has a competence regarding judicial cooperation in civil matters. On the basis of the latter provision, the EU has addressed the issue of jurisdiction, in EU Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 351/1 (2012). The Regulation does not provide for universal civil jurisdiction. Nor does it provide for so-called 'forum of necessity'-based jurisdiction, i.e., quasi-universal jurisdiction based on some (relatively tenuous) nexus with the forum state, exercised to avert a denial of justice. In 2018, the Grand Chamber of the European Court of Human Rights held that a Contracting Party to the European Convention on Human Rights (ECHR) does not violate Article 6 ECHR when it gives a restrictive interpretation to its forum of necessity provision (Grand Chamber of the European Court of Human Rights, Nait-Liman v Switzerland, Application no. 51357/07, 15 March 2018).

[12] Pursuant to Article 85(1) of the Treaty on the Functioning of the EU, 'Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol'.

institutions and Member States should take to support national authorities in combating impunity, holding perpetrators to account and delivering justice to victims (Eurojust), including prosecuting 'core international crimes'. In so doing, the EU and its members ensure that the EU does not become a 'safe haven' for international criminals (see above section 2).

It is of note that the European Parliament has specifically listed universal jurisdiction as a mechanism to tackle impunity in the 2017 Resolution, highlighting 'its importance for the effectiveness and good functioning of the international criminal justice system, and calling on the Member States 'to prosecute war crimes and crimes against humanity in their national jurisdictions, including when those crimes have been committed in third countries or by third-country national' (European Parliament resolution 2017, para 52).

The EU Council had, in an earlier Common Position on the ICC, highlighted the role of Member States in general in combating impunity for serious crimes, while not singling out universal jurisdiction in particular, stating that '[t]he serious crimes within the jurisdiction of the Court are of concern for all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof' (EU Council Common Position 2001, preambular para 4).

The European Commission, for its part, has also taken an interest in in the exercise of UJ. In 2012, in an *amicus curiae* brief filed in the *Kiobel* litigation before the US Supreme Court (which concerned civil rather than criminal jurisdiction), the Commission took the view that core crimes are amenable to both universal criminal and universal civil jurisdiction[13]. In the specific context of the EU's external relations, in 2016, the European Commission called on Croatia not to block Serbia's accession negotiations with the EU, in the context of Serbia having legislated to prosecute Yugoslav war criminals under UJ (Milekic). The Commission opined that Serbia could validly prosecute war crimes under the principle of UJ, and dismissed Croatia's argument that Serbia's assertion of UJ would be contrary to 'European standards' (Radovic).

4 The contested nature of universal jurisdiction: the international debate since 2009 and the position of the EU

While, *per* the TEU, it may be legitimate for the EU to promote the universality principle as a European value or principle, the EU should remain aware of its internationally contested nature. In particular, non-European states may take issue with the very existence of UJ, notably under customary international law, as well as with the way it is exercised. The EU has taken seriously concerns over the external legitimacy of UJ, in particular those voiced by the African Union (AU) and its Member States, by establishing a joint AU/EU Expert Group on the Principle of UJ, which submitted a final report in 2009 (AU/EU Expert Group). African states' concerns pertain to a perception that they 'have been singularly targeted', that 'the exercise of UJ by European states is politically selective against them', that prosecutions under the universality principle 'tend to undermine the dignity of the state officials concerned and put at risk friendly relations between sovereign states', and that 'indictments issued by European states against officials of African states' run counter to 'the sovereign equality and independence of states', and evoke 'memories of colonialism' (AU/EU Expert Group, pp. 35-36). The EU-appointed independent experts, however, considered the exercise of UJ as 'an essential weapon in the fight against impunity for serious crimes of international concern' and 'an important measure of last resort which is necessary to ensure that perpetrators of serious crimes of international concern do not go unpunished whenever the state where the crime has allegedly

[13] See United States Supreme Court, *Kiobel v. Royal Dutch Petroleum*, 'Brief of the European Commission on Behalf of the European Union as *amicus curiae* in support of neither party', 13 June 2012, available https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neither_amcu_eu.authcheckdam.pdf (accessed on 5 May 2018).

been committed and the state(s) of nationality of the suspect and victims are manifestly unwilling or unable to prosecute' (AU/EU Expert Group, p. 37).

While the AU and EU experts agreed on a number of recommendations (AU/EU Expert Group, pp. 40-45), the issue was not put to rest. Following the submission of the report, the AU and its Member States moved the discussion on UJ (especially as exercised by European states) to the UN General Assembly (UNGA). The Sixth Committee of the UNGA has included 'The scope and application of the principle of UJ' as an agenda item since its 64th session in 2009 (UNGA Sixth Committee, 64th session). To date, the matter has been discussed at nine sessions. After each session, a resolution is passed that invites states and relevant observers to submit information and observations on the scope and application of UJ to the General Assembly. The Secretary General then compiles a report on the replies received, which is released and discussed at the following session. Since the 64th session the possibility of requesting a report on UJ from the International Law Commission (ILC) has been raised, but has not been executed. The main reason for this seems to be that the delegates still consider it premature to refer the matter to the ILC (see *e.g.* comments made at UNGA Sixth Committee, 66th session).

Throughout the Sixth Committee's sessions, there has been continued emphasis on the exceptional character of using UJ, meaning that it should be seen as a measure of last resort. Further, delegates in the latest (72nd) session noted that UJ was only one element out of a number of complementary deterrent mechanisms against heinous crimes. In line with this, some delegates have stressed their concern over abuse of the principle of UJ and the need for it to be applied in accordance with the UN Charter as well as other international legal norms. A point of contention that has come up in a number of sessions (including the 71st and 69th session) is the relationship between asserting UJ and possessing territorial jurisdiction. Some delegates argue that presence of the accused in the territory of the State asserting UJ should be a precondition to its application. The presence requirement may be key to avoid diplomatic tension arising from the exercise of UJ. There have also been discussions over a requirement of consultation or consent from the State possessing territorial jurisdiction for another State to successfully claim UJ. Delegates emphasised that the scope of UJ could be drawn from customary international law and from specific treaties that concern particularly heinous crimes. However, no consensus emerged regarding what crimes fall within the scope of UJ under customary international law, apart from the crime of piracy (UNGA Sixth Committee, 72nd session). Throughout the debate, the EU has taken the position that crimes subject to the jurisdiction of the ICC are also amenable to UJ under customary international law (Report of the UN Secretary-General, para 49). There is an ongoing debate in the Sixth Committee whether it is advisable to clearly identify the crimes that fall under UJ or whether an exhaustive list should be cautioned against.

By and large, the debate in the Sixth Committee has stalled, and similar arguments are repeated over and over again. Nevertheless, the discussions have been considered valuable insofar as they clarified 'that there are indeed serious questions not only concerning state practice, but also with regard to *opinio juris*' with respect to UJ (Mennecke, p. 35), while at the same time confirming the existence of the principle of UJ (even if doubts remain regarding its scope and modalities of application) (Mennecke, p. 36)[14].

[14] *E.g.*, AU submission to the UNSG report 2011, AU submission to the UN Secretary- General's report, 'The Scope and Application of the Principle of UJ', UN Doc. A/ 66/ 93 (20 June 2011), para. 108. See regarding *aut dedere aut judicare*-based jurisdiction also AU/EU Expert Group, report, R4, p. 41 ('Those Member States of the AU and EU which have persons suspected of serious crimes of international concern within their custody or territory should promptly institute criminal proceedings against these persons, unless they decide to extradite them …').

5 Recommendations on EU external action with respect to universal jurisdiction

5.1 EU support for universal jurisdiction

In spite of the sometimes acrimonious debates in the UNGA, the exercise of UJ is not an exclusively European phenomenon. 'Extraordinary African Chambers' established in the courts of Senegal have recently convicted the former president of Chad for international crimes, on the basis of UJ (Extraordinary African Chambers press release)[15]. The South African Constitutional Court upheld the legality of UJ in a landmark judgment in the 2014 Zimbabwe case (National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another), while Argentinean magistrates are seeking to bring justice, under UJ, for the victims of Spain's Franco regime (Benevento, see also Delicado Palacios for recent reports)[16]. In light of EU values and the specific expertise gathered regarding international crimes gathered by European prosecutors and courts, the EU may want to support fledgling UJ efforts in non-EU states.

Regarding UJ, the EU may want to support the exercise of UJ over crimes committed in war zones (Syria, Afghanistan, etc.), especially when victims of these crimes have sought and found refuge in third states (see above section 2). The EU may also want to support UJ-based prosecutions even in the midst of armed conflict, in case a more closely connected state proves patently unwilling to prosecute (see also below section 5.3). It may highlight the accused's territorial presence as a requirement for the initiation of UJ prosecutions, while nevertheless encouraging prosecutions when the accused's presence can be anticipated, or when it is likely that the accused will be prosecuted elsewhere (in which case such prosecutions mainly serve an evidence-gathering function).

5.2 A broader EU anti-impunity strategy

More important than just promoting UJ is ensuring that international crimes do not go unpunished. Punishment could be meted out on the basis of UJ, but also, and even preferably, on the basis of less controversial principles, such as territoriality and nationality. Accordingly, the EU may want to pursue a more integrated anti-impunity strategy in its external relations rather than promoting UJ as a stand-alone issue. An aspect of the strategy should however be the use of UJ as a last resort. EU efforts in this respect could build on earlier EU work regarding the implementation of the Rome Statute of the International

[15] Extraordinary African Chambers, 'Press Release Final appeal decision in the Hissein Habré case before the EAC', 27 April 2017, available http://forumchambresafricaines.org/press-release-final-appeal-decision-in-the-hissein-habre-case-before-the-eac/?lang=en (accessed on 5 May 2018). Habré, the former dictator of Chad, was brought to justice in Senegal (where he has sought refuge), in the wake of a judgment of the International Court of Justice which had held Senegal internationally responsible for failing to either prosecute or extradite Habré (International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgment, ICJ Reports 2012, p. 422). After the judgment, the 'Extraordinary African Chambers' were established in the Senegal Courts. Habré was later convicted by these Chambers.

[16] This was last reported in international news media in August 2017. An investigation into the death of Federico Garcia Lorca commenced in August 2016 by Argentinian judge, Maria Servini de Cubria. There have however been no further reports on the progress of this investigation, and further to this a request to extradite the former Minister of the Interior under the Franco regime was overturned by a court in Buenos Aires in 2017. Gina Benevento speculates that this de-escalation of Argentine judicial efforts can be attributed to the change of government in Argentina from left-wing to centre-right. See Gina Benevento, 'Will Spain's 'disappeared' find justice in Argentina?' *Al Jazeera* (30 August 2017), available https://www.aljazeera.com/indepth/opinion/2017/08/spain-disappeared-find-justice-argentina-170810110327087.html (accessed on 4 May 2018). See also in the Spanish press for recent developments by judge Maria Servini de Cubria in continuing investigations and prosecutions: Ana Delicado Palacios, 'Argentina vuelve a llenar las calles en el 42 aniversario del golpe de Estado' *Público* (Buenos Aires, 25 March 2018), available http://www.publico.es/internacional/argentina-vuelve-llenar-calles-42-aniversario-del-golpe.html (accessed on 4 May 2018).

Criminal Court (see EU Council Decision 2011/168/CFSP, Article 2.3).[17] They could include advising interested states on how to draft UJ legislation and assisting them with UJ-based prosecutions.

In its 2006 UJ report, Amnesty International (AI) wrote that '[t]he EU has played a leading role in encouraging states to institutionalise their commitment to fight impunity for international crimes' (Amnesty International, 2006). It is not fully clear, however, what this 'leading role' precisely implied in AI's view, apart from encouraging States to implement the Rome Statute, and from promoting human rights and democracy in its external relations. In the framework of the latter, the EU has not specifically named UJ, but it has emphasised the importance of transitional justice (of which UJ could possibly be an aspect) as a means to bring about accountability (European Commission and EU High Representative).[18] The first accountability priority for the EU should in any event be to ensure that the state which is most closely connected to an international crime, rather than a bystander state exercising UJ, assumes its responsibility to investigate and prosecute the crime. In this respect, the EU may want to develop, or at least support a positive complementarity strategy in inter-state relations, possibly in an EU Human Rights Guideline[19]. In addition, to facilitate international crimes prosecutions, whether by EU Member States or states outside the EU, the EU may want to support institutionalised arrangements for international cooperation and consultation regarding international crimes prosecutions. Both recommendations are fleshed out in sections 5.3 and 5.4.

5.3 EU support for positive complementarity

The aforementioned AU/EU Expert Group recommended that '[i]n prosecuting serious crimes of international concern, states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community', adding that 'it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found' (AU/EU Expert Group, p. 42). This recommendation is based on the notion of 'horizontal' complementarity, pursuant to which a bystander state exercising UJ defers to good faith investigative and prosecutorial efforts on the part of a more closely connected state, in particular the state on whose territory has been committed ('state with territorial jurisdiction')[20]. While there is no hierarchy of jurisdictional principles in inter-state relations and, accordingly, no duty to apply horizontal complementarity, it is nevertheless a good practice to allow and enable the state with territorial jurisdiction to act in respect of international crimes, for the reasons mentioned above. Accordingly, in its relations with the wider world, the EU should emphasise that its Member States will not take up or pursue a case under UJ when made

[17] 'The Member States shall share with all interested States their own experiences on the issues related to the implementation of the Rome Statute and, when appropriate, provide other forms of support to that objective. The Member States shall contribute, when requested, with technical and, where appropriate, financial assistance to the legislative work needed for the participation in and implementation of the Rome Statute by third States. The Union may, when requested, also contribute with such assistance.'

[18] See also the EU's Policy Framework on support to transitional justice, available at http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf (accessed on 30 July 2018).

[19] EU Human Rights Guidelines allow for a strategic and coordinated approach to selected human rights issues in the EU and the Member States' external relations. None of the existing Guidelines pertains to accountability for international crimes, however. See for an overview: https://eeas.europa.eu/topics/human-rights-democracy/6987/eu-human-rights-guidelines_en (accessed on 8 June 2018).

[20] This notion mirrors the notion of vertical complementarity, guiding the admissibility determinations of the International Criminal Court. Cf. Article 17 Rome Statute of the International Criminal Court. See on horizontal complementarity: Ryngaert, C, 'Horizontal Complementarity' in Stahn, C and El Zeidy, M (eds), *The International Criminal Court and Complementarity*, Cambridge, Cambridge University Press, 2011, pp. 855-887.

aware of proper accountability efforts carried out by the state with territorial jurisdiction, and that UJ is only a last resort option when no other accountability options are available.

Complementarity can only operate well if it is part of a positive complementarity strategy, pursuant to which UJ states cooperate with state with territorial jurisdictions, states of nationality, or states belonging to the region where the crimes have been committed, to ensure that the latter prosecute international crimes. Thus, as UJ is only a last resort option if all else has failed, the EU may want to support prosecutions and trials regarding international crimes in more closely connected states. It could do so by making funds available (Eurojust, p. 7)[21], and by encouraging states to share best practices in the prosecution of international crimes, e.g., the establishment of specialised units regarding international crimes prosecutions within the police and office of the prosecutor, enhanced cooperation between immigration and prosecutorial authorities, or the establishment of joint investigative teams responsible for the prosecution of international crimes which have a nexus with multiple states). One should bear in mind in this respect that without the financial support of, inter alia, the EU, the UJ trial of Hissène Habré in Senegal may not have materialised[22]. Logistical support offered by the EU and its Member States could bridge the gap between the mere contemplation of an international crimes prosecution by a non-EU state, and its actual realisation[23].

Support, including funding, for international crimes prosecutions, could take place in the context of strategic partnerships between EU and third countries or regions (AU/EU Expert Group, p. 45)[24]. It could legally be based on the EU's competence for development cooperation pursuant to Article 208 of the TFEU. Moreover, on the basis of Article 212 TFEU, the EU may also 'carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries'. As a joint Commission/EEAS staff working document has pointed out, 'sustainable development may not be achieved in societies in which impunity prevails for individuals who have perpetrated genocide, crimes against humanity, or war crimes on a widespread or systematic scale' (EU Joint Staff Working Document on Advancing the Principle of Complementarity, p. 28). On that basis (albeit in the context of ICC complementarity rather than horizontal complementarity), the EU has developed a toolkit for setting up relevant projects in the fields of rule of law and criminal justice. To limit overlap and boost efficiency, adequate engagement and coordination with other actors, including donors, are obviously desirable (EU Joint Staff Working Document on Advancing the Principle of Complementarity, p. 29). In case foreign states prove to be uncooperative and all positive incentives are exhausted, the EU may contemplate the taking of diplomatic and economic sanctions against these states[25]. Whether sanctions will turn out to be effective obviously remains to be seen. The effectiveness of EU sanctions

[21] Eurojust calls on EU institutions to recognise that 'funding is an essential means of enabling national authorities and civil society to effectively coordinate their fight against impunity; develop the understanding of international criminal law and international humanitarian law; and increase public awareness of the necessity of the fight against impunity'.

[22] In 2014, the EU contributed 500,000 euro to an association of Chadian victims (APTDH) for work regarding the trial, on the basis of a proposal drafted by Human Rights Watch. Brody, R, 'Victims Bring a Dictator to Justice. The Case of Hissène Habré', Human Rights Watch, 21 June 2016, available https://www.hrw.org/news/2016/06/21/victims-bring-dictator-justice (accessed on 5 May 2018).

[23] Cf. AU/EU Expert Group, report, nr. 44, p. 39 ('There seems to be a strength of feeling among EU Member States that African statements of concern over the assertion of universal jurisdiction by national courts of EU Member States need to be backed by a real willingness on the part of African states to prosecute the relevant crimes themselves. It is worth recalling that EU Member States have already offered their logistical support for the realisation of efforts to this end.')

[24] AU/EU Expert Group, report, R17, p. 45 ('The relevant EU bodies should assist AU Member States in capacity-building in legal matters relating to serious crimes of international concern, for example within the framework of the Africa-EU Strategic Partnership. Such matters might include training in the investigation and prosecution of mass crimes, the protection of witnesses, the use of appropriate forensic methods, and so on.')

[25] See also European Parliament Resolution 2017, para. 25 (calling 'for the EU and its Member States to use all means towards third countries, including considering sanctions – in particular in the case of countries with situations under investigation by the ICC and countries under preliminary examination by the ICC – in order to bolster their political will to fully cooperate and to support their capacity to launch national proceedings on atrocity crimes').

ultimately depends on EU political and economic leverage *vis-à-vis* the target country. Sanctions, and various pressure mechanisms more generally, are more likely to be effective with respect to countries interested in an EU accession or association agreement[26], or countries which are economically dependent on EU markets. Human rights clauses in association agreements or free trade agreements concluded between the EU and third countries could possibly be triggered to suspend parts of the agreement in case of failure to prosecute international crimes (see for a model non-execution clause for such agreements: Bartels, p. 36). Arguably, there is an international duty to prosecute international crimes (Jackson). Failure to discharge this duty may result in a violation of victims' right to a remedy, which includes the right to have gross human rights violations criminally investigated and prosecuted (van der Wilt and Lyngdorf). That being, suspending trade agreements can only be the ultimate remedy, as it is a nuclear option which may compromise the enjoyment of human rights by the foreign country's population and even violate the EU's 'extraterritorial' human rights obligations *vis-à-vis* these people (on extraterritorial human rights obligations and sanctions: Craven). Targeted sanctions against individuals who committed or are complicit in international crimes, or who shield criminals from responsibility, may be preferable.[27]

Support needs not just be provided on a country-specific base but could involve an entire region. In that context, replication of the aforementioned EU Genocide Network outside the EU can be considered. As Eurojust pointed out, the EU Genocide Network 'has already served as a model for the development of an African Union network of specialised prosecutors on core international crimes, and with sufficient support may continue to act as a role model for future regional networks' (Eurojust, p. 26)[28]. The development of this network and its state of play, including activities, are not fully clear. Apparently, some fragmented developments, including one in East Africa, are currently taking place by various organisations.[29]The EU Genocide Network could also be replicated in Latin America. As of yet, no institutionalised, network-based cooperation regarding core crimes exists between Latin American countries, although human rights violations have been prosecuted in Latin America (Michel and Sikkink)[30]. Future research, involving

[26] *E.g.*, the Netherlands initially blocked the conclusion of a Stabilization and Association Agreement between the EU and Serbia as long as Serbia failed to adequately cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY). The Netherlands only ratified this agreement after Ratko Mladić and Goran Hadžić were arrested and surrendered to the ICTY in 2011. See Wet van 26 januari 2012, houdende goedkeuring van de op 29 april 2008 te Luxemburg totstandgekomen Stabilisatie- en associatieovereenkomst tussen de Europese Gemeenschappen en hun lidstaten, enerzijds, en de Republiek Servië, anderzijds, met Bijlagen en Protocollen (Trb. 2008, 153)

[27] The EU legal basis for sanctions ('restrictive measures') is Article 215 TFEU, which provides for sanctions against one or more third countries, and against natural or legal persons and groups or non-State entities.

[28] See also Conclusions of the 16th Meeting of the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes 21-22 May 2014, The Hague, nr. 2 ('The Members of the Network welcome the activities of the African Union Commission to establish a network of prosecutors, specialising in core international crimes. Investigation and prosecution of core international crimes present similar challenges to all practitioners; therefore it is important to share best practices, experiences, knowledge, know-how as well as lessons learned. The Network expresses its support for this initiative and its hope for close cooperation between the two Networks and their Secretariats in the future, including in the form of joint meetings. The Network expresses its willingness to engage in continued dialogue with the African Union Commission Secretariat with a view to supporting the creation of the Network.').

[29] Statement by Mr Pezdirc, Head of the Secretariat of the EU Genocide Network, at the workshop on universal jurisdiction held at the European Parliament on 28 June 2018.

[30] While there is no specific Latin American network on core crimes, such a network could possibly build on existing networks and initiatives addressing other forms of (organised) criminality: (1) the Meetings of Ministers of Justice or Other Ministers or Attorneys General of the Americas (*i.e.*, a forum within the system of the Organization of American States, which meets every two years, and has a mandate regarding judicial cooperation in criminal matters; cf. http://www.oas.org/en/sla/dlc/remja/background.asp); (2) the Ibero-American Network for International Legal Cooperation (IberRed) (a tool for cooperation in civil and criminal matters, covering 22 Latin American countries and the Supreme Court of Puerto Rico, and including Andorra, Spain and Portugal; this network addresses: a) Extradition; b) Mutual Criminal Assistance; c) Child abduction; d) Transfer of Sentenced Persons; e) The United Nations Convention on Transnational Organized Crime (UNTOC); and f) The United Nations Convention against Corruption (UNCAC); https://www.iberred.org); (3) the Ibero-American Network of Prosecutors specialised in human trafficking (established in 2011 by the Ibero-American Association of Public Prosecutors and the Specialised Meeting of MERCOSUR Public Ministries; https://www.unodc.org/unodc/en/human-trafficking/glo-act/17-countries-agree-on-regional-mechanism-to-combat-human-trafficking-and-migrants-smuggling-in-latin-america.html); (4) the Network of Prosecutors against Organized

empirical research techniques, could examine how 'genocide networks' operate and could operate, if they do at all, and how dynamics between the EU and other regions (notably Africa) play out at the micro-level, regardless of differences of opinion at the macro-level in the UNGA.

Positive complementarity will mainly work in case the more closely connected state is unable to prosecute, typically because of resource constraints. In contrast, where the more closely connected state, in spite of EU capacity-building efforts, proves *unwilling* (rather than unable) to prosecute, the EU and the Member States should reserve the right to exercise UJ as a last resort. In that case, UJ will be exercised as a form of 'negative' complementarity, to prevent impunity.

The EU and the Member States should however give foreign states sufficient time to come to terms with their violent past before unilaterally exercising UJ. Especially when states are in the midst of an armed conflict, and prosecution offices and courts cannot properly operate, one can possibly not expect that states will exercise territorial jurisdiction. Still, in case of long-lasting conflicts where the state still somehow functions, and evidence is adduced that law-enforcement agencies actively shield state officials from criminal accountability in respect of core crimes, a deferential attitude is not warranted. States should also pay due respect to culture-specific transnational justice mechanisms, which may not always be of a retributive nature. This respect is nevertheless not due when justice is almost in its entirety traded for 'peace and reconciliation'.[31]

When exercising UJ as the ultimate remedy, the EU and its Member States should in any event ensure that proper international cooperative arrangements are in place, which allow the Member States to gather the evidence necessary to sustain a conviction at trial (section 5.2).

5.4 EU support for international cooperative arrangements

International cooperation, whether on the basis of universality, territoriality, or nationality, is key for the prosecution of international crimes. International cooperation is called for when evidence is geographically scattered and where presumed offenders, victims, and witnesses are present in a state other than the state which seeks prosecution. Cooperation increases the odds of a successful UJ prosecution in Europe itself, which is often crucially dependent on having access to the crime scene and evidence located outside the territory (Eurojust, p. 11). Better international cooperation arrangements may also ease concerns over the 'unilateral' or 'hegemonic' exercise of UJ by EU Member States, as they may involve consultation and coordination mechanisms, and create a sense of joint ownership of a prosecution.

In order to strengthen international cooperation regarding the prosecution of international crimes, the EU may in particular want to throw its weight behind the recently taken initiative to conclude a multilateral legal assistance (MLA) agreement regarding these crimes. As existing conventions regarding international crimes contain only rudimentary MLA procedures, and formal agreements facilitate speedier (and mandatory) replies to requests for assistance (see Cocan), Argentina, Belgium, Mongolia, The Netherlands, Senegal and Slovenia (half of them EU Member States) have taken a joint initiative for a 'Multilateral Treaty on Mutual Legal Assistance and Extradition for the most serious International Crimes (crimes of genocide, crimes against humanity and war crimes)' (Parliamentarians for Global Action). The European Parliament may want to urge all states to join this initiative, and to sign and ratify the treaty as soon as it has been adopted[32]. Where an MLA is not possible or where foreign judicial institutions are not able to properly

Crime (REFCO) (founded through the United Nations Office on Drugs and Crime, and covering 10 countries, mostly in Latin America; https://www.unodc.org/ropan/en/REFCO/refco.html). All hyperlinks accessed on 12 June 2018. The author extends his thanks to Ms Laura Inigo Alvarez for pointing this out.

[31] See also European Parliament Resolution 2017, para. 15 (cautioning that 'the execution of justice cannot rest on a balancing act between justice and any kind of political consideration, as such balance would not foster reconciliation efforts but diminish them'). It is not the aim of this briefing, however, to study in-depth under what circumstances bystander states should defer to non-criminal transnational justice mechanisms with respect to the commission of core crimes.

[32] See also the 'Conclusions of the 22nd meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes', The Hague, 29-30 March 2017, available http://www.eurojust.europa.eu/doclibrary/genocide-

cooperate for capacity reasons, the EU may want to support *ad hoc* cooperation arrangements (Eurojust, p. 21).

International cooperation is not only strengthened on the basis of bilateral or multilateral agreements, but also through inclusion of international actors, including foreign states, in EU agenda-setting and decision-making affecting them (Benvenisti). The EU Genocide Network, a EU body coordinated by Eurojust, was mentioned above as an important network coordinating and facilitating the investigation and prosecution of international crimes. Coordination has so far been limited to EU Member States, a number of non-EU States from 'the West', and some international organizations and NGOs. [33] It has hardly involved the states whose nationals are the targets of prosecution and on whose territory the crimes have allegedly taken place. It is unclear, however, whether the EU Genocide Network should expand and involve more non-EU Member States as observers, as this may be to the detriment of the participants' trust and ultimately the effectiveness of the Network.[34] Rather, efforts could be made to link the EU Genocide Network with other regional prosecutorial networks regarding international crimes, or to put in place other horizontal cooperation arrangements.

At the micro-level, the EU may want to call on EU Member States to give due consideration (although not *overriding* consideration) to the views of foreign states which may be affected by UJ-based prosecutions, alongside the views of non-governmental organisations. Representations of foreign states may reveal those states' genuine ability and willingness to prosecute the crimes on a territorial or national jurisdictional basis, thereby obviating the need for the exercise of UJ, pursuant to the aforementioned complementarity principle.

6 Concluding observations

This briefing has examined the role played, and to be played by the EU in respect of UJ, in the specific context of EU external relations. UJ is mainly exercised by EU Member States and could thus be considered as an EU value which the EU may want to promote in its relations with the wider world. As UJ also finds its normative roots in treaty law, and possibly customary international law, and has been supported, and exercised by non-EU states too, it can also be considered an *international* value. Thus, for the EU to promote UJ in its external relations would be both internally and externally legitimate. The EU should nevertheless embed its support for UJ in a wider international accountability strategy. A good starting point of such a strategy is seen in the 2017 European Parliament Resolution. In a follow-up resolution that is specifically devoted to the horizontal relationship between EU Member States competent to exercise universal jurisdiction on the one hand, and the non-EU Member States on whose territory the crimes have been committed on the other, the Parliament may want to set out how the EU and the Member States can and should support international crimes prosecutions in the state with territorial jurisdiction, while calling on Member States to exercise UJ as a last resort to avert the risk of impunity. The Resolution could also call for the establishment of enhanced mechanisms of horizontal international cooperation, consultation, and legal assistance with respect to international crimes, with a view to making accountability for international crimes a reality.

network/genocidenetworkmeetings/Conclusions%20of%20the%2022nd%20meeting%20of%20the%20Genocide%20Network,%2029-30%20March%202017/Conclusions-22nd-Genocide-Network-Meeting-2017-03-EN.pdf (accessed on 5 May 2018). The Bulgarian Presidency of the EU, the European Commission, Eurojust and the Genocide Network appeared to support the MLA during the 3rd EU Day Against Impunity of genocide, crimes against humanity and war crimes (23 May 2018, The Hague), report 10183/18, p. 6.

[33] The Network has liaised with Canada, Norway, Switzerland, the USA and recently Bosnia-Herzegovina as observer states as well as representatives of the European Commission, Eurojust, Europol, the ICC and *ad hoc* international criminal tribunals and mechanisms, the International Committee of the Red Cross, Interpol, and civil society organisations. The Network urges increased cooperation with other 'national, regional, and international actors' (Eurojust, Strategy 2014, p. 25. At p. 43,.)

[34] Statement by Mr Pezdirc, Head of the Secretariat of the EU Genocide Network, at the workshop on universal jurisdiction held at the European Parliament on 28 June 2018.

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Part C:

Briefing: Towards a 'complementary preparedness' approach to universal jurisdiction – recent trends and best practices in the European Union

BRIEFING

Towards a 'complementary preparedness' approach to universal jurisdiction – recent trends and best practices in the European Union

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ABSTRACT

The exercise of universal jurisdiction is a key element of the global 'fight against impunity' of crimes under international law, such as genocide, crimes against humanity and war crimes. Contrary to the common 'rise and fall' narrative, recent empirical data shows an increase in the number of universal jurisdiction cases during the past decade. At the same time, there are indications of a shift from the prevalent 'no safe haven' paradigm to a 'complementary preparedness' approach to universal jurisdiction, reflecting the underlying idea of a transnationally organised and multi-level system of international criminal justice based on the sharing of labour between various stakeholders. The briefing concludes with recommendations to the European Union in order to expedite the goal of ending impunity of gross violations of human rights.

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1 Introduction

This briefing examines the legal practices and strategies in universal jurisdiction cases brought before domestic criminal courts in the European Union (EU)[35]. The analysis of recent trends and good practices in enforcing accountability for crimes under international law and gross human rights violations is timely, given the 20th anniversary of the adoption of the Rome Statute of the International Criminal Court (ICC Statute), the 20th anniversary of the arrest of former Chilean dictator Augusto Pinochet on an international arrest warrant in London, and the 10th anniversary of the establishment of the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction.

1.1 Definition

The term 'universal jurisdiction' is used in different contexts and interpreted in different ways. As a legal concept[36] and for the purpose of this paper, universal jurisdiction is defined as the assertion by a state (the so-called 'third state') of criminal[37] jurisdiction over crimes allegedly committed by non-nationals against non-nationals on the territory of another state with the crime posing no direct threat to the vital interests of the state asserting jurisdiction[38]. Universal jurisdiction is solely based on the nature of the crime which affects the interest of the international community as a whole.

The international legal basis for universal jurisdiction – and therefore the basis on which domestic legislation may authorise national law enforcement agencies and courts to exercise universal jurisdiction – is the principle of universality, which constitutes a firmly settled permissive rule of customary international law. Notwithstanding continuing controversy on the precise scope and preconditions of the exercise of universal jurisdiction[39] it is generally accepted that all crimes under international law ('core crimes')[40], i.e. genocide, crimes against humanity and war crimes as defined in Articles 6 to 8 of the ICC Statute, fall under the principle of universality[41].

1.2 Rationale

Universal jurisdiction is derivative jurisdiction[42]. The authority of a state to exercise universal jurisdiction ensues from the *ius puniendi* (authority to punish) of the international community whose interests (such as

[35] The author thanks Julia Geneuss, Máximo Langer, and Andreas Schüller for comments on earlier drafts and support in the compilation of relevant documents.

[36] 'Universal jurisdiction' as a legal concept must be distinguished from 'universal jurisdiction' as a buzzword used to denote, within a broader meaning, efforts to hold accountable perpetrators of crimes under international law regardless of their jurisdictional bases: Not all 'core crime' cases are universal jurisdiction cases (for instance the first conviction under the German Code of Crimes under International Law concerning events that occurred in the DR Congo was in fact based on territorial jurisdiction). This must also kept in mind, when the activity of special war crimes units is analysed as the basis for statistical findings: Typically the competence of these units is linked to specific offenses (e.g. 'core crimes') rather than to a specific jurisdictional basis (e.g. universal jurisdiction).

[37] For universal *civil* jurisdiction see, e.g. ECHR, Judgment of 15 March 2018, Nait-Liman v. Switzerland, Application-No. 51357/07.

[38] Council of the European Union, AU-EU Technical Ad Hoc Expert Report on the Principle of Universal Jurisdiction, 8672/1/19, Brussels, 16 April 2009, p. 42. Generally, on the principle of universality see G. Werle & F. Jeßberger, *Principles of International Criminal Law*, 3rd, 2014.

[39] For the current debate in the Sixth Committee of the UN General Assembly see, e.g. the Report of the Secretary-General 'The scope and application of the principle of universal jurisdiction' of 20 July 2010 (A/65/181) and the follow-up reports at http://www.un.org/en/ga/sixth/71/universal_jurisdiction.shtml.

[40] It should be noted that universal jurisdiction in many jurisdictions applies also to crimes other than 'core crimes', see, e.g. Section 6 of the German Penal Code (e.g. piracy, torture, trafficking in illegal substances or persons).

[41] See also European Parliament, Resolution of 4 July 2017. The legal situation is less clear when it comes to the crime of aggression.

[42] For details on the theoretical foundations of criminal jurisdiction including universal jurisdiction, see F. Jeßberger, *Der transnationale Geltungsbereich*, 2011.

international peace and security) are infringed or endangered by the offense. The state exercising universal jurisdiction acts as an agent of the international community[43].

With the ICC having only very limited resources, a limited jurisdictional scope, and, more importantly, being designed as a court of last resort which should not replace national courts, the main responsibility to investigate, prosecute and punish war crimes, crimes against humanity and genocide lies on the states. While at present, crimes under international law are, in general, committed outside Europe, the criminal justice systems of EU Member States come into play, in particular, first if EU citizens or legal persons based in the EU are involved in the commission of these crimes or second if foreign perpetrators, victims or witnesses enter EU territory as visitors or as refugees.

But even beyond these scenarios, the concept of universal jurisdiction allows for and encourages an active role of domestic justice systems. The derivative nature of universal jurisdiction brings about the complementary character of its exercise. Prosecution and punishment are achieved through a transnationally organised sharing of labour between states (horizontal) and between states and international courts and tribunals (vertical). Therefore, the idea of international solidarity in the enforcement of international criminal law through the different stakeholders is an integral part of the concept of universal jurisdiction.

In view of this, it is, arguably, an essential function of the exercise of universal jurisdiction by a 'third state' to *stimulate* (so-called 'Pinochet effect') and *support* investigations and prosecutions in a state closer to the crime, such as the territorial state or the state of the nationality of the offender. This points to a more recent trend regarding the exercise of universal jurisdiction ('complementary preparedness', see below). According to this approach, the contribution of a state to the joint effort to prosecute and punish crimes under international law on the basis of universal jurisdiction need not necessarily aim to or result in the completion of a criminal trial or even the conviction of a perpetrator in court. To the contrary, a 'successful' exercise of universal jurisdiction could also consist, inter alia, in securing evidence, in particular witness testimonies, for future proceedings before courts in another (international or domestic) jurisdiction[44]. This approach could in particular be applicable to crimes committed in ongoing conflict situations.

2 General trends

Regarding crimes under international law impunity still is the rule and accountability the exception. Despite considerable progress on the international and national levels resulting in the establishment of (international) institutions (first and foremost the ICC) and the implementation of specific domestic legislation during the past 20 years, the chances to get away with 'core crimes' are still much higher than with shoplifting or murder.

2.1 Beyond the 'rise and fall'-narrative

The common narrative about universal jurisdiction concerns its 'rise and fall'[45]. Beginning in the late 1990s and triggered, inter alia, by the arrest of Augusto Pinochet[46] a series of criminal complaints, investigations and trials based on universal jurisdiction in some EU Member States fueled expectations of victims of

[43] See, e.g., D. Akande, *Journal of International Criminal Justice* 1 (2003), 618, 626 ('acting on behalf of the international community as a whole'); C. Bassiouni, *Virginia Journal of International Law* 42 (2001), 81, 88; M. Henzelin, *Le principe de l'universalité en droit pénal international,* 2000, 412 ('agents executifs').
[44] Therefore, the overemphasis on the *completion* of trials in the 'third state' and on the investigation/complaint to conviction ratio is to a certain extent misleading in universal jurisdiction cases.
[45] See, exemplarily, L. Reydams, in W. Schabas & N. Bernaz (eds.), *Routlege Handbook of International Criminal Law*, 2010, 335.
[46] In 1998 former Chilean dictator Augusto Pinochet was arrested in the UK under an international arrest warrant issued by Spanish Investigative Judge Garzón.

human rights violations around the world that perpetrators would be brought to justice[47]. These expectations, however, are confronted with a negligible number of convictions based on 'true' universal jurisdiction ever since and several 'setbacks', such as the restriction of far reaching legislation on universal jurisdiction in Belgium and Spain.[48] The tale concludes with the 'fall' or 'decline' of universal jurisdiction, a perception which to some extent mirrors the general perception of international criminal justice – in particular the ICC – being 'in crisis'[49]. This narrative is challenged by new empirical data.

2.1.1 Quantitative dimension

Recent studies suggest that the number of universal jurisdiction cases, worldwide but also in Europe, has been constantly growing over the past decade[50]. The 2017 annual report on universal jurisdiction compiled by five NGOs[51] found a considerable increase in universal jurisdiction cases worldwide in the past twelve months (*TRIAL survey*)[52]. Similarly, another study found a significant increase in numbers of trial verdicts between 2008 and 2017 if compared with the previous decade (*Langer survey*)[53]. Compared to the (much lower) number of verdicts delivered by the ICC during the same time period, these numbers are of remarkable significance.

The findings of the two studies are supported by official statistical data published in Germany[54]. In Germany, comprehensive legislation concerning crimes under international law and including a 'pure' notion of universal jurisdiction entered into force in 2002. In the first years after the entry-into-force, hardly any investigations were initiated and no case reached the trial stage. In 2009, a specialised unit within the Federal Prosecutor's Office has been established. In the same year the Federal Criminal Police established a Central Unit for the fight against war crimes and further offences pursuant to the Code of Crimes against International Law (ZBKV)[55]. Between 2009 and 2017 the numbers of cases dealt with constantly grew, from three investigations in 2009 to 46 in 2017[56]. Of these, six are so-called structural investigations (see below). Similarly, the number of complaints and information submitted to the Prosecutor's Office grew dramatically, from 25 in 2013 and 2000 in 2015 to 600 in 2017[57]. This, obviously, has been closely connected with the conflict in Syria and the ensuing migration to Germany; the majority of information was submitted to the Prosecutor's Office and the police by the Federal Office for Migration and Refugees. At the same time, the number of prosecutors assigned to the specialised unit as well as the number of officers working at the ZBKV grew constantly. In sum, Germany seems to be a good example of a 'learning curve' regarding the exercise of universal jurisdiction in recent years.

[47] See, in detail, W. Kaleck & P. Kroker, *Journal of International Criminal Justice* 16 (2018), 165, 171 and W. Kaleck, *Michigan Journal of International Law* 30 (2009) 927 ff.
[48] It should be noted, however, that in July 2018 the newly appointed Spanish Minister of Justice announced the government's intention to re-establish universal jurisdiction legislation and extend it to economic, financial and environmental crimes; see https://elpais.com/politica/2018/07/11/actualidad/1531322927_005203.html.
[49] Evidence for the decreasing support for the ICC may be: Russia withdrawing its signature from the Statute; Burundi and the Philippines withdrawing from the Statute; the African Union adopting a 'withdrawal strategy' and so forth. See generally the contributions in the symposium edited by F. Jeßberger & J. Geneuss, *Journal of International Criminal Justice* 11 (2013), 501 et seq.
[50] It is scientifically sound to refer to the general trends indicated in these surveys although some of the more specific findings are, for statistical reasons, to be used with more caution (different notions of universal jurisdiction etc.).
[51] TRIAL, ECCHR, FIDH, REDRESS, Fundación Internacional Baltasar Garzón.
[52] Trial International et al., *Universal Jurisdiction Annual Review*, 2018.
[53] M. Langer & E. Mackenzie, 'The Quiet Expansion of Universal Jurisdiction', *forthcoming*.
[54] See Bundestags-Drucksache (BT-Drs., official documents of the German Parliament) 18/12487 of 24 May 2017, available online at http://dip21.bundestag.de/dip21/btd/18/124/1812487.pdf.
[55] See for details K. Zorn, *Zeitschrift für Internationale Strafrechtsdogmatik* 2017, 762.
[56] See Bundestags-Drucksache (BT-Drs., official documents of the German Parliament) 18/12487 of 24 May 2017.
[57] See Bundestags-Drucksache (BT-Drs., official documents of the German Parliament) 18/12533of 30 May 2017, available online at http://dip21.bundestag.de/dip21/btd/18/125/1812533.pdf.

2.1.2 Qualitative dimension

Regarding the qualitative dimension of recent practice (i.e. who is investigated and prosecuted and for what crimes) three observations can be made.

First, universal jurisdiction still primarily targets so-called 'low cost defendants' (*M. Langer*) that is persons coming from politically and economically weak states and/or representing a low level of responsibility[58]. Typically, the prosecution of those persons is initiated because they are present in the state exercising universal jurisdiction or residents of that state. The prosecution or trial of 'high cost defendants' – citizens of powerful states, including representatives of Western/European companies whose activity can be linked to conflict regions[59], and/or those most responsible for the crimes – is extremely rare[60]. The same holds true for the prosecution of sexual and gender-based violence.

Secondly, universal jurisdiction cases do not adequately reflect the (geographical) distribution and gravity of the crimes actually committed. There is an obvious mismatch between the scale and nature of the crimes and the cases which authorities are able (and willing) to prosecute[61]. Obviously (and not surprisingly), prosecutions and trials are opportunity-driven rather than the result of a rational selection of cases.

Thirdly, often the prosecution and trial of perpetrators of 'core crimes' is based on charges other than crimes under international law, such as terrorism or immigration offences, arguably for evidentiary reasons. This trend also reflects the growing intertwining between international criminal law on the one hand and counter-terrorism law on the other[62]. The practice sends the message that prosecution and punishment in those cases is about protecting against domestic threats rather than contributing to the universal 'fight against impunity'.

2.1.3 Preliminary assessment

There are good reasons to believe that the recent increase of universal jurisdiction cases reflects efforts of institution building, improved legislation, and institutional learning as well as better opportunities to 'successfully' investigate and prosecute 'core crimes' in Europe. The two main factors for the increase in universal jurisdiction cases during the past decade are:

- regarding the legal circumstances: *improvement and consolidation of the legal environment* (substantive, procedural and institutional), also resulting in greater awareness of law enforcement and prosecutorial agencies. At present, the majority of Member States provides for specific offenses regarding 'core crimes' in their domestic legislation, with Sweden and Austria having amended their legislation most recently; in a number of Member States, e.g. in France, Sweden, the Netherlands and Germany, specialised war crime units were established at the police and/or the prosecutor's offices; in a number of EU Member States immigration and refugee protection procedures have been better linked to police, prosecution, and courts allowing for an exchange of information regarding crime victims and alleged perpetrators.

[58] Universal jurisdiction trials that have been completed concerned primarily defendants from Africa, South-East Europe and the Middle East. Recently, there has been a significant shift in the focus of investigations from Sub-Saharan Africa to the Middle East.
[59] One notable exception is the 'Lafarge case' in France: In June 2017 and following a complaint filed by former Syrian Lafarge employees and, inter alia, the French NGO Sherpa, a judicial inquiry into the activities of the cement and construction group LafargeHolcim and its subsidiary Lafarge Cement Syria was launched in France on allegations of complicity in crimes against humanity and war crimes. In December 2017, the former chief executive of the Lafarge group and three former directors, as well as two former French directors of the subsidiary, were formally indicted for financing of terrorism and endangering people's lives.
[60] But happen: see, e.g., the complaint filed in 2017 by a group of Swedish lawmakers against Turkish President Recep Tayyip Erdogan for genocide, crimes against humanity and war crimes committed against the Kurdish population.
[61] Human Rights Watch, *'These are the Crimes we are Fleeing', Justice for Syria in Swedish and German Courts,* 2017, 4; see also M. Langer & E. Mackenzie, 'The Quiet Expansion of Universal Jurisdiction', *forthcoming.*
[62] See, e.g. Human Rights Watch, *'These are the Crimes we are Fleeing', Justice for Syria in Swedish and German Courts,* 2017, 38; P. Frank & H. Schneider-Glockzin, *Neue Zeitschrift für Strafrecht* 2017, 1.

- regarding the factual circumstances: *better and new opportunities* to successfully prosecute and punish 'core crimes', in particular through better access to suspects and evidence. These 'new opportunities' are related, in particular to the arrival of a large number of refugees from Syria in Europe and the increased use of open sources, such as internet and social media, by the perpetrators and the victims.

While these reasons may explain the quantitative increase of universal jurisdiction cases, the (still) relatively low number of cases and the stalemate in terms of qualitative progress is, arguably, caused by the following factors:

- *legal challenges*, such as the complexity of crimes (collective nature, context elements) and the variety of applicable sources; immunities and the legal challenges of gathering evidence (e.g. witness statements) extraterritorially;
- *factual challenges*, resulting in particular from the foreign element of the crimes investigated, prosecuted and tried, such as the factual difficulties of gathering evidence, and the lack of familiarity of prosecutors and judges with the socio-cultural background of the case; the amount and nature (language) of information etc.

It should be noted, however, that universal jurisdiction cases share many of these obstacles to a smooth investigation and prosecution with other extraterritorial cases and transnational litigation (e.g. based on nationality or the effects or protective principles in the area of terrorism, organised crime, drug trafficking etc[63]). However, it may be argued that in particular the three following factors single out universal jurisdiction cases for international 'core crimes' and are, therefore, universal jurisdiction specific:

- investigation, prosecution and trial take place within a *comprehensive system of international criminal justice* with various international (e.g. ICC) and national (states) stakeholders;
- investigation, prosecution and trial take place in an *ongoing or post-conflict situation*; and
- investigation, prosecution and trial refer to acts which typically (although not necessarily) have *a political dimension* (state-sponsored crime).

2.2 Further (global) trends

In addition to the general *increase* in universal jurisdiction cases two further global trends which have repercussion on the practice in EU Member States need to be mentioned:

First, the *regionalisation*[64] of universal jurisdiction is a novel phenomenon, which was demonstrated, inter alia, in the prosecution of former Chadian dictator Hissène Habré before the Extraordinary African Chambers in the Senegal 'on behalf of Africa' and on the basis of universal jurisdiction. This is, arguably, a welcome development not only because local (or, in this case, regional) justice is 'better justice' than universal justice delivered by 'third states' far removed from the affected community[65], but also a tool to address concerns of 'legal imperialism' voiced, inter alia, by the African Union.

[63] See also the statement of the present Head of the War Crimes Unit at the German Federal Prosecutor's Office, Christian Ritscher, before the Legal Committee of the German Parliament on 25 April 2016, p. 2.
[64] For details see F. Jeßberger, in G. Werle et al. (eds.), *Africa and the International Criminal Court*, 2014, p. 155. Nota bene: I do *not* refer to the regionalisation of international criminal law here (e.g. by the Malabo Protocol and an African Criminal Court), but to the regionalisation of universal jurisdiction.
[65] The well-described advantages (such as the availability of evidence, the familiarity of the defendant, witnesses and judges, the purposes of punishment, the costs) of providing for prosecution and punishment as close as possible to the affected community need not be repeated here.

A second trend refers to the *reversion*[66] of universal jurisdiction on European perpetrators (boomerang effect). This trend is demonstrated, inter alia, by the efforts of Argentinean prosecutors investigating crimes committed under the Franco regime in Spain.

Both these trends have the potential to address (and ease) the perception of universal jurisdiction as a post-colonial tool of European justice systems to deal with crimes allegedly committed in the Global South.

2.3 From 'global enforcer' and 'no safe haven' to 'complementary preparedness': Shifting the paradigm (again)

Traditionally, the development of universal jurisdiction has been described along the lines of two different approaches (*M. Langer*): the 'global enforcer' approach and the 'no safe haven' approach. The 'global enforcer' approach is a more 'offensive' conception in which states have a proactive role in preventing and punishing core crimes committed anywhere in the world. The 'no safe haven' approach on the other hand, which has been prevalent in the practice of states in recent years, embodies the more defensive conception, according to which states act in their own interests in not becoming a refuge for participants in core crimes[67].

It is suggested here, that a new paradigm to universal jurisdiction can be identified in most recent state practice, the here so-called 'complementary preparedness' approach to universal jurisdiction. While the 'global enforcer' approach may be overambitious and the 'no safe haven' approach is merely reactive and disregards the interests of the international community at stake in universal jurisdiction cases, the 'complementary preparedness' approach reflects the specific characteristics of universal jurisdiction as described above. The idea of the 'complementary preparedness' approach has been expressed, inter alia, by the German legislator and to some extent applied by the German Federal Prosecutor's Office[68] and law enforcement agencies of other Member States.

The approach is based on the idea of prosecutorial activity (monitoring procedures, structural investigations, anticipated legal assistance) on the basis of universal jurisdiction designed to prepare and support possible future trials in the same or in a different jurisdiction. Available evidence is collected, consolidated, preserved and analysed in order to facilitate criminal proceedings in a national or international court that exercises or may exercise in the future jurisdiction over the crime. The *'preparedness'* may be relevant for two different scenarios[69]: a) if the person suspected of having committed a 'core crime' enters the territory of the state exercising universal jurisdiction, b) if another state or an international court start a prosecution or trial of the suspect (anticipated legal assistance).

It is important to recall that a trial based on universal jurisdiction typically is the least desirable option (if compared to territorial jurisdiction or jurisdiction based on the nationality principle)[70]. This points to the *complementary* function of universal jurisdiction proceedings which often do not result in a conviction – and are not even necessarily meant to result in a conviction, at least not in a court of the state exercising universal jurisdiction[71].

[66] For details see F. Jeßberger, in G. Werle et al. (eds.), *Africa and the International Criminal Court*, 2014, p. 155 et seq.
[67] The 'no safe haven' approach is also acknowledged in EU instruments such as the Council Decision 2003/335/JHA of 8 May 2003, where it is provided that 'the competent authorities of the Members States are to ensure that [..] the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law' in cases where 'they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes.'.
[68] See, e.g., the statement of the present Head of the War Crimes Unit at the German Federal Prosecutor's Office, Christian Ritscher, before the Legal Committee of the German Parliament on 25 April 2016, 3.
[69] See also W. Kaleck & P. Kroker, *Journal of International Criminal Justice* 16 (2018), 165, 171.
[70] See also footnote 30.
[71] This important facet of universal jurisdiction practice is not adequately captured in the existing surveys which very much focus on the 'success' as reflected in completed trials or convictions in the 'third state'.

In view of this it may be argued that using the number of completed trials and convictions in the state exercising universal jurisdiction as a benchmark to measure 'success' (of universal jurisdiction) misses the point. It disregards the role and function of universal jurisdiction within the multi-level system of international justice based on the idea of transnational, horizontal and vertical sharing of labour. The so-called 'Pinochet-effect' – where investigations in a 'third state' on the basis of universal jurisdiction trigger prosecution and trial in the state where the crimes have been committed – lends the concept of universal jurisdiction much of its legitimacy.

3 Best practices

Whether a practice is 'best' very much depends on the aims and objectives of this practice. Based on the understanding of providing as much accountability as possible, it is possible to identify a number of reasons which facilitate the investigation and prosecution of crimes under international law under universal jurisdiction.

As regards 'successful' litigation and adjudication of universal jurisdiction cases, the observations made above can be summarised as follows: The chance of completing a trial (in the 'third state') are high if the state exercising jurisdiction has comprehensive legislation, a well-functioning specialised war crimes unit[72] with previous experience and access to the necessary evidence, including witnesses, and, most importantly, the suspect. Concerning the latter aspect, one factor which appears to have a strong impact on the number of universal jurisdiction cases is the (improvement in) communication between the immigration authorities and the police and prosecution. Better linking information gathering by immigration and law enforcement authorities has, however, also its pitfalls: It is reported that a trend to self-incrimination by applicants for asylum or refugee protection creates an additional work load for the prosecution authorities, but often enough does not result in the conviction of the alleged perpetrator in a criminal court – since, as it frequently seems to be the case, he or she withdraws his or her statement/confession and no other evidence is available.[73]

Based on the understanding that universal jurisdiction cases need not necessarily result in trial and conviction in the state exercising universal jurisdiction (the 'complementary preparedness' approach), 'best' practices may also include relatively low thresholds for initiating preliminary examinations and investigations. In particular it should *not* be required that the suspect is present in the territory to conduct a preliminary examination or even investigation.

One legal mechanism to enforce the 'complementary preparedness' approach are so-called 'structural investigations'. Structural investigations are broad preliminary investigations without specific suspects, designed to gather evidence related to potential crimes that can be used in future proceedings either before a court in the investigating state itself or before another domestic or international criminal court. It is interesting to note that the 'structural investigations' resemble the procedure applicable at the ICC where the Prosecutor can open a preliminary examination or even a formal investigation referring to a *situation* rather than to a specific individual *suspect*. There, the distinction between situation-oriented examination/investigation and individual-oriented prosecution is key[74]. This approach makes the exercise of jurisdiction also less opportunity-driven: While in some Member States the presence of the suspect is a requirement for the exercise of jurisdiction as such, others, e.g. Germany and Sweden, allow – similar to the

[72] Such 'war crimes units' exist, inter alia, in Germany, France, Netherlands, Sweden, Norway and Switzerland; see also the recommendation in Council Decision 2003/335/JHA.

[73] See Legal Tribune Online (LTO), 'Ich war dabei', 19 April 2018, https://www.lto.de/recht/hintergruende/h/fluechtlinge-selbstanzeige-bleiberecht-subsidiaerer-schutz-terroristische-vereinigung/.

[74] As it is rightly stressed in the Joint Staff Working document, 2013, pp. 10 et seq. with a view to preliminary examinations at the ICC, it is in the phase of preliminary examination that maximum political pressure can be exerted in order for a particular state (e.g. the territorial state, 'Pinochet effect') to take up its responsibility and start domestic proceedings.

procedure before the ICC – for preliminary examinations and investigations notwithstanding presence of the suspect in the territory. In case sufficient evidence has been secured, the investigation can be individualised and an arrest warrant against a specific suspect may be issued. One example for the successful 'individualisation' of an originally situation-oriented investigation is the international arrest warrant issued by the German Federal Prosecutor against Jamil Hassan, the head of Syria's Air Force Intelligence, in June 2018.[75] The arrest warrant results from a structural investigation concerning Syria and conducted by the Federal Prosecutor since 2011.

An additional factor which appears to have a clear impact on prosecution and trial is whether and to what extent civil society and non-governmental organisations are active and advocating for holding accountable perpetrators of 'core crimes' in a certain state. NGOs can play a role, inter alia, in the fact-finding on the crimes and perpetrators (identifying perpetrators and victims/witnesses), in the selection of cases, in assisting and representing the victims' communities and in the documentation of the crimes and dissemination in the general public. In doing so, they complement (and often enough stimulate) official efforts to investigate and prosecute 'core crimes'. In this regard, also the important role of lawyers from affected communities (such as Anwar al Bunni from Syria or Jacqueline Moudeina from the Chad) must be acknowledged. As a side effect, the involvement of victims' communities and their representatives fosters the acknowledgement of the victim's status and the protection of the victim's rights which is of particular significance in international criminal justice.

4 EU coordination and cooperation

The European Union has developed a comprehensive strategy of promotion and support to international criminal justice, including universal jurisdiction[76]. The issue is typically, but not exclusively addressed as an issue of foreign affairs rather than one of justice and home affairs.

Among the organs, it is the European Parliament which takes a particularly progressive position. In its comprehensive Resolution of 4 July 2017 the Parliament stresses 'the primary responsibility of its States Parties to investigate and prosecute atrocity crimes' and 'expresses its concern that not all EU Member States have legislation defining those crimes under national law over which their courts can exercise jurisdiction', advocates for a further 'Europeanisation' of the 'fight against impunity' by encouraging 'Member States to amend Article 83 of the Treaty on the Functioning of the European Union in order to add atrocity crimes to the list of crimes for which the EU has competences' and, most importantly for our purposes 'calls on the Member States to apply the principle of universal jurisdiction'.

In addition, the European Union has implemented a number of tools to facilitate cooperation among Member States. Most importantly, in 2002 the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes (Genocide Network) has been established[77]. In 2011, the Network Secretariat hosted by Eurojust in The Hague has been created. In 2014, the Genocide Network presented its Strategy to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States. The strategy has been endorsed by the Council Conclusions adopted by the Justice and Home Affairs Ministers on 16 June 2015. Furthermore, and most recently grave international crimes have become part of Europol's mandate[78].

[75] See Der Spiegel, 'Germany takes aim at Assad's torture boss', 8 June 2018, http://www.spiegel.de/international/world/senior-assad-aid-charged-with-war-crimes-a-1211923.html.
[76] See, e.g. Council Decision 2011/168/CFSP; Council conclusions on the EU's comprehensive approach of 12 May 2014; EU Action Plan on Human Rights and Democracy 2015-2019; European Parliament Resolutions of 15 December 2016, of 4 July 2017, and of 15 March 2018.; for details see, e.g. B. Steible, *UNIO – EU Law Journal* 4 (2018), 51, at 53 et seq.
[77] Council Decision 2002/494/JHA.
[78] Regulation of the European Parliament and of the Council of 11 May 2016 on the European Union Agreement for Law Enforcement Cooperation, (EU) 2016/794.

5 Recommendations

With the current turbulent times for the international legal order and international law in general, the European Union should reinforce its global leadership in the area of human rights and the 'fight against impunity' and see that the issue remains on the political agenda albeit other pressing global challenges (climate change, terrorism). The 'justice and home affairs' dimension of the 'fight against impunity' should be strengthened. The EU Genocide Network's strategy as it has been endorsed by the Council still constitutes a strong starting point for further action.

In particular, it is recommended that the EU, and, where appropriate, specifically the European Parliament,

i. on the level of the European Union

- acknowledge the 'fight against impunity' as an issue of justice and home affairs and reshape its commitment accordingly;
- draft and implement an Action Plan[79] and Toolkit on universal jurisdiction which provides guidance to Member States and complements the existing Action Plan and Toolkit on the principle of complementarity[80];
- ensure appropriate resources for EU coordination efforts regarding the investigation and prosecution of international 'core crimes';
- continue its support to initiatives to exercise universal jurisdiction on a regional level, such as the Extraordinary African Chambers;
- initiate the establishment of a European database on universal jurisdiction cases in order to have a solid basis for future policy decisions[81];
- initiate and support further research to develop a general model ('model legislation') compatible to the different procedural laws in the Member States for a 'complementary preparedness' approach to universal jurisdiction;
- acknowledge the role of and continue the support of civil society organisations active in the field.

ii. on the level of the Member States

- remind Member States to establish and adequately resource specialised war crimes units;
- encourage Member States to review their legislation with a view to allow for preliminary examinations and structural investigations even if the alleged perpetrator is not present on the territory;
- encourage Member States to urge their police and prosecution services to collect and preserve all available evidence concerning grave international crimes with a view to possible future prosecutions and trials;
- encourage Member States to engage in outreach and dissemination regarding the exercise of universal jurisdiction.

[79] As the European Parliament Resolution of 4 July 2017 (No. 34) already emphasises.
[80] Joint Staff working document on Advancing the Principle of Complementarity, European Commission, 21 January 2013, SWD (2013)26 Final.
[81] It is reported that the establishment of a database within Europol has already been started on the initiative of some Member States.

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