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# UNIVERSAL JURISDICTION: current situation analysis in Lithuania



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## INTRODUCTION

Each armed conflict and every example of dictatorial repression harms the country where they are taking place. The societies and individuals, going through these horrible experiences, are injured and damaged in many ways: physically, economically, and psychologically.

People who have managed to go through torture, war crimes and survive, really want to **hope**, and **justice should help** them to, that, in the end, their suffering will be recognized, the truth will prevail, and history will remember and punish those who could afford to commit such cruelty.

Restoring justice is a challenging task. In the case of foreign aggression, the criminal justice systems of a country, where that aggression happened, can take legal action. Here an example could be the case of January 13<sup>th</sup> – when Lithuanian courts took legal action against the alleged perpetrators who were not Lithuanians.

In some other situations, the international community might agree to initiate the tribunal against the perpetrators – the first of such tribunals was the famous Nuremberg, where Nazi Germany's personnel, responsible for the Holocaust and other crimes were brought to justice.

But there are cases when none of these options is possible – however, justice for victims is still crucial to achieving. In this case, the tool of Universal Jurisdiction can be applied.

We want, from the point of the project's practical realization view:

→ to show Universal Jurisdiction's concept;

→ to motivate doing Universal Jurisdiction from the point of deep international roots and obligations view, which has proved the viability of this institution: it is alive and the international community has started to talk about it more actively (EU Parliament, EU Commission, UN and others);

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→ to use Universal Jurisdiction (UJ) to fight impunity (UJ database and UJ Annual Reviews by TRIAL<sup>1</sup> clearly demonstrate it).

Firstly, we introduce **what the universal jurisdiction mechanism is**: a little historical context shows its deep roots and its significance as an important tool in the fight against impunity, that has attracted EU institutions' attention to it (whose authoritative opinion may encourage states to use it), and we also outline its principles.

Secondly, we consider **the current situation with UJ in Lithuania**, starting with a brief review of the international acts that Lithuania has committed to comply with. A brief analysis of the national legislation and the UJ practice applied in Lithuania is done then. We demonstrate the prosecutor's office positive attitude towards UJ in the Ukrainian context and consider a UJ case in Lithuania.

Then **challenges of UJ application** arising are described and illustrated with examples. A Joint Investigation Team (JIT) as a tool is proposed which it would be more likely to withstand these challenges. This hypothesis has been proved with Germany's **successful international practice** (the country may be called a leader in the UJ implementation) and the Netherlands. Successful, because the evidence collected was recognized as sufficient and set out in the verdicts by the courts. Since there are several UJ cases on the events in Ukraine and Belarus in Lithuania, their context will be taken as the basis. Also, the geopolitical situation requires from the world community and separate democratic countries to have more moral responsibility to take legal action against the alleged perpetrators – whether those responsible for crimes in Syria, Belarus, Ukraine or elsewhere. And the UJ allow for individual countries to take that responsibility – even if the broader global community, such as United Nations, do not agree if the trial for the perpetrators is necessary or how it should be organized.

Some organizations especially support the development of an action plan and toolkit on universal jurisdiction and the need to provide continued support to NGOs and

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<sup>1</sup>Universal Jurisdiction Database. URL: <https://trialinternational.org/resources/universal-jurisdiction-database/> Last visited on December 27, 2022.

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Member States that are working on universal jurisdiction. During the EU Parliament's Workshop, it was mentioned that the European Parliament should provide a study to examine the use of universal jurisdiction by Member States. This study should be focused on one or a small number of universal jurisdiction application specific aspects.<sup>2</sup> So it highlights the importance of our project's goal again.

We show why Ukraine needs help and think that **Lithuania** demonstrating the success of its work with UJ on these examples, **can become one of the flagships**, like Germany and the Netherlands, **in the fight against impunity** and be a good player in the international arena.

This project is implemented as part of the program "Create Lithuania", which provides the Lithuanian public sector with strategies, ideas and best practices to improve the functioning of various Lithuanian state institutions.

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<sup>2</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 13-14.

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# 1. What is Universal Jurisdiction?

The perpetrators alleged of international crimes are primarily prosecuted by national legal systems<sup>3</sup> if the crimes have been committed on their territory or by their own citizens. The Preamble of The Rome Statute of the International Criminal Court points out the effective prosecution great relevance at the national level, and, at the same time, the necessity of international cooperation, and ‘the duty of every State to exercise its criminal jurisdiction over those who are responsible for international crimes’<sup>4</sup>.

If primary responsible national jurisdictions fail for some reason (e.g. unwilling and/or unable to investigate international crimes in their own country), two options could be: national jurisdictions of third states on the basis of universal jurisdiction (UJ) or international level in the form of ICC or special criminal tribunals established for a specific case.

There are several main criminal jurisdictions:

<b>Territorial</b>	<b>National</b>	<b>Protective</b>	<b>Passive personal</b>	<b>Universal jurisdiction</b>
belongs to the sovereign in whose territory the crime occurs	belongs to the sovereign whose national allegedly committed the crime	belongs to the sovereign whose national interest is injured by the crime	belongs to the sovereign whose citizens is victimized by crime	belongs to the sovereign regardless in whose territory international crime has been committed and by which nationality  (see more about the meaning of UJ below)

The universality principle is reserved for conduct constituting an international crime, such as piracy, genocide, crimes against humanity, war crimes and crime of aggression. In earlier times, the extraterritorial universal jurisdiction was applied only to

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<sup>3</sup> The Princeton Principles on Universal Jurisdiction. URL: [https://lpa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lpa.princeton.edu/hosteddocs/unive_jur.pdf). Last visited on December 27, 2022.

<sup>4</sup> The Preamble of The Rome Statute of the International Criminal Court. URL: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

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robbers, pirates, slavers<sup>5</sup>, ‘brigandage and war crimes’<sup>6</sup>. Those crimes are ‘prototypical offences that ... have long been considered the enemies of humanity’<sup>7</sup>. After the World War II, both war crimes and crimes against humanity were prosecuted according heavily on the universal principle<sup>8</sup>. War crimes prosecution in the Nuremberg tribunals and Israel’s prosecution in Eichmann may serve as examples of universal jurisdiction<sup>9</sup>.

The exercise of UJ by states should be distinguished from the jurisdiction exercised by the International Criminal Court (ICC). Only crimes committed on a State Party's territory or by a state party's national can come before the ICC when there is no ability or will to prosecute these crimes domestically. 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them, 33 are from African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States<sup>10</sup>. At the same time, «the ICC, has come under severe criticism for its – perceived – underperformance in delivering justice»<sup>11</sup>, because of its slow pace and costs. It is widely discussed that «to avoid bubble-bursting, international criminal justice should be integrated and connected more closely to domestic systems of criminal justice»<sup>12</sup>. To our mind, it means international criminal justice should provide more thoughts on the principle of complementarity.

The principle of complementarity that underlies the ICC, implies States take up international crimes prosecutions themselves (art. 1 of the ICC Statute). We have mentioned earlier that a national court according to the international law can exercise

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<sup>5</sup> Diane Orentlicher, ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’ in Thomas Biersteker et al (eds), *International Law and International Relations* (Routledge, 2007) 205 (‘Orentlicher – Reconciling Universal Jurisdiction with Democratic Principles’).

<sup>6</sup> Amnesty International September 2001. URL: <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530042001en.pdf>.

<sup>7</sup> Kenneth Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review* 785, 788.

<sup>8</sup> Kenneth Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review* 785, 788.

<sup>9</sup> Ireland-Piper, Danielle, ‘Extraterritorial Criminal Jurisdiction and the Cosmopolitan: A Double-Edged Sword’, in Richard Beardsworth, Garrett Wallace Brown, and Richard Shapcott (eds), *The State and Cosmopolitan Responsibilities* (Oxford, 2019; online edn, Oxford Academic, 23 May 2019), <https://doi.org/10.1093/oso/9780198800613.003.0008>, Last accessed 2 Jan. 2023.

<sup>10</sup> The States Parties to the Rome Statute. URL: <https://asp.icc-cpi.int/states-parties>. Last visited on December 27, 2022.

<sup>11</sup> Sliedregt, Elies van, Future of International Criminal Justice - Bursting the Bubble? (February 15, 2020). The Future of Criminal Justice, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3538697> or <http://dx.doi.org/10.2139/ssrn.3538697>

<sup>12</sup> Sliedregt, Elies van, Future of International Criminal Justice - Bursting the Bubble? (February 15, 2020). The Future of Criminal Justice, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3538697> or <http://dx.doi.org/10.2139/ssrn.3538697>

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extraterritorial jurisdiction on the principle of universality or active and passive nationality principles<sup>13</sup>. The universality principle must be the last applied, as it is thought, due to rather slow international ad-hoc criminal tribunals establishing, long time for the International Criminal Court's (ICC) cases considering, or closing the cases without sufficient satisfaction<sup>14</sup>.

So the role of universal jurisdiction is crucial and has deep historical roots, the traces of the concept can be found in the Code of Justinian dated with the sixth century<sup>15</sup>. Some crimes are so offensive to international peace and security that all states are regarded as having a legitimate interest in their prosecution and punishment. There exist the so-called 'protective principle', according to each a country can assert jurisdiction over threatening national security foreigners' actions; it is also recognised by international law. Another one is 'an effect principle', also supported to some extent, which gives jurisdiction over extraterritorial conduct, the effects of which are felt by a state<sup>16</sup>. It could be qualified as additional arguments for exercising universal jurisdiction over crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole.

Universal jurisdiction is considered to be a part of the customary international law<sup>17</sup> and could be identified as a form of extraterritorial jurisdiction in that it is exercised over events which have not taken place on the state's territory. The universal criminal jurisdiction international legal ground is either written in various treaties or included into unwritten customary international laws. A large number of treaties

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<sup>13</sup> Sliedregt, Elies van, Future of International Criminal Justice - Bursting the Bubble? (February 15, 2020). The Future of Criminal Justice, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3538697> or <http://dx.doi.org/10.2139/ssrn.3538697>

<sup>14</sup> UNIVERSAL JURISDICTION IMPLEMENTATION HANDBOOK AND GUIDELINES: Limitations, implications, and options for crimes committed in Belarus. Law and Democracy Center. Justice Hub. URL: <https://ldc-jh.eu/universal-jurisdiction-handbook/> Last visited on December 27, 2022.

<sup>15</sup> Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* 135 (Paris: Librairie du Recueil Sirey 1928) (arguing that universal jurisdiction had its origin in the Code of Justinian, C. III, 15, *Ubi de criminibus agi oportet*, 1). Amnesty International September 2001. URL: <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530042001en.pdf>

<sup>16</sup> Ireland-Piper, Danielle, Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine (September 26, 2013). *Utrecht Law Review*, Vol. 9, No.4, p. 68-89, September 2013, Available at SSRN: : <https://ssrn.com/abstract=2334638>. P. 68.

<sup>17</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). P. 18. Last visited on December 8, 2022.



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includes ‘qualified’ UJ on the basis of the «obligation to extradite or prosecute (in Latin: *an aut dedere aut judicare clause*)»<sup>18</sup>, which is obliged a State to either extradite or prosecute a person who accused of the crime.

Every state should provide its courts with effective universal jurisdiction over such grave crimes that undermine the international legal framework and eliminate any obstacles to national courts exercising such jurisdiction as agents of the international community to repress such crimes.

The universality principle refers to the right of States to assert jurisdiction over serious international crimes regardless of the fact:

- where the conduct occurs, or
- the nationality of the perpetrator (s).

It is worth mentioning that when universal jurisdiction is exercised appropriately by national courts, in accordance with due process internationally recognized standards, they vindicate not only their own interests and values but common basic interests and values of the international community<sup>19</sup>.

**Universal jurisdiction (UJ)** can be defined as one of the essential tools for fighting against impunity because of:

1) *the limited jurisdiction of international courts* (ICC and others). National legal systems play the decisive role in attempts to stop impunity while the international ones can be mighty, due to their principle of mutual complementarity, but only auxiliary, and therefore insufficient means, as specialists point out in the ICC Statute. The fact is that serious human rights abuses on according to a crime committing territory are often

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<sup>18</sup> The formula “extradite or prosecute” (in Latin: *aut dedere aut judicare*) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, “which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct” (Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, p. 3); Cedric RYNGAERT, Universal Jurisdiction and international crimes – constraints and best practices. Workshop. Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). P. 2 (60). Last visited on October 25, 2022.

<sup>19</sup> The Princeton Principles on Universal Jurisdiction. URL: [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Last visited on December 27, 2022.

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failed to be investigated and prosecuted properly. So, UJ often appears to be the most important mean of justice<sup>20</sup>;

2) *national police and prosecutors are all too often unwilling and unable genuinely to investigate crimes under international law (war crimes, crimes against humanity, enforced disappearances, torture, genocide and extrajudicial executions) in their own countries. American scientists notice that there have recently appeared the tendency for national states' growing work speed and lowering their costs of work, and their methods are being got more efficient, in dealing with this type of cases of criminal proceedings*<sup>21</sup>.

### **The scope of Universal Jurisdiction is conceived in two ways:**

CONDITIONAL	ABSOLUTE
<ul style="list-style-type: none"><li>• requires the presence of the accused in the prosecuting State</li></ul>	<ul style="list-style-type: none"><li>• doesn't require the presence of accused ("in absentia")</li></ul>

Traditionally the development of universal jurisdiction has been described along the lines of two approaches, the ‘global enforcer approach’ (when states play a proactive role) and the ‘no safe haven approach’ (which has recently been used more often in states' practice):

Global enforcer approach	No safe haven approach
<ul style="list-style-type: none"><li>• states have a pro-active role in preventing and punishing core crimes committed anywhere in the world</li></ul>	<ul style="list-style-type: none"><li>• states act in their own interests by not becoming a refuge for perpetrators of war crimes</li></ul>

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<sup>20</sup> The Princeton Principles on Universal Jurisdiction. URL: <http://www.derechos.org/nizkor/icc/princeton.html>. Last visited on December 27, 2022.

<sup>21</sup> UNIVERSAL JURISDICTION IMPLEMENTATION HANDBOOK AND GUIDELINES: Limitations, implications, and options for crimes committed in Belarus. Law and Democrace Center. Justice Hub. URL: <https://ldc-jh.eu/universal-jurisdiction-handbook/> Last visited on December 27, 2022.

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The 'no safe haven approach' conception of is more defensive: states, keeping their own interests, do not give refuge to war crimes perpetrators. We can see a gradual shift from the prevalent 'no safe haven approach' to the third 'complementary preparedness approach' in prosecutorial activity concerning to available evidence collection, keeping and analysis in order to future facilitate national or international criminal proceedings of the crime<sup>22</sup>.

### **The Principles of Universal Jurisdiction**

Scientists developed the following principles to advance national judges' knowledge about the application of international law in national legal systems.

The Princeton Principles (2001)<sup>23</sup> and those of Cairo-Arusha <sup>24</sup>(2001-2002) went a long way in defining the key ideas of Universal Jurisdiction. The Cairo-Arusha Principles on Universal Jurisdiction have been called «the voice of Africa on universal jurisdiction for international crimes». They were cited by the International Court of Justice (ICJ) in the Arrest Warrant Case between the Democratic Republic of Congo and Belgium. But since the publication, the principles' new development, advance, corrections, and application limitations have been done in various countries practice, increasing the lack of defense in many cases. There is no doubt the principles should be necessarily updated and broadened, as well as disseminated and promoted on the political level<sup>25</sup>. For these reasons, Madrid-Buenos Aires Principles of Universal Jurisdiction were proposed.

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<sup>22</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL:[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 9-10.

<sup>23</sup> The Princeton Principles on Universal Jurisdiction. URL: [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Last visited on December 27, 2022.

<sup>24</sup> The Cairo-Arusha Principles on Universal Jurisdiction in respect of gross human rights offences: an African Perspective. URL: <http://jurisdiccionaluniversal.org/wp-content/uploads/2018/07/The-Cairo-Arusha-Principles.pdf> Last visited on December 27, 2022.

<sup>25</sup> MADRID - BUENOS AIRES PRINCIPLES OF UNIVERSAL JURISDICTION. URL: [http://jurisdiccionaluniversal.org/wp-content/uploads/2018/07/Versión-final-Ppios-JU-Madrid-Buenos-Aires\\_EN-versión-última.pdf](http://jurisdiccionaluniversal.org/wp-content/uploads/2018/07/Versión-final-Ppios-JU-Madrid-Buenos-Aires_EN-versión-última.pdf) Last visited on December 8, 2022.

*Table 1*

<b>The Princeton Principles (2001)</b>	<b>MADRID - BUENOS AIRES PRINCIPLES OF UNIVERSAL JURISDICTION</b>
Principle 1 – Fundamentals of Universal Jurisdiction	Principle 1 – Concept
Principle 2 – Serious Crimes Under International Law	Principle 2 – Crimes subject to Universal Jurisdiction
Principle 3 – Reliance on Universal Jurisdiction in the Absence of National Legislation	Principle 3 – Economic and environmental crimes subject to Universal Jurisdiction
Principle 4 – Obligation to Support Accountability	Principle 4 – Scope of Universal Jurisdiction
Principle 5 – Immunities	Principle 5 – Connected crimes
Principle 6 – Statutes of Limitations	Principle 6 – Criminal and/or civil liability
Principle 7 – Amnesties	Principle 7 – Universal civil jurisdiction
Principle 8 – Resolution of Competing National Jurisdictions	Principle 8 – Application of the principle of Universal Jurisdiction when not included in national legislation
Principle 9 – Non Bis In Idem / Double Jeopardy	Principle 9 – Statute of limitations, amnesty, pardon and immunity
Principle 10 – Grounds for Refusal of Extradition	Principle 10 – Principle of legality under international criminal law
Principle 11 – Adoption of National Legislation	Principle 11– Initiation of the investigation and presence of the alleged perpetrator during the proceedings
Principle 12 – Inclusion of Universal	Principle 12 – Complementarity and

Jurisdiction in Future Treaties	cooperation with the International Criminal Court and other international criminal justice mechanisms
Principle 13 – Strengthening Accountability and Universal Jurisdiction	Principle 13 – Conflicts of national jurisdiction
Principle 14 – Settlement of Disputes	Principle 14 – Mutual legal assistance
	Principle 15 – Extradition
	Principle 16 – Ne bis in idem
	Principle 17 – Transitional Justice
	Principle 18 – Independence of the competent authorities
	Principle 19 – Specialised judicial, prosecution and police institutions
	Principle 20 – Rights of victims and protection of witnesses and experts
	Principle 21 – Procedural rights and guarantees of the alleged perpetrator
	Principle 22 – Interpretation

So we can see that some principles were added, and some of them were updated. For example, it was updated the list of international crimes to which UJ shall be applied (genocide, crimes against humanity, war crimes, piracy, slavery, enforced disappearance, torture, human trafficking, extrajudicial executions and the crime of aggression). Such crimes may be committed in many ways, including through economic activities and those that affect the environment. We will use these principles for our further analysis.

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## *European Union Priority*

Lithuania should also consider the recent one of EU priorities due to the UJ.

European Parliament's (EP) commitment to universal jurisdiction can be seen in its resolutions:

(1) the EP's resolution of 15 March 2018<sup>26</sup> on the situation in Syria where it adopted unprecedentedly strong wording on the merits of universal jurisdiction in tackling impunity and welcomed the steps taken by a number of EU Member States to this effect...(art. 10));

(2) the EP's resolution of 4 July 2017<sup>27</sup> the obligation of the international community and individual states to hold to account those responsible for violations of international human rights and humanitarian law committed during the Syrian conflict, including through the application of the principle of universal jurisdiction as well as national law (art. K);

(3) The EP resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine focused on the crimes committed in Ukraine and stressed the need for justice to the Ukraine victims. It called “on the Member States and the Commission to provide all necessary assistance to bolster Ukraine’s judicial capacity and resources to effectively investigate and try war crimes”<sup>28</sup>.

(4) The EP resolution of 15 September 2022, on human rights violations in the context of forced deportations from Ukraine called “the Commission and the Member States to support all legitimate international and national processes, including under the principle of universal jurisdiction, and to investigate alleged crimes against humanity and war crimes with a view to holding all perpetrators accountable before a court of

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<sup>26</sup> European Parliament (2018), Resolution of 15 March 2018 on the situation in Syria (2018/2626(RSP)). Accessible online: <[https://www.europarl.europa.eu/doceo/document/TA-8-2018-0090\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0090_EN.html?redirect)>, last visited on December 1, 2022.

<sup>27</sup> 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)). Accessible online: <[https://www.europarl.europa.eu/doceo/document/TA-8-2017-0288\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0288_EN.html?redirect)>, last visited on December 1, 2022.

<sup>28</sup> European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine 2022/2655(RSP), URL:[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.pdf). Last visited on January 16, 2023.

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law, including cases of forcible transfers, forced adoptions and enforced disappearances”. It was also stressed that the resolution “strongly welcomes the ongoing investigations by the ICC in this regard”<sup>29</sup>.

(5) The EP resolution of 6 October 2022 on Russia’s escalation of its war of aggression against Ukraine called “Member States to work with international bodies to collect evidence and to support the International Criminal Court’s investigation of the war crimes committed within the territory of Ukraine” and “for the establishment of an ad hoc international tribunal for the crime of aggression against Ukraine”<sup>30</sup>.

(6) The EP 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).

Not singling out universal jurisdiction in particular, the EU Council has emphasized the role of Member States in general in combating impunity for serious crimes, while stating that ‘the 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)<sup>31</sup>.

The European Commission, having taken an interest in the universal jurisdiction exercise in an amicus curiae brief filed in the Kiobel litigation, concerning civil rather than criminal jurisdiction, before the US Supreme Court (2012), took the view that core

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<sup>29</sup> European Parliament resolution of 15 September 2022 on human rights violations in the context of the forced deportation of Ukrainian civilians to and the forced adoption of Ukrainian children in Russia (2022/2825(RSP)). URL:[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0320\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0320_EN.html). Last visited on January 16, 2023.

<sup>30</sup> European Parliament resolution of 6 October 2022 on Russia’s escalation of its war of aggression against Ukraine (2022/2851(RSP)). URL:[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0353\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0353_EN.html). Last visited on January 16, 2023.

<sup>31</sup> Cedric RYNGAERT Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL:[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 5 (60).

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crimes are amenable to both of universal criminal and civil jurisdictions<sup>32</sup>. The European Commission called on Croatia not to block Serbia's negotiations with the EU as to their access to the EU in the specific context of the external relations (2016), because of Serbia having legislated prosecuting Yugoslav war criminals according with UJ (Milekic). The Commission opined that Serbia could validly prosecute war crimes in such a way, and declined Croatia's argument that Serbia's assertion of UJ would be contrary to 'European standards' (Radovic)<sup>33</sup>.

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<sup>32</sup> 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", June 13, 2012.

<sup>33</sup> Cedric RYNGAERT Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 5 (60).



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## 2. Current situation analysis of universal jurisdiction in Lithuania.

According to Human Rights Watch<sup>34</sup>, states are obliged to use universal jurisdiction due to the “international treaties”, that include such treaties as the 1949 Geneva Conventions. Also, “international customary law allows the use of universal jurisdiction with regard to crimes considered particularly heinous by the international community, such as crimes against humanity and genocide”<sup>35</sup>.

Lithuania had signed and ratified such treaties as the Geneva conventions<sup>36</sup>, Convention against torture and others<sup>37</sup>, including the Convention on the Prevention and Punishment of the Crime of Genocide<sup>38</sup> and incorporated their principles into the national law.

As it is identified in the “Raoul Wallenberg Centre Report on Russia’s Genocide in Ukraine”<sup>39</sup>, the crime of genocide under international law is codified in the Genocide Convention, a treaty which the Soviet Union (now Russian Federation) ratified in 1954. Russia’s obligations under the Genocide Convention are *erga omnes*, or owed to the international community, which stems from the *jus cogens* status of the prohibition of genocide.

The Genocide Convention provides the criminal liability of individuals for genocide and related acts, while states can be held responsible for such acts under a distinct, though at times overlapping legal framework. Importantly, the standard of

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<sup>34</sup> “Basic Facts on Universal Jurisdiction Prepared for the Sixth Committee of the United Nations General Assembly”. Accessible online: <<https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>> last visited on December 27, 2022.

<sup>35</sup> Ibidem.

<sup>36</sup> 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 I. [n Lithuanian]. Accessible online: <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.106269?jfwid=>>, last visited on October 25, 2022.

<sup>37</sup> “Konvencija prieš kankinimą ir kitokį žiaurų, nežmonišką ar žeminantį elgesį ar baudimą“. More information online: <[https://tm.lrv.lt/uploads/tm/documents/files/dokumentai/Konvencija\\_CAT.pdf](https://tm.lrv.lt/uploads/tm/documents/files/dokumentai/Konvencija_CAT.pdf)>, last visited on December 27, 2022.

<sup>38</sup> “Konvencija dėl kelio užkirtimo genocido nusikaltimui ir baudimo už jį”, Accessible online: <[https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.161369/format/ISO\\_PDF/>](https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.161369/format/ISO_PDF/>), last visited on January 5, 2023.

<sup>39</sup> “Raoul Wallenberg Centre Report on Russia’s Genocide in Ukraine”. Accessible online: <<https://www.raoulwallenbergcentre.org/images/reports/An-Independent-Legal-Analysis-of-the-Russian-Federations-Breaches-of-the-Genocide-Convention-in-Ukraine-and-the-Duty-to-Prevent-2.pdf>>, last visited on October 20, 2022.

proof for breaches of a treaty under international law is lower than that required for criminal proceedings.

It is important to mention, that there is an ongoing discussion between the law experts, if the Geneva conventions, that do not directly mention the UJ, imply the states with moral or legal obligations to exercise it. In this discussion we support the attitude that the historical evolution of law discipline since the conventions were signed in the first half of the 20<sup>th</sup> century has resulted into “the growing understanding of the victim-centered perspective in the criminal prosecution process”, that encourage the states to apply the Universal Jurisdiction towards such crimes as genocide<sup>40</sup>. So, in theory, Lithuania can exercise universal jurisdiction due to international and national law. As Table 2<sup>41</sup> and the analysis below indicate, the present Lithuanian law satisfies most of the conditions, that allow the UJ to be applied in national courts.

*Table 2*

	War crimes		Crime against humanity		Genocide		Torture		Ordinary crimes <sup>42</sup>
	Defined in Law	UJ	Defined in Law	UJ	Defined in Law	UJ	Defined in Law	UJ	UJ
Belgium	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Estonia	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes/0 <sup>43</sup>	Yes
Germany	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes/0	Yes
Latvia	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes/0	Yes
Lithuania	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes/0	Yes

<sup>40</sup> Amina Adanan, Symposium on the Genocide Convention: Reflecting on the Genocide Convention at 70: How genocide became a crime subject to universal jurisdiction, 2019 05 16, accessible online: <<https://www.ejiltalk.org/symposium-on-the-genocide-convention-reflecting-on-the-genocide-convention-at-70-how-genocide-became-a-crime-subject-to-universal-jurisdiction/>>, last visited on December 27, 2022.

<sup>41</sup> Universal Jurisdiction: a preliminary survey of legislation around the world – 2012. Amnesty International. P. 16-17.

<sup>42</sup> States have provided universal jurisdiction over ordinary crimes under national law even when the conduct does not involve conduct amounting to a crime under international law, in most instances permitting their courts in certain circumstances to exercise universal jurisdiction over some conduct that amounts to a crime under international law. Source: Universal Jurisdiction: a preliminary survey of legislation around the world – 2012. Amnesty International. P. 12.

<sup>43</sup> The state has jurisdiction over some conduct amounting to the relevant crime, but only as an ordinary crime (YES/0). Source: Universal Jurisdiction: a preliminary survey of legislation around the world – 2012. Amnesty International. P. 9-10.

Also, as we discussed above (see chapter 1), the current EU policy favors the broader application of the UJ by the member countries – but Lithuania still does not take a lot of initiative on the issue.

Table 3 demonstrates that, as of 2021 data, there was only several criminal pre-trial proceeding under the Universal Jurisdiction in Lithuania since the criminal code created such possibility.

Table 3

<b>LITHUANIA</b> (since 1990)	<b>GERMANY</b> (since 2013)	<b>GLOBALLY</b> (in 2021)
<p><b>2 open cases</b> (2021-2022, torture cases in Belarus)</p> <p><b>1 open case</b> (2022, war crimes in Ukraine)</p> <p><b>1 finished trial</b> “in absentia” – “January 13 case”. The victims were Lithuanian nationals and the crime was committed in Vilnius, so we can just learn experience from «trial in absentia».</p> <p><i><b>Problem:</b> Russian started the persecution of Lithuanian judges and prosecutors investigating the January 13 case.</i></p>	<p><b>27 cases UJ</b><sup>44</sup></p>	<p><b>125 cases UJ</b><sup>45</sup></p>
<b>GOOD PRACTICE OF USING J. I. T.</b>		
<p>→ From the early beginning of the War till now, Lithuania as a part of the <b>Joint Investigation Team (JIT)</b>, gathers evidence of war and other international crimes in Ukraine together with 6 other countries. The JIT was set up by Lithuania, Poland and Ukraine. Both Eurojust and the ICC are participants in the JIT.</p>	<p><b>A German-French JIT</b> with the support of Eurojust and the Genocide Network, made a significant</p>	

<sup>44</sup> Database “trialinternational.org”, accessible online: <<https://trialinternational.org/>>, last visited on October 25, 2022.

<sup>45</sup> “Universal Jurisdiction Annual Review 2022”, accessible online: <[https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf)>, last visited on October 25, 2022.

	contribution to Syrian investigations that led to landmark judgment <sup>46</sup> : → two former members of the Syrian intelligence services were convicted ( <i>Anwar Raslan and Eyad Al-Gharib</i> ).	
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This is quite a small amount when compared with some other European countries. Statistically, in 2021 there were 125 active cases of UJ globally. While in some EU countries, the UJ is practiced often. In Germany, for instance, since 2013 there have been 27 such cases.

Of course, it is important to keep in mind that these numbers are subjective. Not all countries allocate the same resources to UJ-based processes, not all of them have similar situation when it comes to the known or easily detectible perpetrators and victims. But the present geopolitical situation and the amount of war and political refugees from Ukraine and Belarus, present in Lithuania today, require taking some actions to improve the situation.

Ukraine’s jurisdiction cannot solve all the cases of the violation of international humanitarian law due to the war conditions (we will discuss this situation in chapter 4).

While the non-democratic Belarus regime would not allow prosecuting the local law-enforcement personnel, responsible for many crimes, committed against the civilian population, such as torture in custody.

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<sup>46</sup> Press Release by European Union Agency for Criminal Justice Cooperation. URL: <https://www.eurojust.europa.eu/news/syrian-official-convicted-crimes-against-humanity-with-support-joint-investigation-team>. Last visited on January 09, 2023.

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In this chapter, the possible reasons for such rare application of UJ in Lithuania will be identified, the legal background to practice UJ will be analyzed, and the criminal prosecution practices will be briefly discussed.

### *The legal framework of Universal Jurisdiction in Lithuania*

Lithuania is obliged to prosecute the crimes according to these national legal acts.

Article 7 of the Criminal Code of the Republic of Lithuania<sup>47</sup> defines “Criminal Liability for the Crimes provided for in Treaties”. It states that “persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they have committed the (...) crimes subject to liability under treaties”. A category of such crimes, listed in the Criminal Code, are crimes against humanity, war crimes, aggression and several others (Articles 99-113<sup>1</sup>).

Some other categories of crimes, connected to the Ukraine war, listed under Article 7 are “acts of terrorism and crimes related to the terrorist activity (Article 252<sup>(1)</sup>(1) and (2)”, “unlawful handling of nuclear or radioactive materials or other sources of ionising radiation (Articles 256, 256<sup>(1)</sup> and 257))”.

The mentioned cases mean that in theory, Lithuania can prosecute international criminals, using the tool of universal jurisdiction, in the cases of the above-mentioned crimes.

Although the Criminal Code of the Republic of Lithuania<sup>48</sup> allows the prosecution of war crimes, crimes against humanity, genocide and some other crimes using the tools of universal jurisdiction, the criminal procedure code sets some limits. As Article 3

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<sup>47</sup> Criminal Code of the Republic of Lithuania. Accessible online:

URL:[https://e-](https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpyg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD)

[seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpyg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD](https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpyg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD). Last visited on October 24, 2022.

<sup>48</sup> Criminal Procedure Code of the Republic of Lithuania. Accessible online:

<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr>, last visited on October 24, 2022.

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indicates, the criminal procedure cannot be started under Lithuanian law if the person has immunity according to international legal norms. In practice, this is applied to the political leaders of the states that are in office. Therefore, the universal jurisdiction in the Lithuanian case is not a suitable tool to prosecute, for instance, the President of Russia.

Article 4, Paragraph 2 indicates that no matter where the crime is committed, the crime in the territory of Lithuania must be prosecuted using the national laws. However, paragraph 3 of the same article claims that if Lithuania is a signatory of the international treaty, then the rules, defined in the international treaty applies.

Article 5 identifies that citizens of other states and people without citizenship will be prosecuted according to Lithuanian laws. Suspects that have immunity but committed the crime within the territory of Lithuania are prosecuted according to international and national laws. But no arrest is possible for persons having immunity – any criminal prosecution actions against them are possible only if there is the agreement of these persons. This is the other limitation to prosecute the political leaders, regardless of if they are dictators or war crimes suspects – if they are the subject of the mentioned immunity.

Talking about the legal framework, we can conclude that the Lithuanian Criminal Code establishes Universal Jurisdiction under international treaties for certain crimes, such as: a) crimes against humanity, b) war crimes, c) genocide, d) trafficking in human beings, e) Terrorist activity and several others, but, in practice, the prosecutor can think that he or she has the discretion whether to open a case if there is no direct connection to Lithuania. We had already had this situation in 2022, when at first prosecutor's office refused to open one of the Belarusian cases, but this refusal was successfully cancelled by the court. This criminal case should be re-opened. Therefore, the issue of discretionary authority of the prosecutor's office to open criminal cases within the framework of universal jurisdiction remains controversial due to the lack of special regulation. At the same time, to our mind, in this case, the general regulatory rules

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established in the Criminal Procedure Code of Lithuania should be applied, and the same position was confirmed by the court, which cancelled the refusal of the prosecutor's office to open criminal proceedings.

The public communication of Lithuania's Prosecutor General's office towards the UJ, at least at the context of Ukraine war, seems quite positive. As the website of the Prosecutor General's Office indicates, when the large-scale war in Ukraine started in February 24, 2022, the "Prosecutor General's Office of the Republic of Lithuania opened a pre-trial investigation in accordance with Article 100 of the Criminal Code of the Republic of Lithuania on the treatment of human beings prohibited by international law, Article 110 on aggression and Article 111 on prohibited war attacks"<sup>49</sup>. According to the Prosecutor General:

"The pre-trial investigation was launched in the light of the fact that there is military aggression in Ukraine and war attacks against civilians, medical personnel, and hospitals, educational institutions and other civilian facilities are being destroyed whereas all such actions are prohibited by international humanitarian law and have caused deaths of many people including children. Also, one must take into consideration that war attacks take place in the areas posing high environmental and human hazards, such as nuclear power plants, repositories for radioactive fuel and other toxic chemicals. Besides, there are threats to use weapons of mass destruction."

This indicates that Lithuania understands the above-mentioned obligations under international law, as the signatory of the Genocide and Geneva conventions. The additional motivation of the Lithuanian prosecutors to help Ukraine to investigate crimes, occurring in war situation, is the fact that the Ukrainian legal system is overloaded (there are 57 694 war crimes registered in Ukraine), and the assistance of other countries will be very much appreciated. As it is stressed by the official position of the Prosecutor General's office:

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<sup>49</sup> „Generalinė prokuratūra pradėjo ikiteisminį tyrimą dėl nusikaltimų žmoniškumui ir karo nusikaltimų“, 2022 03 03, accessible online: <<https://www.prokuraturos.lt/lt/generaline-prokuratura-pradejo-ikiteismini-tyrima-del-nusikaltimu-zmoniskumui-ir-karo-nusikaltimu-en/8165>>, last visited on October 25, 2022.

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“We are aware that it is the Ukrainian Prosecutor’s Office that has the greatest right to prosecute individuals for war aggression in their country, but we also realize that they need assistance in conducting such prosecutions. The aim of the investigation is to collect and document the testimony of people who are retreating from Ukraine to other European countries, to gather all possible material that could be used to bring those guilty to justice. The carrying out of the opened pre-trial investigation was assigned to an investigation team composed of prosecutors and police officers.”

It is important to stress that a new and growing landscape in international criminal justice that will be relying much more on UJ than before - is emerging, and the war in Ukraine is speeding up this process. The growth of UJ is seen as a potential future trend – as the newest stage of the Russian war against Ukraine helped to understand better, the limitations and constraints inherent in the work of the ICC.

In this new landscape, domestic prosecutions are taking central stage and networks of cooperation are helping to shape justice outcomes. The turn towards criminal investigations and the building of criminal case files by civil society organizations did not only become more regular, but have also become more structured and prosecution oriented. Driving the prosecutions ‘from below,’ civil society is creating new opportunities by cooperating like never before on complex cases with myriad actors involved<sup>50</sup>.

### *Lithuanian experience of conducting Universal Jurisdiction: cases and identification of the threats*

As already mentioned, Lithuania has little practical experience dealing with the universal jurisdiction. However, some Lithuania’s experience, that can be useful in the case of universal jurisdiction, comes from the trials, organized using the territorial jurisdiction. Most significant from these trials is the case of January 13.

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<sup>50</sup> Bethan McKernan, “Criminal Complaint Submitted to German Court Over Sarin Gas Attacks in Syria”, *The Guardian*, 6 October 2020.



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Such experience has demonstrated that, not only the application of UJ, but also using some procedural elements of it (such as peculiarities of issuing the arrest warrant for the criminals who were not nationals and lived abroad or/and trials in absentia) can be a complicated and dangerous task.

First of all, the investigations of the crime, as we have already seen, is more difficult when the crime is committed outside the countries' territories – or (and) when the victim or the perpetrator, or both are not Lithuanian nationals and are not present in the territory of Lithuania.

There are also such challenges as the evidence collection and the mentioned trial in absentia.

Additional burdens are the threats and risks that occur to law-enforcement personnel involved in such trials. As it had already witnessed in the case of January 13, Russia had intentions to use international arrest warrants and other instruments available through Interpol to crack down on Lithuanian officials, working with the mentioned case. Russia announced publicly in the United Nations, that it intends to launch pre-trial investigations on Lithuanian prosecutors and judges working on the case of January 13th.

So, in the case of UJ, similar tendencies can follow: Russia, Belarus or other non-democratic country might try to get international arrest warrants sanctioned through Interpol for the arrests of Lithuanian officials<sup>51</sup>. This risk might reduce the motivation of the prosecutors to apply UJ.

The latter problem has been addressed by Lithuania and other EU countries to the international level. This issue is universal, and other countries, implementing UJ, might face it as well. The fear to be sanctioned this way might prevent prosecutors Lithuanian and other countries from taking legal action within the framework of UJ.

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<sup>51</sup> “Russia could use Interpol to crack down on Lithuanian officials”, 2018 11 20, official website of the Ministry of the Interior of the Republic of Lithuania, Accessible online: <<https://vrm.lrv.lt/en/news/russia-could-use-interpol-to-crack-down-on-lithuanian-officials>>, last visited on December 1, 2022.

Lithuania has been for several years, “together with other EU countries and NATO allies” among “the main voices” addressing the fact that “in past Russia had intentions to use international arrest warrants and other instruments available through Interpol to crack down on Russian democratic and civil society activists as well as Lithuanian officials”<sup>52</sup>.

So, it is not only a Lithuanian problem, but an issue of European and international importance as it is related to the protection of the independence of courts as well as the rule of law values throughout the European Union. The state, exercising universal jurisdiction, acts as an agent of the international community<sup>53</sup>.

However, some work has been done in Lithuania even under such conditions and despite these threats. Several cases fully fitting into the definition of UJ in the territory of Lithuania is now still at the pre-trial investigation stage, the suspects have not yet been identified. Details of Maksim Kharoshyn case<sup>54</sup> can be seen from the Table 4.

*Table 4*

<b>Facts:</b>	Maksim Kharoshyn, a Belarusian citizen, claims that on 13 October 2020, after attending pro-democracy protests in Minsk, he was attacked and tortured by officers loyal to Lukashenko’s regime.
<b>Procedure:</b>	On 30 November 2020, Kharoshyn filed a petition with Lithuanian authorities for the acts of torture he suffered while in custody in Minsk, Belarus. Lithuania’s General Prosecutor opened an investigation against Belarusian regime officials over the alleged torture of pro-democracy activists.
<b>Context:</b>	Ongoing investigation for alleged acts of torture committed against

<sup>52</sup> “Russia could use Interpol to crack down on Lithuanian officials”, 2018 11 20, official website of the Ministry of the Interior of the Republic of Lithuania, Accessible online: <<https://vrm.lrv.lt/en/news/russia-could-use-interpol-to-crack-down-on-lithuanian-officials>>, last visited on December 1, 2022.

<sup>53</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. p. 9.

<sup>54</sup> “Universal Jurisdiction Annual Review 2022”, accessible online: <[https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf)>, last visited on October 25, 2022.

	an activist during the protests against the re-election of Belarus President Alexander Lukashenko.
<b>Suspects:</b>	Belarusian security officers, including Belarusian Deputy Minister of Interior Nikolai Karpenkov.
<b>Country of residence of suspects:</b>	Belarus
<b>Charges:</b>	As the case is at the investigation stage, the charges have not yet been formulated.
<b>Current status:</b>	Under investigation <sup>55</sup> .

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<sup>55</sup> “Universal Jurisdiction Annual Review 2022”, accessible online: <[https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf)>, last visited on October 25, 2022.

### 3. Challenges of Universal Jurisdiction

As it is indicated by the project’s stakeholders and most of the academic sources we have analyzed, there are several reasons why Universal Jurisdiction is criticized by legal scholars and practitioners.

*Table 5*

Main challenges	Explanations
<p>1. Evidence: requirements and sharing</p>	<p>Difficult to gather proper evidence from another country - evidence needs to be gathered not in the territory of Lithuania. Requirements for proper evidence are different in different countries. Lithuania has certain requirements on what could be treated and accepted as evidence. For example, most videos from Ukraine of torture of civilians would not qualify as their authenticity is difficult to verify.</p> <p>It is very important to develop a guide, helping different countries to organize the proper evidence collection – as illustrated by the following example. On 27 June 2018, the case of Theodore Tabaro who had taken part in the Rwandan genocide was decided in Sweden. The court found Mr. Tabaro was guilty of constituted genocide, murder, attempted murder and kidnappings, but he was acquitted of rape charges because of the lack of evidence<sup>56</sup>.</p> <p>There are very few tools to share evidence when it comes to genocide, war crimes and crimes against humanity in the absence of bilateral agreements. So, a comprehensive tool</p>

<sup>56</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 12.

	should be created to help states cooperate beyond the European Union <sup>57</sup> .
2. Presence and rights of the accused	‘Presence requirements in order to open an investigation or to seek extradition and requirements of double criminality’ <sup>58</sup> . Difficult or even impossible to obtain custody of the accused. Fears that rights of the accused might be breached.
3. Immunities from prosecution and Amnesties as ways of impunity	Obstacles to the exercise of universal jurisdiction include the question of the application of sovereign immunity defenses and amnesty laws <sup>59</sup> . There is a general tendency towards the State officials' immunity restriction (even for Heads of States) (...) when they are accused of serious international crimes <sup>60</sup> . To our mind in this regard, former heads of state should not enjoy immunity and be subject to amnesties for the crime of torture, crimes of genocide, crimes against humanity, war crimes and other serious crimes under international law committed in an official capacity (the Pinochet case). For example, when the United Nations faced the question of signing the Sierra Leone Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. We must be

<sup>57</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 19.

<sup>58</sup> Universal Jurisdiction: a preliminary survey of legislation around the world – 2012. Amnesty International. P. 11.

<sup>59</sup> The Princeton Principles on Universal Jurisdiction. URL: [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Last visited on December 27, 2022.

<sup>60</sup> International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits), Judgement of 14 February 2002. Dissenting opinion of Judge Van den Wyngaert; Own emphasis

	<p>cautious not to send the wrong message regarding amnesties for serious violations of human rights<sup>61</sup>.</p> <p>In addition, The Rome Statute of ICC (Art. 27) implied waiving all immunities of their state and other high-ranking officials' heads.<sup>62</sup></p>
<p>4. Lack of specific knowledge about International Criminal Law</p>	<p>Crimes according to international law are not defined as crimes under national law<sup>63</sup>. Criminal investigation under the Universal Jurisdiction legal framework is a particular task. There is a need for trainings on how to implement it in a most efficient way.</p>
<p>5. Refusing to comply with arrest warrant to extradite</p>	<p>It happened several times that courts, that conducted the investigations and trial processes in the context of Universal Jurisdiction, issued international arrest warrants asking another country to extradite the perpetrator. But in most cases the other country refused to comply with it. For example, the Hissène Habré case in Belgium. Belgium, having got a refuse in the case, applied to the International Court of Justice which on 28 July 2012 got a decision that Mr. Habré had to be extradited or prosecuted by Senegal.<sup>64</sup> Those who are most responsible for international crimes should not enter the EU or other territories without being arrested and questioned. One more example: Italy</p>

<sup>61</sup> The Princeton Principles on Universal Jurisdiction. URL: [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf). Last visited on December 27, 2022.

<sup>62</sup> J.S.V. ÁLVAREZ, "The balance of immunity and impunity in the prosecution of international crimes", Serie Working Papers 08/16, FIBGAR, July 2016, p. 21.

<sup>63</sup> Universal Jurisdiction: a preliminary survey of legislation around the world – 2012. Amnesty International. P. 11.

<sup>64</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018. URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 10.

	refused to cooperate and arrest Syrian Intelligence Chief Ali Mamluk, when he travelled to Italy <sup>65</sup> .
6. Not enough focus on the victim-driven perspective	One of the methods to address this issue is a greater focus on the rights of the victims. We can illustrate this thesis by Hissène Habré case, which was so successful because 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 more successful cases if victims are placed at the centre of the process again. EU Parliament's Workshop declared that encouraging the EU both in its internal and external policy in promoting the victims' rights for more effective universal jurisdiction ensuring is of extreme importance. <sup>66</sup> When national prosecutors exercise UJ, in most cases, victim communities (of the diaspora) that are present in the local territory have played a major role in building cases, gathering evidence, and convincing prosecutors to take up cases.
7. Costs	Such criminal investigation and prosecution are expensive. It requires a lot of material resources: travelling to the country where the crime was committed, building international and trans-institutional connections, hiring experts, etc.
8. Human resources	The lack of personnel and experience working on criminal prosecution under Universal Jurisdiction. Also it should be organized by specialized prosecutors, judges and war crimes' prosecution institutions.

<sup>65</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018.URL:[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 14.

<sup>66</sup> Universal jurisdiction and international crimes: Constraints and best practices. Workshop. European Union, 2018.URL:[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf). Last visited on December 8, 2022. P. 19.

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#### 4. Joint Investigation Team as a possible tool to fight some challenges of Universal Jurisdiction: successful international experience and Ukrainian case.

**Problem:** As it was mentioned above, one of the main reasons why Lithuania and some other states are still reluctant to have more cases of universal jurisdiction is that the evidence collection for crimes committed on the territory of the country where the criminal prosecution is taking place is much more difficult.

**The hypothesis of the possible way to solve:** We consider this problem could be solved by the Joint Investigation Team (JIT)<sup>67</sup>. The JIT can cooperate with the countries, pursue the UJ, and help to complete this task. For now, this is our hypothesis, which we are going to further investigate using the examples of committed war crimes in Ukraine, due to the fact that this case is investigated in Lithuania, and Lithuania is a part of JIT, which was organized from the early beginning of the Russian War in Ukraine in 2022.

**Successful practice:** Europe has already had a successful JIT experience gathering MH17 plane crash evidence in Ukraine and in Syrian case in Germany. The courts recognized this evidence in their verdicts (the Dutch Court's verdict, 17 November 2022 and the Higher Regional Court in Koblenz, 13 January, 2022), that is why we think that many elements of these cases **can be helpful for investigations in cases of Universal Jurisdiction**, especially in the Ukrainian and similar cases. For example, JIT of MH17 case was published an interactive map of some evidence from

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<sup>67</sup> JIT is one of the most advanced tools used in international cooperation in criminal matters, comprising a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations. It is made up of prosecutors and law enforcement authorities and judges. JITs are established for a fixed period, typically between 12 and 24 months. See more in: URL: <https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams>, last visited on January 16, 2023.

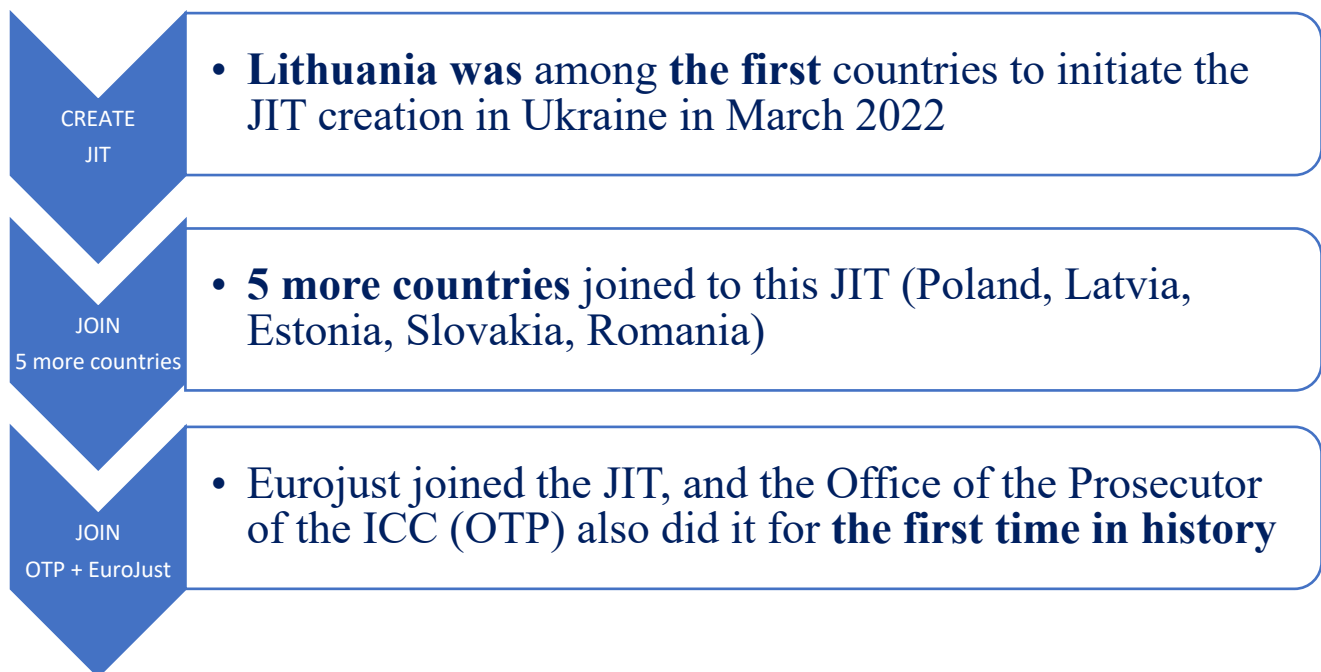


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the case file which was collected in a partnership between the Netherlands, Australia, Malaysia, Ukraine and Belgium<sup>68</sup>. So we can learn a lot from this experience.

**Ukrainian case and more arguments.** Only 3 criminal proceedings have been initiated in Lithuania within the limits of universal jurisdiction so far: the first one as regarding war crimes in **Ukraine** and the second as regarding crimes against humanity committed in Belarus.

The investigation has been still going on. In view of this, the Ukrainian context will be taken as the basis for our study, because Lithuania has been actively working on this matter all this time for the following reasons:



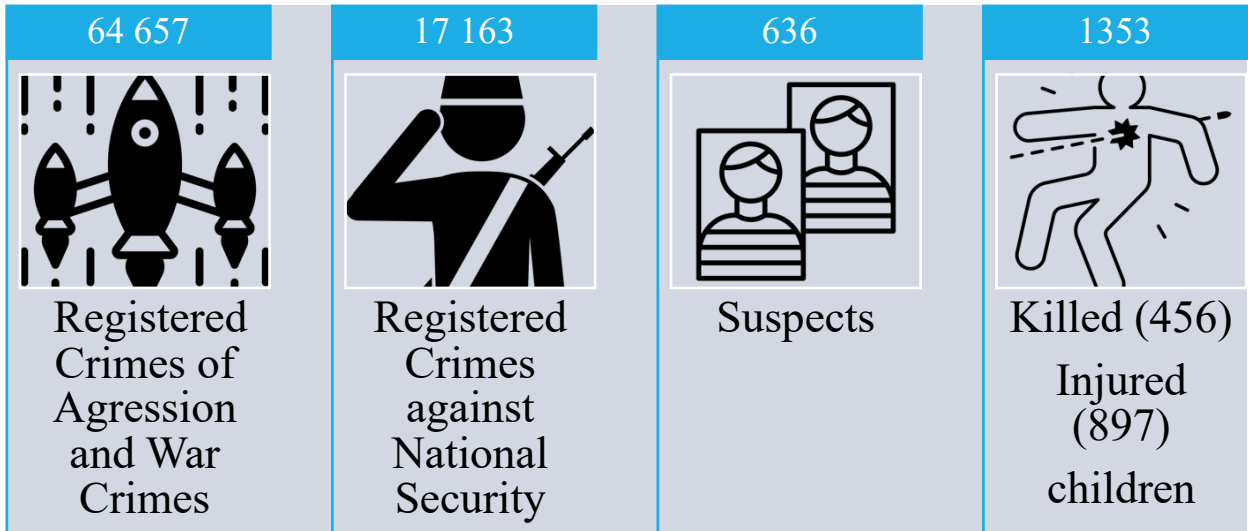
Such a strong JIT composition can indicate a **great trust in the JIT effectiveness** on behalf of the **international community** and the OTP especially.

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<sup>68</sup> See, for instance: The MH17 criminal files, accessible online: <<https://criminalfilesmh17.prosecutionservice.nl>>, last visited on October 22, 2022.

In Ukraine, the number of war crimes is very large and growing. The country, especially in war conditions, lacks resources to perform investigation process and justice (Table 6).

Table 6



Data collected on: 2023 01 18

Source: <https://www.gp.gov.ua>

The Ukrainian national court system needs help to ensure justice for all the victims, and it is an additional argument (see Figure 1).

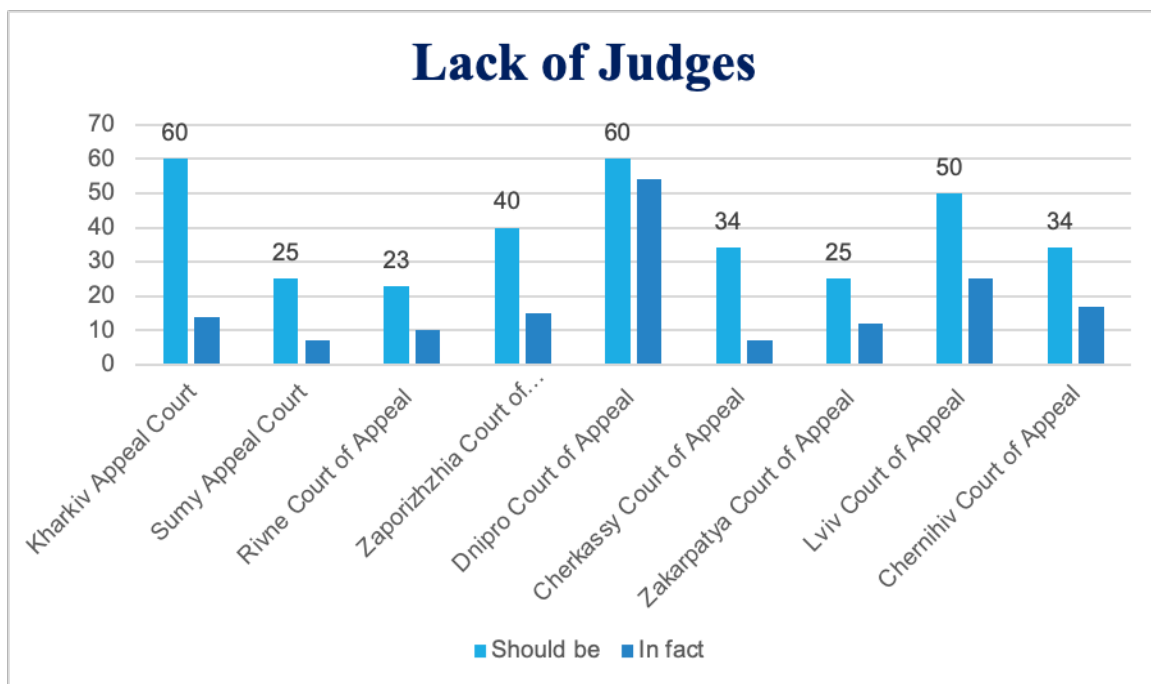


Figure 1

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In Ukraine, 94 of local and appellate courts do not administer justice now (14%). Also, 105 court premises are damaged, and 12 courts are completely destroyed (11%). It is important to stress that 9% of courts are located on occupied territories temporarily not controlled by the Ukrainian authorities.

Justice is not administered in some courts due to the lack of judges. For example, the Kharkiv Appeal Court should have 60 judges, but the actual number is 14 (Figure 1). That is, four times less than it should be. At the same time, the average monthly receipt of cases per judge is 146 cases per month<sup>69</sup>.

As can be seen in a Figure 1, most courts in Ukraine do not work in their full capacity. In some courts only half or less of all judges are in fact working, with places like Kharkiv Appeal Court being in the worst position (with less than one third of judges working).

**Why do we consider it as a possible tool for UJ?** All the representatives from JIT can effectively gather evidence on their own territory, save time/resources, and provide all required investigation actions according to their national legislation. It can be important for future court trials.

National authorities are actively monitored and assisted by the OTP to achieve complementarity with the help of:

- 1) knowledge centres,
- 2) evidence sharing,
- 3) open-source crime databases,
- 4) confidential information exchange, and the third parties' capacity building<sup>70</sup>.

Moreover, as of January 2023, the competent authorities of 20 countries have started their own investigations or evidence collection to investigate crimes committed

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<sup>69</sup> Data gathered by authors from State Judicial Administration of Ukraine. November, 2022.

<sup>70</sup> Sliedregt, Elies van, Future of International Criminal Justice - Bursting the Bubble? (February 15, 2020). The Future of Criminal Justice, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3538697> or <http://dx.doi.org/10.2139/ssrn.3538697>.

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in Ukraine as a result of the armed aggression of the Russian Federation; they are, except for Lithuania, in particular the following: Poland, Estonia, Latvia, Slovakia, Romania, Belgium, Canada, Czech Republic, France, Germany, Ireland, Italy, Netherlands, Norway, Spain, Switzerland, Sweden, Great Britain, USA.

Some of these countries have had significant experience in universal jurisdiction, which can be used to effectively implement and conclude cases in Lithuania under this mechanism. The fact is that some of these countries have already been participating in JIT and opened universal jurisdiction investigations of war crimes in Ukraine, can also prove that cooperation in JIT is a good tool.

It is also important to mention that in 2023, the OTP, according to its vision, will have four field offices in Kyiv, Caracas, Cox's Bazar and Khartoum fully staffed and operating.<sup>71</sup> The situation in Colombia, with the OTP monitoring the peace and its transitional processes to ensure an accountability mechanism, is one more example of this 'positive complementarity' approach.<sup>72</sup>

But we should disagree with the fact that monitoring is enough. Gathering proper evidence sufficiently is JIT's main mission.

To sum up, the authors of this analysis propose the hypothesis that the experience of JIT during the successful MH17 plane crash investigation could also be applied in the cases of UJ. This hypothesis will be further tested in the next stage of our project, best legal practices research, that can be useful to implement the UJ, and we are going to propose the toolbox, dedicated to contributing into more successful implementation of the UJ in Lithuania. As we can see, some of these best practices could be learned not only from the UJ-related cases but from those that involve other elements useful for UJ-related criminal investigations (for instance, trial in absentia).

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<sup>71</sup> Annual Report of the Office of the Prosecutor – 2022. URL: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>. Last visited on January 01, 2023.

<sup>72</sup> *Vervaele*, in: Sieber et al. (eds.), *Alternative Systems of Crime Control: National, Transnational, and International Dimensions*, 2018, 140; Sliedregt, Elies van, *Future of International Criminal Justice - Bursting the Bubble?* (February 15, 2020). *The Future of Criminal Justice*, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3538697> or <http://dx.doi.org/10.2139/ssrn.3538697>.

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# Conclusions

As the current situation analysis reveals, Lithuania has a sufficient legal basis, but the criminal investigation process is difficult, time and resources are consuming<sup>73</sup>, and there are international restrictions to bring the perpetrator to justice (extradition processes and others). Anyway, even limited justice in cases of core international crimes is better than no justice for victims at all.

Therefore, the project's main goal is to create a Universal Jurisdiction toolbox, using the best practices of the most successful EU countries – Germany and the Netherlands, that will help Lithuanian institutions better understand, initiate, and investigate crimes using the Universal Jurisdiction. Especially, taking into the consideration successful experience of JIT in the MH17 case and German-French JIT in the Syrian case (the good practice of gathering and sharing evidence with further recognition in the court verdicts).

Therefore, it is important to assist in this process, from our point of view, with:

- 1) analysis of universal jurisdiction successful international practice in other countries;
- 2) provide possible solutions in the form of UJ toolbox for further implementation in Lithuania.

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<sup>73</sup> See more about it in Chapter 3 (1-6 points: investigation process challenges; 7-8 time and resources challenges).