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# Best International Practices of Universal Jurisdiction



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## Introduction

In the Statement, on behalf of the European Union and its Member States Ms. Simona Popan, Counsellor, Delegation of the European Union to the United Nations claimed that “accountability for core international crimes is part of the EU efforts to fight impunity around the world”, therefore, according to her, EU member states “view **universal jurisdiction (UJ) as an important tool** of the international criminal justice system to prevent and combat impunity and promote international accountability”<sup>1</sup>. Agreeing that “the views and practices of States concerning the definition, scope and application of universal jurisdiction vary”, S. Popan also expressed the idea, that “the exercise of universal jurisdiction can fill jurisdictional gaps, in particular where States are unable or unwilling to exercise jurisdiction, and help achieve accountability”<sup>2</sup>.

This need is well-researched and documented. According to an in-depth analysis of UJ by Luc Reydam, “to this day, any prosecutor anywhere in the world (...) has more jurisdiction than the prosecutors of any international or hybrid criminal tribunal, including the ICC. Not bound by time or geography, any national prosecutor could have investigated – and still can investigate – war crimes committed in conflicts around the world...”<sup>3</sup>. Also, according to L. Reydam, ICC does not have universal jurisdiction and can prosecute limited number of cases. Therefore, it is crucial for the “states do their share”<sup>4</sup>. However, many EU countries in the last two decades experienced backlashes towards the UJ. “The rise and fall of universal jurisdiction” can be observed “in Belgium, France, Germany, Spain and the United Kingdom”<sup>5</sup>.

So, it seems that in past years UJ is mostly been promoted by “NGOs, human rights activists and a fair number of academics”, who argue that “the respective treaties (Genocide Convention, Geneva Conventions, Torture Convention and ICC Treaty)” do “establish obligations without affecting the sovereign right of states to exercise universal jurisdiction”<sup>6</sup>. But these actors, according to Reydam, have not “explained” “why states who have not joined the ICC with its checks and balances – and even those

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<sup>1</sup> Statement on behalf of the European Union and its Member States Ms. Simona Popan, Counsellor, Delegation of the European Union to the United Nations, at the Sixth Committee on the Agenda item 86, The scope and application of the principle of universal jurisdiction, United Nations, New York 2022, p. 2.

<sup>2</sup> Ibidem.

<sup>3</sup> The application of universal jurisdiction in the fight against impunity, by Luc REYDAMS, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES POLICY DEPARTMENT, European Parliament, Belgium. 2016, p. 16.

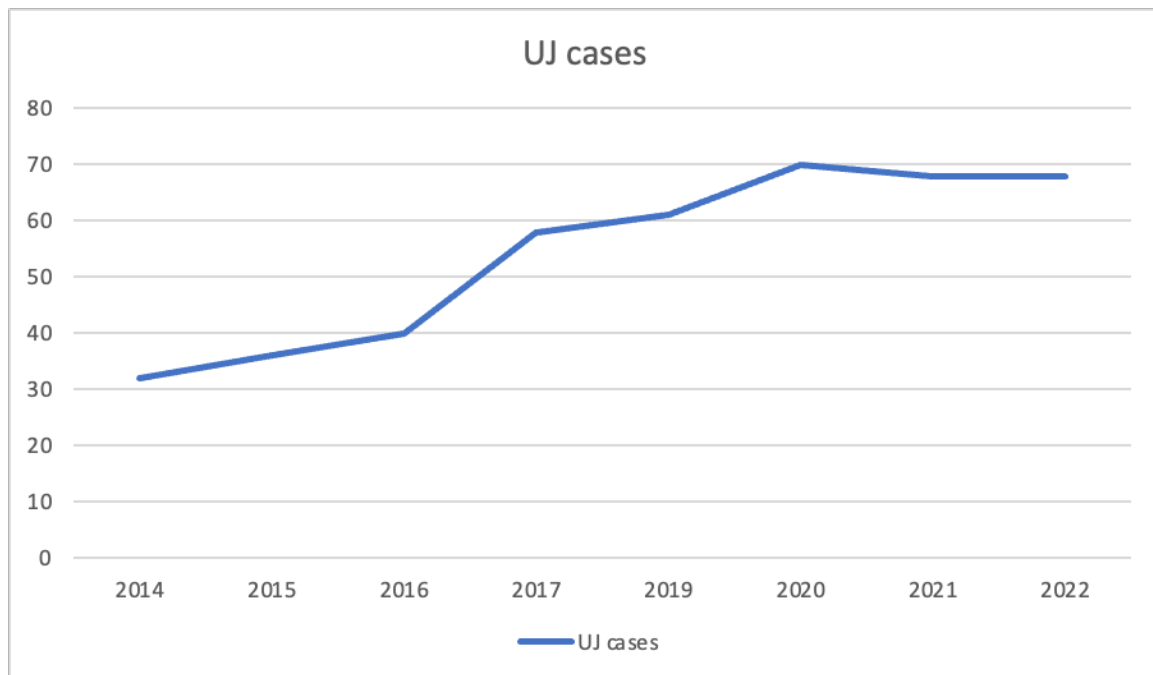
<sup>4</sup> Ibidem.

<sup>5</sup> Ibidem.

<sup>6</sup> Ibidem.

who have joined – would submit to the universal jurisdiction of a national court”<sup>7</sup>. Anyway, the role of UJ is still growing (see Figure 1<sup>8</sup>).

Figure 1



Some countries still apply the UJ on a significant scale (see Table 1).

Table 1

Countries	2014	2015	2016	2017	2019	2020	2021	2022
Argentina	2	2	1	1	2	3	2	3
Austria	-	-	1	1	2	2	1	1
Belgium	2	2	1	2	2	4	5	2
Brazil	-	-	-	1	-	-	-	-
Canada	1	-	-	-	-	-	-	-
Chile	-	1	-	-	-	-	-	-
Finland	-	1	3	1	2	2	2	1
France	8	8	9	12	16	17	17	24
Germany	3	4	8	15	18	16	16	15
Ghana	-	-	-	-	1	1	1	1
Hungary	-	-	-	-	-	1	1	1
Italy	-	-	-	-	1	3	2	1

<sup>7</sup> Ibidem.

<sup>8</sup> Data gathered by authors in <https://trialinternational.org/universal-jurisdiction-tools/>

Lithuania	-	-	-	-	-	-	1	1
Norway	-	-	-	-	1	-	-	-
Senegal	2	2	1	1	1	-	1	-
South Africa	2	-	-	-	-	-	-	-
Spain	6	9	2	4	3	2	1	1
Sweden	2	2	6	4	2	3	2	4
Switzerland	3	3	3	7	4	6	5	4
The Netherlands	-	1	1	3	2	5	5	5
Norway	-	-	-	-	-	2	-	-
UK	1	1	2	4	2	2	2	2
USA	-	-	2	2	3	1	4	2

Therefore, this paper is dedicated to explore, how several EU countries with the highest scopes of application of the UJ are treating, promoting and implementing the UJ in their legal and political agendas. We will explore, how UJ is legally regulated and applied. Although Norway is not a part of EU, we included this country in our analysis as well – due to achievements in the UJ application.

As data of 2022 indicates, in Belgium there were 2 active UJ cases, both related to the genocide crimes committed in Rwanda: one pending and one under investigation, with two suspects detained. Germany had 15 active cases, most criminals were from Syria, some of them – already sentenced and imprisoned. Netherlands prosecuted 5 cases total – some also ending in sentence and imprisonment. Sweden had 4 cases<sup>9</sup>. Norway did not have cases in 2022 or 2021, but two cases were in 2020 – suspects were from Syria and Rwanda<sup>10</sup>.

As S. Popan expresses in already quoted document, the main factor, motivating EU, is the shared desire for accountability, which is seen as “not only a strong deterrent, but also as a driver to successful reconciliation processes and the consolidation of peace in post-conflict societies”<sup>11</sup>.

It is very important today, in Europe itself, due to the war in Ukraine, dictatorship in Belarus. According to Popan:

<sup>9</sup> Universal Jurisdiction Annual Review 2022, Trial International, Geneva, Switzerland, p. 100-104.

<sup>10</sup> Universal Jurisdiction Annual Review 2020, Trial International, Geneva, Switzerland, p. 94.

<sup>11</sup> Statement on behalf of the European Union and its Member States Ms. Simona Popan, Counsellor, Delegation of the European Union to the United Nations, at the Sixth Committee on the Agenda item 86, p. 2.

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*“Several of the EU Member States have been applying universal jurisdiction in the fight against impunity. In doing so, they share the belief that universal jurisdiction can usefully complement efforts that are an integral part of a wider accountability strategy, complementary to the role and the jurisdictional bases of prosecutions at international courts, such as the ICC.”<sup>12</sup>*

So, application of UJ is seen not as a main (although, important) – but, rather, as the **complementary method** to seek the impunity in the cases of violations of the international humanitarian law.

As we will see further in the analysis – this is exactly how it is treated and understood by the analyzed EU member states. And in one of the closest EU partners and the member of the European Economic Area (EEA), Norway.

So, the aim of this paper is to take a deeper look into several European countries’ laws and practices towards the UJ – also, addressing the question, how can these experiences and practices be useful for Lithuania today.

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<sup>12</sup> Ibidem.

# 1. Legal framework of Universal Jurisdiction

The way how the law regulates Universal Jurisdiction related issues differs from country to country. In some countries, there are separate laws or codes, regulating the matters of UJ. Otherwise, the possibility of applying UJ, is embodied in the national criminal and criminal procedure codes. The Table 2 demonstrates, how UJ is legally regulated in different European countries.

Table 2

Is there a separate UJ law? (Or prosecution takes place under the criminal and / or criminal procedure code?)					
Belgium	Germany	Netherlands	Norway	Sweden	Spain
NO	YES	YES	NO	YES	NO
<i>There was a separate law until 2003</i>	<i>Code of Crimes against International Law</i>	<i>International Crimes Act</i>	<i>Prosecution is under the national codes</i>	<i>Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes.</i>	<i>No more after the reforms of 2009 and 2014</i>

As the table demonstrates, in **Belgium**, there used to be the separate law on the punishment of serious violations of the international humanitarian law of June 16, 1993, that allowed “prosecutions to be brought against persons suspected of serious violations of international humanitarian law whether or not they are present within Belgian territory”<sup>13</sup>. But this law was replaced in 2003 by a law, that is much more restrictive towards the UJ. It was done by amending the Belgian Criminal Code<sup>14</sup>. The Code criminalizes genocide, crimes against humanity, war crimes and torture. Enforced disappearance is not included exist as an independent offence – but would be treated as a crime against humanity<sup>15</sup>.

In Germany, there is a separate criminal code to prosecute crimes, that are heavy violations of the international law and requires UJ, called the Code of Crimes against

<sup>13</sup> Universal Jurisdiction Law and Practice in Belgium, May, 2022, Briefing Paper, Open Society Justice Initiative, Trial International, p. 4. <https://trialinternational.org/wp-content/uploads/2022/05/UJ-Belgium-EN-1.pdf>

<sup>14</sup> Ibidem.

<sup>15</sup> Ibidem.

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International Law (Völkerstrafgesetzbuch – VStGB). The VStGB was amended in 2016. The code consists of these parts: Core crimes, Aggression, and Other criminal offences. According to it, criminal offences are punishable even when the offence was committed abroad and bears no relation to Germany<sup>16</sup>.

Core crimes prosecutable using universal jurisdiction are: Genocide<sup>17</sup>, Crimes against humanity (willful killing, extermination, enslavement, deportation or forced transfer of persons, torture, sexual violence, enforced disappearance, causing serious physical and mental harm, unlawful deprivation of physical liberty, persecution, apartheid, other inhumane acts)<sup>18</sup>; War crimes<sup>19</sup>; Aggression<sup>20</sup>; Other crimes<sup>21</sup>.

According to L. Reydam, the “Code of Crimes against International Law (...) provides for universal jurisdiction” and, “together with the original Belgian War Crimes Act, the Code is one of the very few domestic war crimes statutes enacted with the clear intent of its being applied to crimes committed abroad by foreigners”<sup>22</sup>.

In the Netherlands the international provisions relating to international crimes and international humanitarian law have been domesticated in 2003 – when the International Crimes Act (Wet Internationale Misdrijven – ICA) was adopted. One of the main reasons for adopting this law was the creation of the International Criminal Court (ICC) and the related Rome Statute, which entered into force on 1 July 2002. The ICA provides for universal jurisdiction over specific offences allowing national authorities to investigate and prosecute such offences under certain conditions when they were committed abroad by foreign nationals. But ICA does not establish an obligation to prosecute these crimes, the investigation being at the discretion of the prosecutors. The ICA criminalizes Genocide, crimes against humanity, war crimes, enforced disappearance, torture<sup>23</sup>.

In Norway, there is no separate code or law (laws) for the prosecution of crimes that require UJ. Sections 5 and 6 of the Norwegian Penal Code enumerate which crimes can be prosecuted in Norway if they are committed abroad, and what requirements attach to their prosecution. According to Section 5, first paragraph, of the Penal Code, the following acts, among others, can be prosecuted if committed outside of Norwegian

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<sup>16</sup> Universal Jurisdiction Law and Practice in Germany, March 2019, Briefing Paper, Open Society Justice Initiative, Trial International, p. 4. <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany>

<sup>17</sup> Ibidem.

<sup>18</sup> Ibidem, p. 5-9.

<sup>19</sup> Ibidem, p. 9-11.

<sup>20</sup> Ibidem, p. 11-12.

<sup>21</sup> Ibidem, p. 12.

<sup>22</sup> The application of universal jurisdiction in the fight against impunity, by Luc REYDAMS, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES POLICY DEPARTMENT, European Parliament, Belgium. 2016, p. 19.

<sup>23</sup> Universal Jurisdiction Law and Practice in the Netherlands, April 2019, Briefing Paper, Open Society Justice Initiative, Trial International, 4-6. <https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-the-netherlands>



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territory: crimes that are also punishable under the law of the country in which they were committed; war crimes, genocide or a crime against humanity. The Penal Code also allows prosecution of crimes committed abroad that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law<sup>24</sup>.

In Spain, The Spanish Judicial Act of 1985 provided for one of the broadest universal jurisdiction provisions in the world. Spain became a pioneer in the application of universal jurisdiction. But, step by step, the application of UJ lost the political support<sup>25</sup>. The reform took place in 2009. It limiting the ability of Spanish courts to investigate and prosecute crimes committed outside Spain. An additional reform of 2014 meant almost elimination of universal jurisdiction in Spain for the most serious international crimes. The broad and complex list of conditions, that must be met before Spanish courts can assert universal jurisdiction, were established, all open cases had to be closed<sup>26</sup>. For this reason, we will not cover Spain in this analysis further in our analysis.

In Sweden, some international crimes, that are considered most severe, such as the war crimes, are treated as the subject of the universal jurisdiction. They can indeed be prosecuted, regardless of the nationality of the perpetrators or victims and the place where the crimes were committed<sup>27</sup>.

In 2002, the Rome Statute of the International Criminal Court (Rome Statute) was ratified by Sweden. While some of the crimes included in the Rome Statute were previously covered by the Swedish Criminal Code (SCC) and the Swedish Act on Criminal Responsibility for Genocide, a new law codifying the Rome Statute was incorporated into Swedish law through the Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (Universal Crimes Act or UCA). It covers genocide, crimes against humanity and war crimes, as well as attempts, preparations and conspiracy to commit such crimes. In addition, the UCA criminalizes superiors' failure to exercise supervision and the failure to report crimes committed by subordinates as separate crimes<sup>28</sup>.

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<sup>24</sup> Universal Jurisdiction Law and Practice in Norway, January 2019, Briefing Paper, Open Society Justice Initiative, Trial International, p. 5.

<https://www.justiceinitiative.org/uploads/aa5925fb-0c95-4f5f-a1b9-3e56da17c7b3/universal-jurisdiction-law-and-practice-norway.pdf>

<sup>25</sup> Death of Universal Jurisdiction in Spain has Taken Away Plaintiffs' Rights, December 14, 2020, <https://academic.oup.com/jicj/article-abstract/13/2/245/896503>

<sup>26</sup> Ibidem.

<sup>27</sup> <https://unpaiddeb.org/supreme-court-could-limit-swedens-ability-to-prosecute-war-criminals-swedens-jurisdiction-in-the-lundin-case-to-be-decided-in-october/#:~:text=In%20Sweden%2C%20some%20crimes%20are,where%20the%20crimes%20were%20committed.>

<sup>28</sup> Universal Jurisdiction Law and Practice in Sweden, April 2020, Briefing Paper, Open Society Justice Initiative, Trial International, p. 4.

<https://www.justiceinitiative.org/uploads/550b6548-a951-425f-84b3-d75e5d78688c/universal-jurisdiction-law-and-practice-sweden.pdf>

## 2. Requirements for and Limits of Universal Jurisdiction

*Requirements for UJ* vary from country to country. In most of them, there are certain conditions when UJ is applicable.

Table 3

<b>Limitations and Conditions for applying UJ</b>				
<b>Belgium</b>	<b>Germany</b>	<b>Netherlands</b>	<b>Norway</b>	<b>Sweden</b>
<p><b>Connection with Belgium</b> - the suspect is Belgian national or resident; - the suspect is a foreigner, but the victim, at the time of crime commission, is a Belgian citizen or a refugee recognized in Belgium and have their residence there (or has been lawfully staying in the country for minimum 3 years).</p>	<p><b>No special requirements</b> In the case of crimes of genocide, crimes against humanity and war crimes – no special requirements for starting the investigation, but suspects' presence in the court is still required. In other cases, such as aggression, the prosecutor can decide whether to prosecute or not.</p>	<p><b>Connection to the Netherlands</b> Investigation cannot be opened if the crimes is committed abroad, victim and perpetrator is non-national, without the suspect being identified and present in the country.</p>	<p><b>Connection to Norway and presence of the suspect</b> - the suspect is domiciled in Norway; - the suspect is a national of or domiciled in another Nordic country and is present in Norway; - the suspect is present in Norway. Or, the victim has is a citizen or resident of Norway. Also, in order to prosecute the maximum penalty for the alleged crime must be more 1 year.</p>	<p><b>No presence or connection requirements in law, but domestic law requires no investigation without the suspect present.</b> Additionally, the authorization of the government required for UJ.</p>

As it is indicated in the Table №3, Belgium has certain limitations of applying UJ. However, Belgian courts also have jurisdiction to prosecute a person under the UJ, if a rule of international law based on a convention or customary law is binding Belgium. Belgian authorities also have jurisdiction to prosecute serious violations of humanitarian law, even if the crimes were not punishable in the country of commission

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at the time when they were committed. Once started, the investigation can then be conducted even if the suspect has left the country<sup>29</sup>.

**In Germany**, in the case of “Core” crimes no criteria restricting universal jurisdiction. But prosecution has the discretion not to take over investigating crime, when certain requirements are not met. For instance, in the case of the crime of aggression, there are criteria restricting the principle of universal jurisdiction – VStGB is only applicable if the perpetrator is a German national or the offence is directed against Germany. Violation of the duty of supervision and the omission to report a crime are not subject to universal jurisdiction<sup>30</sup>.

When it comes to the physical presence of the suspect, in Germany it is not generally necessary for the investigation of core international crimes; prosecutors can still start investigations even if the suspect is not in the territory of Germany. The logic here is to secure all available evidence for a potential later trial. But prosecutors can refrain from investigating a crime under VStGB if the suspect is not present in Germany and there is no anticipation of his/her presence. This is possible under the procedural rule. When there is no identified suspect, a “structural investigation” can be opened. However, a trial can never be initiated without the accused being before the court. It is a mandatory requirement for a lawful process that defendants have the chance to defend themselves against the accusations brought against them. If the defendant was present at the beginning of a trial, it can be legally admissible to pursue the trial without him or her, but only if one of the following exceptions is fulfilled: a) the defendant leaves during the trial and has already been questioned and his or her further presence is not considered necessary; b) the defendant has intentionally caused his or her physical inability to stand trial; c) the defendant has exhibited disorderly behavior during the trial<sup>31</sup>.

The prosecutor has the discretion to decide whether or not to pursue the case if the case do not meet any of below defined criteria of non-prosecution. But even if none of these factors are met, the prosecutor may still choose to not investigate and prosecute, if a suspect or a victim are not German national or resident<sup>32</sup>.

In the Netherlands there are special requirements for the criminal prosecution. The ICA gives Dutch authorities jurisdiction over the following three situations:

- anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national;

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<sup>29</sup> Universal Jurisdiction Law and Practice in Belgium, p. 16-18.

<sup>30</sup> Universal Jurisdiction Law and Practice in Germany, p. 16-17.

<sup>31</sup> Ibidem, p. 17-18.

<sup>32</sup> Ibidem, p. 18.

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- anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands;
  - a Dutch national who commits any of the crimes defined in this Act outside the Netherlands<sup>33</sup>.

The presence of the accused is important to prosecute in the cases of UJ. An investigation cannot be opened for alleged international crimes committed abroad by foreigners against non-nationals without the suspect being identified and present in the country. Dutch authorities can investigate UJ cases only if the suspect remains on the territory during the investigation. If the prosecution has started, Dutch courts would still be competent to proceed, even if the suspect leaves. Most of the suspects are in custody when prosecution starts, so they would not be able to leave. Trials in absentia are allowed – but, as the Dutch Parliament stated, in UJ cases, it is not recommended<sup>34</sup>.

In Norway, for crimes committed abroad by a foreign national, the Norwegian Penal Code sets out certain requirements that need to be met before investigations and criminal prosecution. It requires a link between the perpetrator and Norway.

Genocide, crimes against humanity and war crimes can be prosecuted when committed abroad. However, the exercise of UJ for foreign perpetrators requires additional conditions with regard to the perpetrator or victim's link to Norway or presence in Norway (as identified in table №3)<sup>35</sup>.

The alleged perpetrator has to be present in Norway when investigations are opened. If she or he leaves Norway afterwards, Norway can keep the prosecution, but it is not required<sup>36</sup>.

In Sweden, the presence or residence of a suspect in the country is not necessary to establish the jurisdiction of the Swedish courts over international crimes. But the accused must be presented before the court during the trial<sup>37</sup>.

However, Swedish authorities have opened a so-called “structured criminal investigation” in relation to Syria and Iraq in 2015. The investigation relates to the context and the on-going armed conflict in those countries, and not to any specific crime or suspect. The aims are to secure evidence, cooperate with other countries that are investigating similar crimes, and to lead to individual investigations<sup>38</sup>. This practice could be useful for the other countries, including Lithuania.

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<sup>33</sup> Universal Jurisdiction Law and Practice in the Netherlands, p. 11.

<sup>34</sup> Ibidem.

<sup>35</sup> Universal Jurisdiction Law and Practice in Norway, p. 20-21.

<sup>36</sup> Ibidem, p. 21.

<sup>37</sup> Universal Jurisdiction Law and Practice in Sweden, p. 12-13.

<sup>38</sup> Ibidem.

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Swedish authorities have jurisdiction even if the crime was committed outside of Sweden by a non-Swedish national or citizen<sup>39</sup>. But courts are limited by an internal rule, which states that the jurisdiction of a Swedish court is limited by what follows from general international law<sup>40</sup>. The requirement of the presence of the suspect has been recently debated. The question if Sweden can prosecute someone who is not present on its territory was publicised as the defence argument in some famous cases. The Prosecutor General argued that there is no requirement in international law that universal jurisdiction is restricted to residents of the prosecuting state<sup>41</sup>.

It is important to mention, that prosecuting a crime committed outside of Sweden requires the authorization of the Government. The rule that the Government must follow reads say, that different circumstances should be considered in such cases, such as the gravity of the crime, the link to Sweden and, when crimes are committed outside of Sweden, the interest of the state. This procedure is designed to filter out cases that Swedish courts are not suited to deal with<sup>42</sup>.

So, UJ in Sweden for war crimes can be applied when the government has approved the prosecution – both when the victim or the perpetrator are in the country and when they are absent. This conclusion is in line with the purpose of universal jurisdiction – making sure that those guilty of the most heinous crimes do not escape accountability<sup>43</sup>. The Supreme Court is about to take a decision, which could limit Sweden’s ability to prosecute war crimes committed in non-international armed conflicts. The fear is growing, that it could lead to Sweden becoming a safe haven for those guilty of heavy international crimes and prevent justice for victims<sup>44</sup>.

The mentioned requirements for UJ in all countries analysed are, most likely, the reason, why, according to L. Reydam, in most countries today, the UJ application “has been reduced to jurisdiction over refugees and migrants who cannot and often do not want to be extradited”<sup>45</sup>. So, the migration and the state's interest not to host alleged perpetrators of serious international crimes motivates the application of UJ, that is, as we have already seen, is overall growing globally. In Lithuanian case, the need to protect the rights of the victims from Ukraine and those prosecuted by the Belarus regime are crucial. But, also, migration from other countries should be kept in mind.

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<sup>39</sup> Ibidem, p. 4.

<sup>40</sup> <https://unpaiddebt.org/supreme-court-could-limit-swedens-ability-to-prosecute-war-criminals-swedens-jurisdiction-in-the-lundin-case-to-be-decided-in-october/#:~:text=In%20Sweden%2C%20some%20crimes%20are,where%20the%20crimes%20were%20committed.>

<sup>41</sup> Ibidem.

<sup>42</sup> Ibidem.

<sup>43</sup> Ibidem.

<sup>44</sup> Ibidem.

<sup>45</sup> The application of universal jurisdiction in the fight against impunity, by Luc REYDAMS, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES POLICY DEPARTMENT, European Parliament, Belgium. 2016, p. 20.

### 3. The Prosecuting Powers

First of all, it is important to mention, that in all analyzed countries, prosecution under the universal jurisdiction can only be started if no other jurisdiction – national or international – has not initiated it. If this is the case, the national institutions will start an investigation.

Table 4

Is there a special police / prosecutor unit to investigate crimes that require UJ?				
Belgium	Germany	The Netherlands	Norway	Sweden
<i>Public prosecutor. No special unit for international crimes</i>	<i>Federal Prosecutor General. Central Authority for Fighting War Crimes (Within the Federal Criminal Police Office).</i>	<i>The National Office of the Dutch Public Prosecution Service (DPPS National Office), Dutch International Crime Unit within the National Crime Squad of the police</i>	<i>The National Criminal Investigation Service (KRIPOS), National Authority for Prosecution of Organized and Other Serious Crimes (NAPO)</i>	<i>The War Crimes Unit within the Swedish police</i>

In **Belgium**, the prosecutorial power belongs to the public prosecutor. The prosecutions may only be initiated at the request of the federal prosecutor. The criminal division of the court exercises judicial control in relation to the power of the prosecutor. But it is also possible to start investigation by filing of a civil party complaint directly to the investigating judge. As of September 2021, four magistrates are in charge of cases of serious violations of international humanitarian law. There are no specialized units dealing with the crime, that might require UJ. Investigations concerning serious violations of international humanitarian law are conducted by Section 7 of the federal judicial police of Brussels<sup>46</sup>.

There is a possibility for Belgian courts to reject the prosecution requests. While the Minister of Justice may bring serious violations of international humanitarian law to the knowledge of the International Criminal Court. The Belgian Supreme Court then declares that the national courts are no longer competent to investigate the case. If the

<sup>46</sup> Universal Jurisdiction Law and Practice in Belgium, p. 17-20.

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Prosecutor of the International Criminal Court decides not to issue an indictment, or if the International Criminal Court does not confirm the indictment, declares itself incompetent or declares the case inadmissible, the Belgian courts will again have jurisdiction<sup>47</sup>.

In *Germany*, investigation is led by Federal Prosecutor General. It is the competent body to lead criminal investigations regarding crimes under the VStGB – it also chooses the police unit that will investigate the exact crimes. In most cases of UJ this is the responsibility of the Federal Criminal Police Office. It reports to the Federal Prosecutor General. Within the Federal Criminal Police Office, investigations regarding “Core crimes” are assigned to the Central Authority for Fighting War Crimes, or, if the case requires, to the State level offices for criminal investigations<sup>48</sup>.

Evidence collected and secured in different ways. There can be questioning potential witnesses, collecting visual evidence. Evidence secured can be used in further investigative procedures or submitted to a foreign or international jurisdiction, if it falls under framework of mutual legal assistance. Prosecutors are the ones, who would need to apply for an arrest warrant to the competent judge against the accused<sup>49</sup>.

German prosecutors generally have the obligation to investigate and prosecute all crimes under the VStGB to avoid impunity and to gather evidence that might be used in the trial later (in country or abroad). However, in certain situations prosecutors have the discretion on whether or not to investigate and prosecute such crimes. These situations are already defined as the criteria, invoking UJ, in the 2<sup>nd</sup> chapter of this paper – we call them criteria of non-prosecution. In practice, the exercise of prosecutorial discretion, whether to prosecute or not, has shown that prosecutors tend to investigate these cases, where they can gather evidence in Germany or where victims or witnesses are present in German territory<sup>50</sup>.

Where evidence is not available in Germany, it remains a discretionary decision, meaning that the prosecutor could continue investigations, but prosecutors will in practice only do so in atypical cases, especially where there is a risk that effective prosecution by another state or the ICC cannot be guaranteed, for instance, because of corruption or other reasons. Here another important principle comes – the subsidiarity<sup>51</sup>.

The prosecutorial discretion to bring public charges of VStGB crimes gives the prosecutor the choice to deviate from the principle of mandatory prosecution. It can be

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<sup>47</sup> Ibidem.

<sup>48</sup> Universal Jurisdiction Law and Practice in Germany, p. 18-20.

<sup>49</sup> Ibidem, p. 18.

<sup>50</sup> Ibidem, p. 18.

<sup>51</sup> Ibidem, p. 18-20.

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done in situations where there is no nexus to Germany. If the case bears a nexus to Germany, the competent prosecutor usually has a legal duty to begin an investigation. Without a nexus to Germany, the main principle is to give priority to the primary right and duty of international courts or prosecutors from the victims' or offenders' home states or the jurisdiction in which the crime was committed<sup>52</sup>.

In the *Netherlands*, The National Office of the Dutch Public Prosecution Service (DPPS National Office) based in Rotterdam has the monopoly to prosecute international crime and other crimes that require Universal Jurisdiction. Investigations are effectively performed by the Dutch International Crime Unit within the National Crime Squad of the police<sup>53</sup>.

Once a public prosecutor is informed by the police or by a complaint of an offence committed, he or she has the authority to initiate criminal proceedings. Public prosecutors have wide discretion and are not obliged to investigate crimes. They can determine whether or not to start an investigation, based on public interest. Public prosecutors use the following criteria to exercise their discretion:

- the estimated rate of success of investigations;
- the possibility to travel to the country where the alleged crime was committed to find evidence;
- the availability of documentary evidence;
- the availability of witnesses and their location, including the possibility to travel where the witnesses live<sup>54</sup>.

The National Board of General Prosecutors, which heads the Dutch Public Prosecution Service, publishes instructions on the criteria to be used by prosecutors when deciding whether to investigate or not. These instructions help prosecutors decide whether to open an investigation. They also are informative for the victims. The instructions set up criteria to consider before opening an investigation, including:

- immunity of the suspect;
- chances of success of the prosecution;
- the type and amount of available evidence;
- the potential necessity and feasibility of mutual legal assistance<sup>55</sup>.

Dutch Minister of Justice and Security has the authority, at his or her own discretion, to direct the DPPS to prosecute a crime. Before giving such an order, the Minister offers the National Board of General Prosecutors the opportunity to give its

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<sup>52</sup> Ibidem.

<sup>53</sup> Universal Jurisdiction Law and Practice in the Netherlands, p. 12-15.

<sup>54</sup> Ibidem, p. 12.

<sup>55</sup> Ibidem, p. 12-13.



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opinion. When the DPPS receives an order from the Minister of Justice and Security (to prosecute the case or not), it is obliged to follow that order. If the decision not to prosecute is taken, the Minister of Justice and Security must immediately inform the Dutch Parliament of this decision. Dutch authorities also apply the principle of subsidiarity to other national jurisdictions – if they can be trusted to ensure the respect of human rights, including their right to a fair trial. The Dutch authorities can investigate and prosecute a suspect in the Netherlands under universal jurisdiction even if there is an extradition request from another state<sup>56</sup>.

In *Norway*, a precondition for invoking UJ for any crime is that the prosecution of the case is in the public interest. The prosecution has broad discretion on whether to prosecute the crimes or not when they are committed abroad. To determine, if prosecution is in the public interest, these criteria are considered:

- The seriousness of the act;
- Any connections of the crime, perpetrator and victim(s) to Norway;
- The extent of effect on Norwegian interests;
- Jurisdiction of other countries with well-functioning justice systems;
- Possibility of extraditing alleged perpetrator<sup>57</sup>.

In practice, the chances of a conviction are essential criteria. According to the Criminal Procedure Act (CPA), the final decision whether or not to prosecute crimes subject to Universal Jurisdiction is made by the Director of Public Prosecutions (DPP). A decision not to prosecute can be challenged to the immediately superior prosecuting authority by persons with a legal interest – but, since taken by the DPP, the decision cannot be challenged. There is no requirement that a political body approves the opening of investigations or the prosecution of crimes subject to universal jurisdiction<sup>58</sup>.

Criminal investigations are opened by the police, but the DPP and public prosecutors concerned may order an investigation to be initiated. In practice, in the case of UJ-requiring crimes, the Head of the National Criminal Investigation Service (KRIPOS) decides whether or not an investigation will be opened, after considering a recommendation from police prosecutors. KRIPOS is the specialized unit within the National Police Directorate, in charge of organized and serious crimes, including international crimes, war crimes. The Section on International Crimes within KRIPOS is staffed by 11 police officers – Head of the Section, and two police prosecutors are

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<sup>56</sup> Ibidem, p. 13-14.

<sup>57</sup> Universal Jurisdiction Law and Practice in Norway, p. 23.

<sup>58</sup> Ibidem.

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supporting the Section among them. In the UJ cases and other international crimes a low evidentiary threshold is indicated in law<sup>59</sup>.

In practice, additional factors are considered if to open an investigation in relation to a crime committed in another country, including the type of crime, its severity, the location where it was committed, including the access to evidence, the investigative steps that would be necessary to obtain more evidence, access to the territory, possible cooperation by other states, the security situation in that country, location of witnesses. Resources are limited. Therefore, it is considered necessary to choose those cases that are likely to be solved. Decision not to open an investigation cannot be challenged by victims, but if circumstances change, the KRIPOS can review its decision<sup>60</sup>.

Regarding core international crimes, KRIPOS, and more specifically, the Section for International Crimes within KRIPOS, is in charge of genocide, crimes against humanity, war crimes, and other serious crimes committed abroad by foreigners or that have an international link. In addition to police officers, specialized police prosecutors who lead the investigations are embedded within this unit<sup>61</sup>.

Once an investigation has been completed, KRIPOS forwards cases to the National Authority for Prosecution of Organized and Other Serious Crimes (NAPO), which consists of specialized public prosecutors for these crimes. NAPO is the specialized unit for international crimes within the Norwegian Prosecution Authority. The NAPO assesses the case and send a proposal to the DPP, who makes the final decision on whether or not investigate further. The following decisions might be issued:

a) *Indictment* (occurs when the prosecuting authority believes that a conviction can be achieved by proving the crime beyond reasonable doubt with enough evidence); b) *Dismissal based on prosecutorial discretion*; c) *Dismissal based on substantive or procedural grounds* (if the evidence is not enough evidence to prove a crime or who committed it). A decision by a prosecutor (in KRIPOS or in NAPO) to dismiss a case or waive prosecution can be challenged by persons with a legal interest to the immediately superior prosecuting authority, unless the decision is made by the DPP<sup>62</sup>.

In *Sweden*, law states that prosecutors have a duty to open an investigation due to a report or for other reason to believe that the crime was committed – as, for example, concrete known crime circumstances, statement from a witness. It is not required that there is a suspected perpetrator at this point<sup>63</sup>.

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<sup>59</sup> Ibidem, 26.

<sup>60</sup> Ibidem, 26-27.

<sup>61</sup> Ibidem, 27.

<sup>62</sup> Ibidem, 28.

<sup>63</sup> Universal Jurisdiction Law and Practice in Sweden, p. 13.

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Practically, however, the prosecutor has considerable discretion and may decide not to open an investigation, even if concrete circumstances can be shown, if he or she decide that it is not possible to investigate the crime. In addition, a prosecutor may decide not to prosecute or not to continue investigation if: a) the investigation *costs* will not be in reasonable proportion to the importance of the matter and the offence b) it is *allowed by law* and *no substantial public or private interests* would be *ignored*<sup>64</sup>.

According to national law, the purpose of any investigation is to find a suspect of a crime, whether there are sufficient grounds for prosecution and whether the required evidence can be presented. If prosecutor decide tthat the evidence is insufficient, the discretion belongs to him or her to further prosecute or stop the investigation. If the prosecutor on the other hand deems the evidence gathered to be sufficient for a prosecution, the obliged to prosecute occurs. So, Swedish law does not only prescribe a duty to investigate crimes, it also prescribes a duty to prosecute. If the mentioned conditions are met, the prosecutor must prosecute the crime regardless of the wishes of the parties involved. So, the victim cannot choose if he/she wants crime to be investigated or not<sup>65</sup>.

The War Crimes Unit within the Swedish police is in charge of investigating the international crimes. In the cases of UJ, due to the complexity of such cases, the prosecutor rather than the police is in charge<sup>66</sup>.

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<sup>64</sup> Ibidem.

<sup>65</sup> Ibidem. p. 14.

<sup>66</sup> Ibidem, p. 15.

## 4. Starting and Some Methods of Investigation, Victim's and NGO role

When talking about the process of investigation and criminal prosecution, the focus on the victim-centered approach is expressed publicly by the EU representatives. According to S. Popan:

*“The European Union and its Member States believe that a victim-centered approach is a key aspect of the application of the principle of universal jurisdiction. The EU attaches great importance to the position and participation of victims in criminal proceedings for international crimes.”<sup>67</sup>*

The statement claims the need to legally and psychologically support and protect victims and witnesses in the process of criminal prosecution. It is very important, according to the statement, to ensure those practices in the member states legal processes. She also suggests that the role of “joint investigative teams, cooperation and coordination is essential between different investigations” is extremely important not only in collecting evidence, but in attempts “to avoid multiple interviews of the same victims, thus mitigating the risk of re-traumatization”<sup>68</sup>.

However, in reality, the role of the victim is not so high – and their rights in the criminal prosecution process are still limited.

*Table 5*

<b>Can victim file a complaint?</b>				
<b>Belgium</b>	<b>Germany</b>	<b>The Netherlands</b>	<b>Norway</b>	<b>Sweden</b>
YES Also, the lawyer can	YES Also, NGO's can	YES Also, NGO's can	YES Also, NGO's can	YES Also, NGO's can

In *Belgium*, the opening of the investigation is possible in the following conditions:

- after receipt of an international arrest warrant;
- where the exclusionary clause Article 1F of the Geneva Convention of 1951 relating to the status of refugees has been invoked by the immigration

<sup>67</sup> Statement on behalf of the European Union and its Member States Ms. Simona Popan, Counsellor, Delegation of the European Union to the United Nations, at the Sixth Committee on the Agenda item 86, p. 3.

<sup>68</sup> Ibidem.

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services (where there exist reasons to believe that the asylum seeker would have committed an international crime);

- after the lodging of a complaint with the federal prosecution service;
- an investigation may be opened by the prosecutors at their own initiative<sup>69</sup>.

According to the Code of Criminal Procedure, the complaint must be submitted in person or by a lawyer. It must indicate the contact details of the victim, the facts at the basis of the complaint as well as the harm resulting from it and finally the personal interest resulting from it. It is advised to attach the declaration form of the injured person to the complaint in order to be kept informed of the subsequent procedure. The complaint as such does not need to take a particular form. If the victim lives abroad, they must agree to be served notice in Belgium, at the office of their counsel in Belgium for example. Complaints concerning serious violation of international humanitarian law must be lodged with the federal prosecutor. If the alleged perpetrator of the facts has Belgian nationality, or has their principal residence in Belgian territory, a complaint with the investigating judge can be lodged together with a civil party claim<sup>70</sup>.

The federal prosecutor then requests the investigating judge to investigate the complaint, unless:

- the complaint is manifestly unfounded;
- the facts arising in the complaint do not correspond to a qualification of offences – such as serious violation of international humanitarian law, or to any other international offence that is criminalized by a treaty binding on Belgium;
- an admissible prosecution cannot result from this complaint;
- from the specific circumstances of the case, it emerges that, respecting Belgium's international obligations, the case should be brought before another court<sup>71</sup>.

If these four criteria can be ruled out, the prosecutor shall *ex officio* refer the case to the investigating judge. The investigating judge must investigate both inculpatory and exculpatory facts. They investigate the case *in rem*, i.e., limited to the facts that are referred to them. The investigating judge may request an extension of the initial referral from the public prosecutor if evidence of offences that are not set out in the initial referral is discovered. The public prosecutor may make further submissions. The

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<sup>69</sup> Universal Jurisdiction Law and Practice in Belgium, p. 19.

<sup>70</sup> Ibidem, p. 19-20.

<sup>71</sup> Ibidem, p. 20.

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accused and any civil parties may ask the investigating judge to undertake additional acts of investigation<sup>72</sup>.

On the other hand, if he considers that points 1, 2 or 3 above are applicable, the federal prosecutor may refer the case to the criminal division of the court of appeal of Brussels seeking a declaration depending on the case, that there are no grounds to prosecute or that the prosecution is not admissible. Only the federal prosecutor shall be heard. The federal prosecutor may lodge an appeal against decisions from the criminal chamber permitting the opening of the investigation and the appointment of an investigating judge. When the criminal chamber finds, against the advice of the public prosecutor, that the complaint is admissible and may be prosecuted, it designates the competent investigating judge and indicates the facts to be investigated. It is then processed in accordance with the general rules. If the federal prosecutor considers that it is clear from the concrete circumstances of the case, in the interests of the proper administration of justice and in compliance with Belgium's international obligations, that the case should be brought before another court, he or she may close the case without having to make an application to the criminal chamber. This decision to discontinue proceedings cannot be appealed<sup>73</sup>.

Where the criminal acts have been committed after 30 June 2002 and fall within the substantive jurisdiction of the International Criminal Court, the Minister of Justice informs the ICC. No structural investigation can be opened in Belgium because of the obligation to investigate *in rem*. Structural investigations are understood as a situation where the suspects have not initially been identified. Such investigations have been opened in France and Germany concerning Syria, after the release of a report documenting abuses committed in detention by the regime<sup>74</sup>.

Since genocide, crimes against humanity and war crimes are not subject to any statute of limitations, they can generally be prosecuted at any time. However, the principle of fair trial under Article 6 of the European Convention on Human Rights may limit the duration of an ongoing investigation. Therefore, subject to the complexity of the case in question, any investigation must be completed within a reasonable time. The Code of Criminal Investigation rules:

- If the investigation is not completed after one year, the suspect or civil party may appeal to the criminal division by filing a petition with the registry of the court of appeal.

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<sup>72</sup> Ibidem, p. 21.

<sup>73</sup> Ibidem, p. 21.

<sup>74</sup> Ibidem, p. 22.

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▪ The crown prosecutor sends a report to the Prosecutor-General containing all cases where the pre-trial chamber has not ruled within a year from the first indictment.

In *Germany*, anybody – including victims and NGOs – can report an offence orally or in writing – to any public prosecution office, the police or local courts. It is advisable to address a complaint directly to the competent authorities listed above. Any other authority will refer a complaint to the competent authorities. The complaint is suggested to be delivered in German, other languages may delay the process. But non-German speakers will be supported. Statement include contact details, a full version of the facts, and any information available about the suspect<sup>75</sup>.

Once prosecutors obtain notice of a possible crime, they are obligated to investigate the case unless the law provides otherwise (principle of mandatory prosecution). For VStGB crimes, law allows prosecutors to exercise discretion over the opening investigations (under Prosecutorial Discretion)<sup>76</sup>.

The threshold to open an investigation provides that there must be sufficient factual indications of a crime for the prosecutor to investigate<sup>77</sup>.

Before the investigation is completed, victims have the status of witnesses, which gives them the right to submit additional evidence or information to the prosecuting authorities. NGOs are not parties and cannot formally submit evidence to the court, but they might make evidence available during the investigations or trial that the court can consider once publicly known. Prosecutors and NGOs cooperate in many ways during the investigation: to find and collect evidence, witnesses, documents – also, by providing information on how the potential victims and witnesses could be contacted and about which relevant parts of a case they could give testimony<sup>78</sup>.

At the end of the investigation, an indictment or termination order will be issued by the prosecutor and sent to the competent court. If indictment, the competent court will subsequently order the opening of the trial if there appears to be reasonable grounds to suspect that the indicted accused has committed the offense<sup>79</sup>.

If the investigation is closed because the prosecution is of the view that there are no reasonable grounds to believe the suspect might have committed the crimes, the victims can appeal this decision by filing a formal complaint to the official superior at the public prosecution's office. As the investigating body for crimes under the VStGB is

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<sup>75</sup> Universal Jurisdiction Law and Practice in Germany, p. 21.

<sup>76</sup> Ibidem.

<sup>77</sup> Ibidem.

<sup>78</sup> Ibidem, p. 28.

<sup>79</sup> Ibidem, p. 21-22.

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the Federal Prosecutor General, the official superior is the Federal Prosecutor General himself or herself. If the Federal Prosecutor General decides not to grant the complaint, victims can resort to the Higher Regional Court. If the Court finds that the threshold for, an indictment is met, it can order the issuance of an indictment. But in practice this did not happen so far<sup>80</sup>.

In the *Netherlands*, the key players in Dutch criminal proceedings are the defendant (and his or her attorney), the DPPS and the Court. Victims have a limited role. A criminal investigation can be initiated by the DPPS on their own initiative (*proprio motu*) or after a complaint is filed. Various sources of information can lead to *proprio motu* investigations, including information from other investigations, from the media or reports from NGOs<sup>81</sup>.

Investigations, however, have been mainly opened *proprio motu* by prosecutors, based on information from other investigations, the media, or public NGO reports. It is very rare that investigations are actually opened after a complaint is filed. In 2018, the prosecutors did not receive any formal complaints, in 2017 only one. Very rare that investigation is opened after the complaint is filed<sup>82</sup>.

The DPPS National Office prosecutors receive files and decisions from the Dutch immigration services when asylum applications are rejected based on Article 1F of the 1951 Convention Relating to the Status of Refugees because the applicant committed serious crimes, including a war crime or crime against humanity. Many of the investigations were triggered this way. Complaint by victims and/or NGOs are possible. Anyone with knowledge of a crime can file a complaint, without necessarily being a victim. The person or entity filing the complaint does not have to become an Injured Party to the criminal proceedings. A complaint can be filed against an unknown suspect, natural or a legal person. But public prosecutors are not obliged to investigate ICA crimes and can determine whether or not to start an investigation based on public interest<sup>83</sup>.

A complaint in respect of an ICA crime can be filed at any local police authority, in writing or orally. Written complaint can be sent directly to the DPPS National Office. NGOs and other third parties can have a role within Dutch criminal proceedings, but they are not an official party to the proceedings. Dutch law provides that everybody who has knowledge of a criminal offence can file a complaint to the competent authorities. This includes third parties that are not victims. Yet a case will be stronger if natural

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<sup>80</sup> Ibidem, p. 22.

<sup>81</sup> Universal Jurisdiction Law and Practice in the Netherlands, p. 11-15.

<sup>82</sup> Ibidem, p. 15.

<sup>83</sup> Ibidem.



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persons who are victims join the complaint. Therefore, lawyers always aim to also include them in the complaint or to file the complaint directly on their behalf<sup>84</sup>.

Appeals are possible. A party with a direct interest can challenge the decision of the public prosecutor not to investigate a criminal offence, to dismiss the case or to issue a penalty order before the respective Court of Appeal. A “directly interested party” is understood as a legal or natural person who are directly affected by the decision of non-prosecution or discontinuance of prosecution<sup>85</sup>.

Investigating judge have several investigative tasks. He or she can be requested by the public prosecutor or the defense to take investigative measures, such as hearing of witnesses. cannot take investigative measure by themselves; they need the prosecutor to require them to do so. In addition, the investigating judge ensures that the public prosecutor remains within the limits of his or her investigative authority. The public prosecutor requires approval from the investigating judge for certain investigation methods, such as wiretapping, house searches and ordering pre-trial detention. Victims and representatives of victims do not have any interaction with the judge under the Dutch system. After the investigation phase, the public prosecutor can dismiss the case or summon the accused to appear before the court. The public prosecutor can decide to dismiss a case until court hearing<sup>86</sup>.

Dutch law does not set any time limits for criminal investigations. However, according to the Dutch Supreme Court, following judgments of the European Court of Human Rights, investigations must be completed within a reasonable time. As a general starting point, a period of two years between the moment of the criminal charge and the moment of the final judgement takes place<sup>87</sup>.

Article 12(2) DCCP adds that a directly interested party can also involve a “legal entity” – such as an NGO – if their goals and actual activities are sufficiently distinct so that the refusal to prosecute specifically affects them. An NGO can qualify as a person with a direct interest, for instance, if the goal of that NGO is to seek the prosecution of certain persons for certain criminal acts and the public prosecutor decides not to prosecute such person for such acts. A recent ruling from the Court of Appeal of The Hague on 6 December 2018 considered two NGOs to have a direct interest. The NGO lodged a challenge (among 58 other complainants) against the decision by the DPPS not to prosecute four tobacco manufacturers. The Court considered the NGOs to have had a direct interest in the prosecution of the case, because the goals of these NGOs were

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<sup>84</sup> Ibidem, p. 16.

<sup>85</sup> Ibidem, p. 13-14.

<sup>86</sup> Ibidem.

<sup>87</sup> Ibidem, p. 17.

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sufficiently distinct and were aimed against the tobacco industry and/or against consuming tobacco products. The person or entity with a direct interest can challenge the dismissal before the Court of Appeal within three months after he or she becomes aware of the decision<sup>88</sup>.

In *Norway*, the prosecuting authority consists of three levels. The first level is prosecutors who are embedded with the police (referred to as police prosecutors) and who lead investigations. The second level is public prosecutors who prosecute the case at trial. The third level is the DPP, who leads the prosecuting authority. Pursuant to Section 224(1) of the CPA, a criminal investigation shall be carried out when as a result of a report or other circumstances, there are “reasonable grounds” (unofficial translation) to inquire whether any criminal matter requiring prosecution by the public authorities subsists<sup>89</sup>. A report (complaint) can be made by anyone, either in writing or orally, to the police or prosecuting authority. This can include victims and NGO’s<sup>90</sup>.

The police will take steps to verify the information presented. Victims have the right to participate during the investigation and trial<sup>91</sup>. Information on alleged crimes can come from many different sources, including Mass Media. The police can also receive information from the Norwegian Directorate of Immigration which routinely informs the police when asylum applications are rejected based on Article 1F of the Convention and Protocol Relating to the Status of Refugees (1951), where there are serious reasons to believe that the applicant has committed war crimes, crimes against humanity or serious non-political crimes<sup>92</sup>.

As already mentioned, the case is investigated by the National Criminal Investigation Service KRIPOS, the specialized unit within the National Police Directorate, in charge of organized and serious crimes. Decision not to open an investigation cannot be challenged by victims, but if circumstances change, the KRIPOS can review its decision<sup>93</sup>.

Investigation measures can include visits to other countries, depending on the cooperation of the other state, crime scene examinations, open source investigations, witness and victim interviews – preferably in person or via video-link - and obtaining materials from NGO’s<sup>94</sup>.

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<sup>88</sup> Ibidem.

<sup>89</sup> Universal Jurisdiction Law and Practice in Norway, p. 25.

<sup>90</sup> Ibidem.

<sup>91</sup> Ibidem, 25-26.

<sup>92</sup> Ibidem, 26.

<sup>93</sup> Ibidem, 26-27.

<sup>94</sup> Ibidem, 27.

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Since the prosecution of crimes subject to universal jurisdiction is decided by the DPP, the decision can therefore not be challenged by victims or NGOs<sup>95</sup>.

In *Sweden*, an investigation, begins with the report or for other reasons, why there are reasons to believe that an offence, that should be prosecuted has been committed. Anybody – including victims and non-governmental organizations– can report an offence orally or in writing. Report can be submitted to the public prosecution office, police or local courts<sup>96</sup>.

In practice, victims’ lawyers collaborate with the prosecuting authorities during the investigation, in particular regarding investigations to be conducted abroad. A specialized group of prosecutors deals with these crimes. As soon as the complaint will be submitted to the police, prosecutors will take charge of the case. Typically, victims’ lawyers are able to suggest victims and witnesses to be interviewed<sup>97</sup>.

If the prosecutor decides to close the investigation and/or not to prosecute the crime, it is possible to apply for a review of the decision. This right only applies to persons who have a legitimate interest, which includes persons who have been exposed to the crime. NGO’s do not have standing to apply for a review because they are not a primary victim. A request for review should be sent the prosecutor who made the decision. If the prosecutor decides not to change their decision, he or she must send the request to their superior who will decide on the request. The decision will be reviewed by a more senior prosecutor, which may lead to a new decision<sup>98</sup>.

So, as we see in our analysis – victim is still not the key stimulator in the process of the criminal prosecution in the EU countries. Prosecutor’s discretion in most of the cases is still key factor when deciding the fate of the criminal case – even if victims have a right to appeal.

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<sup>95</sup> Ibidem, 28.

<sup>96</sup> Universal Jurisdiction Law and Practice in Sweden, p. 15.

<sup>97</sup> Ibidem, p. 15.

<sup>98</sup> Ibidem, p. 16-17.

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## **Conclusions: lessons to be learned by Lithuania**

The analysis demonstrated that countries, that are considered as the ones having the best policies and laws towards the Universal Jurisdiction (UJ), still face many challenges and limitations. Everywhere seems to be present the unwritten rule to use the resources of the criminal prosecution system in the most rational way and allocate them to the cases, that are likely to be solved successfully.

In almost all cases, the Prosecutor has the discretion to decide if the investigation should take place. Germany has the strictest obligations to investigate UJ cases and the smallest amount of limitations, but the Federal Prosecutor here is still the one, taking the final decision.

Having separate law or criminal code regulating UJ helps – as well as having special unit within the Prosecutor’s office and/or Police to take over the investigation on the serious international crimes (including the ones that require UJ). Help by separate departments – such as The War Crimes Unit within the Swedish police, that is in charge of investigating the international crimes – can be very beneficial.

The analyzed countries, except Germany and to some extent Sweden, tend to first take the cases regarding the principle of the benefit to the state, therefore they have a state-driven approach to the UJ. Working with institutions that deal with migrants, NGOs – are the most popular ways to learn about the possible crimes committed. The restrictions in laws limit victims right seek the investigation. In Germany, according to the principle of mandatory prosecution, prosecutors generally have the obligation to investigate and prosecute all crimes indicated in the “Code of Crimes against International Law” in order to avoid impunity and to gather evidence that might be used in the trial later (in country or abroad). However, even here in certain situations, as mentioned, prosecutors have the discretion on whether or not to investigate and prosecute such crimes – especially when there is no chance to collect good quality of evidence. In practice, the exercise of prosecutorial discretion, whether to prosecute or not, has shown that prosecutors investigate all cases where they can gather evidence in Germany or where victims or witnesses are present in German territory. But they refrain from starting an investigation where there is no chance to gather evidence without resorting to mutual legal assistance, unless the suspect is of German nationality.

Evidence is especially important in all countries analyzed, therefore such institutions as Joint Investigations Teams are very useful.

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In the case of Lithuania, it is important to consider establishing a new specialized unit, trained to investigate cases that require Universal Jurisdiction. We suggest opening such a unit within the prosecutor's office.

Proper training on evidence collection is necessary. As well as close collaboration with NGO's and such institutions as JIT.