NATIONAL JURISDICTIONS' MECHANISMS FOR ENFORCING FUNDAMENTAL RIGHTS

Irene Victoria Massimino* and Karnig Kerkonian**

Abstract

As a consequence of the two World Wars and the Holocaust, the international community established a new international legal order to prevent the atrocities and crimes that occurred during these events. This new international legal order was not only made up of norms, but also of common values aimed at protecting human dignity through the recognition of fundamental human rights. In this context, and under this regime, States are obliged to protect, guarantee and promote human rights within their territories and, under certain circumstances, also extraterritorially.

However, the international legal system suffers a crucial gap when it comes to the protection and guarantee of the rights of those people who, for different reasons and under different foundations, fight for their self-determination and recognition of their statehood. That is to say, the moment in which such people exercise the right to self-determination, yet without the express or tacit recognition of their state subjectivity, their subject rights are not afforded clear protection under international regulations. Those who fight for their autonomy and their organization as a State

* Irene Victoria Massimino is a lawyer specializing in international criminal law and human rights law. Ms. Massimino is a graduate of the Faculty of Legal and Social Sciences of the National University of La Plata, in Argentina; has a Master of Laws from Robert H. McKinney School of Law at Indiana University, in the United States, where she is currently pursuing an SJD, and teaching international law, comparative law and genocide and the law as an Adjunct Professor. She also holds a Master of Arts and Humanities in Human Rights from the School of Advanced Studies of the University of London, in the United Kingdom.

** Karnig Kerkonian is a lawyer specializing in public and private international law. Mr. Kerkonian holds an A.B. magna cum laude in government and international legal theory from Harvard University, two law degrees—a J.D. from the University of Chicago, where he served on the Law Review, and a post-graduate Diploma in International Law from Cambridge University, England, where he studied under James R. Crawford, former Judge of the International Court of Justice. He also holds an Honorary Doctorate from Artsakh State University where he has served as an Adjunct Professor of International Law.

independent of the one in which they arguably find themselves, do not, in general terms, have protection of their rights.

While one could posit that the State in which such people are presumably located is the one that is obliged to comply with international obligations, this is not the case in actual practice. The case of the Armenians of Artsakh (also known as Nagorno-Karabakh) is a glaring case in point, as they were recently expelled from their indigenous territory after decades of targeting and persecution by Azerbaijan, which only deepened and turned abjectly violent in the last few years.

Nevertheless, there are tools within domestic jurisdictions that would allow the protection of certain rights or, at least, sanction their violation. Among these possibilities are the exercise of Universal Criminal Jurisdiction (UCJ) for international crimes and, in the civil context, national legislation such as the U.S. Torture Victims Protection Act, providing compensation to victims. This work aims to analyze these possibilities and their applicability to all such situations in which groups demanding statehood recognition and autonomy see their rights violated by the State in whose jurisdiction they are arguably located. The objective will also be to delve on the use of these tools and their effectiveness in practice.

I. INTRODUCTION

The search for justice for international crimes in the contemporary international legal system continues to be a constant struggle. But it is a struggle which the international community has continued to pursue. From the Constantinople trials for the crimes that occurred under the Ottoman Empire, through the notorious Nuremberg trials, to the signing of the Rome Statute for the International Criminal Court (ICC), the international

community has demonstrated its concern for the investigation of international crimes and for the identification and punishment of perpetrators.[1]

States, independently or as members of the international community, have sought to elaborate on the criminal and civil responsibility of individuals involved in the most atrocious crimes. Consequently, domestic and international legal systems have developed temporary or permanent tools to respond to what are commonly known as international crimes. However, despite those efforts, enhanced during the twenty-first century with the ratification of the Rome Statute, not all international crimes are investigated and not are all perpetrators identified, prosecuted and punished.[2] On the contrary, most international crimes remain uninvestigated and unpunished.[3]

Impunity is due to many reasons. By default, the investigation and punishment of crimes must be carried out in the domestic jurisdiction in which the crimes have occurred.[4] The State in whose territory violations of human rights or international crimes have taken place, has the duty to investigate, punish the responsible individuals, and provide reparations and redress to victims.[5] However, many domestic jurisdictions are unable to fulfill such obligations *inter alia* due to lack of capacity, disintegration of primary institutions, lack of financial and human resources, and internal political, social and economic instability.[6] In other cases, domestic jurisdictions are simply unwilling to pursue any efforts to investigate and hold perpetrators accountable.[7]

---

1. INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, at 9 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

2. *See* Irene Victoria Massimino, *The ICC and in-absentia Proceedings – Finding a Response to the Difficulties of Executing Arrest Warrants*, 13 ESIL REFLECTIONS, at 4, (May 21, 2024), https://esil-sedi.eu/esil-reflection-the-icc-and-in-absentia-proceedings-finding-a-response-to-the-difficulties-of-executing-arrest-warrants/.

3. *See id.* at 4.

4. *See generally* Rome Statute of the International Criminal Court Treaty, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] ("An International Criminal Court . . . .shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.").

5. *See id.* at 91.

6. Examples of such impossibilities are Rwanda and Cambodia, where the level of destruction of society and institutions limited—if not impeded—the possibility of a justice process. See generally, e.g., S.C. Res. 955 (Nov. 8, 1994) (providing information on the foundational reason to establish International Criminal Tribunal for Rwanda).

7. Cleo Meinicke, *Domestic Prosecution of International Crimes-Introduction*, PUBLIC INTERNATIONAL LAW AND POLICY GROUP (Mar. 7, 2019), https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2019/3/7/domestic-prosecution-of-international-crimes-introduction-of-series.

The latter scenario is the focus of this work: where States discriminate and persecute a group and, consequently, do not provide sufficient redress or any redress at all to victims.

Faced with this impossibility or unwillingness of a State to investigate and prosecute suspects within its jurisdiction, the international community has created special ad-hoc international or hybrid courts on several occasions, finally agreeing to the establishment of a permanent international criminal court.[8] The sanctioning of the Rome Statute attempted to obviate the need to create special courts, precisely to avoid the complexities and criticisms that often arose in when establishing special courts.[9]

Notably, the efforts of the ICC have also proven insufficient in many regards, and, in the face of current conflicts, the Court has been unable to respond to victims' demands for justice, for truth and, importantly, for reparation.[10] The investigation and prosecution of international crimes continues to face monumental challenges, one of the most poignant being the voluntary nature of international law and the resulting lack of acceptance of the Court's jurisdiction and orders.[11]

Therefore, an exploration into the alternative furnished in different international jurisdictions for criminal and civil redress for victims, and this requires delving into certain tangible options that exist within domestic legal systems. For this reason, this work focuses on the possibility of using universal jurisdiction (UJ) mechanisms that are currently accepted in a few countries.[12] On the one hand, the first part of the paper will focus on the use of UCJ in Argentina, while the second part of this work will focus on the analysis of the Torture Victims Protection Act (TPVA), from the United States. We will examine how these tools have become alternatives to justice in the face of, and to combat, the futility and impracticality in triggering international mechanisms of accountability.

These justice options at the domestic level are relevant in circumstances in which the use of international jurisdictions becomes impossible. They are especially useful in those cases where the victim group is unprotected and discriminated by the State it inhabits,[13] or when the victims' group has an

8. *See* Rome Statute, *supra* note 4, art. I.

9. Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L REV.1 (2014).

10. *See* Massimino, *supra* note 2.

11. *Id.*

12. *Universal Jurisdiction Annual Review 2024*, TRIAL INT'L, https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (last visited Oct. 18, 2024).

13. A most clear example of such scenario is the persecution and genocide against the Rohingya in Myanmar (Burma). *See* U.S. DEP'T OF STATE, DOCUMENTATION OF ATROCITIES IN

autonomous and self-governed territory but is not recognized as a State within the international community, thus preventing the group from exercising its fundamental rights itself.

II. UNIVERSAL JURISDICTION FOR CRIMINAL CASES

A. Concept and Normative Reception

Despite being a principle that has existed for almost a hundred years, no uniform definition for universal criminal jurisdiction is accepted in international regulations.[14] Consequently, many States have chosen to incorporate a definition into their domestic legal systems, either in their constitutions[15] or criminal codes.[16] In general terms, universal criminal jurisdiction is the jurisdiction exercised by a state's domestic courts over criminal acts committed outside its territory, without requiring any nationality connection or other type of link between the perpetrators and victims, and the state whose courts are exercising jurisdiction.[17]

The foundation of universal criminal jurisdiction lies in the nature of the crimes that fall under its jurisdiction.[18] The crimes are by definition contrary to the interests and principles of the international community, to the point of considering their perpetrators as *hostis humani generis*,[19] enemies of humanity. The critical aspect of this jurisdiction lies in the fact that no territorial connection is required either with the facts or with the passive (victim) or active (perpetrator) personalities.[20] Thus, any State can, and must, activate its jurisdiction. Moreover, universal criminal jurisdiction also

---

NORTHERN RAKHINE STATE 5 (2018), https://www.state.gov/wp-content/uploads/2019/01/Documentation-of-Atrocities-in-Northern-Rakhine-State.pdf.

14. Xavier Phillipe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?* 88 INT'L REV. OF THE RED CROSS 375 (June 2006).

15. *See* Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

16. Código Orgánico Integral Penal de Ecuador [Comprehensive Organic Criminal Code of Ecuador], art. 401 (Ecuador) (stating using an official translation of Irene Victoria Massimino: "Universal jurisdiction. Crimes against humanity may be investigated and tried in the Republic of Ecuador, provided that they have not been tried in another State or by international criminal courts, in accordance with the provisions of this Code and the international treaties signed and ratified.").

17. Diccionario panhispanico del Español juridico [Pan-Hispanic Dictionary of Legal Spanish], https://dpej.rae.es/lema/jurisdicción-universal (defining "jurisdicción universal").

18. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L. L. 81, 96 (2001).

19. *Id.*

20. *See* Philippe, *supra* note 14.

responds to the obligation *aut dedere aut judicare*, that is to extradite or to prosecute,[21] a duty originating from several multilateral conventions.[22]

The concept of universal jurisdiction may be traced back to the writings of prominent early scholars like Hugo Grotius,[23] as well as to the understanding that certain crimes, such as piracy and slave trafficking,[24] are universally condemned and, therefore, contrary to the *jus gentium*. Nevertheless, *jus in bello* agreements[25] also included specific instructions concerning these concepts which, over time and practice of states, became the foundation of the principle currently employed.

The four Geneva Conventions of 1949, which constitute the contemporary cornerstone of international humanitarian law, include a common provision and are paramount in the explicit incorporation of universal criminal jurisdiction.[26] The text common to the four instruments establishes:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[27]

---

21. Principle "to extradite or prosecute," as established by Hugo Grotius "[w]hen appealed to [a State] should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal." *The Obligation to Extradite or Prosecute* (aut dedere aut judicare), [2014] 2 Y.B. Int'l L. Comm'n 91, U.N Doc. A/CN.4/SER.A/2014/Add.1 (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [On the Law of War and Peace Three Books] 527 (Francis W. Kelsey trans., Oxford: Clarendon Press ed., 1925) (second alteration in original)).

22. *Id.*

23. *See* Philippe, *supra* note 14, at 378.

24. *See* Veer Mayank, *Juvenile Pirates at the High Seas: Is Universal Jurisdiction the Answer?* 59 J. INDIAN L. INST. 414 (2017).

25. *The Principle and Practice of Universal Jurisdiction: PCHR's Work in the occupied Palestinian territory*, PALESTINIAN CENTRE FOR HUMAN RIGHTS (Jan. 10, 2010).

26. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 49, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 50, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the protection of civilian persons in time of war art. 146, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287.

27. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, *supra* note 26, 75 U.N.T.S 31, art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *supra* note 26, 75 U.N.T.S 85, art. 50; Geneva Convention Relative to the Treatment

Likewise, the customary international law that prevailed until 1996 established the above-mentioned principle *"aut dedere aut judicare"*[28] and the related principle of universal criminal jurisdiction, which were subsequently reflected in Articles 8[29] and 9[30] of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission of the United Nations General Assembly.

These principles were confirmed shortly thereafter when the Rome Statute for the ICC was adopted.[31] Thus, the principle of universal criminal jurisdiction, understood as a universal duty to fight against impunity in the perpetration of certain crimes, is reflected in paragraph six of its Preamble, which states "[i]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[32]

These principles are enshrined also in the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*[33] which obliges State parties:

> [t]o adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.[34]

Similarly, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—in acknowledging and carving out the *jus cogens* norm—establishes in Article 5, subsection 3 that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."[35]

---

of Prisoners of War, *supra* note 26, 75 U.N.T.S 135, art. 129; Geneva Convention Relative to the protection of civilian persons in time of war, *supra* note 26, 75 U.N.T.S 287, art. 146.

28. *See generally The Obligation to Extradite or Prosecute* (aut dedere aut judicare), *supra* note 21.

29. "Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 16, 17, and 18. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court." *See* 1 Y.B. Int'l L. Comm'n 32, Draft Code of Crimes Against the Peace and Security of Mankind, art. 7, U.N. Doc. A/CN.4/L.522 + Corr.1.

30. "The State Party in the territory of which an individual alleged to have committed a crime set out in article 16, 17, or 18 is found shall extradite or prosecute that individual." *See id.* at art. 8.

31. *See* Rome Statute, *supra* note 4 (stating the quoted text in Preamble).

32. *Id.*

33. *See* G.A. Res. 3068 (XXVIII), art. IV(b) (Nov. 30, 1973).

34. *Id.* art. IV(b).

35. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(3), adopted Dec. 9, 1975, 1465 U.N.T.S. 113.

International jurisprudence has also addressed the issue with due consideration. In 1927, the Permanent Court of International Justice, in the *Lotus* Case, established that:

> Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[36]

This seminal *Lotus* decision established the precedent on extraterritorial jurisdiction of criminal law, as a general form of extraterritorial criminal jurisdiction.[37]

In contrast, the contemporary concept of universal criminal jurisdiction is restricted to crimes of an international nature, with its basis and requirements intrinsically linked to violations of international law.[38] This distinction arises from the evolution of the notion of universal criminal jurisdiction in both regulations and jurisprudence, as well as in legal doctrine. For example, in the *Tadić* case the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, ruled that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes."[39]

International human rights law and jurisprudence also provide relevant elements in the development of the principle of universal criminal jurisdiction, through its association with the right to access justice, both nationally and internationally.[40] Indeed, the right to access justice is a right recognized in all the main international human rights instruments,[41] and it has contributed to developing the principle of universal jurisdiction.

---

36. The Case of the S.S. "Lotus" (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 20 (Sept. 7).

37. *See id.* at 20.

38. *Cf. id.* at 7 ("[A] State is not entitled . . . to extend the criminal jurisdiction of its courts to include a crime or offense committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence.").

39. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

40. *See generally* Inter-Am. Comm'n H.R., The Right to Truth in the Americas, OEA/Ser.L/V/II.152 Doc. 2 (2014).

41. For example, article 14 of the International Covenant on Civil and Political Rights and article 8 of the Universal Declaration of Human Rights. *See* International Covenant on Civil and Political Rights art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing

In fact, the right to access justice has expanded in scope, encompassing not only the obligations of the State and the rights of the accused, but also the rights of crime victims to seek justice.[42] Indeed, in many jurisdictions, crime victims now have the ability to initiate legal actions independently, even without the intervention of the Public Ministry.[43] This is, of course, not the case of the ICC which acknowledges the possibility of victim participation in proceedings, as per article 68(a) of the Rome Statute, but does not include a right for victims themselves to file a criminal complaint.[44]

Likewise, the various decisions and opinions issued by the bodies of the Inter-American Human Rights System (IAHRS), which are mandatory in many domestic legal systems in Latin American countries, have highlighted the importance of the exercise of universal criminal jurisdiction and have recommended that States apply it. For example, Resolution No. 1/03 of the Inter-American Commission on Human Rights (IACHR) urges "states to adopt the legislative and other measures needed to ensure punishment for international crimes such as genocide, crimes against humanity and war crimes," and "to combat impunity in the case of international crimes by invoking and exercising their jurisdiction over such crimes on the basis of the different types of existing jurisdiction."[45]

In the IAHRS, universal jurisdiction is linked to the right to truth and the obligation that countries have assumed to investigate, punish and report human rights violations. The right to truth emerged as a response to the lack of clarification, investigation, prosecution and punishment of cases of serious violations of human rights, and infractions of International Humanitarian

by a competent, independent and impartial tribunal established by law."); G.A. Res., art. 8 (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

42. *See* G.A. Res., 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); *see also* Gerardo Bernales Rojas, *El acceso a la justicia en el sistema interamericano de protección de los derechos humanos* [Access to Justice in the Inter-American System Protection of Human Rights], 25 IUS ET PRAXIS 277, 290 (2019), https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122019000300277.

43. This is the case of Argentina, where the Supreme Court's doctrine established in the case "Santillán" (Gabriel Egisto Santillán v. Argentina, Case 12.159, Inter-Am. Comm'n H.R., Report No. 72/03 (2003), https://www.cidh.org/annualrep/2003eng/Argentina.12159.htm) and "Quiroga" (Edgar Quiroga v. Colombia, Case 319-01, Inter-Am. Comm'n H.R., Report No. 72/07 (2007), https://cidh.oas.org/annualrep/2007eng/Colombia319.01eng.htm), among others, clearly indicates that, even when the Prosecutor does not exercise accusation, the complainant (querellante) is fully empowered to do so alone. *See* Int'l Laws. Project, *Victims of Corruption: National Legal Frameworks Database 2022* 2–3 (2022), https://uncaccoalition.org/united-states-of-america-victims-of-corruption-national-legal-frameworks/).

44. *See* Rome Statute, s*upra* note 4, at art. 68.

45. *See* On Trial for International Crimes, Inter-Am. Comm'n of H.R., Resolution 1/03, ¶¶ 1–2 (2003), https://cidh.oas.org/resolutions/1.03.int.crimes.resolution.htm.

Law.[46] Currently, it constitutes one of the pillars of transitional justice mechanisms.[47] The purpose was clear: in order to combat impunity, the bodies of the Inter-American System developed regional standards to give substance to the right to truth.[48]

Although the right to truth is not explicitly included in the Inter-American human rights instruments, both the IACHR and the jurisprudence of the Inter-American Court of Human Rights (IACtHR) have delineated its substance and determined the resulting obligations of States;[49] they have done so through the comprehensive analysis of a series of rights established in the American Declaration on the Rights and Duties of Man and in the American Convention on Human Rights.[50] Therefore, this right has been consolidated as a guarantee established in these instruments, and others.

More specifically, the IACHR and the Court have maintained that the right to truth is directly linked to the rights to judicial guarantees and judicial protection, established in Articles 18 and 24 of the American Declaration and in Articles 8 and 25 of the American Convention.[51] The right to the truth is likewise related to the right of access to information, contemplated in Article 4 of the American Declaration and 13 of the American Convention.[52]

Under these provisions, the right to truth comprises a double dimension. On the one hand, the right to truth recognizes the right of victims and their families to know the truth regarding the events that gave rise to serious violations of human rights, as well as the right to know the identity of those who perpetrated the crimes.[53] On the other hand, the right is understood as corresponding not only to the victims and their families, but also to society as a whole.[54] In this regard, "[t]he Commission has maintained that greater society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future."[55] In this light, the right to truth entails the obligation of States to clarify, investigate, prosecute and punish those responsible for cases of serious violations of human rights and infractions of International Humanitarian Law.

46. *See* Inter-Am. Comm'n H.R., The Right to Truth in the Americas, *supra* note 40, at 7.
47. *Id.*
48. *Id.*
49. *Id.* at 8.
50. *Id.*
51. *Id.* at 10.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

In conclusion, according to international norms and principles and the overwhelming international jurisprudence, States may very well be obligated to incorporate universal jurisdiction into their domestic law. Many countries have expressly incorporated provisions accepting the principle of universal criminal jurisdiction into their domestic legislation or implicitly authorized its use when requested either by national or foreign individuals or organizations. One of those countries is Argentina.[56]

B. Experiences of UCJ Worldwide: The Case of Argentina

Despite the many international provisions where universal criminal jurisdiction is mentioned, it was not until the 1990s that this tool became a relatively common practice in the search for justice.[57] In fact, for many Latin American countries, universal criminal jurisdiction became the only available tool to respond to the many gross human rights violations committed under military dictatorships in the region.[58] After the recovery of democracy around the mid and late 80's, victims, and relatives of victims of countries such as Chile, Argentina, and Guatemala, searched for justice abroad due to the prevailing impunity in their national jurisdictions that too often characterized the democratic governments following the dictatorial ones. [59]

Consequently, at that time, Spain became the country receiving many of the requests to investigate gross violations of human rights that in the majority of cases constituted crimes against humanity and, in some others, amounted to the crime of genocide.[60] Universal criminal jurisdiction thus began to have relevance in the absence of an international criminal court and in a continent where there were no proposals of special courts.

Since then, the situation has changed drastically. Currently, many countries authorize the use of its domestic criminal courts for atrocity crimes committed outside the territory of their jurisdiction and by and against

56. Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

57. *See* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, REFWORLD GLOB. L. & POL'Y DATABASE (Jan. 1, 2006), https://www.refworld.org/reference/countryrep/hrw/2006/en/31672; *see, e.g.,* José Burneo Labrín, JURISDICCION UNIVERSAL Y EX JEFES DE ESTADO. EL CASO PINOCHET [Universal Jurisdiction and Former Heads of State. The Pinochet Case] (Pontificia Universidad Católica del Perú ed., 2009).

58. *See* SEBASTIAN BRETT, EL EFECTO PINOCHET: A DIEZ AÑOS DE LONDRES 1998 (Cath Collins ed., 1998), https://www.corteidh.or.cr/tablas/r25600.pdf.

59. *See* Sabina Puig Cartes, *Reclaiming Universal Jurisdiction*, INT'L CATALAN INST. FOR PEACE, (Apr. 25, 2022), https://www.icip.cat/en/opinion/reclaiming-universal-jurisdiction/.

60. *See Argentina. Scilingo Case,* Baltazar Garzón, https://baltasargarzon.org/en/universal-jurisdiction/argentina-scilingo-case/ (last visited Jan. 11, 2025).

foreign nationals.[61] According to the Universal Jurisdiction Annual Review 2023 drafted by Trial International, twelve countries in the world now have cases under investigation or pending via the principle of universal jurisdiction.[62]

Ironically, a country that for some two decades forced victims to seek justice elsewhere, today has become a beacon of universal criminal jurisdiction in the Latin American region and worldwide. The human rights tradition of Argentina, born as a consequence of the country's last dictatorial experience, allows its justice system to be considered a fundamental tool in the protection of human rights through the principle of universal criminal jurisdiction.

Article 118 *in fine* of Argentina's National Constitution establishes the attribution of jurisdiction for the Argentine criminal courts to know the facts, investigate and, where appropriate, judge those responsible for international crimes (crimes against humanity, crime of genocide, war crimes and/or crime of aggression) committed outside the national territory by stipulating that:

> The proceedings of these [ordinary criminal] trials will be carried out in the same province where the crime was committed. But when this is committed outside the limits of the Nation, against the law of nations, the Congress will determine by a special law the place in which the trial is to be held.[63]

The courts authorized by law for such cases are the Federal Criminal Courts,[64] where there are currently several precedents.[65] The case of the alleged persecution and perpetration of crimes against humanity committed

61. *See Universal Jurisdiction Annual Review 2024,* https://www.ecchr.eu/fileadmin/user_upload/UJAR_2024_digital.pdf ("In 2023, the number of investigations and prosecutions of international crimes opened before domestic jurisdictions under extraterritorial and universal jurisdiction continued to rise.").

62. *See Universal Jurisdiction Annual Review 2023,* https://www.ecchr.eu/fileadmin/user_upload/01_TRIAL_UJAR_2023_DIGITAL_27_03.pdf.

63. Art. 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

64. *See* Law No. 26200, Jan. 4, 2007 (Arg.) ("Jurisdiction for the commission of crimes provided for in the Rome Statute and in this law corresponds to the Federal Courts with criminal jurisdiction.").

65. Since 2005, "96 complaints have been filed against people in different cases under the principle of universal jurisdiction, which have had different luck and run without any oral trial to date" according to Julieta Mira. Julieta Mira, *El principio de la jurisdicción universal en la Argentina: el juzgamiento penal de los crímenes del franquismo y la persecución al pueblo Rohingya* [The principle of universal jurisdiction in Argentina: the criminal prosecution of the crimes of Franco's regime and the persecution of the Rohingya people], 13 SOCIO. CAREER MAG. 336, 348 (2023) (citing Johns et al., *Migration and the Demand for Transnational Justice*, 116 AM. POL. SCI. REV. 1184, 1188 (2022)).

against the Falun Gong spiritual group in China is particularly noteworthy.[66] In that case, arrest warrants and subpoenas were issued for defendants Luo Gan and Jiang Zemin in December 2009 by an Argentine Federal Judge after four years of investigating charges of torture and genocide against the members of the group.[67]

Likewise, in 2010, the victims of crimes committed in Spain during Franco's authoritarian regime filed charges in Argentina through universal jurisdiction.[68] The latter case was admitted, and in 2014, the Argentine Federal Judge ordered the arrest of twenty defendants, entrusting Interpol with their preventive arrest for extradition purposes.[69]

Just four years later, in September 2014, twelve Argentinian citizens filed charges in a Federal Court of the Province of Córdoba against five Israeli officials for crimes against humanity and genocide committed in the Gaza Strip, between July 8 and August 26, 2014.[70] A few years later, the Aché indigenous community of Paraguay accused Alfredo Stroessner dictatorial regime of the crime of genocide.[71] Former Spanish Judge Baltazar Garzón, promoter of the doctrine of universal justice, accompanied the indigenous community in their complaint in the Argentinian Courts.[72]

The utilization of Argentine courts for prosecution of crimes under international criminal jurisdiction has continued in recent times, with a number of notable cases. In 2019, a complaint was filed before the Federal Courts of the City of Buenos Aires for the genocide committed in Myanmar against the Rohingya ethnic group, most of whom are currently taking refuge

66. Luis Andres Henao, *Argentine Judge Asks China for Arrests Over Falun Gong*, REUTERS, (Dec. 23, 2009, 4:19 PM), https://www.reuters.com/article/world/argentine-judge-asks-china-arrests-over-falun-gong-idUSTRE5BM02B/.

67. *Id.*

68. *See Universal Jurisdiction Annual Review 2023*, *supra* note 62.

69. *See* Juzgado Nacional Criminal y Correccional Federal 1 [Juzg. Fed.] [Federal Criminal and Correctional Court 1], 30/10/2014, "Galvan Abascal Celso; Aguilar Dolls; Giralte González, José Ignacio…and others" (Arg.).

70. *See* Ana Delicado, *Ciudadanos argentinos presentan la primera querella contra Israel por "genocidio" en Gaza* [Argentine citizens file the First Complaint Against Israel for "Genocide" in Gaza], PUBLICO, (June 9, 2014, 12:43 PM), https://www.publico.es/internacional/ciudadanos-argentinos-presentan-primera-querella.html.

71. *See* BBC, *Paraguayan Indigenous People Denounce Genocide During Military Government*, (Apr. 8, 2014), https://www.bbc.com/mundo/ultimas_noticias/2014/04/140408_ultnot_paraguay_ache_indigenas_justicia_irm.

72. Former Judge Baltazar Garzón was the one who in the 1990s promoted and pushed for universal jurisdiction cases for crimes committed in many Latin American countries. The most famous case was that of Chilean dictator Augusto Pinochet. *See* Baltazar Garzon, *El arresto de Pinochet* [The Arrest of Pinochet], https://baltasargarzon.org/jurisdiccion-universal/pinochet/ (last visited Jan. 11, 2024).

in the neighboring country of Bangladesh.[73] An investigation opened in 2022, and witnesses traveled to Argentina in 2023 to provide oral testimony.[74] In June 2024, the Federal Prosecutor in charge of the investigation requested Interpol to issue arrest warrants against Myanmar's former president and twenty-four other high-rank officials under the charges of genocide and crimes against humanity.[75]

An important aspect of the Myanmar case is that the case in Argentina is proceeding while ongoing investigations in both the International Criminal Court (same criminal nature as universal jurisdiction) and in the International Court of Justice, where The Gambia filed a complaint against Myanmar for violations of the Genocide Convention.[76]

In another highly publicized case – and despite on-going events, international investigations and reports – the Clooney Foundation for Justice filed a complaint under universal jurisdiction in 2023 against the President of Venezuela, Nicolas Maduro, and other senior officials in the Federal Courts of the City of Buenos Aires.[77] The criminal complaint presented by the Clooney Foundation is founded on the policy of repression[78] instituted and executed by Maduro's government since 2014 and on the rights of

73. *Cf.* CTR. FOR THE STUDY OF GENOCIDE AND JUST., LIBERATION WAR MUSEUM, THE ROHINGYA GENOCIDE: COMPILATION AND ANALYSIS OF SURVIVORS' TESTIMONIES COLLECTED BY THE CSGJ RSCH. TEAM (Mofidul Hoque et al. eds., 2018).

74. *See Testigos rohingyas declaran en Argentina sobre presuntos crímenes de guerra en Myanmar* [Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar], PAGINA 12, (June 9, 2023, 12:01 AM), https://www.pagina12.com.ar/556633-testigos-rohingyas-declaran-en-argentina-sobre-presuntos-cri [hereinafter Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar].

75. *See* Andrew Klipphan, *Un fiscal argentino pidió la detención del ex presidente de Myanmar y 24 militares por genocidio y delitos de lesa humanidad* [An Argentine Prosecutor has Requested the Arrest of the Former President of Myanmar and 24 Soldiers for Genocide and Crimes Against Humanity], INFOBAE (last updated July 1, 2024, 9:39 AM), https://www.infobae.com/politica/2024/06/28/un-fiscal-argentino-pidio-la-detencion-del-ex-presidente-de-myanmar-y-24-militares-por-genocidio-y-delitos-de-lesa-humanidad/.

76. Although it is of a different jurisdictional nature (i.e. State against State), the ICJ case also considers Myanmar's non-compliance with the Convention on the Prevention and Punishment of the Crime of Genocide. *See* Press Release by the Int'l Ct. of Just., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), (July 3, 2024), https://www.icj-cij.org/sites/default/files/case-related/178/178-20241224-pre-01-00-en.pdf.

77. According to the criminal complaint, the policy of repression still in force includes but it is not limited to extrajudicial executions, torture and other ill-treatment, arbitrary detentions, excessive use of force, and politically motivated persecution which may constitute crimes under international law. *See Argentina: Amnesty International Makes Submission to Argentine Criminal Court's Investigation into Crimes Against Humanity in Venezuela,* AMNESTY INT'L (Feb. 27, 2024), https://www.amnesty.org/en/latest/press-release/2024/02/amicus-curiae-argentina-venezuela-crimes-against-humanity-universal-jurisdiction-human-rights/.

78. *See id.*

victims of serious human rights violations to truth, justice, and reparations.[79] And again, as in the case of Myanmar, there is an ongoing investigation in the ICC.[80] On November 3, 2021, the ICC Prosecutor announced that the preliminary investigation in the case of Venezuela concluded with the decision to continue with further investigations.[81]

In all the aforementioned cases, universal jurisdiction has evidently played a fundamental role in the protection of human rights by facilitating the investigation of alleged atrocity crimes and, therefore, attempting to fulfill the victims' rights to access to justice, truth and reparations. Although the International Criminal Court also asserted its jurisdiction in a few of these instances, the reality is that, at the domestic level, the States in question were either unwilling or unable to conduct such investigations. In this context, universal jurisdiction in Argentina has emerged as a crucial tool for the protection of vulnerable groups, ensuring that perpetrators of serious crimes are held accountable regardless of where the crimes occurred.

While the exercise of criminal jurisdiction takes place after the commission of the alleged crimes, the resulting judicial processes serve multiple significant functions. Firstly, they ensure the protection of fundamental rights by delivering justice and redress to victims, thereby acknowledging and addressing their suffering. Secondly, these judicial proceedings play a preventive role, deterring future crimes of a similar nature by sending a clear message that impunity will not be tolerated.

Finally, by holding individuals accountable through universal jurisdiction, the international community reinforces the norms and standards of human rights and international humanitarian law, thereby contributing to a broader culture of accountability and respect for human dignity. The utilization of universal jurisdiction helps to fill the gaps left by national jurisdictions that may be unwilling or unable to prosecute such crimes and, by leveraging the tools of international jurisdiction, to reinforce the global commitment to justice and the rule of law.

---

79. *See Venezuela: Argentine courts must investigate crimes against humanity committed by Venezuelan authorities*, AMNESTY INT'L (June 14, 2023), https://www.amnesty.org/en/latest/news/2023/06/venezuela-argentina-must-investigate-crimes-against-humanity/.

80. *See* Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Nov. 14, 2019), ¶ 111 (stating that at that time in 2019, the ICC issued an opinion on the investigation in the case).

81. *See* Venezuela I: Situation in the Bolivarian Republic of Venezuela I ICC-02/18, INT'L CRIM. CT., https://www.icc-cpi.int/venezuela-i.

C. UJ as a Tool for Protecting Fundamental Rights

Empirical studies by non-governmental organizations affirm that universal jurisdiction has become a valid and legitimate answer for justice to victims of human rights violations, especially when those victims have no State representation, are being persecuted by the government of the State of their citizenship or belong to an unrecognized State.[82]

Argentina's experience with universal criminal jurisdiction, applied to both regional and international cases, serves as a compelling example of the effective application of this legal principle. As previously stated, Federal Courts in Argentina have initiated investigations into crimes committed in various locations around the world, including Spain, Myanmar, and Venezuela, spanning different historical periods.[83] These investigations not only demonstrate Argentina's commitment to addressing serious human rights violations regardless of where they occurred, but they also highlight the relevance of addressing historical injustices that have had lasting impacts on victims and their families. These contemporary and historical cases underscore the ongoing relevance of universal jurisdiction in responding to current atrocities and safeguarding human rights globally.

Universal criminal jurisdiction has inherent versatility as well: not only can it serve as the only available avenue toward justice and accountability in some cases, but it can also act as a complement to proceedings in other jurisdictions. As explained, several of the cases and investigations in Argentina, also have complementary investigations in international jurisdictions. Even if international tribunals are able to act, the nature and complexity of the crimes under consideration often needs the cooperation of more than one jurisdiction. Therefore, universal criminal jurisdiction remains relevant even when either the ICC or another domestic court, or both have opened cases on the subject matter in their jurisdictions.

The sheer seriousness and complexity of the factual underpinnings often presented in universal jurisdiction cases even invites the complementarity of domestic courts, given that it is often difficult, if not impossible, for the burden of investigative and prosecutorial work to be shouldered exclusively by one jurisdiction. Justice for mass atrocities, in a broad sense, depends on the joint efforts of jurisdictions whose collective capacity allows for a full, fair, and comprehensive investigation. Without a doubt, Argentina has

82. *See generally Universal Jurisdiction Annual Review 2023, supra* note 62.

83. *See generally* Mira, *supra* note 65 (describing actions regarding crimes in Spain); Rohingya Witnesses Testify in Argentina About Alleged War Crimes in Myanmar, *supra* note 74; AMNESTY INT'L, *supra* note 79 (describing instruction to investigate crimes in Venezuela by authorities in Argentina).

become a beacon of justice in the world and a living voice for the thousands of victims otherwise silenced by these crimes.

When criminal jurisdictions complement each other, respecting the principle of *ne bis in idem*, the protection of human rights is expanded. The nature of international crimes makes it difficult for a single jurisdiction to deliver on the rights of victims to truth, justice and reparation. Likewise, the message against impunity and the impact on the prevention of future crimes are strengthened when more than one jurisdiction is actively involved in investigating a case.

Moreover, universal jurisdiction provides an opportunity for greater neutrality than international jurisdiction does, particularly when considering the political context in which many such cases arise. The ICC has often been criticized for being a modern colonialist institution, with a disproportionate focus on individuals from African countries.[84] This criticism suggests that the ICC's actions might be influenced by geopolitical considerations, potentially undermining its perceived impartiality.

However, in the case of Argentina, such criticism would be unfounded. Argentina has demonstrated a commitment to applying universal jurisdiction in a politically neutral manner. It has initiated investigations against individuals from countries with which it has historically maintained very close historical ties and diplomatic relations, such as Spain and Venezuela, as well as against individuals from key commercial partners like China.[85]

Even if just apparent, political neutrality also allows for greater protection of the human rights of victims of serious violations. Indeed, this should be the goal. When a State exercises universal criminal jurisdiction without bias, it ensures that justice is pursued based solely on the merits of the case and the severity of the crimes committed. This impartial stance is crucial for upholding the rule of law and delivering justice to victims who might otherwise be denied recourse due to political considerations.

Another relevant aspect to highlight regarding the relationship between universal criminal jurisdiction and the protection of fundamental rights is related to procedure. Universal criminal jurisdiction, like special courts and the ICC, faces significant procedural challenges. These challenges often hinder the effectiveness and efficiency of legal proceedings, irrespective of the jurisdictional framework in place and, therefore, impact on the protection of human rights.

---

84. *See* Fatou Bensouda, *Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, ONLINE J. AND FORUM INT'L CRIM. L. DEBATES (Mar. 2013), https://iccforum.com/africa (last visited Jan. 12, 2025).

85. *See* Mira, *supra* note 65 (Spain); AMNESTY INT'L, *supra* note 79 (Venezuela); Henao, supra note 66 (China).

One of the primary challenges is often the physical distance between the court and the location where the crimes were committed. This distance complicates the collection of evidence, the gathering of witness testimonies, and the overall investigation process. Investigators and prosecutors may face logistical difficulties in accessing crime scenes, especially in conflict or post-conflict areas. However, this issue is equally relevant for special courts and the ICC, as they also operate at an international level and often deal with crimes committed far from where such courts sit.

The physical distance affects the ability of witnesses and survivors to travel and testify. However, this is not unique to universal criminal jurisdiction: this challenge is prevalent in both international courts and universal jurisdiction cases. Testimonies from witnesses and survivors are crucial for establishing the facts and ensuring a fair trial. However, logistical and financial barriers often prevent them from participating in proceedings. Many rely on donations from non-governmental organizations to cover travel expenses, but these organizations also face funding limitations. As a result, important testimonies may be missed, affecting the thoroughness and fairness of the trials. Of course, the integration of technological advancements such as video conferencing in certain courts may provide an alternative, although not ideal, remedy for some of these logistical obstacles in the years to come.

Another significant challenge is the difficulty in apprehending the accused. International jurisdictions, including those exercising universal criminal jurisdiction, rely on the cooperation of States to execute arrest warrants and extradite suspects.[86] However, political considerations, diplomatic relations, and state sovereignty can impede this process. States may be unwilling or unable to apprehend individuals within their territories, leading to delays or, in some cases, the complete stagnation of the justice process. The ICC and special courts face these obstacles more acutely perhaps, as they do not have their own police forces and must depend on member states to enforce arrest warrants.

The lack of human and economic resources is also a common challenge across universal jurisdictions, special courts, and the ICC. Conducting comprehensive investigations and prosecutions of international crimes requires substantial funding and skilled personnel. However, these resources are often limited, leading to prolonged investigations, delayed trials, and even the inability to pursue certain cases. Resource constraints can affect the quality of investigations and the overall effectiveness of the judicial process. In some jurisdictions, such as in Argentina, this could be particularly pressing given the economic instability the country often faces.

86. *See* Massimino, *supra* note 2, at 5.

Finally, universal criminal jurisdiction can contribute to the professional development of the judiciary. Judges and legal practitioners involved in these cases often gain exposure to international standards, enhancing their expertise and understanding of complex legal issues. This exposure can lead to improvements in the national judiciary, promoting the right to access justice not only in specific cases but more broadly within the judicial system. By adhering to international standards, courts exercising universal jurisdiction help reinforce the rule of law and contribute to the global fight against impunity for serious crimes, thereby also enhancing fundamental rights protection.

In conclusion, universal criminal jurisdiction offers a means to overcome the challenges often faced by international jurisdictions. It is a crucial tool, an indispensable one, in the fight against impunity, thereby enhancing the protection of human rights. Moreover, in some cases, it may become the only available tool for vulnerable groups to find some accountability. Despite economic difficulties, Argentina has emerged as a leading advocate of universal jurisdiction in the region. Countries like Ecuador, which incorporates this principle into its penal code,[87] may soon emulate Argentina's example. By doing so, the region can leverage this important tool of universal criminal jurisdiction to aid in the protection of vulnerable groups and enhance the global reach of the rule of law.

III. U.S. TORTURE VICTIMS PROTECTION ACT:[88] UNIVERSAL JURISDICTION OF A CIVIL NATURE

In the fight for the imposition of accountability measures against perpetrators of atrocity crimes, an emerging front is developing with promise in the civil context as well. Increasingly, human rights activists and crime victims are turning to civil statutes within certain jurisdictions to impose financial liability against perpetrators. While the target is perpetrator pocketbooks rather than imprisonment, certain civil legislation provides a meaningful alternative to victim groups who are unable to otherwise hold violators of their fundamental human rights accountable.

87. *See* Código Orgánico Integral Penal de Ecuador [Comprehensive Organic Criminal Code of Ecuador], 2014 art. 401 (Ecuador) (stating using an unofficial translation of Irene Victoria Massimino: "Universal jurisdiction. Crimes against humanity may be investigated and tried in the Republic of Ecuador, provided that they have not been tried in another State or by international criminal courts, in accordance with the provisions of this Code and the international treaties signed and ratified").

88. *See* Torture Victims Protection Act of 1991, 28 U.S.C. § 1350.

A. Concept and Philosophical Legal Foundation (how is it used, who can use it and why was it passed)

The U.S. Torture Victims Protection Act (TVPA) is a case in point. It is a unique and increasingly effective mechanism for the imposition of accountability measures against perpetrators of human rights violations in the civil context. While it is tailored specifically to two types of acts, namely torture and extrajudicial killing, its jurisdictional reach and the ability of U.S. courts to effectively attach physical and financial assets through banking systems and otherwise render it a formidable tool in human rights litigation.[89]

The TVPA provides victims a valuable alternative to remedies in the criminal context and victims themselves can initiate litigation without the need to convince government prosecutors. It offers an access to justice for certain conduct that is not muddled by political considerations which may sometimes plague the decisions to initiate criminal prosecution.

At its core, the TVPA is a U.S. law that allows victims to initiate civil suits in the United States against foreign individuals who have committed extrajudicial killing and torture under "color of law" or acting in an official capacity for a foreign nation.[90] Understanding the history of its enactment is crucial to appreciating its purpose and its enduring scope. The TVPA was born of the increased activism by human rights organizations.[91] In the 1990s, these organizations lobbied the U.S. Congress extensively for a legal framework that would allow redress for victims of torture and extrajudicial killing in countries where leaders committing gross human rights violations with impunity and the national systems in such countries offered victims no recourse, or at least no meaningful recourse.[92]

The legislation was unabashedly aimed at communicating a message to dictators in Latin America, Asia and Africa. Then U.S. Congressman Tom Lantos was part of the legislative muscle behind the TVPA, and his efforts in crafting the intentionally reaching law was in direct response to reports and stories of brutal oppression and torture in these regions.[93] The law was specifically intended to manifest the U.S. government's drive to ensure the

89. *See id.* Sec. 2 (a)(1)–(2).

90. *Id.*

91. *See* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, Jan. 1, 2006, https://www.refworld.org/reference/countryrep/hrw/2006/en/31672 [accessed Jan. 14, 2025] (discussing the work of Amnesty International and Human Rights Watch in shaping the TVPA based on cases out of Argentina).

92. *See id.*

93. *See* Beth Van Shaack, *Tom Lantos Commission: Enhancing U.S. Ability to Pursue Accountability for Atrocities*, JUST SECURITY (June 17, 2019), https://www.justsecurity.org/64579/tom-lantos-commission-enhancing-u-s-ability-to-pursue-accountability-for-atrocities/.

spread of rule of law initiatives outside of its territorial borders and foster an environment of genuine accountability for human rights violations, particularly against the deposed despots of dictatorial regimes in the global south. Signed into law by President George H.W. Bush in 1991, the TVPA promised that perpetrators of certain serious human rights violations would not find safe haven even after fleeing their own states.[94]

To a substantial extent, the TVPA has served its unique purpose. Perhaps the most notable use of the TVPA was a class action case filed in the U.S. against Ferdinand Marcos, the former Philippines President, alleging mass torture, extrajudicial killing and forced disappearances during his rule until he was deposed in 1986.[95] After losing power, Marcos had fled from the Philippines to the United States, after which a class of victims filed action against Marcos in U.S. federal district court in Hawaii.[96]

The case was initially brought under the Alien Tort Claims Act, but plaintiffs' counsel added claims under the TVPA upon its enactment into law 5 years later.[97] Having determined local remedies in the Philippines inadequate, the U.S. federal court awarded the plaintiff class significant damages, including punitive damages, for the abuses perpetrated against the Philippine victims.[98]

The case was significant for three crucial reasons. First, it demonstrated the willingness of U.S. courts to implement the extraterritorial reach of the law, immediately upon enactment, against a high-profile dictator accused of gross human rights violations committed outside of the United States. Second, the award of punitive damages in addition to compensatory damages allowed for an acknowledgement of the severity of the human rights abuses, the need for accountability, and the role of financial deterrence. Finally, the case was an admonition to would-be violators that they could not escape accountability by fleeing their home countries and that the reach of U.S. courts in such human rights matters would be global, deliberate, and exercised.

94. *See* Statement on Signing the Torture Victim Protection Act of 1991, 1 PUB. PAPERS 437 (Mar. 12, 1992).

95. *See* In re Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460, 1462-63 (D. Haw. 1995).

96. *See id.* at 1463.

97. *See id.* at 1469 ("[P]laintiffs in this are citizens of Philippines who are complaining of human rights abuse which occurs in that country, [therefore] this case arises under two statutes—the Alien Tort Statute, 28 U.S.C. § 1350, and the newly enacted Tort Victim Protection Act ("TVPA") of 1991 . . . .").

98. *See id.*

B. Use of the TVPA (Experiences/History)

Recent uses of the TVPA demonstrate not only its endurance and vitality but also its substantive breadth for addressing gross human rights abuses. The TVPA has been applied by U.S. courts expansively as to torture and extrajudicial killing, which has allowed for case law encompassing various forms of torturous conduct and even attempted extrajudicial killing.[99] Moreover, through the application of aiding and abetting liability, U.S. courts have extended liability under the Act to non-primary actors, including corporate players.

First, the definition of torture under the TVPA has been interpreted comprehensively. The TVPA defines torture as:

> Any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . is intentionally inflicted on that individual for such purposes . . . punishing that individual . . . intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.[100]

The "infliction of starvation, unsanitary conditions, severe pain, and threats of execution—are severe enough to qualify as torture under the TVPA."[101]

But the TVPA has encompassed much more into the definition of torture. Torture includes "an all-encompassing environment of physical and mental torture" as well as "threats of death, intense fear, deprivation of medical care and exacerbation of injuries, starvation, severe sleep deprivation, imposition of squalid surroundings, intense cold, . . . isolation from contact with family members, fear for family members, and constant attempts to humiliate."[102] with torture including even "unsanitary conditions, inadequate food and medical care . . . amounts to torture,"[103] and "squalid living conditions, . . . malnutrition, physical ailments, and tenth-rate medical care").[104]

---

99. *See* Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 99 (D.D.C. 2017); *see also* Force v. Islamic Republic of Iran, 464 F. Supp. 3d 323, 360 (D.D.C. 2020).

100. Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1045 (D.C. Cir. 2014) (citing 28 U.S.C. § 1350 (3)(b)(1)) (first and third alteration in original).

101. *S*otloff v. Syrian Arab Republic, 525 F. Supp. 3d 121, 137 (D.D.C. 2021).

102. Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 218 (D.D.C. 2003), *vacated*, 370 F.3d 41 (D.C. Cir. 2004).

103. Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136, 152 (D.D.C. 2010).

104. Kar v. Islamic Republic of Iran, No. CV 19-2070 (JDB), 2022 WL 4598671, at *10 (D.D.C. Sept. 30, 2022).

Second, extra-judicial killing has been interpreted to include even *attempted* extrajudicial killing is also an underlying violation of the TVPA.[105] In *Gill v. Islamic Republic of Iran*, the D.C. District Court held that "the Torture Victim Protection Act's definition of extrajudicial killing allows plaintiffs to assert liability for a defendant's attempted extrajudicial killing, even if no one died as a result of that attempt."[106] Starvation, for example, is sufficient to show extrajudicial killing under the TVPA.[107] The U.S. Supreme Court has determined that starvation is a method of killing.[108]

Furthermore, the courts' application of the TVPA in the aiding and abetting context has expanded liability beyond merely primary actors to those who aid and abet primary actors in the commission of torture or extrajudicial killing, or both.[109] In fact, the line of cases confirming that the TVPA allows liability for aiding and abetting is long.[110]

The *Cisco* decision is instructive in this context, particularly with respect to the expansion of the legal regime to corporate entities and even their executives.[111] In a recent opinion, the Ninth Circuit allowed aiding and abetting claims for violations of the TVPA to proceed against the Cisco

105. Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 96 (D.D.C. 2017).

106. *Id.* (first citing Warfaa v. Ali, 33 F. Supp. 33 653, 666 (E.D. Va. 2014), aff'd, 811 F.3d 653 (4th Cir. 2016); and then citing Jane Doe I v. Constant, No.10108cv04, 2006 WL 3490503 (S.D.N.Y. Oct. 24, 2006)); *see also* Force v. Islamic Republic of Iran, 464 F. Supp. 3d 323, 360 (D.D.C. 2020); Karcher v. Islamic Republic of Iran, 396 F. Supp. 3d 12, 58 (D.D.C. 2019).

107. Han Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1050-51 (D.C. Cir. 2014) (stating that evidence of "'untimely death' due to starvation . . . [is] sufficient evidence to 'satisf[y] the court' that the North Korean government killed [victim] outside the formal legal process").

108. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 297 (1990) (Scalia, A., concurring) (referencing "prosecution of a parent for the starvation death of her infant").

109. *See* Gonzalez-Vera v. Kissinger, No. CIVA 02-02240 (HHK), 2004 WL 5584378, at *8 n.17 (D.D.C. Sept. 17, 2004) ("The legislative history of the TVPA indicates, and courts have held, that the TVPA provides a cause of action for aider and abettor liability."), *aff'd*, 449 F.3d 1260 (D.C. Cir. 2006); *see also* Doe I v. Cisco Sys., Inc., 73 F.4th 700, 744 (9th Cir. 2023) ("[B]ased on the text and Convention Against Torture background of the TVPA, we conclude that the TVPA encompasses claims against those who aid and abet torture or extrajudicial killing.").

110. *See*, *e.g.*, Barrueto v. Larios, 205 F. Supp. 2d 1325, 1332–33 (S.D. Fla. 2002) (denying the motion to dismiss of a former Chilean military officer who allegedly aided and abetted acts of torture committed by other Chilean officials); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002) (holding a former Bosnian Serb soldier liable for aiding and abetting torture); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *15 (S.D.N.Y. Feb. 28, 2002) (aiding and abetting torture actionable under TVPA because it "provides for liability for an individual who 'subjects' another to torture or extrajudicial killing"). Indeed, the legislative history of the TVPA demonstrates the intent to permit suits against persons who "ordered, abetted, or assisted in torture." *Gonzalez-Vera*, 2004 WL 5584378, at *8 n.17 (quoting S. REP. NO. 102-249, at 8 (1991)). *See also Cisco Sys.*, 73 F.4that 741 ("[A]iding and abetting torture is actionable under the TVPA.").

111. *See Cisco Sys.*, 73 F.4th at 709.

corporate executives who had contacts with Chinese authorities and had worked on developing a surveillance technology platform called Golden Shield.[112] Chinese authorities later used the technology to target and repress Falun Gong adherents in China.[113]

The Ninth Circuit concluded that given the "widespread external reporting about the human rights abuses" and statements by defendants included in the complaint, "Plaintiffs have adequately pleaded that [the corporate executive defendants] provided their assistance with awareness that international law violations, including torture, were substantially likely. These allegations, taken as true, also state a plausible claim that [defendants] 'supported' and 'benefitted' from the use of the Golden Shield."[114]

In reversing and remanding the lower court, the Ninth Circuit held that the dismissal of the TVPA claim was in error because Plaintiff adequately pled an aiding and abetting claim and the TVPA permits individual accomplice liability.[115] The impact of this line of cases cannot be underestimated in that it opens the window of accountability for the victim plaintiff to those who participated and assisted in the torture of extrajudicial killing. The increase in scope multiplies a victim's targets in achieving just outcomes.

C. TVPA as a Tool for Protecting Fundamental Rights (Civil Jurisdiction)

Properly strategized, the TVPA can be a powerful tool for protecting fundamental human rights for three primary reasons.

First, the TVPA allows access to justice for the victims of certain grave human rights abuses without the procedural, and even political, obstacles that often plague the initiation of criminal prosecution. Victims can bring cases individually or in a class without having to convince a government prosecutor to initiate an investigation and then a prosecution. Second, evidentiary facilities, such as a victim plaintiff who can take advantage of civil burdens of proof rather than the heightened criminal burdens, which may be advantageous as access to evidence is often limited for plaintiffs or destroyed by governments and primary actors, or both. Finally, civil proceedings attack perpetrators and those that aid and abet them in a manner that impacts them and their progeny financially, which for human rights violators may be a more important concern than the rights of the human beings whose lives their conduct destroys or even their own freedom.

---

112. *See id.* at 708-11.

113. *See id.* at 711.

114. *Id.* at 745 (citing Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1024–25 (9th Cir. 2014)).

115. *See id.*

Victims of human rights abuses traditionally depend on government prosecutors to initiate an investigation, a charge, and a prosecution of the perpetrators of human rights violations. This can be fraught with numerous obstacles, not in the least of which is convincing government prosecutors of the value of bringing such cases. These prosecutorial decisions are often laden with political considerations, particularly in the context of human rights abuses in the international context. At the very least, there are diplomatic and political consequences to a state body initiating actions against foreign leaders or their underlings for human rights abuses.

The TVPA, however, allows victims an avenue to seek justice outside of this politically charged environment. Using the TVPA, victims can seek redress directly against their perpetrators and/or those aiding and abetting them with relative autonomy. This means that cases filed can proceed to the evidentiary phases and even merit adjudications without the obstacles of political or diplomatic considerations. This is a significant access to justice presented by the TVPA, particularly for those who seek legal redress from perpetrators with enduring ties and influence in important political and diplomatic circles.

Moreover, there are evidentiary advantages in civil litigation where victims can benefit from lower burdens of proof. In criminal prosecutions where the burdens are heightened significantly, the evidentiary threshold is a material obstacle, especially where victims may not have access to the evidence often in the hands of perpetrator or their governments, and the political and juridical mechanisms by which international prosecutions can obtain that information are complicated and, often, neither heeded nor complied with. It is not uncommon that primary perpetrators and government organs under their control deliberately destroy evidence or withhold the same, rendering the evidentiary process by which to meet heightened criminal burdens of proof quite difficult, if not at times, impossible.

The civil action for human rights abuses offers victims some reprieve. Of course, the burden of proof, often by a preponderance of the evidence rather than by beyond a reasonable doubt, is certainly more surmountable. But that is only a surface benefit. Victims often have great difficulty collecting conclusive evidence, in the first place.

In the civil context, not only is the evidentiary burden more attainable, but there are often procedural sanctions for destroying or withholding evidence, or both. These can be implemented against perpetrators, allowing the courts to assume evidentiary facts against the perpetrator where there have been discovery abuses by the perpetrator or those under the perpetrator’s control. Several due process considerations could limit such presumptions against the perpetrator in the criminal context. Civil actions for

human rights abuses not only lower the bar, but they often allow litigation benefits through presumption sanctions to a victim whose perpetrator is withholding crucial evidence.

Finally, human rights violators are often individuals who have a complete disregard for the rights and welfare of human beings yet are quite often deeply committed to the financial benefits they can gain from systematic human rights abuses. The example of Philippine's ex-president Marcos is a case point.[116] The sad reality is that human rights violations are often underpinned by other personal motives, often corruption and amassing wealth, that perniciously trump the welfare of actual human beings.[117] This is not a novel realization, but it is one that practitioners should appreciate before discounting the role of civil human rights litigation. The perpetrator often cares more about the wealth he has amassed than the lives he has destroyed in the process.

Civil litigation aimed at human rights abuses target this vulnerability directly. Not only do they provide a means to hold perpetrators accountable where it hurts them the most (perpetrators do not care about human rights abuses), but civil actions seeking damages also undercut the intergenerational wealth such perpetrators have accumulated for their families and progeny.

In one sense, material civil penalties strike a bit broader than targeted criminal prosecution, impacting the perpetrator not only with shame but subjecting his financial framework to vulnerability that will affect the lives and lifestyles of those around him as well—just as his human rights violations have impacted more than merely the victim, but also his family and his social station. In the case of aiding and abetting by corporate entities and executives, the value of civil actions and resulting damages—which have included significant punitive damages[118]—the impact is even more palpable.

---

116. *See* In re Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom*., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Circ. 1996).

117. *See id.* at 1462-63.

118. *See* Tachiona v. Mugabe, 234 F. Supp. 2d 401, 442 (S.D.N.Y. 2002) ("Judgment be entered in favor of Plaintiffs and against defendant ZANU–PF in a total amount of $71,250,453.00 representing compensatory damages of $20,250,453.00 and punitive damages of $51,000,000.00"); Abebe–Jira v. Negewo, 72 F.3d 844, 846–48 (11th Circ. 1996) (affirming punitive damages award of $300,000 to each of three plaintiffs for torture and cruel, inhuman, or degrading treatment); Hilao, 103 F.3d at 779–82 (affirming class award of $1.2 billion in exemplary damages for torture, summary execution, and disappearances); Paul v. Avril, 901 F.Supp. 330, 335–36 (S.D. Fla. 1994) (awarding $4 million to each of six plaintiffs for arbitrary detention, torture, and cruel, inhuman or degrading treatment); Xuncax v. Gramajo, 886 F.Supp. 162, 197–98 (Mass. Dist. Ct. 1995) (awarding punitive damages of $500,000—$5 million for summary execution, torture, arbitrary detention, and cruel, inhuman and degrading treatment); Filartiga v. Pena-Irala, 577 F.Supp. 860, 864–67 (D. N.Y. 1984) (awarding $5 million in punitive damages to each of two relatives of victim of torture and extrajudicial killing).

Such financial considerations are easily understandable by corporate entities and can serve as meaningful economic deterrents for enterprises to monitor their dealings in a global marketplace where the tools for human rights abuses are increasingly sourced from multinationals. The *Cisco* case where the executives of a global software solutions firm stand within the crosshairs of the TVPA for aiding and abetting human rights violations is a telling case in point.[119]

IV. CONCLUSION

Justice outcomes for international crimes remain plagued by significant jurisdictional and procedural shortcomings, even with the growth of notable international mechanisms like the ICC and specialized courts. These realities are often complicated for crime victims by endemic resource constraints, political obstacles, and often, the unwillingness for national authorities to prosecute and hold perpetrators accountable for their crimes. This is particularly difficult in matters where political leaders are themselves the perpetrators of atrocity crimes.

Measures outside of traditional international jurisdiction should be considered and employed by international lawyers and practitioners in delivering justice outcomes to victims of such crimes. Argentina's application of universal criminal jurisdiction illustrates one such alternative avenue and underlines how domestic legal systems can play a formidable role in delivering justice to crime victims by entangling perpetrators who would otherwise escape criminal prosecution and process. The Argentine courts' readiness to exercise universal criminal jurisdiction has demonstrated the potential impact that domestic legal systems can have on the global search for justice and the strengthening of the rule of law.

The use of domestic civil statutes to increase accessibility to justice is another crucial avenue. The TVPA illustrates how domestic legal systems with unique reach can provide a venue for victims to seek truth an accountability through legal processes which may allow for a greater reach of perpetrators and those that aid and abet them, in addition to lower burdens of proof and freedom from many political influence barriers.

Taken together, these examples provide increasingly accessible mechanisms for victims to seek address for human rights abuses. This is particularly crucial for marginalized or unrecognized groups who are often structurally barred from access to international justice mechanisms traditionally available or specially created. By employing universal jurisdiction and targeted domestic statutory frameworks, crime victims can

119. *Cisco Sys.*, 73 F.4th at 708.

find a forum where atrocity crimes and serious violations of human rights law may be heard, regardless of where they occur. The establishment of the rule of law, particularly when it comes to fundamental human rights, depends on precisely this type of creativity.