Should German Courts Prosecute Syrian International Crimes? Revisiting the 'Dual Foundation' Thesis

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Should Germany be prosecuting crimes committed in Syria pursuant to universal jurisdiction (UJ)? This article revisits the normative questions raised by UJ—the principle that serious international crimes such as genocide, crimes against humanity, and war crimes committed by foreigners outside of its territories can be prosecuted by States—against the backdrop of increasing European UJ proceedings regarding Syrian conflict-related crimes, focusing on Germany as an illustrative example. While existing literature justify UJ through universal prohibition of certain atrocities, this creates residual normative issues. Alternatively, this article applies the “two-tiered test” derived from the "dual foundation" thesis of the Eichmann judgement, in which the normative appropriateness of UJ is evaluated against both accounts of universal prohibition and the specific politics surrounding the prosecution. It contends that the large numbers of Syrian refugees in Germany mean that it in particular should initiate Syrian conflict-related UJ proceedings to prevent continued harm and recognize the political agency of refugees. Ultimately, the article suggests UJ should normatively be thought of as a domestic, rather than international, political event.

Introduction

In February 2019, police detained two Syrians in Germany and one in France on "suspicion of torture and other crimes against humanity."[1] Amongst the suspects was Anwar Raslan, a former colonel in Syria's military-intelligence agency who had overseen investigations at an outpost known as Branch 251—human rights organizations have claimed that people held there were "starved, tortured, sexually assaulted and offered no medical care," resulting in several deaths.[2] Raslan, after defecting from Assad's regime in 2012, eventually made his way to Germany and claimed asylum, living alongside other Syrians, some of whom who had been held as prisoners in Branch 251.[3] Raslan's trial began on April 23rd , 2020 in the German city of Koblenz, alongside a lower-level official who worked under Raslan in Damascus, Eyad al-Gharib.[4]

Raslan's trial is part of the growing number of universal jurisdiction (UJ) proceedings, or the prosecution of 'core' international crimes—such as genocide, war crimes, or crimes against humanity—committed outside of a state's territory and involving foreigners. These proceedings show three characteristics: first, the proceedings are largely clustered in Western European states; second, they are predominantly regarding the conflict in Syria; and thirdly, the criminal investigations and prosecutions of international crimes are intricately linked with the flow of refugees and migrants into Western Europe as a result of the conflict in Syria and the neighboring regions.

This article revisits the normative questions raised by UJ against this background, using the German prosecutions of Syrian international crimes as an illustrative example. Germany has been a leading actor in UJ prosecutions with respect to Syrian crimes in the present day, both related to the regional conflict as well as the human rights violations of the Assad regime. Are German domestic courts the appropriate fora to be prosecuting individuals such as Anwar Raslan, for crimes committed in Syria? Existing literature on UJ that assume that third-party states derive their authority to prosecute from the exceptionally heinous nature of the crimes do not provide a sufficient basis for evaluating whether a particular state, like Germany, should prosecute the crimes in question.

As an alternative, this article applies a "two-tiered test" to the example of German prosecutions, derived Itamar Mann's re-reading of the *Eichmann* judgement's "dual foundation" thesis.[5] The two-tiered test is used to clarify the relationship between a state's international obligations to prosecute core international crimes, and the contingent and contextual question of whether a state is the more (or most) appropriate forum for prosecution. In doing so, drawing on both theories of UJ that focuses on the rights of victims advanced by Devika Hovell and Frédéric Mégret,[6] as well as theories on the nature of refugeehood, the article argues that the presence of large numbers of refugees and migrants as a result of the Syrian conflict provides additional normative imperative for Germany *in particular* to initiate UJ proceedings against crimes committed by Syrian actors.

By turning our attention to both the state's relationship with the people who are within its borders, as well as with abstract 'international community,' this article contributes to the broader discussion on international criminal justice and UJ proceedings in a manner that is rooted in the domestic politics surrounding UJ proceedings and its potential effects. This is particularly urgent given continued against international courts, such as the International Criminal Court (ICC), as it is increasingly likely that the route to realizing justice will be domestic.

The article will proceed as follows. First, it will provide a brief overview of the historical development of UJ and the German prosecution of Syrian conflict-related international crimes. It will then discuss the normative theories of UJ, focusing on the 'standard account' of cosmopolitanism and its critiques. From this, the article will introduce the framework of the 'two-tiered test' drawing on Mann's re-reading of the 'dual foundation' thesis in the *Eichmann* judgement. Finally, based on the two-tiered test, the article will argue that the particular political relationship between Germany and the Syrian conflict-related crimes is forged by the movement of refugees and the specific forms of physical and ontological harms they have suffered.

Background: Universal Jurisdiction

UJ refers to the prescriptive jurisdiction exercised by a state to punish conduct that is committed by and against foreigners outside of its territory, when the crime is not deemed to constitute a direct threat to its fundamental interests.[7] Historically, UJ was associated with piracy and later slavery. It is generally accepted in contemporary international law that 'core' international crimes, namely genocide, war crimes, and crimes against humanity, torture are subject to universal jurisdiction.[8] Multilateral treaties, such as the Convention Against Torture, provide for the obligation of member states to 'prosecute or extradite' individuals within their jurisdiction regardless of the offender's or the crime's connection to the country.[9] While the customary international legal basis for UJ is less clear, given inconsistencies in state practice, it is still nonetheless accepted that UJ for core international crimes and piracy is an established part of customary norms.[10] According to a 2012 survey by Amnesty International, for example, 147 states have provided for UJ for one or more of the core international crimes in their respective domestic jurisdictions.[11]

The history of UJ post-World War II is often told as a story of 'rise and fall' with the dramatic arrest of former Chilean dictator Augusto Pinochet by authorities in London pursuant to a Spanish arrest warrant in 1998 marking the apex of its 'rise.'[12] Although Pinochet himself was let go from custody, his arrest prompted various UJ cases related to atrocities in countries such as Argentina, Guatemala, Rwanda, Congo, and Chad, to make their way through various domestic courts, particularly in Europe.

However, the post-Pinochet UJ cases generated considerable political backlash, resulting restrictions on UJ legislations in 'standard bearing' states known for their permissive UJ laws, such as Spain and Belgium.[13] The complaints against Israeli and American state officials in Belgium were particularly controversial. Because of the case against the then-Israeli Prime Minister, Ariel Sharon, and other high-level state officials for their alleged role in the 1982 massacre of Palestinian refugees, Belgium was sidelined from the Israeli-Palestinian peace talks, even though it was the president of the European Union at the time. The US exerted public pressure on Belgium to quash investigations against former President George H.W. Bush and other top officials such as Dick Cheney and Colin Powell for their alleged responsibility for war crimes committed during the 1991 Gulf War, even blustering that the US might pull the NATO headquarters out of Belgium if Belgian courts continued with the case.[14] In 2003, the Belgian legislature responded by severely restricting its UJ laws, requiring both alleged perpetrators and victims to Belgian nationals or long-term residents, and provided immunity for state officials and Heads of States.[15]

But despite concerns about the 'death' of UJ,[16] UJ prosecutions continued to expand in number.[17] The nature of UJ cases, however, shifted over the years, with states taking on politically less controversial cases related to "low-cost defendants" who imposed less political cost on the prosecuting country,[18] or "quiet" cases that attracted less public attention,[19] such as cases involving politically weaker states or less prominent individuals. Underlying this change seemed to be a shift in the key aim of UJ prosecutions, as Máximo Langer argues, moving from a "global enforcer" model, in which states are understood to be part of a global anti-impunity regime, to a "no safe haven" model, in which UJ cases are pursued by states to avoid becoming refuge for participants in core international crimes.[20]

The New 'Standard Bearer' for UJ? Germany and Syrian International Crimes

Syrian conflict-related UJ cases started to work its way through European judicial systems against this backdrop. Since its beginning in 2011, the conflict in Syria and its surrounding region have been marked by the commission of grave atrocities committed by all sides. According to Amnesty International, all parties to the conflict "continue to commit with impunity serious violations of international humanitarian law, including war crimes," such as the indiscriminate attacks against civilians, the use of internationally banned weapons, and the obstruction of vital humanitarian aid, as well as gross violations of human rights such as arbitrary detention, torture, and enforced disappearances.[21] In 2016, the International Commission of Inquiry on the Syrian Arab Republic (COI) also found that the so-called Islamic State of Iraq and Al-Sham (ISIS) committed genocide against the Yazidi population.[22] As of December 2020, the United Nations High Commissioner for Refugees (UNHCR) has registered over 5 million refugees from Syria.[23]

Despite such allegations of widespread commission of international crimes, efforts to hold perpetrators accountable have been less forthcoming.[24] For example, involvement of the ICC

does not seem to be likely for both legal and political reasons—as Syria is not a Member State to the ICC, the Prosecutor does not have the authority to open investigations under their *propio motu* powers. While the United Nations (UN) Security Council could refer situations pertaining to non-Member States, efforts to refer the situation to the ICC were defeated by Chinese and Russian vetoes.[25] Although the UN General Assembly did create an investigative body referred to as the "International, Impartial, and Independent Mechanism (IIIM)" in 2016, its mandate is limited to assisting in future trials by collecting and analyzing evidence of international crimes, and does not have its own adjudicative powers.[26]

This 'accountability gap' has so far been filled by predominantly Western European domestic courts that initiated investigations under principle of UJ.[27] As of early-2020, there are twenty-five cases against individuals accused of international crimes committed in Syria, including cases under investigation and appeal stages.[28]

German Efforts to Prosecute Syrian Crimes

Germany has thus far pursued the greatest number of investigations relating to international crimes committed in Syria.[29] The type of investigations and prosecutions that are currently underway broadly align with the post-Pinochet shift towards prioritizing political lower-cost, 'quiet' cases that involve officials within Syrian state organs, such as the Air Force Intelligence Services—rather than politically significant individuals such as the Head of State— or allegations of war crimes and genocide committed by groups such as ISIS that are potentially less controversial publicly.[30] Furthermore, the motivations behind the pursuit of international crimes are in line with the 'no safe haven' model, preventing Germany from becoming a refuge for perpetrators,[31] as stated by the dedicated federal war crimes investigation unit.[32]

Three major institutional factors contribute to Germany's current active role in Syrian conflict related-UJ prosecutions. First, along with Norway, Germany has one of the least restrictive requirements for UJ proceedings in Europe.[33] The Code of Crimes Against International Law (CCAIL, or Völkerstrafgesetzbuch), adopted at the time of the establishment of the ICC to domestically enact the crimes specified in the Rome Statute, provides for 'pure' UJ proceedings, or the prosecution of core international crimes without direct links of territory, residence or nationality with Germany, although the Office of the Federal Prosecutor retains discretionary powers to not pursue cases.[34] The expansive nature of CCAIL, alongside Germany's multilateral treaty obligations such as the Convention Against Torture,[35] created a favorable legal environment for UJ cases. The adoption of CCAIL, which was passed with broad support across political parties,[36] was made necessary by the German legal system that requires international law to be incorporated into the domestic legal order through legislation.[37] This replaced the crimes of genocide and war crimes in the domestic Criminal Code, which had laid dormant for nearly four decades.[38]

Additionally, the establishment of the specialized war crimes unit, as briefly noted above, within the Federal Prosecutor's Office in 2010 increased the efficacy and resources devoted to UJ proceedings pursuant to CCAIL.[39] The ability of the Prosecutor to conduct 'structural investigations,' which investigates the criminality of broader structures even before individual suspects are identified, further facilitated UJ proceedings in complex contexts such as the Syrian conflict.[40]

Germany's favorable legal and institutional environment is further augmented by broader developments in technology as well as activities of civil society organizations. Technological developments, including relatively simple ones that allow for massive amount of data to be stored in small devices that can be easily smuggled out of the country as well as the proliferation of social media postings, also meant that UJ investigations can utilize a vast array of different kinds of evidence, including crucial photographic and video evidence with relevant metadata and timestamps.[41] Non-governmental organizations (NGO) have also played significant roles in initiating UJ proceedings more generally by utilizing national instruments, launching criminal complaints in domestic jurisdictions, submitting amicus curiae briefs, and mobilizing public opinion.[42] The 'Commission of International Justice and Accountability (CIJA),' for example, is a NGO that effectively functions as a private investigative body that aims to "collect documentation and material that follows a chain of custody" that "establishes criminal linkages between those who physically execute the underlying crimes" and those who "give the orders and/or establish policy" with the ultimate objective of preparing case briefs for criminal prosecutions by any domestic court or an international tribunal at a future date, specifically with regards to the Syrian context.[43] Some of this information have been provided to the German authorities at their request, notably regarding the case on Anwar Raslan.[44] Groups such as the European Center for Constitutional and Human Rights (ECCHR) and the 'Caesar Files Group,'[45] have played pivotal roles in filing criminal complaints in Germany pertaining to torture by the Assad regime.[46]

The most significant development that cuts across advancements in legal institutions, civil society, and technology, however, is the movement of refugees into Europe from Syria and the neighboring region since the beginning of the conflict in 2011. Germany has been at the center of this trend—between 2015-2019, 1.7 million people have applied for asylum in Germany,[47] making it the country with the fifth highest population of refugees.[48] Refugees and asylum seekers from Syria make up the largest group. In 2019, for example, about 25% of asylum applicants in Germany came from Syria.[49] According to a statement by the German Federal Prosecutor from the War Crimes Unit, the focus of UJ proceedings shifted from African situations to the Syrian conflict precisely because of the increasingly number of migrants entering Germany and returning Germans who had joined armed groups in Syria and Iraq. This had heightened the concern that perpetrators of international crimes had entered Germany unpunished.[50] In Germany, as well as in other European countries, asylum

seekers were regularly asked whether they have been victims of, witnesses to, or perpetrators of international crimes, providing valuable leads for UJ investigations.[51]

The presence of Syrians in Germany, both in terms of potential suspects and victims of grave international crimes, however, do not simply form the background condition for the rising number of Syria-related UJ proceedings in Germany. Syrian refugees, alongside human rights activists still operating within Syria, have played proactive roles in making it possible for German prosecutors to initiate UJ proceedings. Syrian diaspora organizations have been collaborating with non-Syrian transnational advocacy groups on demands for accountability for mass atrocities committed in Syria, both by the government and non-state armed groups like ISIS. These demands are predominantly framed in transitional justice terms that include efforts towards criminal prosecution.[52] For example, the aforementioned ECCHR is representing several Syrian torture victims who are now refugees in Germany in its criminal complaints.[53] ECCHR's partner Anwar al-Bunni is a human rights lawyer who himself arrived in Germany in 2014 on a humanitarian visa and founded the Syrian Center for Legal Studies and Research in Berlin, which has played an important role in building momentum for UJ proceedings regarding the Syrian regime.[54]

Universal Jurisdiction: Normative Accounts

The discussion thus far has sketched out the key factors that enabled German UJ proceedings regarding Syrian conflict-related international crimes. Factors such as legal and institutional provisions that allow for wide-ranging UJ cases, technological developments that aid investigations, and the pivotal role played by Syria refugees within Germany and Europe more broadly, however, only explain *how* UJ proceedings came to be in present-day Germany, rather than its normative appropriateness. To better understand whether Germany should be taking on Syrian-conflict related UJ cases, the following discussion will examine the normative justifications behind the principle of UJ itself.

The 'Standard Account' of Universal Jurisdiction: from Sovereignty to Cosmopolitanism

The very idea of a *universal* jurisdiction severs the tie between the state that is exercising jurisdiction and the wrongs that are being prosecuted. Jurisdiction—the authority to administer justice–over a specific territory, group of people, and interests is considered to be one of the foundational entitlements of sovereignty.[55] The international law of jurisdiction thus emphasizes the link between the "subject matter of jurisdiction" and state sovereignty, whether it is in terms of the state's territory or national interest.[56] Exercising 'pure' UJ as permitted by CCAIL in Germany challenges this link between state sovereignty and jurisdiction by its very definition.

Consequently, the "standard account" of UJ thus relies on the nature of wrongs it regulates, rather than the relationship between the prosecuting state and the crime.[57] Jurisdiction is justified through the exceptional moral gravity or heinousness of the crime that is not only

understood to be universally wrong, but also damages the broader 'international community.' For example, the Princeton Principles of UJ states that, in the absence of common connections to the state that justifies jurisdiction, such as territory or national interest,

> […] national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole. This is universal jurisdiction: it is jurisdiction based solely on the nature of the crime.[58]

By focusing on the nature of the wrong, the 'standard account' of UJ relies on a form of cosmopolitanism as its normative justification.[59] This cosmopolitan foundation of UJ can be understood in two ways. First, UJ is derived from the assumed existence of universal values that pertain to all of humanity. Core international crimes that are commonly understood to be subject to UJ is argued to be so heinous that it "shocks the conscience of humanity," rendering those who commit them as *hostis humani generis,* or 'enemies of mankind,' in violation of universal values of all humankind.[60] Investigating and prosecuting cases under the aegis of UJ from this context renders domestic courts into a component of a "decentralized enforcement of universal values" with individual states as stand-ins for humanity at large.[61] This understanding of UJ is most explicit in the 'global enforcer' model of UJ mentioned above, justifying the prosecution of *any* international crime by *any* national court.[62]

There is a second interrelated dimension to this cosmopolitan account. The assumption of universal values rooted in *humanity,* comprised of individuals, rather than a society or system of discrete sovereign states, is gesturing towards a substantially different understanding of the international legal order from a model of jurisdiction that requires a nexus to state sovereignty. Broader developments in the international legal order, particularly pertaining to the conduct and prevention of violence,[63] has resulted in the heightened importance of individuals both as right bearers and duty holders.[64] As Ruti Teitel argues, descriptively, the "grammar and syntax" of international law is progressively moving beyond that of states to the individual. [65] Human security and the rights of the individual is becoming a key referent in the landscape of international norms, evidenced by the development of international criminal law, the body of law that provides for the core crimes under international law with UJ. If both the moral agent and referent of international law is the individual, then jurisdiction follows the imperative to protect individual rights rather than state territory or interest, necessitating UJ.

This cosmopolitan account of UJ provides a clear basis to justify the *existence* of UJ as a legal principle. However, it presents challenges when it is used as an evaluative guideline to determine whether a state *should* take on a UJ case in a particular context. In other words, if cosmopolitanism helps the clarify the absolute question of jurisdiction (whether a state should have jurisdiction over international crimes that occurred outside of its territory pertaining to foreigners) it leaves open the question of relative appropriateness (whether a

state is more, or the most, suitable forum for prosecution).[66] Cosmopolitanism from this perspective provides the general and permissive conditions for UJ but not the normative, legal, and/or political imperatives to determine the appropriateness of specific cases.

Critique of the Cosmopolitan Account

Four major types of normative issues arise from the permissive and general characteristic of the cosmopolitan account of UJ. First is the problem of burden-sharing. Without a normative theory that provides secondary evaluative standard as to whether a specific state should pursue UJ it is not clear from the perspective of the international legal order how the burden should be distributed between states if the state in which the crime occurred does not carry out its responsibility to provide justice. The ICC, while near-global in its jurisdiction, was designed only to address a small number of cases when states are "unable or unwilling"[67] and thus provides a partial solution to this issue.[68] The distributional question remains particularly pertinent in the case of UJ prosecutions, given the reality that UJ cases are often pursued precisely because international prosecutions are not possible for political and practical reasons as it is in the context of the Syrian conflict.

Without a secondary normative principle that guides the issue of burden-sharing, the question of which domestic court has better claim to prosecute international crimes becomes effectively about resources and will—those who able and willing have the better claim.[69] In the case of Syrian-conflict related crimes, we have seen to date efforts by international organizations and NGOs to increase the capacity of domestic courts to prosecute international crimes, primarily by amassing evidence that can be used in future criminal trials. This not only reduces the cost of opening criminal trials by domestic courts, but also transfers some of the practical cost of international crimes prosecution to the broader international community. Investigative bodies such as the IIIM, or the work of CIJA and ECCHR, can be understood as developments that increases the overall capacity of domestic courts in this context.[70]

Making investigations and prosecution easier for domestic institutions, however, does not answer the question from the perspective of the domestic polity as to whether resources should be used for the particular UJ cases, as opposed to other domestic activities of the state. Consequently, the broader distributional issue of the international legal order translates into a question of prioritization for the individual state. Without a clearer, more persuasive articulation of secondary normative and political arguments that can guide how UJ cases are distributed, pursuit of UJ cases is open to criticism from the domestic public as inappropriate use of resources. For example, the Spanish press publicly worried in light of the post-Pinochet UJ cases whether UJ was turning Spanish courts into surrogate international courts, siphoning resources away from addressing national problems.[71]

The idea that states that have the *capacity* to prosecute should pursue UJ cases under the cosmopolitan framework highlights the second, a more fundamental issue with a general and permissive theory of UJ. By allowing all states to have authority to prosecute all international crimes committed, UJ has the potential to take on a form of vigilantism, in which punishment is administered by groups and individuals that do not have clear legal authority to do so.[72] Given that criminal punishment is one of the most extreme forms of interference to individual liberty a state can mete out, modern states generally differentiate themselves from opportunistic vigilantes that derive their authority through sheer capacity, by connecting their authority to infringe upon individual liberty with political procedures rooted in popular sovereignty, such as democratic legislative processes.[73]

In contrast, as David Luban argues, justice administered in the name of 'humanity' becomes "vigilante justice" in which the perpetrator "becomes anyone's and everyone's legitimate enemy" absent principled evaluative standards that can evaluate the appropriateness of the specific tribunal.[74] Luise Müller further suggests that this logic of vigilantism can result in a competitive structure of jurisdiction, in which different domestic courts will have equal or similar claims to prosecutorial authority,[75] a concern echoed in the International Court of Justice (ICJ) President Gilbert Guillaume's concern of "judicial chaos" expressed in his separate opinion in the *Arrest Warrant* case.[76] For Luban, vigilantes cannot be trusted to mete out any form of justice due to their illegitimate authority.[77] Müller on the other hand, present a more circumscribed point of contention that arises from recognizing the parallels between UJ and vigilantism. Given the diversity of conceptions of criminal justice across the world, prosecution of a crime that occurred in a faraway land, committed by and against foreigners, could be understood as imposing one state's conception of justice and punishment on to another.[78] International standards do exist regarding the right to fair trials,[79] but the issue of cultural diversity continues to effect international justice.[80]

This critique of vigilantism is rooted in the ambiguity of the normative authority of humanity itself. As Hovell argues, 'humanity' as both a moral or legal concept lacks clear definition or parameters that can be translated into evaluation of practice.[81] Such conceptual ambiguity results in challenges to a particular domestic court's authority to prosecute, irrespective of broader normative acceptance of the prohibition of the underlying acts of international crimes, hence mirroring the logic of vigilante justice.

This brings us to the third issue of cosmopolitan justifications of UJ—based only on a general and permissive arguments for UJ, specific UJ prosecutions are constantly open to attacks of political motivation. Henry Kissinger famously contended that while proponents of UJ for international crimes assume that situations of mass violence has clearly identifiable perpetrators and circumstances that are "self-evident," UJ cases in general are susceptible to arbitrary application where the underlying circumstances presents cases of international crimes is dependent on different understandings of "historical and political context."[82]

Kissinger's argument is a curious one as it implies that the clarity of guilt is required before trial. Nevertheless, it does point to a broader issue of the relationship between political motivations and UJ prosecutions. Prosecution of international crimes "originates in political decisions and motives," as the type of acts criminalized by international law frequently requires political organization and ideologies, and thus the act of prosecution itself can become a means of discrediting the perpetrator's politics.[83] The debate as to whether such relationship between politics and international criminal prosecutions should be embraced, or kept at arms-length even if acknowledged, is beyond the scope of this argument.[84] But the intricate relationship between the politics of another country and UJ prosecution that should be recognized in considering the robustness of the cosmopolitan account of UJ.

Such politics of prosecuting international crimes takes on greater urgency once we consider inequalities within the international system. Simply put, a general and permissive model of UJ opens the possibility of turning UJ into a tool of hegemonic interference. Critics of international criminal justice more broadly have long highlighted the selective nature of international criminal prosecutions, both by the ICC and domestic courts, where the focus has been on crimes committed by weaker states in the international system that do not directly impinge on the interests of more powerful states and their allies.[85] This is a particularly acute critique when considering UJ prosecutions by predominantly Western states in relation to crimes committed in the Global South, as it is in the case of Germany's prosecution of Syrian conflict-related crimes. Judge Bula-Bula in his Separate Opinion of the *Arrest Warrant* case , for example, argued that the historic and colonial relationship between Belgium and the Congo makes Belgium particularly inappropriate venue for UJ proceedings regarding Congolese cases.[86] In a similar vein, William Schabas asks, in reference to Belgium's insistence that Hissene Habré should be prosecuted, "[w]hy Belgium insists that American leaders like Rumsfeld and Cheney be extradited to stand trial, as it did in Senegal?," contrasting Belgium's insistence that impunity in Senegal is something Belgian courts need to urgently address whilst bowing to diplomatic pressure from more powerful countries like the US.[87] A purely capacity-driven argument alone fails to fully address the thorny normative question of paternalism and neocolonialism—after all, the distribution of government capacity, including the ability to prosecute international crimes, is not a fact exogenous to political dynamics, but also a result of a complex imperial legacy of unequal development.

Making Victims and Refugees Invisible

Finally, a cosmopolitan justification for UJ in effect denies normative significance to the proactive activism of victim and diaspora communities. A significant feature of modern UJ cases was the pivotal role played by the advocacy carried out by victims, their families, and human rights groups that supported them in propelling the cases forward. For example, Chilean and Argentinian exiles in Spain, many of whom who had been persecuted for their human rights activism back home, were instrumental in supporting Spain's investigations into Pinochet's crimes and mobilizing public support for the case in Spain and London.[88] The

controversial Belgian cases against Israeli and US officials were also initiated by complaints by Palestine and Iraqi survivors of the atrocities.[89] As Hovell demonstrates, over half of the UJ prosecutions since 1961 were "primarily victim driven."[90]

The cosmopolitan account of UJ is, from this perspective, based on a descriptive fallacy that over-emphasizes the normative pull of states' obligation to the international community founded on individual rights, obscuring, as Mégret notes, the fact that the existence of UJ proceedings have almost always "followed existing patterns of transnational interactions between states"—the most concrete form being the movement of peoples.[91] Thus, anchoring Germany's UJ proceedings in the standard cosmopolitan account of UJ not only renders the proactive and critical roles played by Syrian victims and activists as normatively insignificant, but also makes the existence of a large refugee population in Germany a marginal factor in determining its appropriateness as a forum for Syrian conflict-related cases. The existence of a large refugee population, from the general and permissive characteristics of the cosmopolitan account, only serves as an argument to demonstrate the potentially increased capacity to prosecute due to increased access to witnesses and other forms of evidence.

The Dual Foundation of Universal Jurisdiction

Despite such weaknesses of the cosmopolitan account, the contention here is not to deny the cosmopolitan foundations of UJ. Rather, as this section will lay out, the aim is to suggest that the evaluation of UJ proceedings should be based on a "two-tiered test" that conceptualizes the imperative to prosecute international crimes as stemming from *both* the universal character of the crimes as well as its specific political relationship to the prosecuting state.[92]

This 'two-tiered test' is a jurisprudential conceit that stems from Itamar Mann's reading of the Opinion of *The State of Israel v. Adolf Eichmann* case.[93] The trial of Adolf Eichmann in front of a special tribunal at the Jerusalem District Court in Israel is, while not directly pursuant to UJ, commonly considered as a precedent to UJ for grave international crimes.[94]

The District Court justified its jurisdiction over Nazi crimes committed in Europe by advancing two arguments. First, it defended its jurisdiction through a cosmopolitan account, arguing that Nazi atrocities are breaches of international law that offend the conscience of humanity.[95] The Jerusalem District Court thus was standing in as the "court of humanity" [96] filling a judicial vacuum as a 'global enforcer.' [97] The Court, however, did not only present itself as component body to enforce international law, but went a step further to argue that its particular authority is based on a "dual foundation: [t]he universal character of the crimes in question and their specific character as being designed to exterminate the Jewish People."[98] It is this "special relationship" between the State of Israel and Nazi crimes against Jews that gave the Court the authority to prosecute Eichmann[99]—the "right to punish" is in part derived from the specific right of the "*victim nation* to try any who assault its existence."[100]

Mann's reading of the 'dual foundation' thesis, however, does not rely on the assumption that there is a preexisting historical and political relationship between the Nazi crimes and Israel, departing from the conventional reading of the *Eichmann* judgement that derives Israel's 'right to punish' from the self-evident identity of Israel as both a homeland for the Jewish diaspora and a result of the history of Nazism. [101] Rather, the 'dual foundation' thesis as read by Mann reveals how the relationship between Israel as the prosecuting state and the Nazi crimes is *constituted* by the trial of Eichmann. The UJ trial, rather than relying on a pre-existing relationship between the victim, perpetrator, and prosecuting state outside of the courtroom, consolidated the "collectivity of victims and the community of Israeli citizens" into one, "reasserting what the state of Israel stands for."[102] The cosmopolitan theory of UJ points toward the constitutive role of UJ in creating an 'international community' based on universal values.[103] The 'dual foundation' theory on the other hand suggests that this constitutive role is twofold—one, in creating an international community and clarifying the prosecuting state's role within in, and two, in forging the domestic political community of the prosecuting state. In the case of *Eichmann,* as historian Tom Segev argues, the trial became domestically a national unifying experience that put the Holocaust at the center of the country's collective memory,[104] while simultaneously fusing Israel's international identity with that of the Jewish victim of Nazi crimes, suggesting that "whatever the world owes to the victims, they now owe to Israel."[105]

Ultimately, the 'dual foundation' thesis of UJ explicitly places the secondary normative, political, and historical contextual justifications as to why a specific state would take on UJ cases at the heart of the normativity of UJ itself. Descriptively, as briefly discussed in the previous sections, state practice suggests that UJ cases are more likely to be pursued when it is related to the prosecuting state's interests in some way—Germany's own justification, for example, is stated as the desire to prevent Germany from becoming a refuge for perpetrators.[106] States rarely justify UJ on cosmopolitanism alone and tend to resolve the ambiguity of the permissive characteristics of the cosmopolitan justification by highlighting specific political interests. The Princeton Principles, for instance, attempts to resolve this ambiguity by highlighting specific contexts, such as nationality connections of the alleged perpetrators or victims, or availability of evidence, as criteria to determine jurisdictional priority between states.[107]

The 'standard' cosmopolitan account of UJ, however, considers these secondary interests as implicitly contravening the normative foundation of UJ. In other words, pursuing UJ for "parochial" reasons is seen as weak commitment to the normative principle underlying UJ.[108] This conceptualization presents three distinct problems. First is that theoretically, it relies on an overly stark distinction between principled and instrumental behavior of states. As Janina Dill argues, the distinctiveness of international legal principles lies in the very compromise between instrumental and normative motivations.[109]

Secondly, framing UJ as essentially a form of window-dressing that allows states to achieve other political objectives underplays the specific expressive function of *prosecuting* an act as an *international* crime.[110] For example, Eugene Kontorovich contends that European states have used UJ as a surrogate extradition process for perpetrators of mass atrocities because of the broad interpretations of the rule of nonrefoulment by European courts.[111] However, as Langer notes, even in the 'no safe haven' justification UJ, the prosecuting state is implicitly conceptualized as a stand-in for the "international community," carrying out both a broader international normative principle and 'parochial' interests.[112]

Finally, and most crucially for our purposes, the conceptualization of UJ only through the 'standard' cosmopolitan account does not provide us with a way to judge the relative appropriateness between different UJ cases where political considerations present. For instance, how should we evaluate the normative difference between Belgium's arrest warrant against a Congolese Minister and the complaints against a former US President? Both cases involve 'political' considerations—but the 'standard' cosmopolitan account of UJ blurs the boundaries between the two very distinct forms of politics.

In effect, the 'two-tier' test derived from the 'dual foundation' thesis of UJ clarifies the secondary normative principle that can mitigate the issues of burden-sharing, vigilantism, and imbalances of power politics arising from the cosmopolitan account of UJ by clearly articulating the contextual reason why particular UJ trials was pursued at a given moment. As Mann states, the 'two-tier' test demands that "the political link between the court's state", the defendant, the victim, and the crime be laid bare.[113] This 'two-tier' test does not negate the importance of the cosmopolitan foundation of UJ, as the universality of the harm UJ trials address forms the necessary condition for UJ's normativity. Cosmopolitanism, however, does not provide the sufficient condition—a robust normative justification of UJ requires a persuasive and open justification of its domestic political links. This link cannot be fundamentally in conflict with UJ's cosmopolitan foundation. Mann uses Justice Bula-Bula's Opinion in the aforementioned *Arrest Warrant* case to illustrate this point—using the frame of the two-tier test, Bula-Bula's argument is precisely that the 'second-tier' consideration of the neocolonial link between Belgium and the Congo taints the 'first-tier' consideration of universality, which is rooted in notions of equality.[114]

Universal Jurisdiction Trials as Protection of Victims

The absolute question of whether Germany has jurisdiction over international crimes at all, and the fact that core international crimes give rise to UJ, have already been covered in the previous background discussion. What, then, forms the specific political link between Germany and the Syrian-conflict related crimes from the perspective of the 'two-tier' test? The argument here is that the link between Germany and the Syrian-conflict related crimes is forged by the presence of the large number of Syrian refugees, including victims of

international crimes, in Germany. Refugees and migrants not only facilitate UJ prosecutions but also provide the secondary normative imperative as to why Germany *in particular* should be acting on behalf of humanity to prosecute international crimes.

Victims generally are provided with recognized legal interest in the prosecution of crimes, so arguing that the presence of victims within the country justifies UJ trials does not require a radical shift from the standard cosmopolitan account of UJ.[115] But beyond the general right of victims, the existence of victims of Syrian conflict-related crimes within the country suggests the possibility that the suffering and harm created by the original commission of the crime will continue within Germany. While from a strictly legal point of view, the commission of a crime is understood through a specific "time and place" where the act was physically carried out,[116] as Mégret argues, serious international crimes have a "long tail" that goes beyond the moment of commission.[117] The effects of wounds and trauma, both physical and psychological, travel with the victims and their communities, severing the neat imagined link between the crime that occurred 'over there' and the people that now reside within the host country. Furthermore, the fact that often perpetrators and victims take the same escape routes due to proximity, historical connections, or political expediency, also present the possibility that victims will suffer secondary harm of encountering, and living alongside, their perpetrators in their new place of refuge.[118] The dramatic trial of Anwar Raslan in Koblenz, in fact, began with a chance encounter with a victim—through a strange twist of fate, the Syrian human rights lawyer Anwar al-Bunni, whose arrest and imprisonment were supervised by Raslan in 2006, had been assigned to live in the same refugee resettlement center on the outskirts of Berlin as his former jailor.[119] The existence of a large Syrian refugee population in Germany from the perspective of the 'dual foundation' thesis therefore provides a normative urgency for German UJ proceedings regarding Syrian crimes.

Furthermore, the specific experience of refugeehood also points towards continued harm that could be addressed by the UJ trial. The Refugee Convention defines a refugee as someone who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.[120]

From this definition, refugees are in effect those who find themselves outside of the state system, who lack effective membership in one state and without clear positive entitlement in any other.[121]

This condition of disconnect from both one's state of origin and state of refuge, for Hannah Arendt, results in two forms of fundamental deprivation. First, the condition of the refugee

denoted the de facto deprivation of human rights. Human rights may have universal aspirations, but it is through the state that such rights can be enforced and thus gain practical meaning. Consequently, Arendt argues, the condition of exile rendered people 'rightless' as well.[122] In legal terms, this meant that once someone was no longer subject to domestic jurisdiction of their home country, there was no clear way to treat them as a full legal subject.[123] The loss of clear political community for victims of international crimes consequently can be understood as the loss of the right to justice. Arguably, the establishment of international institutions such as the ICC has mitigated this situation. However, in the case of Syrian international crimes, such international options are effectively inaccessible because of the political context discussed above. Prosecution by a foreign court pursuant to UJ is the only viable option for criminal accountability in the near foreseeable future. From this perspective, as Mégret suggests, UJ can be a "remarkable way of circumventing law's exclusions, of treating the newcomer as if he[sic] were already a citizen."[124]

Secondly, Arendt argues that the condition of the refugee results in a what Serena Parekh refers to as "ontological deprivation," or the loss of individual socio-political identity and the consequent loss of political agency and recognized subjectivity—as Arendt states, being a refugee meant that "nobody knows who I am."[125] Stripped of their identity, shaped in part through their experience of suffereing in their home states, refugees appear as "abstract human being[s]" who does not appear to be fully human, as someone who is constituted through their private selves and public political persona, both past and present.[126] Giorgio Agamben referred to this abstract existence as the "bare life," defined primarily through their immediate and material needs.[127] Refugees thus become objects of need as bodies to be rescued, cared for, and protected, rather than political subjects with agency.[128]

The focus on bare minimum survival results in policies of integration and resettlement geared towards the urgent material needs, endeavoring to transform refugees into economically productive members of society. Public recognition of the experience—including the political struggles, trauma, and wounds that severed their relationship with their home states in the first place—brought by refugees into the host country becomes difficult to achieve. For example, while the German integration policies of Syrian refugees are widely considered to be successful, both in terms of international standards and compared to its past integration policies, the metric through which this is measured is predominantly by refugees' integration into the labor market and, to a lesser degree, educational system.[129] Even support for explicit trauma is understood primarily in terms of physical recovery.[130] For some refugees, this singular focus on their needs represents a paternalistic "one-way conversation" between them and the German state, which does allow for their own agency.[131] Therefore, responding to the political demands of justice made by victims by investigating and prosecuting relevant international crimes through UJ can become a way to recognize refugees as ontological subjects, responding to them by 'who' they are rather than 'what' they need.[132] Trials such

as that of Anwar Raslan can serve as a means of *constituting* a new political community within the host state that includes refugees as political agents.

Conclusion

This article has argued that to evaluate the normative appropriateness of UJ cases, relying on the standard cosmopolitan account alone is insufficient. The cosmopolitan account of UJ justifies its existence. But the question of whether a particular state should take on a specific UJ case requires a 'two-tiered' test that is cognizant of UJ's 'dual foundation' as being derived from both universal claims of cosmopolitanism *and* the specific political relationship between the victim, perpetrator, and prosecuting state. Ultimately, what the 'two-tiered test' for UJ reveals is the potential for understanding Syrian UJ cases in Germany as a domestic political event. German UJ should be carried out not only because it is acting on behalf of an amorphous 'international community,' but also because it allows the German state to enforce the rights of victims and recognize the status of refugees already within its own territory as ontological subjects, with meaningful political agency in their new surroundings.

This more inward-looking justification of UJ has several implications for the resurging practice of UJ in Europe. First is that the imperative to prosecute Syrian-conflict related crimes in European states may markedly differ from one another, not only because of divergences in legal and institutional environments, but rather due to the differences in their respective relationship to the refugee population and victim groups. Demands from victim and refugee communities within a state's borders should be considered normatively significant when a state is weighing up the options of UJ, and it should be open about the role victim advocacy in the political debates surrounding UJ.

Furthermore, focusing on the domestic political relationships may result in differing standards of what are the important and urgent cases that should be tried by domestic courts. Some critics of European efforts to prosecute Syrian conflict-related crimes have criticized the focus on specific types of crimes—generally, focused on past regime violations, terrorism related cases, and centered on relatively less powerful individuals. If each of the UJ cases are seen as stand-ins for a broader, global struggle against impunity on behalf of the international community, the emphasis on crimes committed by one particular actor in the conflict, or tendency to pursue less controversial cases, can result in selective justice.[133] It also can be seen as distorting the overall narrative of the conflict.[134] If, however, it is argued that states *should* be responsive to the internal political demands and imperatives, it should be expected that the type of cases pursued in each European jurisdiction will vary greatly across the board. Thinking about the victim and refugee population within the country not as resources to facilitate global efforts to prosecute Syrian conflict-related crimes, but as agents that can demand specific justice for themselves to the host State means that the contours of UJ will necessarily change for each country's context.

Finally, the two-tiered test of UJ suggests further avenues of empirical inquiry that focuses on the internal effects of UJ. Both scholarly and political debates on UJ trials have generally focused on the effects it has on international developments—how it responds to shifts in international power dynamics,[135] how it responds to international legal developments,[136] and how it provides remedy to the on-going crisis of international mechanisms of accountability.[137] By highlighting the specific relationship between the victim, perpetrator, and prosecuting state in the normative justification of UJ, the two-tiered test however shifts the attention to what happens to the domestic polity through the trial. How do UJ trials change the relationship between old and new members of the domestic society?

The argument that UJ should be not only something a state does for the international community, but for those who are closer to home is simultaneously a position of humility and ambition. It is a position of humility in the sense that it circumvents historical grandstanding that permeates much of international criminal justice endeavors; it is a position of ambition because arguing for the normative appropriateness of UJ trials based on domestic political considerations, such as the place of refugees in society, is potentially a far more contentious one. By 'right-sizing' the rhetoric surrounding UJ, the two-tiered test as Mann argues[138] forces a more explicit discussion of the politics of UJ.

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[2] Ibid.
[3] Ibid.
[4] Emma Graham-Harrison "'My Goal is Justice for All Syrians': One Man's Journey from Jail to Witness for the Prosecution," *The Guardian,* December 12, 2020.https://www.theguardian.com/world/2020/dec/12/my-goal-is-justice-for-all-syrians-one-mans-journey-from-jail-to-witness-for-the-prosecution (Last accessed: December 28, 2020)
[5] Itamar Mann, "The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the 'Court of Critique'," *Transnational Legal Theory* 1, no. 4 (December 2010), pp. 485–521.
[6] Devika Hovell, "The Authority of Universal Jurisdiction", *European Journal of International Law* 29, no. 2 (2018), pp.427-456; Frédéric Mégret, "The 'Elephant in the Room' in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political", *Transnational Legal Theory* 6, no. 1 (2015), pp.89-116
[7] Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", *Journal of International Criminal Justice* 2 (2004), pp. 745; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press 2003), pp.5
[8] Princeton Project on Universal Jurisdiction. *The Princeton Principles on Universal Jurisdiction* Program in Law and Public Affairs, (Princeton University, 2001), pp.17
[9] Devika Hovell, "The Authority of Universal Jurisdiction", pp.431. See, for example, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention

Against Torture) 1984, Art. 5. The principle of 'prosecute or extradite' (*aut dedere aut judicare*) is not in the strictest sense, conceptually equivalent to the idea that jurisdiction over certain crimes is universal. Nevertheless, this has been interpreted to support UJ. For further discussion, see: M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes", *Virginial Journal of International Law* 42, no. 1 (2001),pp. 123

[10] While the *Arrest Warrant* case of the International Court of Justice in 2002, judges argued that an assessment of national legislation suggests that the only clear consensus of UJ is over the crime of piracy, not the 'core' international crimes, scholarly discourse on UJ have pointed out that state practice has evolved greatly in favor of UJ's existence over the subsequent decades. See: *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) ICJ Judgement of 14 February 2002,* Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para. 44, 45, 50; and Claus Kreß, "Universal Jurisdiction over International Crimes and the Institut de Droit International', 4 *Journal of International Criminal Justice,* (2006); Máximo Langer and Mackenzie Eason, "The Quiet Expansion of Universal Jurisdiction", *European Journal of International Law* 30, no. 3 (December 2019), pp.779–817

[11] This is the most comprehensive survey of domestic UJ legislation available to date. Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislations Around the World—2012 Update,* IOR 53/019/2012 (Amnesty International Publications, 2012),pp. 2

[12] Luc Reydams, "The Rise and Fall of Universal Jurisdiction", in William A. Schabas and Nadia Bernaz eds. *Routledge Handbook of International Criminal Law,* (Routledge, 2011)

[13] Naomi Roht-Arriaza, *The Pinochet Effect.* (University of Pennsylvania Press, 2005), pp.170.

[14] Ibid, pp. 387; Richard Bernstein, "Belgium Rethinks it Prosecutorial Zeal." *The New York Times,* (April 1st, 2003) https://www.nytimes.com/2003/04/01/world/belgium-rethinks-its-prosecutorial-zeal.html (Last accessed: August 6th 2021)

[15] Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back", *Leiden Journal of International Law,* 17 no.2 (2004), pp.387-8.

[16] See, for example: Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction," *Journal of International Criminal Justice* 589, (2003), pp.589-595.

[17] Máximo Langer and Mackenzie Eason, "The Quiet Expansion of Universal Jurisdiction", *European Journal of International Law* 30, no. 3 (December 2019), pp.779–817.

[18] Langer and Eason, "The Quiet Expansion of Universal Jurisdiction," pp.782; Máximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", *The American Journal of International Law* 105, no. 1 (January 2011), pp.1

[19] Langer and Eason, "The Quiet Expansion of Universal Jurisdiction"

[20] Máximo Langer, "Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction", *Journal of International Criminal Justice* 13, no. 2 (2015), pp. 245–56; Yuna Han, "Rebirth of Universal Jurisdiction?" *Ethics and International Affairs Blog* (May 2017) https://www.ethicsandinternationalaffairs.org/2017/rebirth-universal-jurisdiction/ (Last accessed: December 28, 2020)

[21] Amnesty International "Syria" in *Amnesty International World Report 2017/2018*, POL 10/6700/2018 (2018), pp.349-353.

[22] United Nations Human Rights Council "UN Commission of Inquiry on Syria: ISIS is Committing Genocide Against Yazidis," June 16, 2016. https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20113&LangID=E (Last accessed: December 28, 2020)

[23] United Nations High Commissioner for Refugees (UNHCR), "Syria Regional Refugee Response" http://data2.unhcr.org/en/situations/syria

[24] For a general overview of the politics of peace and justice in the Syrian conflict, see: Beth Aan Schaack, *Imagining Justice for Syria,* (University of Oxford Press, 2020).

[25] Van Schaack, *Imagining Justice for Syria,* 55-56.

[26] Ingrid Elliott, '"A Meaningful Step towards Accountability"?', *Journal of International Criminal Justice* 15, no. 2 (May 2017), pp.239–56.
[27] There are currently two forms of UJ— 'pure' UJ do not require the presence of victim or suspect in the territory; 'conditional' UJ generally require either one or both parties to be present. Alexandre Skander Galand "Accountability for International Crimes Committed in Syria" *Individualization of War Policy Brief,* 2019 https://iow.eui.eu/wp-content/uploads/sites/20/2019/04/IOW-Policy-Brief-Galand_160419.pdf (Last accessed: December 28, 2020)
[28] The countries include: Austria, France, Germany, Hungary, Netherlands, Norway, Spain, Sweden, and Switzerland. This was compiled from the 2020 Universal Jurisdiction Annual Review 2020. TRIAL International *Universal Jurisdiction Annual Review 2020,* March 30, 2020. https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf (Last accessed: December 28 2020)
[29] TRIAL, *Universal Jurisdiction Annual Review 2020,* pp.1-95
[30] Van Schaak, *Imagining Justice for Syria,* pp.288
[31] Website of the war crimes unit, https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html (Last accessed: August 7th 2021)
[32] Central Unit for the Fight against War Crimes and further Offences pursuant to the Code of Crimes against International Law (Zentralstelle für die Bekämpfung von Kriegsverbrechen, ZBKV) in the Federal Criminal Police Office (Bundeskriminalamt, BKA).
[33] Wolfgang Kaleck and Patrick Kroker, "Syrian Torture Investigations in Germany and Beyond" *Journal of International Criminal Justice* 16 no. 1 (2018), pp. 176
[34] Kaleck and Kroker, "Syrian Torture Investigations", pp.171
[35] The Federal Republic of Germany ratified the Convention Against Torture in 1990, and ratified the Genocide Convention in 1954.
[36] Máximo Langer, "The Diplomacy of Universal Jurisdiction," *American Journal of International Law* 105, no.1 (2011), pp. 11
[37] The German legal system, while highly receptive to international law, is not strictly speaking a monist state in which international law inhabits a superior position to municipal law and is considered within the same legal corpus, and requires customary international law to be incorporated into this domestic legal system through Article 25 of its Basic Law (Grundgesetz). Consequently, although the crimes listed in the Rome Statute of the ICC can be considered part of customary international law, it required domestic legislation to be applicable in Germany. Although the Rome Statute of the ICC does enumerate individual crimes, because it does not meet German constitutional principles of legality, and because the primary aim of the statute was understood as providing the ICC jurisdiction over the crimes, not its member states, a separate piece of legislation was necessary to introduce the international crimes in the Rome Statute in the German legal order. For further explanation on CCAIL, see: Helmut Satzger, "German Criminal Law and the Rome Statute" *International Criminal Law Review* 261 (2002), pp.261-282; on Germany's dualist legal system see: George Slyz, "International Law in National Courts," *NYU Journal of International Law & Politics* 28, no. 1&2 (Fall/Winter 1995), pp.65-114
[38] Helmut Gropengießer, "The Criminal Law of Genocide", *International Criminal Law Review* 5, (2005), pp. 329-331
[39] Kaleck and Kroker, "Syrian Torture Investigations", pp.178
[40] Kaleck and Kroker, "Syrian Torture Investigations", pp.179
[41] Máximo Langer and Mackenzie Eason, "The Quiet Expansion of Universal Jurisdiction", *European Journal of International Law* 30, no. 3 (December 2019), pp.779–817
For example, the so-called 'Caesar Report,' named after a Syrian military defector with the code name 'Caesar,' was based on tens and thousands of images smuggled out of Syria. United Nations Security Council (UNSC), *A Report into the Credibility of Certain Evidence with Regard to Torture and*

Execution of Persons Incarcerated by the Current Syrian Regime, April 4, 2014. Available at https://undocs/org/en/S/2014/244 (Last accessed December 28, 2020)

[42] Florian Jeßberger and Julia Geneuss "Litigating Universal Jurisdiction—Introduction." *Journal of International Criminal Justice* 13 (2015), pp.205-208

[43] Melinda Rankin, "Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability." *Global Responsibility to Protect* 9 (2017),pp.401; Since 2012, CIJA has reportedly amassed 800,000 pages of Syrian government documents as well as 469,000 videos or other digital files. Hannah el-Hitami "Syrian Trial in Germany: The Orders that Came from the Very Top"*Justiceinfo.Net*, (November 26, 2020) https://www.justiceinfo.net/en/tribunals/national-tribunals/46100-syrian-trial-germany-orders-came-from-very-top.html (Last accessed December 28, 2020)

[44]El-Hitami, "Syrian Trial in Germany"; Tom Miles, "German Arrest is First Big Catch for Syria Investigators," *Reuters,* February 13, 2019. https://www.reuters.com/article/us-germany-syria-investigators-idUSKCN1Q22G1 (Last accessed December 28, 2020)

[45] The 'Caesar' files became the impetus for the 'Caesar Files Group,' a NGO from in 2014 including activist inside and outside Syria to continue documentation of human rights violations and identification of victims. "Background," About the Organization, Caesar Files Group https://caesar-fsg.org/about-the-organization/ (Last accessed December 28, 2020)

[46] European Center for Constitutional Human Rights (ECHR), "Dossier—Human Rights Violations in Syria: Torture Under Assad," November 2020. https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Syria_2020November.pdf (Last accessed December 28, 2020)

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[48] United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2019,* June 18, 2020. https://www.unhcr.org/5ee200e37/ (Last accessed December 28, 2020)

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[50] Jill Baehring, "Side Event: 'National Jurisdiction in the Front Line of Fighting Impunity'" (November 18, 2016) https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2016/11/18/side-event-national-jurisdictions-in-the-front-line-of-fighting-impunity-hosted-by-the-eu-network-for-investigation-and-prosecution-of-genocide-crimes-against-humanity-and-war-crimes (Last accessed December 28, 2020)

[51] Kaleck and Kroker, "Syrian Torture Investigations", pp.180

[52] Espen Stokke and Eric Wiebelhaus-Brahm, "Syrian Diaspora Mobilization: Vertical Coordination, Patronage Relations, and the Challenges of Fragmentation in the Pursuit of Transitional Justice," *Ethnic and Racial Studies,* 42 no. 11 (2019),pp.1931-2

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[55] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy,* (Princeton, New Jersey: Princeton University Press, 1999), pp. 20

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[58] Princeton Project on Universal Jurisdiction, *The Princeton Principles*, pp.23
[59] Song, "Pirates and Torturers", pp.473-5
[60] Hovell, "The Authority of Universal Jurisdiction," pp.443-4
[61] Frédéric Mégret, "The 'Elephant in the Room' in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political", *Transnational Legal Theory* 6, no. 1 (2015), pp.93
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