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Imagining justice for Syria : water always finds its way

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National Courts Step Up: Syrian Cases Proceeding in Domestic Courts

*Selective justice is better than no justice.*¹

Historically, what we today call international criminal law was primarily adjudicated before domestic courts. While the international community has established international tribunals in the past, and some singular cases involving the commission of core international crimes are at the moment proceeding before international courts, there is no question that domestic legal systems will continue to play an essential role in defining, prosecuting, and enforcing international criminal law. This decentralization is particularly so given a confluence of factors on the international scene, including the limited jurisdiction and resources of the International Criminal Court (ICC), the understandable reluctance of the international community to create new stand-alone justice institutions, the centrality of the concept of complementarity to the Rome Statute system, obligations contained in many international crimes treaties to either prosecute those who breach treaty rules or to extradite them elsewhere for trial, and the increased capacity of domestic legal systems to address the commission of international crimes.² The ability and responsibility to prosecute international crimes thus exists across multiple domestic jurisdictions.

Ideally, international criminal law cases would go forward in the domestic courts in the impacted country itself. This proximity to the events in question ensures greater societal visibility to maximize the expressive function of the law, to tap into the potential of such proceedings to help instantiate the rule of law, and to prevent impunity and an often-concomitant recurrence of violence.³ On a practical level, local proceedings also facilitate access to evidence and for victims. All that said, where courts in the affected country are foreclosed, as is the case in Syria, legal processes in the courts of other countries offer an advantageous second-best alternative.

The ability of domestic courts to adjudicate international crimes depends, of course, on having in place the requisite legal framework with respect to both jurisdiction and substantive law. Nations can apply their criminal laws to events that happened extraterritorially on a number of grounds. These include principles of nationality and passive-personality jurisdiction, territoriality and the effects doctrine, and the protective principle.⁴ When it comes to international crimes, most

¹ Mohammad Hadi Zakerhossein, *To Bury a Situation Alive—A Critical Reading of the ICC Prosecutor’s Statement on the ISIS Situation*, 16(4) INT’L CRIMINAL L. REV. 613, 618 (2016).

² See ILC Study by the Secretariat, *The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), U.N. Doc. A/CN.4/Ser.630 (June 18, 2010) (discussing the range of treaties containing this formulation); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422 (July 20) (discussing this obligation in connection with the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

³ David A. Kaye, *Justice Beyond The Hague: Supporting the Prosecutions of International Crimes in National Courts*, COUNCIL ON FOREIGN RELATIONS, 6 (June 2011) (“There are good reasons to support prosecutions at national levels. According to the World Bank, national-level justice contributes to ‘legitimate institutions and governance’ that are ‘crucial to break cycles of violence.’”); KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD* 129 (2011) (arguing from empirical research that post-conflict human rights trials lead to more stable democracies).

⁴ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 409-412 (AM. LAW INST. 2018) (describing these bases for jurisdiction to prescribe under customary international law) [hereinafter

important has been the principle of universal jurisdiction.⁵ Since the 1990s, this concept has evolved: blossoming at first, then withering slightly, and now experiencing new growth, nurtured in part by the imperative to prosecute the crimes committed during the Syrian war.⁶ Although this phenomenon once generated hyperbolic antagonism,⁷ the exercise of extraterritorial jurisdiction over international crimes is now a regular feature of international affairs, as domestic and regional legal systems reorder themselves to facilitate the investigation and prosecution of crimes with a transnational dimension.

In the Syrian context, European and regional domestic courts have emerged as fertile grounds for justice given the failure of the ICC referral effort, the lack of multilateral support for a hybrid or *ad hoc* tribunal devoted to Syria, and the perceived impediments to building international justice institutions outside the Security Council. The Syrian Commission of Inquiry (COI) has expressly called upon states to utilize universal jurisdiction to “investigate and prosecute persons and groups implicated in egregious violations.”⁸ Individual states have begun to oblige, leading to the revival of the concept of universal jurisdiction after a period of retrenchment and the activation of diverse principles of jurisdiction.⁹

As a result, a number of domestic trials involving events and actors in Syria are underway, featuring a range of criminal charges and fact patterns. These cases fall into two general buckets. One set of cases involves charges under anti-terrorism legislation or laws criminalizing participation in foreign wars—effectively crimes against a sovereign. These defendants are ISIL members and former foreign fighters who have returned home. States are highly motivated to prosecute such cases because they perceive these defendants as posing an acute national security threat, both from the perspective of bringing the violence home but also as potential recruiters and radicalizers.¹⁰ In this regard, the Paris attacks of November 2015, among others, stand as a stark reminder of the risk posed by “weaponized” foreign recruits.¹¹ In addition, by virtue of Security Council Resolution 2178, states are under U.N. Charter-based duties to comprehensively address the phenomenon of foreign terrorist fighters.¹² Many states have accordingly enacted expansive

FOURTH RESTATEMENT]. See generally William S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PRIV. INT’L L. 143 (2016/2017).

⁵ *Id.* § 413 (describing universal jurisdiction under customary international law).

⁶ See Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT’L L. 779 (2019) (citing empirical data showing a gradual yet inexorable expansion in the number, geographic distribution, and national origin of defendants in universal jurisdiction prosecutions and trials).

⁷ Goldsmith and Krasner argue, with little substantiation, that “a universal jurisdiction prosecution may cause more harm than the original crime it purports to address.” Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 51 (2003). See also Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS (July/Aug. 2001); Ken Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS (Sept./Oct. 2001).

⁸ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69, ¶ 145(a) (Feb. 5, 2015).

⁹ Trial International estimates that universal jurisdiction cases worldwide are up 18% since 2018. Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases*, *Universal Jurisdiction Annual Review 2019*, at 11 [hereinafter *Trial International, Evidentiary Challenges*].

¹⁰ Rukmini Callimachi, *How a Secretive Branch of ISIS Built a Global Network of Killers*, N.Y. TIMES, Aug. 3, 2016 (discussing efforts by ISIL to arrange attacks abroad).

¹¹ Jean-Charles Brisard, *The Paris Attacks and the Evolving Islamic State Threat to France*, 8(11) CTC SENTINEL (Nov/Dec 2015) (noting that at least eight of the attackers were returning foreign fighters).

¹² S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014). The Council has defined this concept as: “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in

legislation enhancing their ability to prosecute participation in acts of terrorism,¹³ raising concerns among rights groups and advocates about the misuse of such laws.¹⁴

A second subset of cases involves individuals who stand accused of committing international crimes *stricto sensu*—i.e., crimes against human beings. These latter prosecutions are enabled by the incorporation of international criminal law—and particularly war crimes—into domestic penal codes, a global legislative trend occasioned in part by the ratification of the ICC Statute (even though that treaty technically does not require domestic incorporation of ICC crimes).¹⁵ Although most domestic cases involving Syria feature some combination of these two sets of criminal charges, states may only be able to resort to immigration remedies for foreign defendants for lack of evidence or other legal impediments—a last-ditch option for accountability.

Facilitating these cases is the proliferation of special prosecutorial units dedicated to investigating international crimes;¹⁶ global mutual legal assistance arrangements (including INTERPOL);¹⁷ the formation of multinational “joint investigative teams” focused on the prosecution of transnational crimes;¹⁸ training programs dedicated to investigating international crimes;¹⁹ and Europe-wide institutions such as EUROPOL,²⁰ the European Arrest Warrant

connection with armed conflict.” *Id.* at pmb. See also Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, U.N. Doc. A/70/330, ¶ 13 (Aug. 19, 2015) (“individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology.”).

¹³ See, e.g., Council Framework Decision on Combating Terrorism, 2002/475/JHA, 2002, O.J. (L 164) 3 (EU).

¹⁴ See Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, U.N. Doc. A/73/45453 (Sept. 3, 2018).

¹⁵ See U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, U.N. Doc. A/66/93 (June 20, 2011); AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE* (2012); Beth Van Schaack & Zarko Perovic, *The Prevalence of “Present-In” Jurisdiction*, 107 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 237, 239 (2013) (“there is a marked upward trend in the degree to which states are incorporating atrocity crimes into their domestic codes and empowering their courts to exercise various forms of extraterritorial jurisdiction.”). The General Assembly has invited member states to submit information on the scope and application of the principle of universal jurisdiction. G.A. Res. 70/119, U.N. Doc. A/RES/70/119 (Dec. 14, 2015) (creating a working group to study universal jurisdiction).

¹⁶ Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (2014) [hereinafter *HRW, The Long Arm*]. Many of these units were originally established to track Nazi war criminals discovered abroad. See Redress/FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units 7-8* (December 2010).

¹⁷ INTERPOL is mainly focused on facilitating cooperation and mutual legal assistance among national police organizations and serving as a repository and distributor of international arrest warrants, including those that allege the commission of international crimes. See Mark Leon Goldberg, *What an “Interpol Red Notice” Actually Means*, UN DISPATCH (Dec. 1, 2010).

¹⁸ Council Framework Decision of 13 June 2002 on Joint Investigative Teams, 2002/465/JHA.

¹⁹ The Institute for International Criminal Justice regularly hosts such trainings for domestic investigators and other legal professionals. See <https://iici.global/>. INTERPOL has offered such trainings as well in connection with investigators with the International Criminal Court. See *Interpol Simulation Exercise for War Crimes Investigators*, DEFENCEWEB (Nov. 20, 2018).

²⁰ See, e.g., Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, L 135/53, art. 3 (May 24, 2016) (indicating that Europol “shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member

(EAW),²¹ and the Eurojust Genocide Network.²² In addition, domestic prosecutors have benefited from institutional learning and assistance from non-governmental investigative efforts that jumpstart domestic processes and render these cases less daunting.²³ Besides these criminal cases, and important in their own right, a handful of civil cases have moved forward, particularly in the United States, including against the sovereign state of Syria. The latter cases—which offer victims the opportunity to shape justice without having to work through the national prosecutorial authorities or the criminal justice system—will be taken up in the next chapter.

This chapter thus focuses on the growing class of criminal cases that have been brought to date in courts around the globe that are exercising jurisdiction over perpetrators hailing from, or active within, Syria. This jurisprudential survey yields a number of interesting observations and trends in prosecutorial practice. *First*, the cases skew towards charges of terrorism, as opposed to atrocity crimes. As compared to war crimes charges and given the broad reach of material support for terrorism statutes, these crimes are easier to prove with available evidence while also responding to sovereign national security priorities. Indeed, all that may be necessary is proof of an association between the defendant and an identified or designated foreign terrorist organization.²⁴ Australia, for example, has used its statute criminalizing the offense of entering, or remaining in, a “declared area,” with Al-Raqqa—the epicenter of the wannabe caliphate—being a declared area from 2014-2017.²⁵ These charges are particularly common when states are charging their own nationals who have endeavored to join the fight but then returned to the comforts of Europe.

Such terrorism charges paint an incomplete picture, however. As one commentator has noted: “Resorting to terrorism charges for reasons of prosecutorial convenience and disregarding international crimes charges from the get-go, runs the risk of legally misrepresenting the potential involvement in international crimes of such fighters.”²⁶ Leveling and proving international law charges presents a more complex exercise, especially because investigators do not have access to the Syrian crime scene, key witnesses may be languishing in sprawling refugee camps, and linkage evidence—connecting specific perpetrators to particular criminality—is elusive. All that said, some states have utilized domesticated international humanitarian or international criminal law to

States, terrorism and forms of crime which affect a common interest covered by a Union policy, as listed in Annex I,” which includes international crimes).

²¹ Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584/JHA [2002] OJ L 190/1. The EAW replaces the process of extradition between EU member states and abolishes dual criminality for many categories of crimes.

²² Council Decision 2203/335/JHA, Official Journal 118/12, of 8 May 2003 on the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes. Europol and the European Investigation Order Directive also support member states in combatting forms of international organized crime and terrorism. *See* Eurojust, Genocide Network, <http://www.eurojust.europa.eu/practitioners/networks-and-fora/pages/genocide-network.aspx>. *See also* HRW, *The Long Arm*, *supra* note 16, at 86. A similar network is being stood up across Africa. *See* Network for Investigations and Prosecution of Genocide, Crimes Against Humanity and War Crimes, *Conclusions of the 16th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes* (May 21-22, 2014).

²³ Langer & Eason, *supra* note 6, at 792.

²⁴ *See, e.g.*, 19 U.S.C. § 2339A.

²⁵ *Declared Area Offense*, Australian National Security, <https://www.nationalsecurity.gov.au/whataustraliaisdoing/pages/declaredareaoffence.aspx>.

²⁶ Alexandra Lily Kather & Anne Schroeter, *Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I*, OPINIO JURIS (Mar. 7, 2019).

charge a variety of war crimes, particularly when it comes to foreign nationals who have ended up in their territories. Some states can even invoke ordinary criminal law, particularly the law governing aspirational crimes, incitement, or simple weapons offenses, or maybe even treason or extraterritorial mayhem, if available.²⁷ Several cases involve all three types of charges. This decision often turns on the available evidence, the degree of risk aversion exhibited by prosecutorial authorities, political pressure from the populace, and the self-conceptualization of prosecutorial authorities as champions of international law.

Second, most of the existing indictments involve single incidents (rather than large operations or systemic abuses). To the extent that war crimes charges are forthcoming, they tend to involve relatively minor offenses, often for lack of evidence of more serious crimes that are implied—but not conclusively established—by the proof at hand. These include crimes such as desecrating a corpse, rather than the more serious charges associated with targeting civilians, custodial abuses, or the use of chemical weapons. States have also been creative about coupling these international law-based charges with ordinary penal charges and enhancements, such as unlawful weapons use. Together, the types of substantive charges being filed are more easily proven—often through the defendant’s trophy images, social media profile, or phone records—than more grave war crimes or crimes against humanity.

Third, these cases present interesting gender dynamics. None of the cases that have moved forward involves sexual violence charges, even though these crimes have been legion in Syria (especially in detention centers) and documentation centers have compiled large quantities of relevant evidence.²⁸ Although most defendants are men, some women who have joined ISIL have faced charges for their involvement in, or the provision of material support to, acts of terrorism.²⁹ The case of Samantha El-Hassani in the United States is instructive; she was charged with, and pled guilty to, material support for terrorism but not for her apparent involvement in the purchase and detention of three Yezidi children, who were abused by her late husband.³⁰ Although some have argued that the partners of ISIL fighters should be treated as victims, this assumption can overlook the role that women can play in sustaining armed groups, even intensely misogynistic ones. Indeed, the Security Council in its resolution on foreign fighters notes the multifaceted role played by women in terrorist organizations.³¹

Fourth, from the perspective of other trends in the demographics of the defendants targeted for prosecution, most indictments—with a few exceptions—tend to focus on low-level perpetrators, rather than the architects of violence or those most responsible. *Fifth*, and also troubling, is that the vast majority of cases that have moved forward have targeted members of opposition groups—including ISIL members—rather than Syrian government personnel. These two observations reflect the fact that senior figures from all sides, and particularly regime actors, have simply not traveled to Europe or to other states that might be motivated to prosecute, or extradite, them. This asymmetry, coupled with an over-emphasis on charging terrorism as opposed

²⁷ On incitement to terrorism, see Yael Ronen, *Incitement to Terrorist Acts under International Law*, 23 LEIDEN J. INT’L L. 654 (2010).

²⁸ See Columbia School of Public Health, *Sexual Violence in the Syrian Conflict* (Aug. 30, 2012) (discussing effort by Women Under Siege to crowdsource information on sexual violence).

²⁹ See Fionnuala Ní Aoláin & Jayne Huckerby, *Gendering Counterterrorism: How to, and How Not to—Part I*, JUST SECURITY (May 1, 2018); Fionnuala Ní Aoláin & Jayne Huckerby, *Gendering Counterterrorism: How to, and How Not to—Part II*, JUST SECURITY (May 3, 2018).

³⁰ Jessica Roy, *Two Sisters and the Terrorist Who Came Between Them*, ELLE (Aug. 27, 2019).

³¹ S.C. Res. 2396, ¶ 31, U.N. Doc. S/RES/2396 (Dec. 21, 2017).

to atrocities crimes, has become a source of controversy, frustration, and disappointment within the growing Syrian diaspora.³²

That said, national authorities are increasingly organizing structural investigations of the conflict and its various armed groups—essentially far-reaching investigations *in absentia*—which will allow them to move quickly against particular individuals as soon as they are within reach. And, a handful of indictments have been issued against more senior regime figures. Some defendants have been arrested; a few are subject to extradition proceedings; the majority are still at large, subject to investigations that remain aspirational works in progress. None of the regime cases moving forward, however, has been hindered by any immunity defenses, which is consistent with the International Law Commission’s current thinking on the topic of immunities for state officials.³³

Sixth, as is apparent from the available evidentiary records, many of these cases are benefiting from the sophisticated documentation work of non-governmental organizations that are sharing their holdings with national authorities. As discussed in chapter 8, these groups are compiling dossiers on potential defendants, producing memoranda on key background inquiries (such as the chain of command), coding their holdings for ease of search, and authenticating digital and documentary evidence. *Seventh*, regardless of the nature of the charge, essential evidence is often drawn from the defendant’s own digital profile, attesting to the importance of social media companies retaining such information even if they remove it from public view on the grounds that they offend community standards or their terms of service.³⁴ These digital artifacts of atrocities—including WhatsApp messages, YouTube videos, and social media posts—increasingly offer ready, and largely unimpeachable, evidence of the commission of certain war crimes and domestic offenses.

Eighth, in many European systems, Syrian lawyers and experts are intimately involved in conceptualizing, encouraging, and proving these cases—signaling to the emergence of a new model of hybridity and complementarity. *Ninth*, national authorities are gradually developing a track record of invoking international criminal law to address the presence of perpetrators within their jurisdictional reach rather than relying solely on immigration remedies (e.g., deportation or immigration fraud charges). As domestic courts grapple with international humanitarian and criminal law, they are generating state practice and *opinio juris*—the two ingredients of customary international law. This jurisprudence has inspired new thinking on such issues as combatant immunity, the required nexus to armed conflict, conflict classification, and the elements of lesser war crimes that have rarely been prosecuted, such as the aforementioned desecration of a corpse.

Tenth, and finally, many cases also come to light on the basis of tips from refugees about the presence of suspected Syrian war criminals among their ranks, as typically happens in

³² Syrian Justice and Accountability Center, *Sweden’s First Steps Towards Justice Prove Controversial Among Syrians* (Mar. 9, 2015), <https://syriaaccountability.org/updates/2015/03/09/swedens-first-steps-towards-justice-prove-controversial-among-syrians/> (discussing case of Mouhannad Droubi, who was shown on a Facebook video abusing someone who appeared to be a bound Syrian soldier); Human Right Watch, “*These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts*” 4, 36 (2017) [hereinafter *HRW, “These are the Crimes”*].

³³ International Law Commission, Report on the Work of the Sixty-Eighth Session, *Chapter VII: Immunity of State Officials from Foreign Criminal Jurisdiction*, GAOR 71st Sess., Supp. No. 10 (A/71/10), ¶¶ 83-86 (2016) (denying any immunities for international crimes).

³⁴ See Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES, Aug. 22, 2017.

connection with conflict situations that produce massive outflows of people.³⁵ The testimony of asylum-seekers and others who have sought refuge in prosecuting states has thus proven to be crucial to these accountability efforts, attesting to the importance of prosecutorial authorities building trust and genuine connections with Syrian (indeed all) diaspora communities. Furthermore, these migrants are essential sources of evidence and often confirm the commission of war crimes in their refugee or asylum applications, which can trigger an investigation or prosecution. And, many legal systems allow victims to initiate criminal actions, which has generated some Syrian cases in foreign courts.³⁶

All told, while important, these domestic proceedings remain episodic and opportunistic. Given the investigatory and prosecutorial realities, the cases in the aggregate are not representative of the full scope of the international crimes being committed in Syria. If the goal is comprehensive accountability, these results are disappointing; nonetheless, these cases are establishing important legal precedents, providing domestic authorities with valuable experience prosecuting international crimes, offering a measure of justice to victims, and punishing individuals accused of horrific acts. In addition to putting a dent in impunity and denying safe haven to perpetrators, cases in foreign courts promote stability by preventing victims and victim groups from taking justice into their own hands in their places of refuge.³⁷ Even singular cases can be highly salient and can exert a multiplier effect, signaling that justice is possible and helping advocates overcome political resistance elsewhere. Finally, the availability of this accountability outlet, notwithstanding its limitations, has also helped to galvanize and sustain civil society organizations whose documentation energies might wane without some evidence of tangible impact during this seemingly endless conflict. When situated against the previous chapters on the obstacles to exercising international jurisdiction, these results should be celebrated, since domestic courts have emerged as the only potential forum to administer justice to date—one case at a time.

A Partial Inventory of the Domestic Cases Emerging from the Syrian Conflict

A number of investigations and prosecutions arising out of events in Syria are proceeding in domestic courts around the world under various principles of jurisdiction. Notwithstanding this proliferation of cases, advocates rightly insist that there is more to be done to provide justice for victims.³⁸ At the same time, civil society organizations are concerned about expanding the reach of counter-terrorism laws and have recommended that states focus on the rehabilitation of some foreign fighters rather than their aggressive prosecution for mere membership.³⁹ With these caveats in mind, the remainder of this chapter offers a survey—necessarily incomplete given the

³⁵ *Refugees in Germany Reporting Dozens of War Crimes*, DEUTSCHE WELLE, Apr. 11, 2016 (noting that German police are receiving dozens of reports per day about war crimes from arriving refugees and asylum seekers); Stine Jacobsen, *Norway Police Search for Syrian War Criminals Among Asylum Seekers*, REUTERS, Jan. 15, 2016.

³⁶ FOURTH RESTATEMENT, *supra* note 4, at § 407, reporters' note 5.

³⁷ *Developments in the Law, International Criminal Law*, 114 HARV. L. REV. 1943, 1967 (2001) (noting that legal proceedings can provide a "controlled substitute for vigilantism"). See Sonya Swink, *Pari Ibrahim: Without Justice, Yezidis Will get Revenge*, THE GLOBAL POST, Aug. 9, 2018.

³⁸ Human Rights Watch, *EU: Use National Courts to Fight Impunity* (May 19, 2016) (noting that the refugee crisis "creates a unique opportunity for European states to make a meaningful contribution to justice").

³⁹ See Yuki Fukumoto, *International Cases Studies of Terrorist Rehabilitation*, 13 J. POLICING, INTELLIGENCE & COUNTER-TERRORISM 376 (2018).

enduring difficulty of tracking domestic proceedings—of the types of Syrian cases moving forward in domestic courts worldwide.⁴⁰

Cases in the Region

Starting with Syria itself, multiple legal systems have operated in Syria over the course of the conflict—in government-controlled areas, in opposition redoubts (around Aleppo, Daraa, Idlib, and Ghouta), in territory under ISIL occupation, and in parts of northern Syria under Kurdish control.⁴¹ As one commentator put it: “With the loss of territorial control in large areas, official Syrian government organs disappeared in these areas, including the justice system. In its place, a variety of systems of justice have emerged in different regions controlled by the various armed groups.”⁴² In areas that remained under state control, the Syrian courts have not actively or impartially prosecuted war crimes cases emerging from the conflict, as confirmed by the COI. In an early report, the COI noted:

it has not yet identified any evidence that Syria is making a genuine and credible effort to punish severe crimes. In fact, given the protracted and increasingly sectarian nature of the conflict, it seems highly improbable that effective and independent prosecutions that meet essential international standards could be carried out in Syria anytime in the near future. There is not only a lack of willingness to institute proceedings, a country torn by almost two years of bloody and destructive conflict is also unlikely to be capable of such an effort.⁴³

Even if the political will existed, neither the 1953 Penal Code⁴⁴ nor the 1950 Military Penal Code⁴⁵ contains provisions enabling the prosecution of war crimes, crimes against humanity, or genocide, although ordinary crimes committed on Syrian territory are easily prosecuted as such.⁴⁶ This includes the crime of torture in the form of Article 391 of the Penal Code, which criminalizes subjecting “a person to illegal hardship in order to obtain a confession to a crime or information.”⁴⁷ That said, a number of immunities are provided for by law for state actors and other perpetrators.⁴⁸ For one, Syria, like several Middle Eastern states, has a “rape-marriage” law, which exempts criminal punishment for rape if the perpetrator subsequently marries the victim.⁴⁹

⁴⁰ Both Trial International (<https://trialinternational.org/>) and the International Crimes Database (<http://www.internationalcrimesdatabase.org/>) are endeavoring to track these cases.

⁴¹ See generally Jacques el-Hakim, *Syria*, in 1 Y.B. ISLAMIC & MIDDLE EASTERN L. 142 (Eugene Cotran & Chibli Mallat eds., 1994) (discussing Syrian legal framework and foundational legislation).

⁴² See ILAC RULE OF LAW ASSESSMENT REPORT: SYRIA 2017, INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM 58 (Mikael Elman ed., 2017).

⁴³ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/22/59, at 124 (Feb. 5, 2013).

⁴⁴ See Penal Code, Legislative Decree No. 148 of 22 June 1949, as amended (Syr.).

⁴⁵ See Law No. 61 of 1950, Military Penal Code, as amended (Syr.).

⁴⁶ Amnesty International, *supra* note 15, at 111 (discussing the lack of Syrian international crimes legislation).

⁴⁷ *Id.* Syria ratified the Torture Convention in July 2004. See Legislative Decree 39/2004. The Constitution also specifically prohibits torture. See art. 28(3) (“No one may be physically or psychologically tortured or treated in a degrading fashion”).

⁴⁸ See Alternative Report to the Syrian Government’s Initial Report on Measures Taken to Fulfil its Commitments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Damascus Center for Human Rights Studies 5-8 (2010); ILAC, *supra* note 42, at 21-22.

⁴⁹ Syrian Penal Code, Legislative Decree No. 148/1949, art. 508 (“If a valid contract of marriage is made between the perpetrator of any of the offenses mentioned in this section, and the victim, the prosecution is

In addition to exceptional national security courts that pre-date the war,⁵⁰ the Syrian government established a special Counter-Terrorism Court (CTC) in Damascus,⁵¹ which effectively replaced the Supreme State Security Court, abolished by Decree No. 53 of April 21, 2011, after Assad lifted the state of emergency on the same day with Decree No. 161.⁵² Authorities are bringing terrorism charges in closed CTC proceedings against opponents of the regime, including civilian political dissidents,⁵³ under new counter-terrorism legislation.⁵⁴ The latter law criminalizes everything from financing terrorism, to destabilizing public security, to promoting terrorism, to damaging state infrastructure.⁵⁵ Many of these offences carry the death penalty.⁵⁶ The law itself has become an instrument of terror against members of the opposition. According to the Violations Documentation Center (VDC), Syria had referred over 80,000 suspects, mostly civilians, to the CTC as of April 2015.⁵⁷ In 2016, political detainees rioted in one facility demanding the implementation of Security Council Resolution 2254 (2015), which calls for the release of arbitrarily detained individuals,⁵⁸ consistent with Article 6(5) of Additional Protocol II to the 1949 Geneva Conventions.⁵⁹

On other fronts, military field courts⁶⁰—which have the authority to prosecute civilians for offenses against state security committed during armed conflict and domestic unrest⁶¹—are visiting detainees in detention and handing out judgments after summary proceedings.⁶² According to the Syrian COI, confessions obtained under torture are regularly submitted as the only evidence in the CTC and other Syrian courts, despite the illegality of the way in which they were obtained.⁶³ Such summary and selective procedures in special courts violate Common Article 3(d) of the Geneva Conventions, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial

suspended. If judgment was already passed, the implementation of the punishment is suspended.”) See *The Middle East’s “Rape-Marriage” Laws*, SELFSCHOLAR (July 18, 2012).

⁵⁰ ILAC, *supra* note 42, at 42.

⁵¹ Legislative Decree No. 22 of 26 July 2012 established the CTC.

⁵² See SPECIAL REPORT ON COUNTER-TERRORISM LAW NO. 19 AND THE COUNTER-TERRORISM COURT IN SYRIA, COUNTER-TERRORISM COURT: A TOOL FOR WAR CRIMES, VIOLATIONS DOCUMENTATION CENTER IN SYRIA 2-3 (Apr. 2015) [hereinafter VDC]; Observatory For The Protection Of Human Rights Defenders, *Syria*, Annual Report (2011).

⁵³ Human Rights Watch, *Syria: Counterterrorism Court Used to Stifle Dissent* (June 25, 2013).

⁵⁴ Law No. 19 of 2 July 2012.

⁵⁵ Syria passed Legislative Decree No. 51 of December 22, 1962 after a series of post-independence coups. It infringed a number of speech and assembly rights and remained in place until the uprising when it was effectively replaced by the Counter-Terrorism Law.

⁵⁶ See Maëlla Ducassoux, *Enforcing Human Rights in Counter-Terrorism Laws in Syria*, ARAB REFORM INITIATIVE.

⁵⁷ VDC, *supra* note 52, at 21.

⁵⁸ Zuhour Mahmoud, *Hama Prison Riot Shines Spotlight on Show Trials*, SYRIA DEEPLY (June 9, 2016).

⁵⁹ Protocol Additional to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), 1125 UNTS 609, Jun. 8, 1977 (“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”).

⁶⁰ Legislative Decree No. 109 of 17 August 1968. See ILAC, *supra* note 42, at 45, 63; VDC, *supra* note 52, at 5.

⁶¹ INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS LAWYERS AND DEFENDERS IN SYRIA: A WATERSHED FOR THE RULE OF LAW 28 (2011); VDC, *supra* note 52, at 6.

⁶² Mahmoud, *supra* note 58.

⁶³ U.N. Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP1, at ¶ 35 (Feb. 3, 2016).

guarantees which are recognized as indispensable by civilized peoples.”⁶⁴ This provision applies equally to non-state actors who may set up informal courts to prosecute regime offenders.⁶⁵

President Assad has also issued a number of successive and overlapping amnesty decrees over the course of the conflict that might exempt certain individuals from prosecution and punishment.⁶⁶ Early in the uprising, he issued a partial amnesty for crimes committed before May 31, 2011. The decree reduced the punishments for some crimes (but not for crimes committed in 1980, undoubtedly a reference to the Hama Massacre), including army defectors or individuals who fled the country to avoid compulsory military service.⁶⁷ Subsequent iterations continued to advance the drop dead date on which individuals had to turn themselves in in order to benefit from the amnesty.⁶⁸ A number of such amnesties focused on “military deserters” and crimes contained in the Military Penalties Law, set forth in Legislative Decree No. 61 (1950), as amended.⁶⁹ In 2014, an amnesty was extended to non-Syrian foreign fighters who joined a “terrorist group.”⁷⁰ Many of the decrees left the ability to bring civil suits intact.⁷¹ As formulated and if applied, these amnesty decrees would not necessarily cover individuals accused of committing international crimes, which would be unlawful under international law.⁷²

Turning to other actors, as ISIL began occupying swaths of Syria in 2013, it imposed its radical interpretation of *shariah* law and established proto-courts to legitimize the group, facilitate its hold over captured territory, advance its governance aspirations, and enforce internal discipline.⁷³ ISIL has also developed its own rules of warfare, including a version of superior

⁶⁴ Convention Relative to the Protection of Civilian Persons in Time of War art. 3(d), Aug. 12, 1949, 75 U.N.T.S. 287.

⁶⁵ Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 1, 9-10 (2011). See *Ilașcu and others v. Moldova and Russia*, App. No. 48787/99, 2004-VII, Euro. Ct. H.R. (GC) Judgment, ¶ 460 (July 8, 2004) (“In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal ‘established by law’”).

⁶⁶ See, e.g., Amnesty Decree No. 15 (July 28, 2016); Amnesty Decree No. 32 (Oct. 27, 2016) (extending Decree No. 15), available at <http://www.parliament.gov.sy/arabic/index.php?node=554&nid=17002&>. See also Josei Ensor & Joseph Haboush, *Syria’s Assad Offers Amnesty to Military Deserters and Dodgers to Encourage Refugee Returns*, THE TELEGRAPH, Oct. 9, 2018.

⁶⁷ Legislative Decree No. 61 for the Year 2011 Granting General Amnesty for Crimes Committed before May 31, 2011 (on file with the author); Zeina Karam, *Syria Offers General Amnesty*, WASH. POST, May 31, 2011.

⁶⁸ Legislative Decree 71, A General Amnesty for Crimes Committed Before November 23, 2012 (on file with the author); Legislative Decree No. 10 for the year 2012 (applying to crimes related to the laws on peaceful demonstration, draft evasion, and carrying or possessing an unlicensed weapon, and requiring individuals to turn themselves in prior to January 31, 2012) (on file with the author).

⁶⁹ Legislative Decree No. 8 of 2016, A General Amnesty for Crimes of Internal and External Desertion and for Crimes Stated in the Military Service Law committed prior to 17 February 2016, available at <https://www.refworld.org/pdfid/58ac08c74.pdf>; Presidential Decree Granting General Amnesty for Military Deserters Inside and Outside Country, Legislative Decree No. 18 (Oct. 9, 2018), available at <https://sana.sy/en/?p=148449>. Legislative Decree No. 22 of 2014, General Amnesty for Crimes Committed before 9 June 2014 (on file with the author).

⁷⁰ Legislative Decree No. 22 of 2014, General Amnesty for Crimes Committed before 9 June 2014 (on file with the author).

⁷¹ See, e.g., Legislative Decree No. 23 Granting a General Amnesty for Crimes Committed Before the Date of April 16, 2013 (on file with the author).

⁷² See Ron Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, 43 VA. J. INT’L L. 173 (2002).

⁷³ See Mara Revkin, *The Legal Foundations of the Islamic State*, BROOKINGS, 25 (July 2016).

responsibility.⁷⁴ Many identified offenses are subject to the death penalty,⁷⁵ often by way of public stonings or beheadings.⁷⁶ Needless-to-say, none of these proceedings adheres to international standards or advances accountability for the war crimes and crimes against humanity—including torture, summary execution, and sexual slavery—being systematically committed in the region. Such “enactments” by non-state actors purporting to make mayhem “legal” cannot insulate perpetrators from liability under Syrian, international, or—in some cases—foreign law.⁷⁷

Following the rout of ISIL in and around Raqqa, hundreds of ISIL fighters are now in the custody of U.S.-backed opposition groups, such as the Kurdish-led Syrian Democratic Forces (SDF) and the Free Syrian Army.⁷⁸ They may be accompanied by their families, including thousands of children who are now languishing in camps that may, or may not, be depriving these people of their liberty under human rights law.⁷⁹ Uncertainty abounds as to how to resolve this situation.⁸⁰ One option involves trials by their captors. Many opposition groups have rejected Syrian law altogether given its association with the Assad regime. As such, they are applying *ad hoc* rules—in some cases also resorting to *shariah* law, customary international law, or even foreign law—and establishing new justice mechanisms.⁸¹ Although certain groups have formed their own rudimentary administrative and judicial institutions, including the SDF,⁸² they do not always have the capacity to undertake long-term detention operations in compliance with international humanitarian law or to conduct fair criminal trials where warranted.⁸³ The United States is funding trainings and infrastructure improvements, but has resisted directly undertaking detention operations in Syria given its own troubled history with law-of-war detention.⁸⁴ Donor states are wary of assisting with these proceedings for fear that fair trial violations that might implicate their own duties under human rights law. It remains unclear whether non-state actors are governed by any *aut dedere aut judicare* obligations to either prosecute detainees themselves or send them to a state that is willing and able to do so, particularly where international crimes are at issue.⁸⁵

⁷⁴ *Id.* at 22-23.

⁷⁵ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48, ¶ 173 (Aug. 13, 2015). The Nusra Front similarly conducts legal proceedings without due process. *Id.* ¶ 97.

⁷⁶ Revkin, *supra* note 72, at 17-19.

⁷⁷ Kevin Jon Heller, *Islamic State is not a State*, OPINIO JURIS (Oct. 9, 2019).

⁷⁸ See Dan Stigall, *The Syrian Detention Conundrum: International & Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54 (2020); Sarah El Deeb, *Syrian Militia Says Large Number of IS Foreign Fighters Held*, US NEWS, Feb. 12, 2018.

⁷⁹ See Robin Wright, *The Kids of the Islamic State*, FOREIGN POLICY, June 3, 2019.

⁸⁰ Nicolas Sion, *10 Recommendations for Solving the Issue of ISIS Detainees in North East Syria*, ARMED GROUPS & INTERNATIONAL LAW (July 8, 2019).

⁸¹ ILAC, *supra* note 42, at 76-79; Omar Hossino, *Syria's Secular Revolution Lives On*, FOREIGN POLICY, Feb. 4, 2013; *The Syrian Justice System: What Role do Non-State Courts Play?*, CHATHAM HOUSE (Oct. 25, 2017), <https://www.chathamhouse.org/event/syrian-justice-system-what-role-do-non-state-courts-play>.

⁸² Stigall, *supra* note 77, at 63-64; FIDH & KINYAT, IRAQ SEXUAL AND GENDER-BASED CRIMES AGAINST THE YAZIDI COMMUNITY: THE ROLE OF ISIL FOREIGN FIGHTERS 44 (Oct. 2018) (discussing Kurdish legal proceedings).

⁸³ Alessandra Spadaro, *ISIS members Detained by Kurdish Forces in Syria: Operational and Legal Challenges*, ARMED GROUPS AND INTERNATIONAL LAW (Mar. 13, 2019). See generally REBEL GOVERNANCE IN CIVIL WAR (Ana Arjona, Nelson Kasfir & Zachariah Mampilly eds., 2015).

⁸⁴ Eric Schmitt, *Pentagon Wades Deeper into Detainee Operations in Syria*, N.Y. TIMES, Apr. 5, 2018.

⁸⁵ Stigall, *supra* note 74, at 84.

Many of those detained by opposition forces are foreign fighters who hail from outside the region. Then-U.S. Secretary of Defense James Mattis urged members of the anti-ISIL coalition to take back their nationals to determine the best course of action,⁸⁶ even as the United States has refused the same for its own citizens.⁸⁷ According to a Pentagon spokeswoman: “We are working with the coalition [against ISIL] on foreign fighter detainees, and generally expect these detainees to return to their country of origin.”⁸⁸ Opposition groups in the region have echoed this demand that European states repatriate their nationals.⁸⁹ Some, but not all, Western states are heeding this call amidst uncertainty over whether they are under some sort of legal duty to repatriate their nationals.⁹⁰ The European Union has indicated that this is a decision for each member state to make within their “national competence” and will not be subject to a “unified response.”⁹¹ The SDF have threatened to release detainees if the international community does not step up, a contingency that has become all the more ominous in light of President Trump’s decision to withdraw all U.S. forces from the country.

By contrast to the state of play in Syria, the Iraqi legal system has conducted a number of prosecutions of ISIL members alongside individuals who did little more than find themselves living within ISIL-controlled regions. These proceedings may include individuals who were active in Syria. To the extent that there have been domestic cases against ISIL members in Iraq, these have largely involved charges under omnibus counter-terrorism legislation.⁹² Such charges carry the death penalty regardless of the severity of the offense or degree of participation of the accused. These prosecutions are proceeding in dedicated counter-terrorism courts and operate according to procedures that are subject to criticism because they are overbroad, vague, and not always fully fair to the accused.⁹³ Moreover, many cases involve Sunni men who were picked up in mass arrests in previously ISIL-controlled territory and who may have had little involvement with the group other than simply trying to survive under ISIL occupation.⁹⁴ In addition, Iraq has prosecuted the wives of ISIL fighters, including some European women.⁹⁵

These counter-terrorism charges are often the only viable option for this class of defendants in Iraqi courts. At the moment, the Iraqi Penal Code (IPC) is silent when it comes to the international criminal law canon.⁹⁶ Efforts to draft new penal legislation nationally, or in Iraqi

⁸⁶ *U.S. Urges Home Countries to Take Back Foreign Fighters Caught in Syria*, CBS NEWS, Feb. 12, 2018.

⁸⁷ Martin Chulov & Bethan McKernan, *Hoda Muthana ‘Deeply Regrets’ Joining ISIS and Wants to Return Home*, THE GUARDIAN, Feb. 17, 2019.

⁸⁸ Katrina Manson et al., *U.S. Urges Allies to Help With Captured Foreign ISIS Fighters*, FINANCIAL TIMES, Feb. 12, 2018.

⁸⁹ *Switzerland Pressured to Repatriate its Jihadists from Syria*, SWISSINFO.CH (Oct. 10, 2018).

⁹⁰ Charlie Savage, *As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away*, N.Y. TIMES, July 18, 2018.

⁹¹ Helen Maguire & Khalil Hamlo, *Syria’s Kurdish Forces Call for UN Tribunal for Foreign IS Fighters*, DPA-INTERNATIONAL (Feb. 18, 2019).

⁹² Anti-Terrorism Law, Law No. 13 of 2005 (Iraq).

⁹³ See ABA Center for Human Rights, *Compliance of Iraq’s Anti-Terrorism Law (2005) with International Human Rights Standards* (June 2014), available at https://www.americanbar.org/groups/human_rights/justice_defenders/library/2017/08/iraq_antiterrorlaw2005/. See N. Houry, *The Justice Question After ISIS*, HUMAN RIGHTS WATCH (Aug. 25, 2017).

⁹⁴ Human Rights Watch, *Iraq: Flawed Prosecution of ISIS Suspects* (Dec. 5, 2017).

⁹⁵ Joanne Stocker, *Iraq Sentences French Woman to Life in Prison for ISIS Ties*, THE DEFENSE POST (Apr. 18, 2018).

⁹⁶ CODE PENAL [C. PEN.] [PENAL CODE] (Iraq), No. 111 of 1969, July 1969, available at <http://www.refworld.org/docid/452524304.html> (hereinafter *Iraqi Penal Code*).

Kurdistan, have been stalled, in part because there was inadequate international assistance and pressure. The Kurdistan Regional Government (KRG) established an investigative commission, the Commission for Investigation & Gathering Evidence (CIGE), and a People's Defense Court to prosecute captured ISIL members. These efforts will focus on local crimes, however, and are unlikely to substantially contribute to accountability for Syria. The KRG has enacted legislation governing a number of sectors, including a counter-terrorism law, but it does not have its own complete penal code.⁹⁷

These Iraqi prosecutions are being assisted by an investigative mechanism authorized by the Security Council in 2017: the United Nations Investigative Team to Promote Accountability for crimes committed by Da'esh/ISIL (UNITAD), discussed more fully in chapter 8.⁹⁸ UNITAD is charged with investigating international crimes committed by ISIL members with an eye towards contributing to, and enhancing, national prosecutions within Iraq.⁹⁹ U.N. Security Council Resolution 2379 made oblique reference to the due process concerns that have been repeatedly raised with respect to the Iraqi judicial system¹⁰⁰ when it stated that the information gathered “should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law.”¹⁰¹ Most troubling is the continued availability—and pervasiveness—of the death penalty in Iraq, which has one of the highest rates of capital punishment in the world. Indeed, a death sentence was handed down in the first case involving a foreign fighter in Iraq, a Russian national charged with “carrying out terrorist operations” against Iraqi security forces.¹⁰² Additional mass executions followed.¹⁰³

Although both Baghdad and Erbil are prioritizing terrorism prosecutions, UNITAD is not likely to significantly enhance these proceedings in their current incarnation because its work is limited to “collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide.”¹⁰⁴ Terrorism charges *per se* would only fall within UNITAD's ambit if the underlying violent acts also constituted these so-called atrocity crimes, such as attacks on civilians. Even if Iraq were to update its Penal Code or if the KRG were to promulgate its own penal legislation, *nullum crimen sine lege* concerns may arise if ISIL members are charged with crimes in connection with conduct pre-dating any legal reform effort.¹⁰⁵ Precedent emerging from the Iraqi High Tribunal (IHT), however, provides that its Statute, which

⁹⁷ See The Kurdistan Parliament, Kurdistan Regional Gov't, <http://cabinet.gov.krd/p/p.aspx?l=12&p=229>.

⁹⁸ See S.C. Res. 2379, ¶ 2, U.N. Doc. S/RES/2379 (Sept. 21, 2017). See generally, Beth Van Schaack, *The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide*, 16(1) J. INT'L CRIM. JUSTICE 113 (Mar. 2018).

⁹⁹ See Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold ISIL (Da'esh) Accountable of Acts that May Amount to War Crimes, Crimes against Humanity and Genocide Committed in Iraq, established pursuant to Security Council resolution 2379 (2017). See generally Beth Van Schaack, *UN Releases Guidelines for Team Investigating ISIS Crimes in Iraq*, JUST SECURITY (Feb. 19, 2018).

¹⁰⁰ See generally Amnesty International, Iraq 2016/2017; U.N. Assistance Mission for Iraq/Office of the High Commissioner for Human Rights, Report on the Death Penalty in Iraq (Oct. 2014).

¹⁰¹ S/RES/2379, *supra* note 97, ¶ 5.

¹⁰² Josie Ensor, *Iraq Sentences Russian ISIL Fighter to Death by Hanging in First Ruling of Its Kind on Foreign Jihadists*, THE TELEGRAPH, Sept. 13, 2017.

¹⁰³ In December 2017, Iraq executed 38 men for terrorism crimes. *UN Rights Wing “Appalled” at Mass Execution in Iraq*, UN NEWS CENTRE, Dec. 15, 2017.

¹⁰⁴ S/RES/2379, *supra* note 97, ¶ 2.

¹⁰⁵ The Iraqi Constitution, adopted by referendum in 2005, contains a prohibition on *ex post facto* legislation. Constitution, 15 October 2005, art.19(2) (Iraq), Constitute Project. (“There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed.”).

incorporated international crimes but had limited jurisdiction over crimes committed during the Ba’athist regime (1968-2003), did not constitute impermissible retroactive legislation because the conduct in question was unlawful under either conventional or customary international criminal law during the period in question. The IHT also concluded that the constitutive acts that make up the *actus reus* of war crimes and crimes against humanity were already unlawful under Iraqi penal law and the laws of the nations of the world at the time the relevant crime was committed.¹⁰⁶ This observation would *a fortiori* hold true for atrocity crimes committed in the region today. This outcome is consistent with human rights law, which provides that so long as the new provisions reflect the state of international criminal law at the time the defendant acted, there is no due process violation.¹⁰⁷

In Jordan and Lebanon, which are playing host to millions of refugees, prosecutions are similarly made more difficult by the lack of legislation incorporating international crimes. Although Jordan has been an ICC member since April 11, 2002, it has yet to fully domesticate elements of the Rome Treaty. Likewise, Lebanese law does not account for any international crimes beyond terrorism.¹⁰⁸ Even the Special Tribunal for Lebanon (STL) is capable of asserting jurisdiction only over the crime of terrorism as defined by Lebanese law. A proposal to include crimes against humanity within the STL’s subject matter jurisdiction was ultimately rejected by Russia and the United States, likely for fear of lowering the threshold for the crime.¹⁰⁹ In any case, most acts of terrorism committed in Syria would lack the necessary nexus to the Hariri assassination, which forms the nucleus of the STL’s work.¹¹⁰

For its part, Turkey has enacted domestic statutes devoted to crimes against humanity and genocide,¹¹¹ but it does not recognize universal jurisdiction except with regard to the crime of torture.¹¹² The cases in Turkey that have been announced all involve ISIL perpetrators—sometimes prosecuted *en masse*—charged with terrorism charges.¹¹³ These legislative deficiencies put all these nations in breach of their treaty obligations to domesticate these international

¹⁰⁶ The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al., 1/E First/2005 (Nov. 5, 2006). The decision was upheld on appeal. Prosecutor v. Hussein et al., 29/c/2006 (Dec. 26, 2006).

¹⁰⁷ International Covenant on Civil and Political Rights art. 15, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. . . . Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”).

¹⁰⁸ Amnesty International, *supra* note 15, at 67-68 (compiling Jordanian statutes), 72-73 (compiling Lebanese statutes).

¹⁰⁹ Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUSTICE 1125, 1128 (2007).

¹¹⁰ The STL has jurisdiction over other attacks in Lebanon that “are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005 . . . This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.” Statute of the Special Court for Lebanon, art. 1, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).

¹¹¹ Amnesty International, *supra* note 15, at 115-116 (Turkish statutes). See Penal Code of Turkey, Law Nr. 5237 (Sept. 26, 2004), Official Gazette No. 25611 dated Oct. 12, 2004, art. 76 (genocide), art. 77 (crimes against humanity), and arts. 94-95 (torture), *available at* <https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf> (Turk.).

¹¹² *Id.* at art. 13(1) (indicating that Turkish law applies to torture “committed in a foreign country whether or not committed by a citizen or non-citizen of Turkey.”).

¹¹³ See, e.g., Martin Chulov & Jamie Grierson, *British Jihadi Aine Davis Convicted in Turkey on Terror Charges*, THE GUARDIAN (May 9, 2017).

prohibitions.¹¹⁴ Theoretically, all these states could amend their penal codes to allow for the prosecution of international crimes, although this might trigger the same *ex post facto* concerns discussed above.¹¹⁵ In addition, while the European courts generally adhere to established due process protections and are subject to supervision by the European Court of Human Rights, trials in the region can raise acute fair trial concerns. Impartiality may also suffer when neighbors judge their neighbors, especially with Turkey increasingly drawn into the conflict. The potential for trials to be unfair and biased are two downside to relying upon domestic courts to prosecute international crimes.¹¹⁶

These cases in the region are important because Western states do not necessarily want to, or may not be able to, undertake prosecutions in their own courts. Bringing potential defendants to Europe raises national security concerns but also the risk that defendants will eventually resist repatriation and assert *non-refoulement* claims if they are acquitted or once they have served any sentence, assuming they have they have well-founded fears of persecution back home.¹¹⁷ Under the Refugee Convention, an individual is not entitled to refugee status or the protection of *non-refoulement*, however, if there are “serious grounds for considering that the person” has committed war crimes, crimes against humanity, or other serious crimes.¹¹⁸ All that said, encouraging the Kurds to exercise too much prosecutorial autonomy may raise complications in the future with Turkey and Iraq, which will resist any course of conduct that might appear to advance or be supportive of Kurdish independence.

Cases Farther Afield

This brings us to cases outside the region. Particularly—but not exclusively—in Europe, a number of cases involving events in Syria are proceeding in domestic courts by virtue of the exercise of various forms of extraterritorial jurisdiction.¹¹⁹ The European cases are spurred by a European Union-wide policy in favor of domestic international crimes prosecutions, including under the principle of universal jurisdiction,¹²⁰ and a formal network of international crimes

¹¹⁴ See Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422 (July 20), ¶ 75 (noting the obligations of states that are party to international crimes treaties to criminalize acts in question to enable the establishment of extraterritorial jurisdiction).

¹¹⁵ For a survey of arguments deployed by courts to satisfy the principle of legality, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law & Morals*, 97 GEORGETOWN L. J. 119 (2008).

¹¹⁶ HUMAN RIGHTS WATCH, *LAWYERS ON TRIAL: ABUSIVE PROSECUTIONS AND EROSION OF FAIR TRIAL RIGHTS IN TURKEY* (Apr. 10, 2019).

¹¹⁷ See UNDESIRABLE AND UNRETURNABLE? POLICY CHALLENGES AROUND EXCLUDED ASYLUM SEEKERS AND OTHER MIGRANTS SUSPECTED OF SERIOUS CRIMINALITY WHO CANNOT BE REMOVED (Inst. Adv. Legal Studies, Univ. London, Jan. 25-26, 2016).

¹¹⁸ Convention Relating to the Status of Refugees arts. 1F, 33, 189 U.N.T.S. 150 (1951). *But see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, 1465 U.N.T.S. 85 (1984) (“No State Party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

¹¹⁹ See HRW, “*These are the Crimes*”, *supra* note 32.

¹²⁰ See Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, 2018/C 334/07, Official Journal of the European Union (July 4, 2017), P8_TA(2017)0288, ¶ 42 (“Encourages the EU and its Member States to fight against impunity and to lend active support to international efforts to bring to justice members of non-state groups ... calls for the development of a clear approach to the prosecution of ISIS/Daesh fighters and their abettors, including by using the expertise of the EU network for investigation and prosecution of genocide, crimes against humanity and war crimes”). See also *id.* at ¶ 51 (encouraging member states to prosecute nationals and people under their jurisdiction who have committed atrocity

units.¹²¹ Many of these cases involve defendants and/or victims who are within the immediate reach of European prosecutorial authorities, although outcomes depend on a whole range of factors, including the ability of the local law to address extraterritorial crimes; the willingness of investigators and prosecutors to take on these cases, which are resource intensive and difficult to win; and the presence of evidence and especially witnesses able to testify. At the same time, a number of states are undertaking so-called structural investigations devoted to Syria—broad inquests that do not necessarily focus on specific suspects but that build an evidentiary cache in an effort to understand the context in which crimes were committed.¹²² This latter approach enables investigators and prosecutors to develop expertise on the history of the conflict, the dynamics of violence, the functioning of the operative chains of command, the available evidence, and identities of potential perpetrators, all with an eye towards being able to move quickly once a defendant comes within reach or to offer “anticipated legal assistance to third states or international courts.”¹²³ Importantly, structural investigations also enable evidence to be preserved, when it is fresh, for eventual prosecutions at home and the provision of mutual legal assistance elsewhere. In many civil law systems, victims can initiate criminal prosecutions by constituting themselves as *parties civiles*, although many refugees and asylum seekers are not aware of this option.¹²⁴ Human rights groups often fill this gap. In Germany and France, for example, victims’ advocates have filed criminal complaints against high-level officials linked to the detention, torture, and murder of detainees in Syrian prisons.

Germany

Germany, home to over a million Syrian refugees, has taken the lead in prosecuting Syrian cases.¹²⁵ This activity has been spurred in part by the European Center for Civil and Constitutional Rights (ECCHR), a Berlin-based organization that has played a major role in advancing the principle of universal jurisdiction in European courts.¹²⁶ ECCHR is working closely with Syrian civil society organizations and Syrian human rights lawyers to pursue these cases. The latter include Anwar al-Bunni with the Syrian Center for Legal Research and Studies, Mazen Darwish with the Syrian Center for Media and Freedom of Expression, and the Caesar Files Support Group. Together, these advocates have filed multiple criminal complaints in Germany against 27 senior officials of the Syrian Military and Intelligence Service and other alleged perpetrators—known and unknown.

The operative international criminal law framework, the 2003 Code of Crimes Against International Law (CCAIL), gives German courts full universal jurisdiction over acts of genocide,

crimes in Iraq and Syria); ¶ 52 (calling upon member states to apply the principle of universal jurisdiction in tackling impunity).

¹²¹ Guidelines On The Functioning Of The Network For Investigation And Prosecution Of Genocide, Crimes Against Humanity And War Crimes (Nov. 15, 2018).

¹²² See generally Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 J. INT’L CRIM. JUSTICE 165 (2018) (discussing German cases and structural investigations).

¹²³ *Id.* at 179.

¹²⁴ HRW, “*These Are The Crimes*,” *supra* note 32, at 50.

¹²⁵ UNHCR, Germany, Q1 2018, Country Update, https://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/03/Factsheet_Germany_O1_2018.pdf.

¹²⁶ See ECCHR, *Dossier, Human Rights Violations in Syria*, https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Syria_ArrestWarrant_Austria_Lafarge_2018July.pdf.

crimes against humanity, and a whole range of war crimes.¹²⁷ This is the case even if the offense was committed abroad and has no connection to Germany. In general, German law also embodies the principle of mandatory prosecution, although prosecutors have discretion to decline to move forward if the accused is not present in Germany, the accused is being prosecuted elsewhere, or there are no links to Germany.¹²⁸ The law allows for the assertion of superior responsibility¹²⁹ and removes all statutes of limitations in connection with serious offenses.¹³⁰ Germany can also prosecute individuals for being a member or supporter of a foreign terrorist group.¹³¹ Authorities report that they will rely on the terrorism charges if there is insufficient evidence to prosecute for the commission of substantive offenses.¹³²

Germany's war crimes unit—the Central Unit for the Fight against War Crimes and further Offenses pursuant to the Code of Crimes against International Law (ZBKV)¹³³—has had a structural investigation (*Strukturermittlungsverfahren*) open since 2011 into crimes committed by the Syrian government and its various organs, including the Air Force Intelligence Services.¹³⁴ In 2014, Germany opened a second structural investigation involving ISIL with a focus on harm to the Yazidi people in Northern Iraq and Syria.¹³⁵ Although Germany does not allow trials *in absentia*, authorities can conduct such investigations while the defendants are at large and either seek the extradition of identified suspects or otherwise share the results of its research with other national authorities that might be in a position to move forward.¹³⁶ The website of the Unit, which was established in 2003, indicates that “[i]n principle, . . . the German law enforcement/prosecution agencies have worldwide jurisdiction. The focus of searches is, however, on perpetrators who seek to use Germany as a ‘safe haven’ and place of retreat.”¹³⁷ In this regard, these cases signify the “no safe haven” version of universal jurisdiction rather than the “global enforcer” version.¹³⁸

The numbers of individual cases are hard to come by as many are in the investigative phase, but media suggest that the German authorities have received thousands of submissions and investigative leads about potential war crimes.¹³⁹ By February 2016, the Federal Prosecutor of

¹²⁷ See VÖLKERSTRAFGESETZBUCH [VSTGB], June 29, 2002, at §§ 6-12, *available at* Act to Introduce the Code of Crimes Under International Law, <https://www.mpicc.de/files/pdf1/vstgbleng2.pdf> (Ger.). See generally, Gerhard Werle & J. Bung, *The German Code of Crimes Against International Law*, *available at* http://werle.rewi.hu-berlin.de/06_German%20CCIL-Summary.pdf.

¹²⁸ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], §§ 152, 153f (Ger.) (allowing prosecutors to “dispense with” the prosecution of criminal offenses under the CCAIL under certain defined circumstances); Patrick Kroker & Alexandra Lily Kather, *Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany*, EJIL: TALK! (Aug. 12, 2016).

¹²⁹ CCAIL, *supra* note 120, § 13.

¹³⁰ *Id.* § 5.

¹³¹ STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 89(a), 89(b), 129a (Ger.).

¹³² HRW, “*These are the Crimes*,” *supra* note 32, at 39.

¹³³ Bundeskriminalamt, https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html.

¹³⁴ Ana Carbajosa, *Building the Case against Assad's Regime*, EL PAÍS, June 15, 2018. See ECCHR, *Saydnaya Military Prison—Objective is to Physically and Psychologically Break Detainees* (Nov. 2017), <https://www.ecchr.eu/en/case/saydnaya-military-prison-objective-is-to-physically-and-psychologically-break-detainees/>. Kaleck & Kroger, *supra* note 121, at 180.

¹³⁵ *Id.*

¹³⁶ *Id.* at 184.

¹³⁷ Bundeskriminalamt, *supra* note 132.

¹³⁸ Máximo Langer, *Universal Jurisdiction is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction*, 13 J. INT’L CRIM. JUST. 245 (2015).

¹³⁹ Benjamin Duerr, *International Crimes: The German Strike Force*, JUSTICEINFO.NET (Jan. 10, 2019). Parliamentary archives indicate an 8000% increase in leads since 2013. *Id.*

Germany was investigating 15 cases of international crimes committed in Syria.¹⁴⁰ Additional investigations followed.¹⁴¹ In a 2019 speech, the Federal Prosecutor indicated that his section was conducting about 80 investigations into international crimes, about half involving Syria and Iraq. Some of these German cases are proceeding at the state level, and state prosecutors (*Generalstaatsanwalt*) may have additional investigations in the pipeline.¹⁴² Although a number of these cases involve anti-terrorism charges akin to material support for terrorism, the Federal Prosecutor is increasingly charging individuals with more substantive crimes in order to deter German citizens from joining the fight.¹⁴³ Four brothers, for example, have been charged with war crimes in addition to membership in a terrorist group.¹⁴⁴

Germany has produced the most important war crimes cases to emerge from the Syrian war. Its structural investigation has led to the issuance of what has been described as an international arrest warrant against Jamil Hassan, head of the Air Force Intelligence Directorate who has also been indicted in parallel by France.¹⁴⁵ Germany has sought the extradition of Hassan from Lebanon where he had been seeking medical treatment.¹⁴⁶ The United States, which exercises considerable influence over Lebanon, issued a statement in support of the extradition request, a significant gesture in favor of exercises of universal jurisdiction.¹⁴⁷ Another important case to come out of Germany involves two senior figures from the Syrian General Intelligence Service who have been indicted for crimes against humanity: Anwar R. and Eyad A (German privacy law prevents the release of defendants' full names).¹⁴⁸ Anwar R. stands accused of killing and mistreating individuals in Syrian custody during interrogations. Eyad A. allegedly manned a check point where he endeavored to identify deserters, protesters, and members of the opposition and transfer them to the prison where Anwar R. operated. The arrests were the result of a joint investigation team formed between Germany and France. A third suspect, as yet unnamed, was simultaneously arrested in France.¹⁴⁹ Trial is expected to commence in 2020 in Koblenz.

An earlier case involves Abdalfatah H.A., Abdulrahman A.A. and Abdul Jawad A.K., who stand accused of being members of a terrorist group (the Nusra Front) and of committing war

¹⁴⁰ See Kroker & Kather, *supra* note 121.

¹⁴¹ Kaleck & Kroker, *supra* note 121, at 181.

¹⁴² Correspondence with Wolfgang Kaleck, ECCHR, Nov. 22, 2018.

¹⁴³ Kathleen Schuster, *Germany Prosecutors Press Charges Against Returning Jihadists*, DEUTSCHE WELLE, Feb. 25, 2016.

¹⁴⁴ Trial International, *Evidentiary Challenges*, *supra* note 9, at 45.

¹⁴⁵ Louisa Loveluck, *Germany Seeks Arrest of Leading Syrian General on War Crimes Charges*, WASH. POST, June 8, 2018; Jörg Diehl, et al., *Germany Takes Aim at Assad's Torture Boss*, SPIEGEL ONLINE, June 8, 2019.

¹⁴⁶ Anchal Vohra, *Germany 'Seeks Extradition' of Syria's Jamil Hassan from Lebanon*, AL JAZEERA, Feb. 23, 2019.

¹⁴⁷ U.S. Department of State, Press Statement, Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan (Mar. 5, 2019), <https://www.justsecurity.org/wp-content/uploads/2019/03/united-states-support-for-germany-request-for-lebanon-to-extradite-syrian-general-jamil-hassan.pdf>. See Ryan Goodman, *BREAKING: United States Supports Germany's International Arrest Warrant for Accused Syrian War Criminal*, JUST SECURITY (Mar. 6, 2019); Claus Kreß, *Letter to the Editor—Germany's Extradition Request for Gen. Jamil Hassan, with U.S. Support*, JUST SECURITY (Mar. 13, 2019) (arguing that the German authorities took action in the absence of an alternative forum “as fiduciaries of the international community’s rightful authority to prosecute”).

¹⁴⁸ Kate Connolly, *Germany Arrests Two Syrians Suspected of Crimes Against Humanity*, THE GUARDIAN, Feb. 13, 2019.

¹⁴⁹ Vanessa Romo, *3 Syrian Ex-Intelligence Officials Arrested On Charges Of Torture*, NPR, Feb. 13, 2019.

crimes—the execution of 36 Syrian civil servants in March 2013.¹⁵⁰ An additional notable case involves Suliman Al-S., an asylum seeker who was convicted of complicity in war crimes (attacking personnel involved in a peacekeeping mission) for his role in the detention of a Canadian adviser to U.N. forces deployed to the Golan Heights.¹⁵¹ He received a sentence of three and a half years’ imprisonment for committing a war crime against humanitarian operations, deprivation of liberty for the purpose of blackmail, and membership in a foreign terrorist organization (the Nusra Front)—a verdict the prosecutor appealed as insufficient. The appeals court agreed. One remand, his sentence was extended to four years and 9 months.¹⁵² Similar cases are proceeding against other Nusra Front, ISIL, and Free Syrian Army fighters arrested in Germany.¹⁵³ Ibrahim A., for example, was convicted and given a life sentence for leading a Free Syrian Army militia in Aleppo that tortured captives and looted private goods for personal gain.¹⁵⁴ Likewise, in what may be the first trial to involve harm to the Yezidi people, Taha A.-J. and his German wife Jennifer W. are on trial for murder, human trafficking, war crimes, crimes against humanity, and genocide in connection with their purchase and mistreatment of a Yezidi woman and her five-year old daughter, who ultimately died of thirst while in their custody in Iraq.¹⁵⁵

Many of these cases involve foreign citizens discovered in Germany, but not all of them. For example, one investigation is proceeding against German national Harry Sarfo, who was originally convicted of joining a terrorist organization. However, authorities opened a new case against him when a video surfaced of him seeming to participate in the execution of prisoners in Palmyra.¹⁵⁶ Another German national, Aria Ladjedvardi, became radicalized in Germany and subsequently travelled to Syria to fight against the Assad regime.¹⁵⁷ Upon his return, Ladjedvardi was convicted of the war crime of subjecting a protected person to humiliating and degrading treatment by posing with the heads of executed members of Assad’s forces.¹⁵⁸ He was identified from trophy photographs found on Facebook. The court held that it is a war crime to mistreat enemy fighters who are *hors de combat*—including prisoners of war in an international armed conflict and captured fighters of the opposing party in non-international armed conflicts—even when such individuals are already deceased.¹⁵⁹ Ladjedvardi was sentenced to two years’

¹⁵⁰ *Germany Arrests Suspected Syrian War Criminal*, REUTERS, Mar. 2, 2017; Melissa Eddy, *Germany Arrests 2 Syrians on Terrorism Charges*, N.Y. TIMES, Mar. 2, 2017 (discussing arrest of Abdalfatah H.A. and Abdulrahman A.A. for terrorism offenses).

¹⁵¹ *German Court Jails Syrian Refugee Over UN Kidnapping*, THE LOCAL, Sept. 21, 2017. See BGH StR 149/18 of Aug. 23, 2018. The defendant was charged under §10 of the CCAIL (attacking a person involved in a humanitarian aid mission or peacekeeping mission under the U.N. Charter).

¹⁵² BGH, StR 149/18 (Aug. 8, 2019); Higher Regional Court Stuttgart, *New Ruling in the State Protection Proceedings for a War Crime Against Humanitarian Operations*, inter alia, on the Occasion of the Kidnapping of a United Nations Official in Syria (Jan. 1, 2019),

<https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Stuttgart&Datum=23.01.2019&Aktenzeichen=3%20StE%205%2F16>.

¹⁵³ Trial International, *supra* note 9, at 52-57. See, e.g., *Germany Detains Suspected ‘IS’ Member Accused of War Crimes in Syria*, DEUTSCHE WELLE, Aug. 9, 2017 (discussing arrest of Fares A.B. on suspicion of mistreating prisoners and civilians and committing a summary execution while a member of an opposition group).

¹⁵⁴ OLG Düsseldorf, III-5 StS 3/16 (Sept. 24, 2018).

¹⁵⁵ *Germany Indicts Iraqi Man over Death of Yazidi Slave Girl*, AP, Feb. 21, 2020.

¹⁵⁶ Rick Gladstone, *German ISIS Member Who Denied Killing is Charged with Murder*, N.Y. TIMES, Jan. 3, 2017.

¹⁵⁷ For background, see International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3276/Aria-Ladjedvardi/>; Eléonore Coeuret, *German Jihadist Convicted of War Crime*, ILAWYER (July 14, 2016).

¹⁵⁸ See *Prosecutor v. Aria Ladjedvardi*, OLG Frankfurt Am Main, Az.: 5-3 StE 2/16-4-1/16 (July 12, 2016).

¹⁵⁹ *Id.* at III, §§1-2. For this proposition, the court cited *Prosecutor v. Brđanin*, Case No. T-99-36-T, Judgement, (Sept. 1, 2004) and *Prosecutor v. Bagasora et al.*, Case No. ICTR-98-41-T, Judgement (May 8, 2012).

imprisonment, which included mitigation for his youth, the fact that someone else uploaded the photographs (although he approved of them), and his confession.¹⁶⁰ A Düsseldorf court sentenced Nils D. to four and a half years' imprisonment for his confessed involvement in a unit of ISIL responsible for internal security and the Manbij prison.¹⁶¹ His shorter sentence reflects considerable cooperation with German authorities and his willingness to enter into an *Aussteigerprogramm* (de-radicalization program for former extremists).¹⁶² Later evidence emerged that he may have participated directly in torture; although new charges were filed, they were rejected on double jeopardy grounds.¹⁶³ On appeal, the Federal Court of Justice ordered a retrial.¹⁶⁴

Similar charges were advanced in the case against Abdelkarim El B., a German national convicted of membership in a terrorist organization, weapons use in violation of the Military Weapons Control Act, and humiliating a protected person—a dead Syrian soldier found in Aleppo.¹⁶⁵ The defendant was arrested in Turkey and extradited to Germany; the contents of his phone were provided through mutual legal assistance.¹⁶⁶ Prosecutors proved the membership charge on the basis of ISIL registration documentation obtained by the German police from an informant as well as video evidence from Abdelkarim's phone that made clear he had participated in hostilities as part of ISIL. Although phone videos suggested he was not directly involved in the desecration of the corpse in question, he was convicted on the basis of the common purpose doctrine for filming and commenting upon the events. He was sentenced to over eight years' imprisonment.

It can be difficult to prove charges based upon the conduct of individuals on the battlefield for lack of direct evidence. The German case of Harun P. offers an exception.¹⁶⁷ Harun was convicted of being a member of a terrorist group and an accessory to murder. The charges stem from his involvement in an assault on Aleppo's central prison launched by an Islamist group, *Junud-al-Sham* ("Soldiers of the Levant") with the goal of liberating political prisoners and other *jihadists* imprisoned therein.¹⁶⁸ He was not convicted of murder because the court was unable to determine how many people died in the attack, although there was sufficient evidence that the armed group intended to harm prison guards deemed to be supporters of the Assad regime.¹⁶⁹ Based upon a cellphone video, Harun was also charged with firing a mortar into a civilian zone

¹⁶⁰ *Id.* at II, Sentencing. The defendant appealed the conviction, but the appeal was quashed by the Federal High Court of Justice.

¹⁶¹ Manasi Gopalakrishnan, *German Court Sentences former 'Islamic State' Member Nils D.*, DEUTSCHE WELLE, Mar. 4, 2016. See OLG Düsseldorf, 4 March 2016, 5 StS 5/15 III.

¹⁶² Jörg Diehl, et al., *Former Islamic State Members Open Up to Investigators*, SPIEGEL ONLINE, Aug. 8, 2016.

¹⁶³ OLG Düsseldorf, Oct. 10, 2018 – III – 6, StS 5/18.

¹⁶⁴ OLG Düsseldorf, Sept. 4, 2019 – III – 6, StS 5/18.

¹⁶⁵ Prosecutor v. Abdelkarim El. B., Frankfurt Higher Regional Court, Case 5-3 StE 4/16 - 4 - 3/16, Judgment of November 8, 2016, http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7812208.

¹⁶⁶ Prosecutor v. Abdelkarim El. B., International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3297/Prosecutor-v-Abdelkarim-El-B/>.

¹⁶⁷ Prosecutor v. Harun P., Oberlandesgerichte München [OLG München] [Higher State Court Munich] July 15, 2015, Urteil 7 St 7/14 (4), (Ger.) <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-13419>.

¹⁶⁸ Hans Pfeifer, *German Jihadi Gets 11-Year Prison Sentence*, DEUTSCHE WELLE, July 15, 2015. See Prosecutor v. Harun P, International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3283>.

¹⁶⁹ Harun P., *supra* note 166, ¶¶ 427-432.

out of “boredom.”¹⁷⁰ In convicting the defendant, the court rejected the defenses of combat immunity (given the lack of an *international* armed conflict), necessity, and self-defense, although Harun did receive some credit for cooperating with authorities.¹⁷¹ The court also noted that some of the crimes in question were also criminal under Syrian law.¹⁷² The case was assisted by evidence and testimony from the non-governmental Commission on International Justice and Accountability (CIJA), profiled in chapter 8, which early in the conflict established protocols for responding to external requests for information from national authorities. Indeed, CIJA responded to appeals on 500 matters in 2017;¹⁷³ it was also instrumental in the conviction of Zoher J. on suspicion of membership in a terrorist organization abroad (Al Nusra).¹⁷⁴

Although many of these German cases resulted in convictions, charges against other suspects have been dismissed when prosecutors have been unable to prove the identities of the supposed victims or the circumstances of their deaths or mistreatment.¹⁷⁵ This was the fate of the only case involving sexual violence emerging from the war in Syria. Akram A. was indicted for allegedly raping a woman at a checkpoint he was manning for ISIL. The suit was dismissed for lack of evidence.¹⁷⁶

Although most of the cases that have come to light involve male defendants, the Federal Prosecutor’s Office has indicated that women who have joined ISIL will not be spared prosecution under the penal code provision criminalizing membership in a foreign terrorist organization. This is the case even if there is no evidence of these women participating in the conflict on the theory that they strengthen the inner structure of ISIL.¹⁷⁷ This policy statement proved controversial, as some commentators have argued that these women (many of whom are minors) should be seen as victims rather than felons.¹⁷⁸ Others commentators have argued that women can play central roles in armed groups, even highly patriarchal ones, and it should not be assumed that they have been deceived or exploited.¹⁷⁹ These cases have met some resistance from German judges as well. For example, a judge refused to issue an arrest warrant for Sibel H., which would have laid the groundwork for her extradition from Iraq, on the theory that solely being in ISIL territory in Syria was not criminal conduct under German law.¹⁸⁰ The penalties available in Iraq include the death penalty, so extradition to Germany would have resulted in a lower sentence, better detention conditions, and procedures that adhere to European human rights law. In a novel legal theory, German citizen Mine K. was charged with the war crime of pillage and plunder for living with her

¹⁷⁰ *Id.* ¶ 128.

¹⁷¹ *Id.* ¶¶ 449-459.

¹⁷² *Id.* ¶ 426.

¹⁷³ Correspondence with Stephanie Barbour, CIJA, Dec. 18, 2018.

¹⁷⁴ Press Release, *Criminal Proceedings against Zoher J. on Suspicion of Membership of a Terrorist Organization Abroad (“Jabhat al-Nusra” and “Islamic State”)*, Oberlandesgericht München, Mar. 21, 2019.

¹⁷⁵ Schuster, *supra* note 142 (listing dismissed cases).

¹⁷⁶ *Prosecutors Release Syrian Accused of Raping Woman While Fighting for ISIS*, THE LOCAL (June 13, 2017).

¹⁷⁷ Volmar Kabisch, et al., *Mehr Härte gegen IS-Frauen*, SÜDDEUTSCHE ZEITUNG, Dec. 14, 2017.

¹⁷⁸ *Sie sind eher Opfer als Schwerverbrecherinnen*, DEUTSCHLANDFUNK KULTUR, Dec. 15, 2017.

¹⁷⁹ See DUTCH MINISTRY OF THE INTERIOR AND DUTCH RELATIONS, GENERAL INTELLIGENCE AND SECURITY SERVICES, *JIHADIST WOMEN, A THREAT NOT TO BE UNDERESTIMATED* (NOV. 2017).

¹⁸⁰ Jörg Diehl & Fidelius Schmid, *Arrest Warrant against Islamist Sibel H. Rejected*, SPIEGEL ONLINE, May 28, 2018.

ISIL husband in a home that had been seized by ISIL.¹⁸¹ In a show of gender disparity, such charges have not been leveled against the husbands of these defendants.¹⁸²

Elsewhere in Europe

Additional Syrian cases are moving forward elsewhere in Europe, although these generally involve lower-level actors and anti-terrorism or weapons charges. According to Human Rights Watch, the Dutch war crimes units (located within the immigration, police, and prosecution services) are “the most robust and well-resourced in the world.”¹⁸³ The Netherlands has relied upon both anti-terrorism legislation and international humanitarian law to charge perpetrators found in its territory.¹⁸⁴ The first returnee to the Netherlands, Maher H., for example, was convicted of incitement and intent to commit terrorist acts in December 2014.¹⁸⁵ His wife, Shukri F., who was charged with attempting to recruit men (including her husband) and women (including some who were underage) to go to Syria, was acquitted of most charges except the dissemination of inciting materials.¹⁸⁶ The *Maher* case is notable because the defendant attempted to argue that the Dutch terrorism law was inapplicable since the existence of a non-international armed conflict in Syria rendered international humanitarian law *lex specialis*.¹⁸⁷ The Dutch court ruled, however, that the defense of combatant immunity is only available in international armed conflicts and cannot be raised by members of a non-state armed group.¹⁸⁸



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The defense in the so-called *Operation Context* case raised similar arguments on behalf of nine ISIL recruiters who ran a website, maintained social media accounts (including Twitter and

¹⁸¹ *Arrest of a suspected member of the foreign terrorist organization “Islamic State (IS)”*, Der Generalbundesanwalt beim Bundesgerichtshof (Oct. 17, 2018).

¹⁸² See *Kather & Schroeter*, *supra* note 26.

¹⁸³ HRW, *The Long Arm*, *supra* note 16, at 32.

¹⁸⁴ For a discussion of the Dutch practice, see Martin Zwanenburg, *Foreign Terrorist Fighters in Syria: Challenges of the Sending State*, 92 INT’L L. STUD. 204 (2016).

¹⁸⁵ *Prosecutor v. Maher H.*, Rechtbank-Gravenhage [District Court of The Hague], No. 09/767116-14, Dec. 1, 2014, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:14652> (Neth.). See also International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3299>.

¹⁸⁶ *Prosecutor v. Shukri F.*, Gerechtshof Den Haag, No. 22-005387-14, July 7, 2016, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2016:1979> (Neth.). See *Three Years and Acquittal for ‘Jihad Couple,’* TROUW (Dec. 1, 2014).

¹⁸⁷ *Maher*, *supra* note 184, ¶ 3.

¹⁸⁸ *Id.*

Facebook), and disseminated other publications online and via YouTube.¹⁸⁹ The court held that although there was significant involvement by other states in the conflict, it did not yet rise to the level of an international armed conflict.¹⁹⁰ As such, participation in the armed conflict with ISIL would not give rise to combatant immunity and would inherently involve the commission of terrorist acts that might be charged under international humanitarian law or Dutch law.¹⁹¹ Furthermore, although not all the defendants' conduct was criminal, the court rejected the argument that statements inciting violence in the Netherlands and acts of recruitment to an armed struggle were protected by the right to freedom of expression under European human rights law. Rather, the court ruled that the criminalization of incitement to prevent the commission of criminal offenses (including inciting others to take part in the "armed *jihadi* struggle" on social media platforms) was a legitimate restriction on the freedom of expression.¹⁹² One individual was sentenced to seven days' imprisonment for retweeting inciting material; others received longer sentences for more elaborate recruitment efforts.

Unlike other European states, the Dutch have actively sought the extradition of their nationals when they are within reach. For example, Dutch citizens Reda Nidalha and Oussama Achraf Akhala were convicted in Turkey of being part of a terrorist organization, but were later deported home to be charged under Dutch law. Among other charges, Oussama was prosecuted for posing with a crucified body.¹⁹³

Turning to Austria, like many European states, Austria updated its penal law following its ratification of the Rome Statute. Austria can now exercise universal jurisdiction over several international crimes—including torture, genocide, crimes against humanity, forced disappearances, and war crimes¹⁹⁴—so long as Austria is under an obligation to prosecute them. This duty exists even if the conduct happens abroad and was not criminalized in the place where committed.¹⁹⁵ Austrian law also allows for the prosecution of other extraterritorial crimes (including crimes of sexual violence) if the perpetrator has a habitual residence in Austria or is present there and cannot be extradited.¹⁹⁶ ECCHR filed an additional complaint under this legislation in May 2018 against 24 Syrian intelligence officials on behalf of several individuals detained and mistreated in Syria, including an Austrian citizen. The investigation is ongoing. As is true elsewhere, many of the other Syrian cases involve opposition fighters, such as one Syrian asylum seeker who confessed to killing 20 wounded Syrian soldiers as a member of the Farouq

¹⁸⁹ Prosecutor v. Imane B. et al., Rechtbank-Gravenhage [District Court of The Hague] (ECLI:NL:RBDHA:2015:14365), ¶ 7.4, Dec. 10, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:14365>. See also Prosecutor v. Imane B. et al., International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3270>; "Context" Case on the Applicability of Dutch Criminal Law in the Context of International Humanitarian Law, Prosecutor v. Imane B. et al. (District Court of The Hague, 10 December 2015), 18 Y.B. HUMANIT. L., CORRESPONDENTS' REPORTS 2 (2015).

¹⁹⁰ Imane B., *supra* note 188, ¶¶ 7.5-7.13.

¹⁹¹ *Id.* ¶¶ 7.18-7.27.

¹⁹² *Id.* ¶ 11-14-11.15.

¹⁹³ *Alleged ISIS Militant Tried in Netherlands over War Crimes*, 7D NEWS, July 8, 2019. See generally Stephanie Van Den Berg, *The Dutch War Crimes Unit Hits Harder on Syrian Suspects*, JUSTICEINFO.NET (May 23, 2019).

¹⁹⁴ STRAFGESETZBUCH [STGB] [PENAL CODE], § 312a (torture), § 312b (disappearances), §321 (genocide), § 321a (crimes against humanity), § 321b (war crimes), <https://www.jusline.at/gesetz/stgb> (Austria).

¹⁹⁵ *Id.* § 64 (acts punishable when committed abroad).

¹⁹⁶ *Id.*

Brigade of the FSA.¹⁹⁷ This individual was convicted of war crimes but his conviction was overturned on the grounds that key witnesses had not been questioned.¹⁹⁸

The most high-profile case has caused a bit of a scandal in Austria. Brigadier General Khalid Halabi, who headed Syria's State Security in the town of Raqqa, was granted asylum in Austria. His application had not moved forward in France, so he relocated to Austria and then applied again in a refugee camp.¹⁹⁹ He was spotted by former victims. CIJA provided witness evidence that he was directly involved in war crimes in Raqqa.²⁰⁰ Austria has now opened an investigation into these allegations and also into the functioning of its asylum system.²⁰¹

The Caesar files have spun off a number of investigations and cases around Europe, as people recognize their loved ones as among those who were tortured to death in Syrian detention centers. In Spain, Amal Hag-Hando Anfalis, the sister of a victim depicted in the Caesar files, initiated suit against nine Syrian officials within the Security and Intelligence Forces²⁰² in connection with the enforced disappearance, torture, and execution of her brother. The crime alleged was "state terrorism" under Spain's international crimes legislation,²⁰³ because unlike with respect to other international crimes, terrorism can be prosecuted in Spain when the victim has Spanish nationality.²⁰⁴ An investigative judge, Eloy Velasco Núñez, declared the complaint admissible,²⁰⁵ reasoning that the victim's sister was also a victim of terrorism within the understanding of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²⁰⁶ The prosecutor appealed; in July 2017, the Spanish National

¹⁹⁷ Kate Connolly, *Austrian Court Jails Asylum Seeker for War Crimes in Syria*, THE GUARDIAN, May 11, 2017.

¹⁹⁸ See Trial International, *Evidentiary Challenges*, *supra* note 9, at 16.

¹⁹⁹ *Asylum Scandal about Syrian National Security General in Austria*, KURIER.AT, Oct. 23, 2018.

²⁰⁰ *Asylum Scandal: Witnesses Massively Incriminate Syrian Stasi General*, KURIER.AT, Oct. 25, 2018.

²⁰¹ *Id.* See also Zaman Al Wasl, *Austria to Try Syrian Intelligence Officer Who Tortured Detainees*, THE SYRIAN OBSERVER, Oct. 29, 2018.

²⁰² The defendants were: Mohamed Alhaj Ali, General Jalal Al Hayek, Colonel Sulayman Alyusef, Abdel-Fatah Qudsiyeh, Mohamed Dib Zeitoun, Major General Jamil Hassan, Major General Ali Mamluk, Farouk Al-Sharaa and Mohamed Said Bekheitan. Preliminary Proceedings Summary Procedure 0000011/2017, Central Court of Instruction No. 006 (Mar. 27, 2017).

²⁰³ See CÓDIGO PENAL [C.P.] [PENAL CODE] art. 607bis(2)(6) (Spain).

²⁰⁴ L.O.P.J. at §23.4(e).

²⁰⁵ Preliminary Proceedings, *supra* note 201, at 2 (noting that the complaint alleged "the implementation of a terrorist security plan conceived and developed by high ranking members of the security, military and intelligence forces; among them, the defendants. The aim of this plan was to spread terror and intimidate the civil population through a campaign of massive illegal detentions and the systematic practice of enforced disappearances and tortures in response to the *Arab Spring*."). Judge Núñez is the same judge hearing a case involving the killing of six priests in El Salvador during the dirty war. Elisabeth Malkin, *From Spain, Charges Against 20 in the Killing of 6 Priests in El Salvador in 1989*, N.Y. TIMES, May 30, 2011. He also dismissed the case against Bush Administration officials (the "Bush Six") for torture at Guantánamo Bay on the grounds that the requirements of Spanish law were not satisfied and the United States was investigating the case itself. See *Accountability for U.S. Torture: Spain*, Center for Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain>.

²⁰⁶ Preliminary Proceedings, *supra* note 201, at 6. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 8, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. ... Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.").

Court (*Audiencia Nacional*) dismissed the case on the grounds that the complainant was not a “victim” under Spanish law.²⁰⁷ Lawyers with the Guernica 37 International Justice Chambers lodged an appeal with Spain’s Constitutional Court, arguing that the dismissal of the case has amounted to a denial of justice. They have also sought a determination by the European Court of Justice that the definition of “victim” is not in accordance with European directives.²⁰⁸ This outcome has galvanized a debate within Spain as to whether it should reinstate extraterritorial jurisdiction over international crimes,²⁰⁹ although the Catalonia secession movement is absorbing legislators’ energies.

At the request of the French Minister of Foreign Affairs, French war crimes prosecutors opened a preliminary examination into the crimes depicted in the Caesar photographs in September 2015.²¹⁰ France conformed its penal code to the Rome Statute in 2010,²¹¹ but grants jurisdiction to French courts in only narrow circumstances: when the suspect habitually resides in France, when dual criminality is satisfied, and if no other international or domestic court is asserting jurisdiction or has requested the suspect’s surrender.²¹² Its war crimes investigations unit, the National Office for Investigation of Crimes Against Humanity, is part of the *gendarmerie* and opened a structural investigation on Syria in 2015 inspired in part by the Caesar photos.²¹³ Although opposed by many NGOs, the specialized crimes against humanity unit has been merged with the terrorism unit. France also boasts a specialized judicial unit within the Paris Tribunal de Grande Instance, which was formed in 2012.²¹⁴

French law recognizes the concept of the *partie civile*—which allows victims to force the opening of an investigation without receiving the green light of a prosecutor—when it comes to ordinary crimes and international crimes solely in connection with the implementation of the statutes of the international tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR). With respect to other international crimes, prosecutors have a monopoly on initiating suit per the 2010 legislation, so victims cannot trigger a formal investigation under universal jurisdiction.²¹⁵ Where the principle of passive personality is at issue, however, victims may request the authorities

²⁰⁷ Marcos Pinherio, *The National Court Refuses to Investigate the Syrian Regime for Kidnapping and Terrorism*, ELDIARIOS.ES, July 21, 2017.

²⁰⁸ *Spanish Court Case Tests the Challenges of Universal Jurisdiction on Syrians*, SYRIA UNTOLD (2017).

²⁰⁹ *Spain Wants to Re-Establish Universal Jurisdiction Doctrine: Minister*, JUSTICEINFO.NET, July 11, 2018; Declaración de la Sociedad Civil para la recuperación de la Jurisdicción Universal (Oct. 22, 2018), available at <https://www.ecologistasenaccion.org/?p=108554>.

²¹⁰ Adam Nossiter, *France Opens Criminal Investigation of Torture in Syria Under Assad*, N.Y. TIMES, Sept. 30, 2015.

²¹¹ See Loi No. 2010-930 du 9 août 2010, portant adaptation du droit pénal à l’institution de la cour pénale internationale,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022681235&categorieLien=id>.

²¹² CODE DE PROCEDURE PENALE [C. PR. PÉN] [CODE OF CRIMINAL PROCEDURE] art. 689-11 (Fra.). See French Coalition for the ICC (CFCPI), *Recommandations De La CFCPI Sur La Loi N°2010-930 Du 9 Aout 2010 Portant Adaptation Du Droit Pénal a L’institution De La Cour Pénale Internationale*.

²¹³ See Décret n° 2013-987 du 5 novembre 2013 portant création d’un office central de lutte contre les crimes contre l’humanité, les génocides et les crimes de guerre (Nov. 5, 2013), <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028160634&categorieLien=id> (Fra.).

²¹⁴ See Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l’allègement de certaines procédures juridictionnelles (“Case Distribution Law”), No. 0289, entered into force on December 14, 2011, art. 22, <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000024960344&dateTexte=&oldAction=rechJO&categorieLien=id> (Fra.).

²¹⁵ C. PR. PÉN, *supra* note 211, at art. 689-11.

to open an investigation as was done by Obeïda Dabbagh, who together with several human rights organizations, filed a complaint in France alleging that his brother and nephew (both French-Syrian citizens) were arrested in 2013 by the Syrian Air Force Intelligence Directorate and disappeared.²¹⁶ Key organizations involved are Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Ligue des Droits de l'Homme (LDH), and the Syrian Center for Media and Freedom of Expression (SCM).²¹⁷ French judges recently issued international arrest warrants against three high ranking regime officials—Ali Mamluk,²¹⁸ Jamil Hassan, and Abdel Salam Mahmoud—for their complicity in the disappearances and death.²¹⁹ Mamluk reportedly visited Italy as recently as February 2018, even though he has been subject to EU sanctions, which include a travel ban, since 2011.²²⁰ The ECCHR has filed a complaint against Italy before the European Commission.²²¹ U.S. officials may have met with him in Damascus in connection with the counter-ISIL campaign.²²²

When it comes to its own citizens, France has brought prosecutions not only against its nationals for joining ISIL but also against family members and friends who have lent support.²²³ For example, Christine Riviere was charged with following her son to Syria and sending him money.²²⁴ A similar result was reached in the Nathalie Haddadi case.²²⁵ For individuals not within France, and opposite to the Dutch approach, France has refused to allow for the repatriation of some of its nationals and is encouraging Kurdish authorities in Kurdish-controlled parts of Syria to prosecute French nationals locally, raising due process concerns.²²⁶ Suspected ISIL recruiter Emilie König, for example, and other French nationals remain in SDF custody.²²⁷

Sweden—which after Germany is the second largest European destination country for Syrian asylum seekers and refugees²²⁸—has also pursued a number of these cases through its War Crimes Commission and Unit.²²⁹ Like Germany, it can exercise “pure” universal jurisdiction and investigations can proceed even if the defendant is not present on the territory (although trials *in*

²¹⁶ FIDH, *The Case of Two Disappeared Franco-Syrians in a Bashar El-Assad Jail Referred to the French Justice* (Oct. 24, 2016).

²¹⁷ See FIDH, *Syria, in Search of Justice*, <http://insearchofjustice.fidh.org/>.

²¹⁸ Trial International, Ali Mamluk (June 6, 2018), <https://trialinternational.org/latest-post/ali-mamlouk-marie-colvin-case/>. Mamluk is also named in the Spanish case, *see supra* note 201, and the complaint filed on behalf of the family of Marie Colvin, the U.S. war correspondent killed in Syria, discussed in chapter 7.

²¹⁹ FIDH, *Q & A on the Dabbagh Case: French Judges Issue 3 International Arrest Warrants against Top Syrian Officials*, May 11, 2018; FIDH, *Breaking: French Judges Issue International Arrest Warrants Against Three High-Level Syrian Regime Officials*, Nov. 5, 2018.

²²⁰ Stephanie Kirchgaessner, *Italian Officials Allegedly Met with Syria's Top Military Adviser*, THE GUARDIAN, June 29, 2018.

²²¹ *Id.*

²²² Dahlia Nehme et al., *U.S., Syrian Security Officials Met in Damascus: Official Report*, REUTERS, Aug. 28, 2018.

²²³ See Marc Hecker, *137 Shades of Terrorism: French Jihadists Before the Court*, ÉTUDE DE L'IFRI (Apr. 2018).

²²⁴ Angelique Christafis, *Radicalised French Woman who Followed Son to Syria Jailed for 10 Years*, THE GUARDIAN, Oct. 6, 2017.

²²⁵ Emmanuel Jarry, *French Court Jails Woman Who Sent Money to Son Killed in Syria*, REUTERS, Sept. 28, 2017.

²²⁶ Amandla Thomas-Johnson, *Legal Fears Over French Plan to Put IS Suspects on Trial in Kurdish Courts*, MIDDLE EAST EYE (Mar. 8, 2018).

²²⁷ Ari Khalidi, *France Says Jihadists can be Tried in Syria Kurdistan, Signaling De Facto Recognition*, KURDISTAN 24, Jan. 5, 2018.

²²⁸ See European Parliament, Directorate General for Internal Policies, *Integration of Refugees in Austria, Germany and Sweden: Comparative Analysis* (2017).

²²⁹ Polisen, War Crime—Swedish Police Efforts, <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>.

absentia are not allowed).²³⁰ It does not, however, have an effective terrorism statute, so these international crimes may be its only option. Sweden convicted Haisam Omar Sakhanh, a former member of a Syrian rebel group, of war crimes for killing captured Syrian soldiers.²³¹ He was charged on the basis of a video published on social media and sent to the *New York Times*.²³² The case is of interest because his defense was that a rebel court had sentenced the captured soldiers to death and he was lawfully acting as executioner.²³³ The Swedish courts rejected this line of argument,²³⁴ reasoning that although non-state actors lacking full sovereignty can create courts to enforce international humanitarian law, the tribunal in question was not a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” as required by Common Article 3 of the Geneva Conventions.²³⁵ Sakhanh was sentenced to life imprisonment.

A similar case involved allegations that Mouhannad Droubi—a Syrian citizen who had sought refuge in Sweden after serving in the Free Syrian Army—had assaulted what appeared to be a pro-regime soldier who was *hors de combat*. Droubi was identified by a video on his computer of the assault, which had also been uploaded on Facebook.²³⁶ After he was convicted, the victim was located in Turkey by a Swedish journalist and turned out to be a defected Syrian soldier who had gotten into an altercation with the defendant. On a retrial, the court acquitted the defendant on the war crimes charge (but retained the gross assault charge under the ordinary penal law) on the ground that there was no nexus between the assault and the conflict. On appeal, the war crimes charge was reinstated on the theory that there was an armed conflict at the time of the assault in 2012.²³⁷

Sweden gets credit for bringing the first extraterritorial case involving a member of the Syrian Army. Sweden convicted Mohammed Abdullah, a Syrian asylum-seeker, of violating the personal dignity of the dead and injured.²³⁸ Abdullah was depicted in a photograph with his boot

²³⁰ Act 2014:406 on Criminal Responsibility for Genocide, Crimes Against Humanity, and War Crimes, https://www.government.se/49cd62/contentassets/6e0e65c994124235a39387e2dcf5ad48/2014_406-act-on-criminal-responsibility-for-genocide-crimes-against-humanity-and-war-crimes-.pdf. Sweden also has a genocide act dating back to 1964. Law (1964:169) on Punishment for Genocide, http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1964169-om-straft-for-folkmord_sfs-1964-169.

²³¹ *Prosecutor v. Haisam Omar Sakhanh*, Stockholm District Court, Case B 3787-16, Judgment of February 16, 2017; *Prosecutor v. Haisam Omar Sakhanh*, Svea Court of Appeal, Case B 3787-16, Judgment of May 31, 2017. On July 20, 2017, the Swedish Supreme Court denied Sakhanh’s leave to appeal, *Prosecutor v. Haisam Omar Sakhanh*, Swedish Supreme Court, Case B 3157-17, Decision of July 20, 2017. See Trial International, Haisam Omar Sakhanh (Oct. 1, 2018), <https://trialinternational.org/latest-post/haisam-omar-sakhanh/>.

²³² C.J. Chivers, *Syrian Asylum Seeker Linked to Mass Killing Is Arrested in Sweden*, N.Y. TIMES, Mar. 14, 2016.

²³³ See generally Jenny Wahlberg, *Rebel Courts—The Legality of Courts Established by Non-State Actors in the Context of NIAC* (2017) (unpublished thesis, Stockholm University), <http://www.diva-portal.se/smash/get/diva2:1165030/FULLTEXT01.pdf> (discussing circumstances in which non-state actors can establish courts in compliance with IHL).

²³⁴ *Prosecutor v. Omar Haisam Sakhanh*, Stockholm District Court, B 3787-16, Judgement, (Feb. 16, 2017), at 24; *Prosecutor v. Omar Haisam Sakhanh*, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, at 3.

²³⁵ Geneva Convention, *supra* note 64, at art. 3.

²³⁶ *Facebook ‘Torture’ Video Leads to Sweden Arrest*, THE LOCAL, Feb. 2, 2015.

²³⁷ See *Prosecutor v. Mouhannad Droubi*, International Crimes Database, <http://www.internationalcrimesdatabase.org/Case/3296/Prosecutor-v-Mouhannad-Droubi/>.

²³⁸ *Prosecutor v. Mohammad Abdullah*, Södertörn District Court, Case B 11191-17, Judgment of September 25, 2017. See Al-Kawakibi Human Rights Organization, Report, [http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights,_swedish_case_against_mohammed_abdullah_\(eng\).pdf](http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights,_swedish_case_against_mohammed_abdullah_(eng).pdf) (discussing efforts to get the defendant prosecuted).

on one of several corpses. Activists alerted the authorities to photos on his Facebook page suggesting that he had been a member of the Syrian army.²³⁹ The authorities dropped earlier charges of participating in the execution of the victims for lack of additional evidence.²⁴⁰ He served an eight-month sentence. Nine torture survivors have since filed suit in Sweden against senior regime officials, alleging their commission of crimes against humanity.²⁴¹

Elsewhere in Europe, Brigadier General Nabil al-Dandal, who headed the Political Security unit of the Ministry of the Interior in Latakia Governorate from 2003 to 2008, was found in Switzerland in 2016 after he apparently deserted in 2012. Swiss authorities denied him asylum, although he was not originally referred to the Federal Prosecutor because there was no evidence of his direct involvement in abuses, notwithstanding his senior position in the notorious intelligence office. Eventually, such evidence emerged, and he is being investigated for his participation in the commission of international crimes.²⁴² As an example of historical justice, Switzerland is also prosecuting Rifaat Al-Assad, the uncle of the President, for international crimes committed in Syria in the 1980s.²⁴³ One case, which was dismissed and is on appeal, involves the 1980 Tadmor prison massacre that resulted in the death of a thousand detainees in their cells; the other involves the 1982 Hama massacre. The U.N. Special Rapporteurs on Torture and Independence of Judges and Lawyers have expressed concerns that the Swiss war crimes unit has come under political pressure to slow roll universal jurisdiction cases.²⁴⁴

Belgium has also been faced with homegrown terrorism cases as well as the prospect of prosecuting criminal conduct committed in Syria. Similar to the Dutch Operation Context case, Belgium also identified a recruitment ring in its midst, *Sharia4Belgium*, and prosecuted 45 members (many *in absentia*) for terrorist offenses.²⁴⁵ In the United Kingdom, cases have been brought primarily under anti-terrorism legislation²⁴⁶ in connection with aspirational crimes and crimes of incitement.²⁴⁷

Corporate Actors

Some additional cases in Europe have been brought against corporate actors as well for their complicity in international crimes being committed in Syria. For example, the cement company LafargeHolcim and some of its principals (Bruno Pescheux, Frédéric Jolibois, Bruno Lafont, Eric Olsen, and Christian Herrault) have been questioned, detained, investigated and/or charged with financing a terrorist enterprise, complicity in war crimes and crimes against

²³⁹ Heba Habib and Louisa Loveluck, *A Syrian Soldier Has Been Sentenced for Battlefield Crimes. Why Did It Take So Long?*, WASH. POST, Oct. 1, 2017.

²⁴⁰ Anne Barnard, *Syrian Soldier is Guilty of War Crime, a First in the 6-Year Conflict*, N.Y. TIMES, Oct. 3, 2017.

²⁴¹ Stephanie Nebehay, *U.N. Investigators Hot on Trail of Syrian War Criminals*, U.S. NEWS, Mar. 8, 2019.

²⁴² *Syrian Ex-Intelligence Squad Flees to Switzerland*, SRF, Mar. 28, 2018, <https://www.srf.ch/news/international/justiz-ingeschaltet-syrischer-ex-geheimdienst-kader-fluechtet-in-die-schweiz>.

²⁴³ *Revelations about TRIAL International's Investigation*, TRIAL INTERNATIONAL (Sept. 25, 2017).

²⁴⁴ See Trial International, *Is Switzerland Becoming a Safe Haven for War Criminals?* (Sept. 18, 2018) (noting allegations that the Office of the Attorney General has come under pressure from the Federal Department of Foreign Affairs).

²⁴⁵ *Sharia4Belgium Trial: Belgian Court Jails Members*, BBC, Feb. 11, 2015.

²⁴⁶ See Counter Terrorism and Security Act, c. 6, 2015 (Eng.), <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>.

²⁴⁷ For information on British subjects who have been prosecuted in the United Kingdom, died in battle, or still operating in theater, see *Tracking Britain's Jihadists*, BBC, May 21, 2015.

humanity, and forced labor (among other charges). The suit is based on the company's breach of an EU embargo on Syrian oil by Lafarge's cement factory in northern Syria, where ISIL was operating, and the endangerment of its employees.²⁴⁸ It is alleged that the company paid millions to ISIL in order to further its operations knowing that ISIL was engaged in atrocities. On behalf of former Lafarge Syrian employees, the case was initiated by ECCHR and Sherpa, a French NGO devoted to representing victims of economic crimes.²⁴⁹ This marks the first time that a parent corporation has been criminally indicted for crimes against humanity, an outcome allowed by French law, although those charges were eventually dismissed.²⁵⁰ Lawyers representing Yazidi victims of ISIL crimes have recently sought or been granted civil party status in the case.²⁵¹

Similarly, Qosmos, a French software company, has been deemed an "assisted witness" (a step that can precede a formal indictment) for its possible complicity in torture for allegedly selling surveillance and interception equipment to the Syrian government that was used to identify, track, and arrest members of the opposition. Qosmos denied the allegations and filed a defamation suit against the human rights organizations that initiated the complaint.²⁵² ECCHR also filed a complaint against a German joint venture, Utimaco, in 2017; however, prosecutors refused to open an investigation.²⁵³ Flemish companies were convicted in Belgium for illegally exporting chemicals, including one that is a component of sarin gas.²⁵⁴ A consortium of civil society actors, including the Syrian Archive, has filed an additional complaint against other German, Swiss, and Belgian companies asking prosecutors to commence an investigation into a 2014 shipment of chemical weapons precursors.²⁵⁵ These European cases implicate E.U. regulations programs that restrict imports and exports to Syria of weapons, certain dual use items, and anything that "might be used for internal repression," among other sanctions.²⁵⁶

The United States

Turning to cases outside of Europe, although the U.S. Department of Justice boasts a dedicated Human Rights & Special Prosecutions Unit²⁵⁷ as well as a robust suite of universal jurisdiction statutes, there have been very few international crimes prosecutions in the United

²⁴⁸ Liz Alderman, *France Investigates Lafarge Executives for Terrorist Financing*, N.Y. TIMES, Dec. 8, 2017.

²⁴⁹ See ECCHR, *Lafarge in Syria—Accusations of Complicity in Grave Human Rights Violations*, <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>.

²⁵⁰ See C. Pén. Art.121-2 (Fr.) ("Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives"); *Lafarge Charged with Complicity in Syria Crimes Against Humanity*, THE GUARDIAN, June 28, 2018.

²⁵¹ Lin Taylor, *Yazidi Women Seek to Join Case Against French Company Accused of Funding Islamic State*, REUTERS, Nov. 30, 2018.

²⁵² The complaint was originally brought by the Fédération Internationale des Droits de l'Homme (FIDH) and the Ligue des Droits de l'Homme (LDH). See Business & Human Rights Resource Centre, *Qosmos Investigation (re Syria)*, <https://www.business-humanrights.org/en/qosmos-investigation-re-syria>.

²⁵³ ECCHR, *Surveillance in Syria: European Firms may be Aiding and Abetting Crimes Against Humanity*, <https://www.ecchr.eu/en/case/surveillance-in-syria-european-firms-may-be-aiding-and-abetting-crimes-against-humanity/>.

²⁵⁴ Daniel Boffey, *Belgian Firms Prosecuted over Syria Chemical Exports*, THE GUARDIAN, Apr. 18, 2018.

²⁵⁵ Open Society Justice Initiative, *German & Belgian Prosecutors Urged to Investigate Chemical Shipments to Syria*, June 3, 2019.

²⁵⁶ E.U. Council Regulation No. 36/2012, Chap. II (Jan. 18, 2012) (restricting, in addition, participation in infrastructure projects and financing certain enterprises).

²⁵⁷ Department of Justice, Human Rights and Special Prosecutions (HRSP), <https://www.justice.gov/criminal-hrsp>.

States.²⁵⁸ One exception is the case against Chuckie Taylor, the son of warlord Charles Taylor of Liberia who was sentenced to life imprisonment by the Special Court for Sierra Leone. Taylor *files* was convicted of torture in a U.S. court and subjected to the same punishment as his father.²⁵⁹ Prior to the outbreak of the Syrian war, most U.S. universal jurisdiction cases involved terrorism and piracy statutes, including cases with little tangible nexus at all to the United States. Most salient are the Al Shabaab cases. For example, Al Shabaab Operative, Eritrean citizen, and Swedish resident Mohamed Ibrahim Ahmed pled guilty²⁶⁰ and was sentenced in March 2013 to 111 months in prison²⁶¹ for conspiring to provide material support to terrorists²⁶² and for receiving military training from Al Shabaab.²⁶³ Congress passed the latter statute after it became clear that it might be difficult to prosecute U.S. citizen John Walker Lindh for joining the Taliban in the absence of other overt criminal conduct.²⁶⁴ Ahmed was arrested in Nigeria and transported to the United States for prosecution, but this did not divest the court of jurisdiction since that statute requires only that the defendant be “brought into or found” in the United States.²⁶⁵

A number of cases involving Syria have proceeded in U.S. courts, mostly involving U.S. foreign fighters, or wannabe foreign fighters, and their facilitators.²⁶⁶ So far, these have been dealt with through terrorism charges²⁶⁷ (particularly material support for terrorism) combined with various enhancement charges (e.g., the commission of a crime of violence with a weapon).²⁶⁸ These cases have yielded close to a 100% conviction rate (mostly following a guilty plea although more ISIL cases go to trial than ordinary criminal cases).²⁶⁹ For example, U.S. citizen Mohamad Jamal Khweis was convicted by a jury and sentenced to 20 years in prison for providing material support to ISIL.²⁷⁰ Additional cases involve several women who have been charged with terrorism-related crimes in consort with their romantic partners.²⁷¹ Still other cases have been closed following the death of the suspect. For example, the FBI issued a \$50,000 reward for information

²⁵⁸ See generally Beth Van Schaack, *The Parallels between South African and U.S. Law on Universal Jurisdiction*, JUST SECURITY (Dec. 16, 2013).

²⁵⁹ See Elise Keppler, Shirley Jean & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr.*, 15 HUM. RTS. BRIEF 18 (2008).

²⁶⁰ *Eritrean-born Man Tied to Terror Group Sentenced to more than 9 Years*, CNN, Mar. 23, 2013.

²⁶¹ Fed. Bureau of Investigations, *Al Shabaab Operative Sentenced in Manhattan Federal Court to 111 Months in Prison for Conspiring to Support and Receive Military-Type Training from a Foreign Terrorist Organization*, Mar. 27, 2013.

²⁶² 18 U.S.C. § 2339A, 18 U.S.C. § 2339B.

²⁶³ 18 U.S.C. § 2339D.

²⁶⁴ Beth Van Schaack, *John Walker Lindh’s Legacy: To Join The Fight Is Criminal*, JUST SECURITY, Sept. 5, 2014.

²⁶⁵ *U.S. v. Ahmed et al.*, 2011 U.S. Dist. LEXIS 123182, at *4–5 (S.D.N.Y. Oct. 21, 2011) (“Both the material support and the military-type training statutes explicitly grant extraterritorial jurisdiction, as follows: extraterritorial jurisdiction may be exercised when the ‘offender is brought into . . . the United States’”).

²⁶⁶ George Washington University’s Program on Extremism has tracked these cases and counts 182 prosecutions as of July 2019. See <https://extremism.gwu.edu/cases>.

²⁶⁷ CENTER ON NATIONAL SECURITY, *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES: THE ISIS CASES* (March 2014–August 2017) (Karen J. Greenberg ed., 2017).

²⁶⁸ 18 U.S.C. § 924(c).

²⁶⁹ Greenberg, *supra* note 266, at 13, 27–28. For updated statistics on these cases, see Counter-Terrorism Center at Fordham Law, Terrorism Database and Publications, <https://www.centeronnationalsecurity.org/research/>.

²⁷⁰ Department of Justice, *American Sentenced to 20 Years for Joining ISIS* (Oct. 27, 2017), <https://www.justice.gov/opa/pr/american-sentenced-20-years-joining-isis>. Goran Shakhawan & Mewan Dolamari, *Exclusive Interview with the American-Born ISIS Fighter*, KURDISTAN 24, Mar. 17, 2016.

²⁷¹ See *Virginia Woman Sentenced for Making False Statements in an International Terrorism Investigation*, FBI (May 11, 2015), <https://www.fbi.gov/contact-us/field-offices/richmond/news/press-releases/virginia-woman-sentenced-for-making-false-statements-in-an-international-terrorism-investigation>.

leading to the capture of Ahmad Abousamra, a U.S.-Syrian national who ran ISIL's *Dabiq* magazine.²⁷² He was reportedly killed in an airstrike in January 2017.²⁷³

Notwithstanding this activity, the United States has not asserted jurisdiction over several high-profile cases involving U.S. nationals. For example, Nasrin As'ad Ibrahim Bahar (a.k.a. Umm Sayyaf), the widow of ISIL leader and *financier* Abu Sayyaf, was captured in a raid on her Syrian home by U.S. special forces and transferred to Kurdish custody.²⁷⁴ She has been convicted of terrorism in Iraq. She has also been charged in the United States with participating in a conspiracy to provide material support to a foreign terrorist organization under a statute with a broad extraterritorial reach.²⁷⁵ The United States could additionally charge her with torture,²⁷⁶ human trafficking,²⁷⁷ or genocide,²⁷⁸ given her admitted involvement in the enslavement of Yazidi women.²⁷⁹ She could also be prosecuted for war crimes²⁸⁰ because of her participation in the torture and rape of a U.S. citizen by ISIS leader Abu Bakr al-Baghdadi, among others: humanitarian aid worker Kayla Mueller.²⁸¹ The United States' War Crimes Act of 1996 gives federal courts jurisdiction over war crimes committed by or against U.S. persons.²⁸²

Such additional charges have not been forthcoming, for reasons that have not been made public. One explanation may relate to the limits on U.S. extraterritorial jurisdiction and extradition. For example, torture and genocide charges cannot currently be levelled against Sayyaf, because she is not yet "present in" the United States, as is required by those statutes. Even if the United States were to seek her extradition, the principle of specialty creates a bit of a catch-22: the United States cannot charge someone with some international crimes unless they are "present in" the United States, but authorities cannot seek someone's extradition unless they are formally charged. The rule of specialty then requires the state seeking extradition to prosecute the person only for the charges and factual allegations that served the basis for the extradition, request unless the rendering state consents to more charges.²⁸³ Defendants have standing to raise a violation of the

²⁷² Fed. Bureau of Investigations, Most Wanted, Ahmad Abousamra, https://www.fbi.gov/wanted/wanted_terrorists/ahmad-abousamra. Michele McPhee and Brian Ross, *Official: American May be Key in ISIS Social Media Blitz*, ABC NEWS, Sept. 3, 2014.

²⁷³ John Hall, *Two US Jihadis who made ISIS Propaganda Videos—including one on the FBI's Most Wanted Terrorist List—are Killed in Iraqi Air Strike*, DAILY MAIL, June 1, 2015.

²⁷⁴ Barbara Starr, et al., *Abu Sayyaf, Key ISIS Figure in Syria, Killed in U.S. Raid*, CNN, May 17, 2015. See John Reed, *Background Reading on Umm Sayyaf's Transfer to Kurdish Authorities*, JUST SECURITY (Aug. 7, 2015).

²⁷⁵ 18 U.S.C. § 2339B (2015). See Criminal Complaint, United States v. Nisreen Assad Ibrahim Bahar (E.D. Va. Feb. 8, 2016) (No. 1:16mj63), available at <https://www.justice.gov/opa/file/822211/download> [hereinafter *Sayyaf Criminal Complaint*].

²⁷⁶ 18 U.S.C. § 2340A ("There is jurisdiction over the activity prohibited in subsection (a) if—...(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.").

²⁷⁷ See United States v. Baston, 818 F.3d 651, 669–70 (11th Cir. 2016) (upholding constitutionality of statute under domestic and international law).

²⁷⁸ 18 U.S.C. § 1091.

²⁷⁹ See Sayyaf Criminal Complaint, *supra* note 274, ¶ 16.

²⁸⁰ 18 U.S.C. § 2441.

²⁸¹ Other U.S. citizens have been tortured and killed in Syria, which could give rise to legal action in the United States. Conor Finnegan, *Chicago Woman Believed to have been Tortured, Killed in Syria: Human Rights Group*, ABC NEWS, Dec 6, 2018.

²⁸² See Beth Van Schaack, *Iraq and Syria: Prospects for Accountability*, JUST SECURITY, Feb. 22, 2016 (noting potential for Sayyaf to be prosecuted in the United States).

²⁸³ *United States v. Rauscher*, 119 U.S. 407, 430 (1886) ("a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty").

rule of specialty.²⁸⁴ Iraq would thus have to waive the specialty principle in order for the United States to seek Sayyaf’s extradition and then add potential torture, genocide, or trafficking charges once she is officially “present in” the United States.²⁸⁵ The Rome Statute, for example, envisions that states may waive specialty and, in fact, encourages them to do so to allow the ICC to prosecute suspects for the full scope of their criminal behavior.²⁸⁶ At the moment, and by contrast, there is no such bar to adding war crimes charges to an extradition request. Although the U.S. War Crimes Act²⁸⁷ does not go as far as it could under international law,²⁸⁸ it does give U.S. courts clear jurisdiction over war crimes committed by *or against U.S. citizens*. Included in the list of war crimes are various forms of harm to civilians taking no active part in hostilities, crimes that are subject to capital punishment if death results to the victim,²⁸⁹ which liberates these charges from any statute of limitations.²⁹⁰

It remains to be seen whether Sayyaf will be extradited to the United States to stand trial on any additional charges.²⁹¹ There is a 1934 extradition treaty between Iraq and the United States that has been used sparingly.²⁹² A major impediment is that the 2005 Iraqi Constitution seems to prevent the extradition of Iraqi nationals at Article 21: “No Iraqi shall be surrendered to foreign entities and authorities.”²⁹³ The Constitution also requires, however, that Iraq must meet its international obligations.²⁹⁴ There is some precedent for getting around this apparent constitutional contradiction. Two Iraqi nationals, for example, were extradited to the United Kingdom after committing a horrific honor crime in London and then fleeing to Iraq. The Iraqi regional felonies court ruled that the two would not face any due process violations were they to be extradited and

²⁸⁴ *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988) (“A person extradited may raise whatever objections the extraditing country would have been entitled to raise.”).

²⁸⁵ See *United States v. Stokes*, 726 F.3d 880, 889 (7th Cir. 2013) (“It is well-established that the Rule of Specialty may be waived by the surrendering country.”).

²⁸⁶ See Article 101:

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court. . . . States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Rome Statute, Article 101.

²⁸⁷ 18 U.S.C. § 2441(b).

²⁸⁸ See Beth Van Schaack, *United States War Crimes Statute & Sri Lanka*, JUST SECURITY (May 20, 2014).

²⁸⁹ 18 U.S.C. § 2441(a).

²⁹⁰ 18 U.S.C. § 3281.

²⁹¹ It has been alleged that the U.S. charges against her are “more of an ‘insurance policy’ in case Iraqi officials fail to charge her or she is ever transferred to another country or she escapes prison.” N.A. Yousseff & S. Harris, *Feds Charge ISIS Widow in American’s Death but Won’t Say Who Killed Her*, THE DAILY BEAST, Feb. 8, 2016.

²⁹² See Ashley Deeks, *Dusting off the U.S.-Iraq Extradition Treaty?*, LAWFARE (May 11, 2012).

²⁹³ Iraq Constitution (2005), available at https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en. See also Criminal Proc. Code of 1971, as amended March 14, 2010, Art. 358(4) (Iraq).

²⁹⁴ *Id.* at art. 8 (“Iraq shall observe the principles of good neighborliness, adhere to the principle of noninterference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and respect its international obligations.”).

that they had forfeited their rights to non-surrender by virtue of leaving and then re-entering Iraq illegally and committing a murder while abroad.²⁹⁵

Another significant case with a strong U.S. nexus involves the so-called Beatles—El Shafee Elsheikh and Alexanda Amon Kotey—two British subjects formerly in SDF control who are discussed in chapter 4 because they fall within the ICC’s personal jurisdiction as well.²⁹⁶ The two were reportedly involved in the killing of U.S. journalists, including James Foley, who was abducted in 2012. U.S. personnel have interrogated the two men and confirmed their identities. Foley’s mother has poignantly urged the United States to prosecute her son’s killers,²⁹⁷ although the families have called on U.S. officials not to imprison the men at the Guantánamo Bay Naval Base or subject them to the death penalty.²⁹⁸ The United States has the necessary legal framework in place to prosecute both captured men for the war crime of killing a protected person.²⁹⁹ Because the Foleys received multiple ransom demands,³⁰⁰ the pair could also be prosecuted for hostage taking.³⁰¹

As Turkish forces swept into northern Syria after U.S. troops were pulled aside, they made plans to take custody of several “high value” ISIL detainees. The Beatles were among them.³⁰² At the moment, the plan seems to be for the Beatles to eventually be tried in the United States, an arrangement that drew criticism when it appeared that the United Kingdom was willing to provide mutual legal assistance without seeking assurances that the pair would not be subject to capital punishment in the event of their conviction.³⁰³ On a petition filed by Elsheikh’s mother, the U.K. High Court of Justice ruled that it was lawful for the U.K. Home Secretary to authorize the provision of mutual legal assistance to a foreign state for offenses that carry the death penalty without requiring such assurances.³⁰⁴ The issue may ultimately go to the judges of the European Court of Human Rights,³⁰⁵ which have ruled in the past that extraditing a person to the United States where he or she might land on death row for extended periods of time violates the European Convention on Human Rights’ prohibition of torture and other forms of cruel, inhuman, and degrading treatment or punishment.³⁰⁶ With the two in U.S. custody, however, any remedy remains speculative.

The United States has never leveled charges under its War Crimes Act. The brutal mistreatment and murders of Foley, Sotloff, Kassig, Mueller, and other U.S. citizens in Syria offer an opportunity to activate this statute. Gaining physical custody of the accused often proves to be a challenge when it comes to war crimes trials. With Elsheikh and Kotey now in the hands of U.S.

²⁹⁵ Karen McVeigh, ‘Honour’ Killing: Pressure Grows on UK to Extradite Suspect from Iraq, THE GUARDIAN, Nov. 22, 2007; Extradited Iraqi Charged with Honour Killing, THE TELEGRAPH, June 30, 2009.

²⁹⁶ A third Beatle was prosecuted in Turkey.

²⁹⁷ Diane & John Foley et al., Opinion, *Justice for Our Children, Killed by ISIS*, N.Y. TIMES, Feb. 16, 2018.

²⁹⁸ *Slain American’s Mom Reacts to Capture of Alleged ISIS Executioners*, CBS NEWS, Feb. 9, 2018.

²⁹⁹ See Beth Van Schaack, *Attacks on Journalists A War Crime*, JUST SECURITY (Aug. 20, 2014).

³⁰⁰ Rukmini Callimachi, *Before Killing James Foley, ISIS Demanded Ransom from U.S.*, N.Y. TIMES, Aug. 20, 2014.

³⁰¹ 18 U.S.C. § 1203.

³⁰² Beth Van Schaack & Julia Brooks, “With a Little Help from our Friends”: Prosecuting the ISIL “Beatles” in U.S. Courts, JUST SECURITY (Oct. 22, 2019).

³⁰³ Yasmeen Serhan, *ISIS is Shaking Britain’s Anti-Death Penalty Resolve*, THE ATLANTIC, July 24, 2018.

³⁰⁴ R. (on the application of El Gizouli) v. Sec. State Home Dept., [2019] EWHC 60 (Admin) (Eng.).

³⁰⁵ See Antonios Tzanakouloulos, *The “ISIS Beatles” and “Non-Territorial” Applications of the European Convention of Human Rights*, JUST SECURITY (Dec. 17, 2018).

³⁰⁶ *Soering v. United Kingdom*, App. No. 14038/88, 11 EHRR 439 (July 9, 1989).

forces, that impediment is diminished. Furthermore, if these two can be linked to the videotapes of these deaths or identified by former hostages, such as French journalist Nicholas Henin who escaped ISIL custody, the Department of Justice will have direct evidence of their complicity in the deaths of U.S. citizens. In addition, the journalists were allegedly guarded by French-born Mehdi Nemmouche, who was convicted in Belgium for his involvement in the murder of patrons at the Brussel Jewish Museum in 2014.³⁰⁷ As such, this is not an opportunistic battlefield capture of anonymous fighters with no direct evidence of their involvement in war crimes, but rather a case involving notorious violations of the law of armed conflict. In any case, if the prospect of a war crimes prosecution is too daunting for the DOJ, the federal penal code also allows for the prosecution of the murder of any U.S. citizen abroad so long as it can be shown that the act “was intended to coerce, intimidate or retaliate against a government or a civilian population”³⁰⁸—a caveat easily satisfied in these cases. In any of these scenarios, the families of the victims could intervene in the case under the Crime Victims’ Rights Act (CVRA), which grants victims certain procedural rights in criminal prosecutions, such as the right to be present and to be reasonably heard.³⁰⁹

In September 2017, the United States took custody of one U.S. citizen-foreign fighter, initially referred to as “John Doe,” from U.S.-backed Kurdish forces in Syria.³¹⁰ For thirteen months, Doe’s fate remained uncertain, and he was the subject of *habeas corpus* litigation by the American Civil Liberties Union (ACLU).³¹¹ Notwithstanding the statutes identified above, there was some question about whether John Doe, who later was determined to be a joint U.S.-Saudi citizen named Abdulrahman Ahmad Alsheikh, could be prosecuted given the evidence on hand.³¹² Ultimately, he was released to Bahrain as part of a confidential settlement agreement, which also involved the cancellation of his U.S. passport.³¹³

To the north, Boutros Massroua, a Lebanese citizen is defending against charges in Canada for complicity in crimes against humanity in connection with his work repairing vehicles for ISIL.³¹⁴ Canadian authorities are now arguing that he should have been barred from entering Canada as a result of his affiliation with the terror group. This marks one of the first cases in which atrocity crimes charges have been brought against ISIL members. On appeal, Massroua is pressing his claim that he worked for ISIL under duress—a defense that has been rejected by two lower courts.

³⁰⁷ Christopher Dickey, *French Jihadi Mehdi Nemmouche is the Shape of Terror to Come*, DAILY BEAST, July 12, 2017.

³⁰⁸ 18 U.S.C. § 2332(d).

³⁰⁹ 18 U.S.C. § 3771. See Jefri Wood, *The Crime Victims’ Rights Act of 2004 and the Federal Courts*, FEDERAL JUDICIAL CENTER (June 2, 2008).

³¹⁰ Betsy Woodruff & Spencer Ackerman, *U.S. Military: American Fighting for ISIS ‘Surrenders’*, THE DAILY BEAST, Sept. 14, 2017.

³¹¹ See *ACLU v. Mattis*, Case No. 17-cv-2069 (TSC), (D.C. Dist. Col. 2017), <https://www.documentcloud.org/documents/4336082-ACLU-v-Mattis-Mem-Op.html> (rejecting the government’s argument that the ACLU lacked standing to proceed as Doe’s “next friend”); Deb Riechmann, *ACLU Challenges Detention of American ‘John Doe’ Captured in Syria*, MIAMI HERALD, Oct. 5, 2017.

³¹² Marty Lederman, *Three Quick Observations on the U.S. Citizen ISIL Detainee*, JUST SECURITY (Oct. 6, 2017).

³¹³ Charlie Savage et al., *American ISIS Suspect is Freed After Being Held More Than a Year*, N.Y. TIMES, Oct. 29, 2018; Jonathan Hafetz, *U.S. Citizen, Detained without Charge by Trump Administration for a Year, Is Finally Free*, ACLU (Oct. 29, 2018).

³¹⁴ Stewart Bell, *The ISIS Mechanic: Man now Living in B.C. Fixed Trucks for Terror Group. Is he Complicit in War Crimes?* GLOBAL NEWS, Apr. 25, 2019.

Mutual Legal Assistance

The crisis in Syria has helped to activate and lessen the friction within multilateral systems of mutual legal assistance. Interpol has established a war crimes directorate and has an existing cooperation agreement with the ICC, which provides for the exchange of information and analysis about international crimes and the whereabouts of ICC fugitives and allows the ICC-OTP to use Interpol's telecommunications system.³¹⁵ The Office of the Prosecutor can request Interpol to circulate its various notices: red concerning ICC defendants, blue seeking supplementary information, yellow for tracing missing persons, and black for identifying corpses.³¹⁶ Interpol entered into similar arrangements with other international and hybrid tribunals, including the SCSL and STL. So far, however, Interpol has not been engaged when it comes to issuing red notices involving Syria (the closest thing that the international community has to an international arrest warrant).³¹⁷

More promising, European states have begun to utilize joint investigative teams (JITs) to coordinate investigations and the provision of mutual legal assistance around transnational criminal events.³¹⁸ A JIT is an “international cooperation tool based on an agreement between competent authorities—both judicial ... and law enforcement—of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved States.”³¹⁹ One important example is the JIT convened to investigate the downing of Malaysian Airlines Flight MH17,³²⁰ apparently shot down by Ukrainian separatists with a Russian-made missile. That JIT includes representatives from the five states most impacted upon by the attack: the Netherlands (which lost 196 nationals), Australia, Belgium, Malaysia, and Ukraine. The JIT has benefited from the work of the Bellingcat collective,³²¹ which has been researching the open source information available on the crash and has made some important discoveries about key figures involved.³²² Another JIT devoted to Syria helped lead to the indictment and apprehension of high-level regime figures discussed above.³²³

In 2011, the Dutch announced an initiative to create a new Mutual Legal Assistance Treaty for International Crimes, which would encompass genocide, crimes against humanity, and select

³¹⁵ Co-operation Agreement Between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization—INTERPOL (Mar. 22, 2005), <https://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements/Global-Organizations>.

³¹⁶ *Id.* at art 4.

³¹⁷ Red notices identify persons who are sought for arrest and extradition. Interpol circulates red notices to member countries to facilitate capture and transfer to the state that issued the original warrant. Goldberg, *supra* note 17.

³¹⁸ See Europol, *Joint Investigation Teams*, <https://www.europol.europa.eu/activities-services/joint-investigation-teams>; Council Resolution 2017/C 18/01, Council Resolution on a Model Agreement for Setting up a Joint Investigation Team (JIT), 60 OFFICIAL J. E.U. (Jan. 19, 2017).

³¹⁹ COUNCIL OF THE EUROPEAN UNION, JOINT INVESTIGATIONS TEAMS PRACTICAL GUIDE 4 (Feb. 14, 2017); see also Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union art. 13, 2000/C 197/01.

³²⁰ Openbaar Ministerie, National Public Prosecutor's Office, *Update in Criminal Investigation MH17 Disaster* (May 24, 2018).

³²¹ Openbaar Ministerie, *Reaction Joint Investigative Team to Information Bellingcat* (Dec. 8, 2017), <https://www.om.nl/onderwerpen/mh17-crash/@101329/reaction-joint/>.

³²² See, e.g., Bellingcat, *Russian Colonel General Identified as Key MH17 Figure* (Dec. 8, 2017).

³²³ *Syrians held in Germany for Suspected Crimes Against Humanity*, BBC, Feb. 13, 2001.

war crimes.³²⁴ It draws its inspiration from previous MLATs devoted to transnational crimes that fall under the purview of the U.N. Office on Drugs & Crime (UNODC), such as the U.N. Convention against Transnational Organized Crime and its trafficking Protocols.³²⁵ It is unclear when this project will come to fruition; as it stands, states must utilize bilateral MLATs and extradition treaties to facilitate cooperation around the prosecution of international crimes in domestic courts.

Immigration Remedies

In addition to this range of counter-terrorism and international criminal charges, governments have also utilized immigration remedies (such as expulsion orders, entry bans, and passport or citizenship revocation) and other administrative mechanisms (such as travel bans, area restrictions, and control orders) when faced with potential perpetrators either in their midst or attempting to enter the country.³²⁶ Indeed, immigration officials are on the frontlines in identifying potential perpetrators,³²⁷ who often end up inadvertently self-identifying in the context of their asylum proceedings.³²⁸ Governments are improving their ability to screen out individuals who have committed abuses; nonetheless, some perpetrators slip in, either because their names do not make it on a watch list or they misappropriate the identity of an innocent. This risk is inevitable given that the number of asylum seekers from conflict zones around the world is at its highest point in many decades.³²⁹

Accordingly, several states have set up special war crimes units within their immigration services.³³⁰ In Europe, states have established the European Asylum Office Exclusion Network to coordinate efforts to exclude individuals who fall within Article 1F of the 1951 Convention Relating to the Status of the Refugees.³³¹ Article 1F withholds the benefits of refugee protection from certain individuals if they have committed international crimes:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior

³²⁴ See generally Madaline George, *Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes*, OPINIO JURIS (Jan. 11, 2019).

³²⁵ U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

³²⁶ See Bérénice Boutin, *Administrative Measures Against Foreign Fighters: In Search of Limits and Safeguards*, International Centre for Counter-Terrorism (December 2016).

³²⁷ Redress/FIDH, *supra* note 16, at 12.

³²⁸ Langer & Eason, *supra* note 6, at 797 (noting that “65% of all the defendants ever to be tried on the basis of universal jurisdiction had sought asylum status in the prosecuting state”).

³²⁹ Imogen Foulkes, *Global Refugee Figures Highest Since WW2, UN Says*, BBC NEWS ONLINE, June 20, 2014.

³³⁰ See EU Directive 2003/335/JHA, *supra* note 22, at § 9 (urging member states to “ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes”). See also HRW, *The Long Arm*, *supra* note 16, at 7-10.

³³¹ Refugee Convention, *supra* note 117. See UNHCR, *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 (May 30, 1997).

to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.³³²

The Exclusion Network is empowered to submit potential perpetrators to prosecution rather than extradition if there are credible allegations against them.³³³

In the United States, there is the U.S. Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) Human Rights Violators and War Crime Unit (HRVWCU). The U.S. State Department and the Department of Homeland Security also manage the Consular Lookout and Support System (CLASS), which performs name checks against a massive database on visa and passport applicants to determine eligibility to enter the country.³³⁴

In addition to the international crimes set forth in Title 18, the U.S. Congress has enacted a range of immigration statutes aimed at the perpetrators of atrocity crimes. Although there are now a number legal barriers to entry into the United States for such individuals,³³⁵ these filters are imperfect. Indeed, in 2011, the Department of Homeland Security (DHS) estimated that there were almost 2,000 perpetrators in the United States.³³⁶ Collectively, U.S. immigration authorities allow the U.S. government to denaturalize,³³⁷ deport, remove, or pursue related remedies against individuals who commit fraud during an immigration proceeding or process, including while completing visa forms to come to the United States.³³⁸ The United States regularly invokes these statutes when it is impossible to prosecute a person for the underlying substantive crime due to a deficiency in substantive law (for example, if the conduct in question involves a mass killing that is not genocide or does not involve torture), some jurisdictional bar (such as the lack of universal jurisdiction over the offense), a constitutional infirmity (such as the prohibition against *ex post facto* prosecutions), evidentiary deficits, or other impediment.³³⁹

Immigration remedies offer an expedient solution to the presence of a perpetrator in our midst by preventing states from becoming a safe haven for human rights abusers. However, such remedies are unsatisfying when the underlying criminal conduct rises to the level of crimes against humanity. And they may be unavailable if the individual can advance credible *non-refoulement* claims, which may be a factor explaining the upsurge of universal jurisdiction cases in Europe involving Syrian and Iraqi defendants. Administrative proceedings, and even criminal convictions

³³² Refugee Convention, *supra* note 117, at art. 1F. Article 33 of the Convention addresses individuals who have already received refugee status but who later prove to be associated with criminal conduct and removed the prohibition of *non-refoulement*. *Id.*

³³³ See European Asylum Support Office (EASO), "EASO Exclusion Network," <https://www.easo.europa.eu/easo-exclusionnetwork-0>.

³³⁴ See U.S. Department of State, 9 FOREIGN AFFAIRS MANUAL § 303.3, <https://fam.state.gov/fam/09FAM/09FAM030303.html>.

³³⁵ See Presidential Proclamation 8697—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses (Aug. 4, 2011).

³³⁶ Statement of John P. Woods, Deputy Assistant Director, National Security Investigations Division, Homeland Security Investigations, U.S. Immigration and Customs Enforcement, Before the House Committee on Foreign Affairs, Tom Lantos Human Rights Commission, No Safe Haven: Law Enforcement Operations Against Human Rights Violators in the US (Oct. 12, 2011).

³³⁷ 18 U.S.C. § 1425 (1948) (Procurement of Citizenship or Naturalization Unlawfully).

³³⁸ 18 U.S.C. § 1546 (1948) (Fraud and Misuse of Visas, Permits, and Other Documents); 18 U.S.C. § 1001 (1948) (false statements); 18 U.S.C. § 1621 (1948) (perjury). For a list of such statutes, see <https://www.justice.gov/criminal-hrsp/immigration-crimes>.

³³⁹ See Alexandra Insinga, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SECURITY (Nov. 7, 2017).

for immigration fraud, do not carry the stigma of the substantive penal law or allow for the imposition of penalties commensurate with the underlying criminal conduct. These statutes also have short statutes of limitation, which may hinder their utility in the atrocity crimes context given that perpetrators may live undercover for years before being recognized.³⁴⁰ Moreover, the resort to such remedies may result in merely returning a perpetrator to a national system that lacks the legal framework, juridical capacity, or political will to prosecute for the substantive crime or where the suspect's reintroduction could exert a destabilizing effect or result in the intimidation or re-traumatization of victims. Finally, most immigration remedies are not be effective against a state's own citizens.³⁴¹ All that said, these cases provide a measure of accountability—albeit imperfect—as a last resort.

Conclusion

Although there has been no movement at the international level to prosecute those responsible for war crimes and crimes against humanity in Syria, domestic prosecutorial authorities and courts are stepping up to pursue these cases. In so doing, courts providing a measure of justice while also developing important jurisprudence and capacities to undertake these cases.

At the same time, this chapter demonstrates that there are myriad challenges to bringing international law cases in national courts. These cases are resource intensive. The evidence is complicated and difficult to amass. Crime scenes may be inaccessible and the territorial state may withhold cooperation or affirmatively obstruct investigations, as is the case with Syria. Evidence may be compromised or ambiguous. Witnesses and victims may be reluctant to come forward because they are terrified of retaliation by still-powerful individuals and distrustful of prosecutorial authorities generally. Witness protection measures remain rudimentary on the international level. Indeed, the name of one of the Yezidi witnesses made public during the course of an investigation by the German Federal Prosecutor.³⁴² Investigators and prosecutors may be unfamiliar with the conflict and the local culture, which hinders the gathering of evidence, the construction of a theory of the case, and the conduct of witness interviews, although the initiation of structural investigations has helped to alleviate this impediment in some national systems. Important evidence may be located in multiple jurisdictions, attesting to the importance of international cooperation and enhancing states' abilities (and obligations) to engage in mutual legal assistance. Even if these evidentiary impediments can be overcome, international crimes contain idiosyncratic elements that do not lend themselves to easy proof.

No matter how diligent, committed, and experienced national investigators and prosecutors are, war crimes trials in national systems will inevitably be limited and dependent upon significant serendipity when it comes to the presence of perpetrators, victim witnesses, and evidence. But, at the moment, these cases are the most important outlet for justice for Syria.

³⁴⁰ See 18 U.S.C. § 3282(a) (2006) (five-year statute of limitations for noncapital offenses); 18 U.S.C. § 3291 (1994) (ten-year limitation for crimes involving nationality, citizenship, and passports).

³⁴¹ Christophe Paulussen, *Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive*, INTERNATIONAL CENTRE FOR COUNTER-TERRORISM (Oct. 17, 2018).

³⁴² See Free Yezidi Foundation, *Witness in Universal Jurisdiction Proceedings Ought to Be Protected* (Nov. 7, 2018), <https://www.freeyezidi.org/blog/witness-in-universal-jurisdiction-proceedings-ought-to-be-protected/>.