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Hilly Moodrick-Even Khen

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# REVISITING UNIVERSAL JURISDICTION: THE APPLICATION OF THE COMPLEMENTARITY PRINCIPLE BY NATIONAL COURTS AND IMPLICATIONS FOR EX-POST JUSTICE IN THE SYRIAN CIVIL WAR

*Hilly Moodrick-Even Khen\**

## ABSTRACT

*In this Article, I revisit the concept of universal jurisdiction in making a case for the application of mitigated universal jurisdiction in general and in the Syrian civil war case in particular, through the jurisdiction of sovereign states and their national courts. I argue that the international community will sooner or later demand that the perpetrators of the heinous war crimes and crimes against humanity be held accountable. However, since the jurisdiction of the International Criminal Court (ICC) will probably be impeded by the United Nations Security Council's veto, the international community might use another trajectory for prosecuting the perpetrators of the alleged crimes. One possibility is to rely on the principle of universal jurisdiction, in its mitigated form, according to which Syrian leaders can be prosecuted under the jurisdictions of foreign states.*

*I claim that mitigated universal jurisdiction, dependent mainly on its subordination to the principle of complementarity (also referred to as "subsidiarity" in the national legislation of some states), is still the best legal tool for doing ex-post facto justice with perpetrators of international core crimes in general and in the Syrian case in particular. This conclusion results from an analysis of Syrian society in Part IV, which reveals that the chances are high that post-conflict Syrian society would have great difficulty undertaking the legal trials of perpetrators of international core crimes in good faith. Therefore, universal jurisdiction could serve as a practical tool for prosecuting those perpetrators of crimes in other states.*

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\* Dr., Senior Lecturer of public international law in The Academic Center of Law and Science, Israel; LL.D, Hebrew University of Jerusalem (2007); M.A. in philosophy, *magna cum laude*, Tel Aviv University (2001), LL.B, The Interdisciplinary Center of Herzliya (2000); B.A. in humanities, Hebrew University of Jerusalem (1996). The author would like to thank the members of the editorial board of *Emory International Law Review* for their valuable comments on earlier drafts of this Article.

## INTRODUCTION

Since March 2011, Syria has been experiencing a devastating civil war,<sup>1</sup> which began as civil demonstrations for a democratic and liberal Syria<sup>2</sup> and deteriorated into a bloody armed conflict.<sup>3</sup> During this conflict, numerous war crimes and crimes against humanity have been perpetrated by both the regime's army (mainly the *shabbiha*, the Syrian security forces) and the troops of the various rebel groups.<sup>4</sup> The crimes include murder, torture, violence against civilians, and even the use of chemical weapons.<sup>5</sup> Sooner or later, the international community will demand that the perpetrators of these crimes be held accountable; however, an initiative to try President al-Assad at the International Criminal Court (ICC) was vetoed by Russia and China in the United Nations (U.N.) Security Council.<sup>6</sup> It seems, then, that the international community might use another trajectory for prosecuting the perpetrators of the alleged crimes. One possibility is to rely on the principle of universal jurisdiction, according to which Syrian leaders<sup>7</sup> can be prosecuted under the jurisdictions of foreign states. This principle would also work to pressure post-war Syrian society into prosecuting those responsible for committing international core crimes in its own courts—because if Syria fails to do so, it knows that other states will.<sup>8</sup>

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<sup>1</sup> Also referred to as “the Syrian uprising,” “the Syrian rebellion,” and in legal terms, a non-international armed conflict. In this Article it will be referred to as “the uprising” or “the war.”

<sup>2</sup> See FOUAD AJAMI, THE SYRIAN REBELLION xv (2012); Salwa Ismail, *The Syrian Uprising: Imagining and Performing the Nation*, 11 STUD. ETHNICITY & NATIONALISM 538, 539 (2011); Emma Lungren-Jörum, *Discourse of a Revolution: Framing the Syrian Uprising*, 3 ORTAGOĞU ETÜTLERİ 9, 11 (2012).

<sup>3</sup> Numerous reports of bodies of the United Nations appointed to investigate human rights violations in Syria review this deterioration. See, e.g., United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Rep. on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus, U.N. Doc. A/67/997-S/2013/553 (2013) [hereinafter Ghouta Report]; Human Rights Council, Report of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012) [hereinafter Indep. Int'l Comm'n Syrian Report 2012]; Human Rights Council, Report of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/25/65 (Feb. 12, 2014) [hereinafter Indep. Int'l Comm'n Syrian Report 2014].

<sup>4</sup> Indep. Int'l Comm'n Syrian Report 2012, *supra* note 3, at 16.

<sup>5</sup> Ghouta Report, *supra* note 3, at 2–3.

<sup>6</sup> Rep. of the S.C., at 2–3, U.N. Doc. A/68/663 (2014).

<sup>7</sup> I refer here both to those serving in President Al-Assad's regime and to those responsible for international crimes among the dissident armed groups in Syria.

<sup>8</sup> This claim in particular and the overall analysis made in this Article in general rest on the assumption that the conflict will not render a complete dissolution of the Syrian state. Nevertheless, it is of course possible that the current developments on the ground, such as the establishment of the Islamic State of Iraq and the Levant, will render changes in the political order or even dissolution of the Syrian state. For arguments supporting the assumption that Syria will not dissolve, see AJAMI, *supra* note 2, at 184–87.

In this Article, I revisit the concept of universal jurisdiction in making a case for the application of mitigated universal jurisdiction through the jurisdiction of sovereign states and their national courts.<sup>9</sup> I claim that mitigated universal jurisdiction, dependent mainly on its subordination to the principle of complementarity (also referred to as “subsidiarity” in the national legislation of some states), is still the best legal tool for doing ex-post facto justice with perpetrators of international core crimes—genocide, war crimes, and crimes against humanity—and apply my conclusions to the Syrian case.

Following this introduction, in Part I, I present and analyze the concept of mitigated universal jurisdiction. After a brief review of the rationale of universal jurisdiction, I focus on the justifications for its mitigated version. I claim that this concept has been accepted by the ICC and states that have incorporated universal jurisdiction into their national legislation because, as numerous scholars have argued, it addresses several interests: on the one hand, it prevents impunity and ensures due process of law; on the other, it secures the interests of reformed societies in their transition to democracy. It also serves to protect the rights of the accused and prevent their persecution by their own nation states, provided that the preconditioning of universal jurisdiction on the principle of subsidiarity is in itself limited by several parameters that ensure the legal procedure is executed in good faith.

In Part II, I explain why the concept of universal jurisdiction applied by the national courts, and not only by the ICC, is still relevant. I focus on situations in which the ICC cannot or would not interfere, and suggest that in these cases universal jurisdiction may be applicable by the national courts of sovereign states.

In Part III, due to the fact that both the ICC and national courts consider themselves “courts of second resort,” I discuss in depth the principle of complementarity, which serves as the cornerstone for the application of mitigated universal jurisdiction. I first examine this principle’s development under the ICC’s jurisdiction, as this principle was first formed by the Rome Statute and applied and interpreted by this court. Then, I review the principle’s application and interpretation in national courts, where it is mostly referred to as the principle of subsidiarity.<sup>10</sup>

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<sup>9</sup> This is true regardless of its possible application by the ICC or other international courts or tribunals.

<sup>10</sup> In Part III, I argue that the terms “complementarity” and “subsidiarity” may be used interchangeably. I also explain in this Part why I prefer to use “complementarity.” However, because “subsidiarity” is the term

In Part IV, I discuss the Syrian case. First, I provide a historical background of Syrian society, beginning with the establishment of the Syrian state through the French Mandate and continuing through the development of the Syrian state to the eruption of the 2011 uprising. I will focus here on the different sectarian, regional, and tribal loyalties within this society. By contrasting the cohesion of Syrian society with its factionalism, I will assess the potential ability and willingness of the Syrian society to conduct trials of war crime perpetrators in Syria. In this way, I examine the possible ramifications of this Article's analysis for the Syrian case. I argue that given the specific circumstances in Syria, the chances are high that post-conflict Syrian society would have great difficulty undertaking the legal trials of perpetrators of international core crimes in good faith. Therefore, universal jurisdiction could serve as a practical tool for prosecuting those perpetrators of crimes in other states. In the final section I present my conclusions.

## I. MITIGATED UNIVERSAL JURISDICTION

While the concept of universal jurisdiction is controversial, as will be shown in the following subsection, the concept of universal jurisdiction mitigated by the principle of complementarity (subsidiarity) that I promulgate in this Article is more prevalent and prompts fewer objections. Before exploring the core elements of this concept and describing its application by national courts and states' legislation, I will quickly review the unlimited version of this concept and refer to some of the concerns raised against it.

### A. *The Controversy Over the Concept of Universal Jurisdiction*

According to customary international law, universal jurisdiction is one of the generally accepted bases on which a state may assert extraterritorial jurisdiction.<sup>11</sup> Universal jurisdiction is based on the universality principle,

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used by most domestic jurisdictions, I will use it in Part III, in which I discuss the application of this principle by domestic jurisdictions.

<sup>11</sup> For an overview of the core international law instruments that pronounce this view, see generally Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 60 (Feb. 14); Institut de Droit Int'l, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity, and War Crimes, Aug. 26, 2005, [http://www.justitiaetpace.org/idiE/resolutionsE/2005\\_kra\\_03\\_en.pdf](http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_03_en.pdf) [hereinafter IDI Resolution]; Int'l Law Comm., Draft Code of Crimes Against Humanity and the Peace and Security of Mankind, U.N. Doc. A/CN.4/L.532 (1996); STEPHEN MACEDO, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2011). See also Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arms of the Law Undermine the Rule of Law?*, 13 MELBOURNE J. INT'L L. 122, 130 (2012).

defined by Ian Brownlie as a principle adopted by “[a] considerable number of states . . . usually with limitations . . . allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy.”<sup>12</sup> Another important aspect of universal jurisdiction is a very narrow, or even the lack of a specific, self-interest that should be protected by the state asserting universal jurisdiction<sup>13</sup>—in other words, when the offenses over which jurisdiction is exerted “are not deemed to constitute threats to the fundamental interests of the prescribing state, or, in appropriate cases, to give rise to effects within its territory.”<sup>14</sup>

Nevertheless, universal jurisdiction is a widely debated doctrine in international law.<sup>15</sup> This is most evident in the fact that states have not yet signed a general treaty on the doctrine of universal jurisdiction, nor have they agreed on written standards for its application.<sup>16</sup> Indeed, the international community has set some international legal foundations through the adoption of a considerable number of multilateral treaties dealing with international crimes (such as slave trade, slavery and forced labor, war crimes, drugs and terrorism) that demand the prosecution or extradition of the perpetrators,<sup>17</sup> as well as through resolutions of intergovernmental bodies,<sup>18</sup> official drafts, and studies.<sup>19</sup> In addition, and mainly in the last decade, states have legislated laws that endow them with the right for universal jurisdiction.<sup>20</sup> Lastly, universal jurisdiction is the legal principle at the foundation of international courts and

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<sup>12</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (6th ed. 2003).

<sup>13</sup> LUC REYDAMS, *UNIVERSAL JURISDICTION* 5 (2003) (presenting research on states that apply universal jurisdiction).

<sup>14</sup> Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 745 (2004).

<sup>15</sup> See *infra* notes 24, 25, 27, 28 and accompanying text.

<sup>16</sup> Claus Krefß, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. INT’L CRIM. JUST. 561, 562 (2006); REYDAMS, *supra* note 13, at 16.

<sup>17</sup> REYDAMS, *supra* note 13, at 43–68.

<sup>18</sup> For example, the U.N. Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity. *Id.* at 69.

<sup>19</sup> See, e.g., MACEDO, *supra* note 11; IDI Resolution, *supra* note 11; REYDAMS, *supra* note 13, at 73–78.

<sup>20</sup> See REDRESS & INT’L FED’N FOR HUMAN RIGHTS, *EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION: A STUDY OF THE LAW AND PRACTICE OF THE 27 MEMBERS OF THE EUROPEAN UNION* 2–4 (2010), [http://www.redress.org/downloads/publications/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union.pdf](http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf) [hereinafter *EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION*]; see also REYDAMS, *supra* note 13, at 81–226 (describing the universal jurisdiction in the municipal laws of fourteen states).

tribunals such as the ICC,<sup>21</sup> the International Criminal Tribunal for the former Yugoslavia,<sup>22</sup> and the International Criminal Tribunal for Rwanda.<sup>23</sup>

This controversial doctrine has invoked both support and criticism. The proponents of the doctrine mainly mention its role in securing the interests of “society at large . . . in defending the integrity and credibility of its legal order and what it considers its essential interests and values,”<sup>24</sup> thus preventing the impunity of “high-ranking dignitaries involved in actions showing a marked political dimension”<sup>25</sup> and expressing a firm commitment to the protection of human rights.<sup>26</sup> Its opponents, on the other hand, have claimed that universal jurisdiction prefers the victims’ interests over the rights of the accused, the most prominent of the latter being the right to avoid double jeopardy and to be protected from being persecuted by the authorities.<sup>27</sup> In addition, they contend that universal jurisdiction has been exerted mainly and manipulatively against relatively minor suspects and could not, therefore, achieve its highest goal—that is, to prevent impunity.<sup>28</sup> Other critics have warned against the possibility that a full application of the doctrine may inhibit the cathartic processes of rehabilitation and reconciliation following mass atrocity.<sup>29</sup> They also claim that universal jurisdiction may hinder the transition from authoritarianism to democracy and “the development and entrenchment of democratic institutions and attitudes” that “encourage a sense of self-government,”<sup>30</sup> enabled, for example, by conducting trials of perpetrators of atrocities in the perpetrators’ own state. This controversy has generated the emergence of more subtle forms of universal jurisdiction, whose supporters acknowledge the fundamental role of states exercising universal jurisdiction in “a capacity . . . of a trustee of the

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<sup>21</sup> Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, 2187 U.N.T.S. 2004 [hereinafter Rome Statute].

<sup>22</sup> Statute for the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

<sup>23</sup> Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 99, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

<sup>24</sup> Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 596, 597 (2003).

<sup>25</sup> Antonio Casesse, *Is the Bell Tolling for Universality?*, 1 J. INT’L CRIM. JUST. 589, 595 (2003).

<sup>26</sup> *Id.*

<sup>27</sup> George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 580, 582 (2003).

<sup>28</sup> Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 2–3 (2011).

<sup>29</sup> Diane F. Orenlichter, *The Future of Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 214, 236–38 (Stephen Macedo ed., 2004).

<sup>30</sup> Pablo De Greiff, *Comment: Universal Jurisdiction and Transitions to Democracy*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 124–26 (Stephen Macedo ed., 2004).

fundamental values of the international community,”<sup>31</sup> and seek, for the reasons explained below, for ways to limit the concept’s absolute nature.

### *B. Mitigated Universal Jurisdiction: Justifications*

In recent years, the doctrine of universal jurisdiction has been narrowed both in theory and in practice. Two important works have developed the theoretical grounds for a limited version of universal jurisdiction. The first was the 2001 Princeton Project.<sup>32</sup> Supporting the proponents of universal jurisdiction and yet aware of the principle’s challengers and critics,<sup>33</sup> a group of scholars and jurists in public international law, sponsored by Princeton University’s Program in Law and Public Affairs and other international law organizations,<sup>34</sup> published a work on universal jurisdiction that aimed to develop consensus principles on this doctrine in 2001.<sup>35</sup> Along with defining the scope and fundamentals of universal jurisdiction relating to issues such as immunity,<sup>36</sup> amnesty,<sup>37</sup> and the types of crimes the doctrine addresses,<sup>38</sup> the scholars also accepted the conditioning of the doctrine on the resolution of competing national jurisdictions and the concept of subsidiarity to national legal systems.<sup>39</sup> This can be described as a limited or mitigated version of universal jurisdiction. The second work was conducted by the Institute of International Law, whose 17th Commission accepted in 2005 a resolution on universal jurisdiction that conditioned this doctrine, *inter alia*, on the principle of subsidiarity.<sup>40</sup>

In addition to the research of these committees, other scholars have promulgated an application of a limited version of the universality principle.<sup>41</sup> In summary, they developed two concepts: “universality plus” and

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<sup>31</sup> Kreß, *supra* note 16, at 567.

<sup>32</sup> See generally MACEDO, *supra* note 11.

<sup>33</sup> “Universal jurisdiction holds out the promise of greater justice, but the jurisprudence of universal jurisdiction is disparate, disjointed and poorly understood. So long as that is so, this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice.” See *id.* at 23.

<sup>34</sup> These organizations include: the International Commission of Jurists, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Netherlands Institute of Human Rights. See *id.* at 19.

<sup>35</sup> *Id.* at 6.

<sup>36</sup> *Id.* at 31.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 28.

<sup>39</sup> *Id.* at 32.

<sup>40</sup> IDI Resolution, *supra* note 11, ¶¶ 3(c)–(d).

<sup>41</sup> See Cassese, *supra* note 25; Abi-Saab, *supra* note 24; Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 59 (Feb. 14).

“conditional universality.” The former prefers the jurisdiction of the state that has the most significant links to the crime;<sup>42</sup> the latter is a moderate conception of universality, according to which universal jurisdiction is applied only when the territorial or national state fails to act.<sup>43</sup> The mitigated version of universal jurisdiction emerged through the practice of those states that legislated laws of universal jurisdiction, applying both the idea of conditional universality<sup>44</sup> and that of universality plus.<sup>45</sup>

The arguments supporting mitigated universal jurisdiction and criticizing what is referred to as “*absolute* universal jurisdiction”<sup>46</sup> stem, nevertheless, from a point of departure that accepts the vitality of universal jurisdiction and does not aim to completely refute it. This perception rests, *inter alia*, on the fact that the goals of universal jurisdiction, especially preventing impunity from the perpetrators of international core crimes, are now universally endorsed not only by many scholars but also by significant courts and tribunals.<sup>47</sup> Hence, the arguments presented hereinafter acknowledge “the vital role [that] national courts . . . play in combating impunity even when traditional jurisdictional connections are absent,”<sup>48</sup> but they accept that these advantages apply only when legitimate domestic processes conducting genuine examinations of past atrocities are unavailable.

The scholarly criticism of universal jurisdiction, in sum, considers questions of legitimacy, consistency, and externalized justice.<sup>49</sup> The doubts over the legitimacy of universal jurisdiction, stemming from a presumption of bias when exerting universal jurisdiction, constitute a major consideration against its application. Most critics argue that universal jurisdiction is applied in courts of “developed countries pursuing dictators and war criminals from

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<sup>42</sup> Orenlichter, *supra* note 29, at 236.

<sup>43</sup> Cassese, *supra* note 25, at 595.

<sup>44</sup> See, e.g., *infra* Parts III.A.1, III.A.2, & III.A.4 (describing universal jurisdiction laws of Belgium, Germany, and France).

<sup>45</sup> See, e.g., *infra* Part III.A.3 (discussing Spanish legislation).

<sup>46</sup> Cassese, *supra* note 25, at 595.

<sup>47</sup> The ICC is the most obvious representative of these courts. See *Marcus v. Croatia*, no. 4455/10, ¶ 126, Eur. Ct. H.R. 2014 (affirming the conviction of the appellant because “where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible”).

<sup>48</sup> *Commentary to UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 27 (Stephen Macedo ed., 2004).

<sup>49</sup> See generally Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 357–74 (2003).

developing countries, but not the reverse.”<sup>50</sup> “The states seeking to apply universal jurisdiction are largely countries of the ‘global north,’” which implies that these activities are illegitimate and even neo-colonialist.<sup>51</sup> In a recent and comprehensive survey that aimed to cover all universal jurisdiction cases on international core crimes brought to justice since *Eichmann*,<sup>52</sup> Máximo Langer argues that states avoid prosecuting major perpetrators of international core crimes.<sup>53</sup> He contends that, given the substantial costs in terms of international relations paid by states applying universal jurisdiction, there are strong incentives for universal jurisdiction prosecuting states to concentrate on defendants who impose low international relations costs, as it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs.<sup>54</sup>

In addition to destabilizing the legitimacy of the doctrine of universal jurisdiction, the above argument also questions the doctrine’s consistency. Inconsistent standards, such as those applied by states deciding whether to apply universal jurisdiction in specific cases, give states a wide scope of action. They can “vex and harass their political opponents,”<sup>55</sup> while at the same time preserving their political interests and assets.<sup>56</sup>

While the arguments of (il)legitimacy or (in)consistency criticize universal jurisdiction in general, arguments of externalized justice more specifically suggest that universal jurisdiction is inferior to domestic mechanisms of justice in cases of societies in transition.<sup>57</sup> Globalized justice is based on the rationale that it “provides an antidote to the impunity that accomplished despots are likely to enjoy in the countries that endured their crimes.”<sup>58</sup> It thus may be the only solution when a state or a society is unwilling or unable to come to terms with the past because domestic justice is misled by the practice of amnesties or the state’s legal institutions are paralyzed and cannot act.<sup>59</sup> However, externalized global justice seems to ignore the processes of transitional justice

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<sup>50</sup> *Id.* at 367.

<sup>51</sup> *Id.* at 318.

<sup>52</sup> See generally CrimA 40/61 Attorney-General of the Gov’t of Isr. v. Eichmann 36 I.L.R. 227 (1968) (Isr.).

<sup>53</sup> Langer, *supra* note 28, at 5–6.

<sup>54</sup> *Id.*

<sup>55</sup> Sriram, *supra* note 49, at 370.

<sup>56</sup> Langer, *supra* note 28, at 5.

<sup>57</sup> See Orentlicher, *supra* note 29, at 232; Sriram, *supra* note 49, at 312, 375–76.

<sup>58</sup> Orentlicher, *supra* note 29, at 232.

<sup>59</sup> Sriram, *supra* note 49, at 376.

that have become prevalent since the 1970s in the form of truth commissions, local trials, hybrid courts, and other measures aimed at rehabilitation and reconciliation within societies that have suffered from atrocities.<sup>60</sup> These processes advance the transition to constitutional democracy<sup>61</sup> and incorporate the needs of those societies in transition as well as those of the victims of the crimes.<sup>62</sup>

Transitional societies have numerous urgent needs that can include achieving stability, developing and entrenching democratic institutions and attitudes,<sup>63</sup> and recovering from the implications of past mass atrocity, reconciliation, and rehabilitation.<sup>64</sup> Local prosecutions seem to serve those goals much better than external ones.<sup>65</sup> While internal prosecution may reinforce in-country democratic processes,<sup>66</sup> external prosecutions, by contrast, can contribute to weak judicial and state capacity.<sup>67</sup> In addition, “in-country justice . . . advance[s] a wounded nation’s recovery in the aftermath of mass atrocity”<sup>68</sup> and promotes justice because it channels the desire for vengeance over prior wrongs into a legal trajectory.<sup>69</sup>

Other advantages of local justice are related to assessing its ability to secure the needs of the victims of mass atrocities.<sup>70</sup> Although both external and internal justice make victims’ stories public, officially endorse the truth, and provide compensation to victims,<sup>71</sup> they both also exhibit some deficiencies. On the one hand, externalized justice better protects the interests of the victims in states where the new regime, established after the humanitarian crisis, is not democratic or fails in practice to secure human rights and the rule of law.<sup>72</sup> On the other hand, externalized justice may have other flaws. While external trials provide acknowledgement of the crime,<sup>73</sup> the sense of acknowledgment is much weaker and less pervasive when it is engendered by an outside

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<sup>60</sup> *Id.*

<sup>61</sup> Orentlicher, *supra* note 29, at 232; De Greiff, *supra* note 30, at 124–25.

<sup>62</sup> Sriram, *supra* note 49, at 375–76.

<sup>63</sup> *Id.* at 379; De Greiff, *supra* note 30, at 124–25.

<sup>64</sup> Orentlicher, *supra* note 29, at 236.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Sriram, *supra* note 49, at 382.

<sup>68</sup> Orentlicher, *supra* note 29, at 236.

<sup>69</sup> Sriram, *supra* note 49, at 382.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 385.

<sup>72</sup> *Id.* at 381.

<sup>73</sup> *Id.* at 386.

institution, such as a foreign national court.<sup>74</sup> Also, the distance of proceedings may hinder the acknowledgement of the crimes because the victims may be unaware of the proceedings or unable to participate.<sup>75</sup>

Lastly, internal justice systems may operate more effectively than external justice systems because numerous practical issues can be resolved in a much easier and more direct way in the territorial state or another state that has some nexus to the crime (such as the state of the crime's victim).<sup>76</sup> For example, the suspects are usually already present in the territory of the state of jurisdiction so there is no need to operate procedures for extradition; the evidence and interviewing witnesses are usually at hand;<sup>77</sup> and finally, the lack of language and culture barriers also smoothens the technical proceedings.<sup>78</sup> However, if the territorial state's judicial system has collapsed and is not functioning because of destabilizing circumstances, the arguments for better efficacy of the internal justice systems will not prevail. The conclusion of the controversy between internal and external justice supporters is that neither form of justice is ultimately perfect. While globalized justice better secures the interests of the international community in bringing perpetrators to justice, exacting retribution, and denying amnesties, internal justice is better at reconciling the interests of the specific community that suffered from atrocities, reestablishing its own rule of law, ensuring justice for the victims, and executing efficient investigations and trial proceedings. From this, I conclude that universal jurisdiction should not be entirely neglected but rather limited by a principle that would render it a second best option. Complementarity or subsidiarity<sup>79</sup> can serve as such principles.

The principle of complementarity makes universal jurisdiction a more practical and less objectionable concept. This principle was developed through the ICC's founding statute and, as I will show, is applied both by the ICC and by states using universal jurisdiction. However, before delving into analysis of this principle, I will explain why states have continued to apply universal

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya*, 80 *FORDHAM L. REV.* 2267, 2284 (2012). Professor Laplante gives reasons for involving domestic courts in the proceedings of investigation and prosecutions. *See id.* at 2289.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See infra* Part III for a brief discussion of the distinction and the similarities between complementarity and subsidiarity.

jurisdiction since the establishment of the ICC—in other words, I will examine cases in which the ICC cannot operate.

## II. LIMITATIONS OF ICC JURISDICTION

The main purposes for establishing the ICC—whose legal foundation is the principle of universal jurisdiction—were to prevent the perpetration of international core crimes, to punish their perpetrators, and to prevent impunity.<sup>80</sup> By constructing a special court for these purposes, the ICC also intended to indirectly prevent a competition over the *forum conveniens* for the prosecution of the perpetrators of international core crimes. It set a hierarchy of appropriate forums whereby the courts of the territorial state (or another state that has a connection to a specific case) are courts of first resort and the ICC is a court of second resort, intervening only in cases where the territorial state failed to investigate or prosecute.<sup>81</sup> States that are parties to the Rome Statute are instructed to cooperate with the Court,<sup>82</sup> to allow the office of the prosecutor (OTP) to launch investigations in their territory,<sup>83</sup> to supply the OTP with records and documents,<sup>84</sup> and to comply with the Court's requests for arrest and surrender of suspects.<sup>85</sup>

The ICC's jurisdictional provisions authorize the Court to hear “certain cases, based upon the nature of the case, the parties involved, and how the case was initiated.”<sup>86</sup> In addition, the Court is able to overcome impediments that would have barred states from applying jurisdiction on either a universal jurisdiction basis or other bases of criminal jurisdiction, such as territoriality, or active or passive personality. For example, a state that has jurisdiction over a case may be “barred from proceeding with an investigation or prosecution because the person concerned enjoys immunity under international law.”<sup>87</sup> The Rome Statute, on the other hand, does not recognize customary law immunities.<sup>88</sup> “Another conceivable example would be a resolution of the

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<sup>80</sup> Rome Statute, *supra* note 21, pmb1.

<sup>81</sup> The concept of a court of second resort applies the concept of “mitigated universal jurisdiction.” *See* discussion *supra* Part I.B.

<sup>82</sup> Rome Statute, *supra* note 21, art. 86.

<sup>83</sup> *Id.* art. 93.

<sup>84</sup> *Id.* art. 93(1)(i).

<sup>85</sup> *Id.* art. 89(1).

<sup>86</sup> Leanos, *supra* note 76, at 2283.

<sup>87</sup> *See generally* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS (2009).

<sup>88</sup> Rome Statute, *supra* note 21, art. 27(2).

Security Council under Chapter VII, prohibiting a State or States from prosecuting a given (number of) individual(s).<sup>89</sup>

Nevertheless, the ICC is limited in other situations where states are not. The ICC's jurisdiction is limited by four major conditions. First, its jurisdiction *ratione materiae* is limited to four types of international crimes: genocide, crimes against humanity, war crimes, and aggression.<sup>90</sup> Second, its jurisdiction *ratione loci* is limited to offenses that were committed on the territory of a state that is party to the Rome Statute.<sup>91</sup> Third, its jurisdiction *ratione personae* is limited to offenses committed by nationals of states who are parties to the Rome Statute.<sup>92</sup> Fourth, its jurisdiction is narrowed by the complementarity principle, which requires the ICC to serve only as a court of last resort and only when a state that has nexus to the case is unwilling or unable to exert criminal proceedings and trials.<sup>93</sup>

According to the Rome Statute, the U.N. Security Council can overcome the ICC's jurisdictional limitations *ratione personae* and *ratione loci*.<sup>94</sup> However, the Council's permanent members' veto may obstruct such orders, as in the case of Syria described at the beginning of the Article. By contrast, states' universal jurisdiction is limited only *ratione materiae*, in the same way that the ICC's jurisdiction is limited by the principle of complementarity.<sup>95</sup> Hence, in cases where the offense has not been committed in the territory of a state party to the Rome Statute or by a national of such a state party, the ICC cannot investigate, let alone acquire jurisdiction, while the national courts of independent states are able to.<sup>96</sup>

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<sup>89</sup> KLEFFNER, *supra* note 87, at 158.

<sup>90</sup> Rome Statute, *supra* note 21, art. 5(1).

<sup>91</sup> *Id.* art. 12.

<sup>92</sup> *Id.* art. 12(2)(b).

<sup>93</sup> *Id.* pmb1. See *infra* Part III for a discussion on the principle of complementarity.

<sup>94</sup> The Rome Statute allows the U.N. Security Council to refer a case to the prosecutor of the Court even when the Court does not have jurisdiction *ratione personae* or *ratione loci*. Rome Statute, *supra* note 21, art. 13.

<sup>95</sup> See *infra* Part III.A for a discussion on the application of universal jurisdictions by states.

<sup>96</sup> Note that the ICC's jurisdiction is also limited *ratione loci* to cases that occurred in the territory of a state party to the Rome Statute or in a territory of a state that accepts the court's jurisdiction ad hoc the jurisdiction of the court. See Rome Statute, *supra* note 21, art. 12(3). This means that when a situation arises in a territory that belongs to an entity not defined as a state according to international law principles, the ICC does not have jurisdiction over the situation. This was the case when the Palestinian Authority addressed the Office of the Prosecutor (OTP) and asked that the Court investigate the situation in the Gaza strip after the Israeli Defense Forces launched operation Cast Lead (December 27, 2008-January 18, 2009). The ICC prosecutor determined that the Court was barred from intervening, and the Palestinian Authority could not ask it to apply jurisdiction because the Palestinian Authority was not defined as a state according to international

In addition, the ICC may be barred from acting when its extradition requests are not answered. While states that are parties to the Rome Statute are obliged to cooperate with the Court and to extradite suspects according to its requests, states that are not parties to the Rome Statute are under no such obligation. Because of this, the fact that the ICC does not conduct trials in absentia<sup>97</sup> if the suspect was not extradited to the Court means that it may not be able to operate even when it acquires jurisdiction over a case. By contrast, some states not parties to the Rome Statute are nevertheless parties to international conventions that proscribe and criminalize war crimes,<sup>98</sup> genocide,<sup>99</sup> or crimes against humanity,<sup>100</sup> so they are under an obligation to prosecute or extradite the perpetrators of such crimes.<sup>101</sup> Moreover, while there

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law. See Palestinian Nat'l Auth., Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), for the declaration of the Palestinian National Authority recognizing the jurisdiction of the ICC. See *Situation in Palestine*, INT'L CRIM. CT. (Apr. 3, 2012), <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>, for the OTP's decision. However, recently, "UN Secretary General Ban Ki-moon confirmed that the Palestinians will formally become a member of the ICC on April 1, 2015 and the Court's registrar said that jurisdiction would date back to June 13, 2014." Michelle Nichols, Louis Charbonneau & Thomas Escritt, *U.N. Confirms Palestinians Will be ICC Member on April 1*, REUTERS (Jan. 7, 2015, 6:16 PM), <http://www.reuters.com/article/2015/01/07/us-palestinians-israel-un-idUSKBN0KG1JV20150107>. In addition, on January 16, 2015 the OTP decided to open a preliminary examination of the situation in Palestine. See Press Release, Office of the Prosecutor, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan. 16, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

<sup>97</sup> Rome Statute, *supra* note 21, art. 63. The Trial Chamber may remove the accused only when the accused continues to disrupt the trial, but it "shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom." *Id.* art. 63(2).

<sup>98</sup> For example, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilians Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. All states are parties to these conventions. The four conventions will be hereinafter referred to as the 1949 Geneva Conventions.

<sup>99</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>100</sup> See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

<sup>101</sup> See Geneva Convention I, *supra* note 98, art. 49; Geneva Convention II, *supra* note 98, art. 50; Geneva Convention III, *supra* note 98, art. 129; Geneva Convention IV, *supra* note 98, art. 146; Genocide Convention, *supra* note 99, arts. 5, 7; Convention Against Torture, *supra* note 100, arts. 4, 5, 8.

is controversy over the legality of universal jurisdiction in absentia,<sup>102</sup> it is more generally accepted that a prohibition on *trials* in absentia should not include a prohibition on the commencement of investigation in the absence of the suspect, as is indeed allowed by many continental legal systems.<sup>103</sup> In addition, there seems to be no customary rule prohibiting trials in absentia based solely on universal jurisdiction,<sup>104</sup> and as some continental law states do not proscribe such trials,<sup>105</sup> more trajectories are open for states to apply universal jurisdiction when the ICC is blocked from interfering.

Under the above-discussed circumstances, when the ICC cannot apply its jurisdiction, national courts must interfere by applying universal jurisdiction. However, as suggested above, national courts, like the ICC, tend to limit their jurisdiction through the principle of complementarity or subsidiarity. In the following section I discuss this principle. I refer briefly to its origins and analyze its basic parameters, which are reflected in the principle's demand that external justice will be operated if the domestic (default) state is “unwilling or unable” to exert its jurisdiction.<sup>106</sup> Finally, I show that in recent years some states have adopted the principle of complementarity in their own universal jurisdiction legislation, referring to it as the “subsidiarity principle.” I review the legislation of states that include this principle and analyze the main cases where it has been applied by national courts.

### III. THE PRINCIPLE OF COMPLEMENTARITY

I will begin the discussion with a note on whether or not a distinction between complementarity and subsidiarity is required. The principle of subsidiarity dictates that “a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.”<sup>107</sup> Complementarity, on the other hand, describes “a relationship in which two or more different things improve or emphasize each other's qualities.”<sup>108</sup> Subsidiarity implies that universal jurisdiction is subsidi-

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<sup>102</sup> Kreß, *supra* note 16, at 576; Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 9 (Feb. 14) (separate opinion by Guillaume, J.). Cf. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 7 (Feb. 14) (separate opinion by Higgins, Koojmans & Burghenthal, J).

<sup>103</sup> Kreß, *supra* note 16, at 576–77.

<sup>104</sup> *Id.* at 578–79.

<sup>105</sup> O'Keefe, *supra* note 14, at 750.

<sup>106</sup> Rome Statute, *supra* note 21, art. 17(1)(a).

<sup>107</sup> *Subsidiarity*, OXFORD ENGLISH DICTIONARY (2015).

<sup>108</sup> *Complementarity*, OXFORD ENGLISH DICTIONARY (2015).

ary to local jurisdictions, that is, universal jurisdiction as a jurisdiction of last resort; on the other hand, complementarity seems to posit that both the universal and the local jurisdiction are on par, so that both jurisdictions complete each other's deficiencies and function together as a unit,<sup>109</sup> and neither is subsidiary to the other.

However, complementarity and subsidiarity are not entirely different, and the resemblance between them is evident.<sup>110</sup> Moreover, in the context of international criminal law and according to the interpretation of the principle of complementarity by the Rome Statute of the ICC, which posits the Court as a court of last resort, it seems that complementarity should be understood as a synonym to subsidiarity, or as "a manifestation of subsidiarity in the [international criminal law] system."<sup>111</sup> Therefore, despite the fact that the Rome Statute uses "complementarity" while domestic criminal jurisdictions that apply universal jurisdiction often use "subsidiarity" to refer to the principle that mitigates the application of universal jurisdiction or subjects it to several preconditions, the terms can be used interchangeably. I prefer the term "complementarity" because, as explained below, the concept of mitigated universal jurisdiction was developed by the ICC's legacy, and the states that adopted the mitigated concept relied on this legacy, notwithstanding their use of the term "subsidiarity" to refer to the mitigating principle.

Complementarity is one of the core principles of the ICC. It is established as a legal principle<sup>112</sup> both by the Preamble to the Rome Statute and by the statute's first article, which declares that the ICC shall be "complementary to national criminal jurisdictions."<sup>113</sup> With the idea that the ICC and domestic jurisdictions complete and perfect each other and supply each other's deficiencies,<sup>114</sup> the Rome Statute promulgates a system in which the prosecution of serious international crimes should involve measures at the national level and at the international level.<sup>115</sup> Moreover, the ICC determined that "the principle of complementarity expresses a preference for national investigations and prose-

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<sup>109</sup> See KLEFFNER, *supra* note 87, at 100.

<sup>110</sup> GILAD NOAM, ALLOCATION OF JUDICIAL POWER BETWEEN DOMESTIC AND INTERNATIONAL COURTS AND TRIBUNALS 379 (2012); see Hervé Ascensio, *Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals*, 1 J. INT'L CRIM. JUST. 690, 696 (2003).

<sup>111</sup> NOAM, *supra* note 110, at 380.

<sup>112</sup> KLEFFNER, *supra* note 87, at 100.

<sup>113</sup> Rome Statute, *supra* note 21, pmbl., art. 1.

<sup>114</sup> KLEFFNER, *supra* note 87, at 100.

<sup>115</sup> *Id.* at 100–01.

cutions.”<sup>116</sup> Therefore, national criminal jurisdictions are the default and first resort for prosecution, while the Court is rather filling in their deficiencies. As Luis Moreno Ocampo, the first Chief Prosecutor of the ICC, articulated his view of the ICC when he was appointed:

The Court is complementary to national systems. This means that whenever there is genuine state action, the Court cannot and will not intervene. As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.<sup>117</sup>

The main goal of the ICC—ending impunity for perpetrators of serious international crimes—seems to conflict with complementarity,<sup>118</sup> as complementarity places the Court in a position secondary to national jurisdictions for achieving this goal. However, Ocampo's words combined with the ICC's reliance on the principle of complementarity suggest that the basic tenet at the foundation of the ICC was in fact the concept of mitigated universal jurisdiction, rather than its absolute type; this former concept was believed to best achieve the ICC's primary goal to end impunity for the world's most serious crimes.<sup>119</sup>

The justifications for the principle of complementarity coalesce with those supporting mitigated universal jurisdiction. Therefore, just like mitigated universal jurisdiction, complementarity is considered to achieve the goals of the court by simultaneously safeguarding state sovereignty,<sup>120</sup> empowering domestic jurisdictions throughout the world and encouraging them to build up their domestic judicial systems,<sup>121</sup> enhancing and promoting the emergence of a norm of genuine national criminal proceedings,<sup>122</sup> and ensuring that the ICC interferes effectively when national criminal proceedings are committed in bad faith or cannot be exerted.<sup>123</sup>

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<sup>116</sup> Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶215 (May 31, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>.

<sup>117</sup> Luis Moreno-Ocampo, Chief Prosecutor, ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor at the ICC, at 2 (June 16, 2003).

<sup>118</sup> JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* 15 (2008).

<sup>119</sup> Leanos, *supra* note 76, at 2281.

<sup>120</sup> STIGEN, *supra* note 118, at 15.

<sup>121</sup> Leanos, *supra* note 76, at 2281.

<sup>122</sup> STIGEN, *supra* note 118, at 18.

<sup>123</sup> *Id.* at 19.

The secondary place of the ICC in relation to the primary role of national jurisdictions<sup>124</sup> is expressed in the admissibility rule established by Article 17 of the Rome Statute, which formulates a regime for the allocation of the judicial competences of the ICC and national criminal jurisdictions.<sup>125</sup> According to this regime, national jurisdictions have priority in the investigation and prosecution of international core crimes, and cases are admissible before the ICC only if the default prosecuting state is “unable or unwilling”<sup>126</sup> to carry out criminal (i.e., investigative or prosecutorial) proceedings.

The inability or unwillingness of the state that has jurisdiction must be clarified in order to determine the “winners of the competition” between the ICC and domestic jurisdictions. However, three prior preconditions should prevail to determine the presence of such a competition.<sup>127</sup> Both jurisdictions should address (1) the same case;<sup>128</sup> (2) the same person;<sup>129</sup> and (3) the same conduct.<sup>130</sup> Even though these preconditions are relevant to determine the admissibility of cases before the ICC, I will not include them in my analysis of the complementarity principle because it *presupposes* a competition between the ICC and domestic jurisdictions and focuses on how to determine the winners of this competition. Therefore, my point of departure is that these preconditions have already been fulfilled,<sup>131</sup> and my analysis henceforth focuses on the terms “unwillingness and inability.”<sup>132</sup>

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<sup>124</sup> KLEFFNER, *supra* note 87, at 57, 99.

<sup>125</sup> Rome Statute, *supra* note 21, art. 17(1)(a).

<sup>126</sup> *Id.*

<sup>127</sup> The ICC also relates to these parameters as prior conditions for the evaluation of unwillingness and inability. The Court stated: “[I]n considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.” See Prosecutor v. Gadaffi, Case No. ICC-01/11-01/11 OA 4, Judgment, ¶ 213 (May 21, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1779877.pdf>.

<sup>128</sup> Rome Statute, *supra* note 21, art. 17(1)(a)–(b).

<sup>129</sup> *Id.* art. 17(1)(b).

<sup>130</sup> *Id.* art. 17(1)(c).

<sup>131</sup> For the discussion of these parameters, see generally KLEFFNER, *supra* note 87, at 114–25; STIGEN, *supra* note 118, at 91–93, 197–99; NOAM, *supra* note 110, at 220–25. For an analysis of the ICC’s interpretation of these parameters, especially how the ICC determines whether the same case is investigated by competing domestic jurisdictions, see NOAM, *supra* note 110, at 259–98.

<sup>132</sup> However, the “same case” precondition may be included among the “unwillingness or inability” parameters, because the state might prosecute a different case (for example, not characterize a killing as genocide) due to its unwillingness or inability to conduct genuine proceedings. See STIGEN, *supra* note 118, at 198.

Article 17(2) of the Rome Statute determines that the unwillingness of a state to conduct criminal proceedings shall consider the parameters listed below, and that in assessing these parameters the Court should have “regard to the principles of due process recognized by international law.”<sup>133</sup> The unwillingness of the prosecuting state is defined as follows:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.<sup>134</sup>

The inability of the state is defined as “whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>135</sup>

Before delving into the interpretation of the standards of unwillingness and inability, two general remarks should be made. First, the *inability* and *unwillingness* are attributed to a state. Because the state is an abstract entity, its “will” to act is referred to the will of its organs.<sup>136</sup> Therefore, if one of the state's branches of power (i.e., the executive, the legislature, or the judiciary) expresses an unwillingness or inability to conduct a criminal investigation, the state will be considered as unwilling or unable.<sup>137</sup> Relatedly, the ability and willingness (as opposed to *inability* and *unwillingness*) of the state are rather determined upon the attitude of the state's composite organs.<sup>138</sup> Therefore, the

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<sup>133</sup> Rome Statute, *supra* note 21, art. 17(2).

<sup>134</sup> *Id.* art. 17(2)(a)–(c).

<sup>135</sup> *Id.* art. 17(3).

<sup>136</sup> STIGEN, *supra* note 118, at 254.

<sup>137</sup> Int'l Law Comm'n, Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 4(1), *in* Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001); STIGEN, *supra* note 118, at 255.

<sup>138</sup> KLEFFNER, *supra* note 87, at 107.

willingness of one organ to initiate criminal proceedings will not compensate for the lack of such will on behalf of the other organs.<sup>139</sup>

Another preliminary question is which states are in fact in “competition” with the ICC with regard to acquiring jurisdiction over a case. Article 17(1) establishes that the relevant states are those that “[have] jurisdiction.” Determining which state has jurisdiction over a specific case is crucial for the discussion in Article 17(1) because it accounts for questions regarding the competition between different states over jurisdiction. If the states applying mitigated universal jurisdiction accept the precondition that their jurisdiction may be given up for “the state that has jurisdiction,” then the question of what it means to “have jurisdiction” should be answered.

In the criminal context, jurisdiction refers to that exerted by the different organs involved in different phases of criminal proceedings, such as the investigative, prosecutorial, and adjudicative authorities.<sup>140</sup> In addition, jurisdiction has different meanings in international and national law. Jann Kleffner suggests that both meanings should be considered, such that the definition of “‘a State which has jurisdiction over a case’ refers to States which have established domestic jurisdiction in conformity with international law.”<sup>141</sup> He adds that under “the assumption on which complementarity is based, namely that states have the possibility to exercise jurisdiction and have taken at least initial investigative steps . . . [it is] decisive for the ambit of permissible action of national investigative or prosecutorial authorities that jurisdiction be available under national law.”<sup>142</sup> However, because “the ICC defers cases to States which have the legal right, under international law, to exercise jurisdiction . . . the term ‘jurisdiction’ thus needs to [also] be understood to refer to jurisdiction in its international connotation.”<sup>143</sup>

Having defined the states that participate in the competition with the ICC for jurisdiction over a case, I turn to analyze the conditions under which this competition should be resolved: the willingness and ability of those states to begin criminal proceedings. In the Rome Statute, the standards of unwillingness and inability were not clearly established.<sup>144</sup> Indeed, whether these terms

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 111.

<sup>141</sup> *Id.* at 113.

<sup>142</sup> *Id.* at 112.

<sup>143</sup> *Id.* at 113.

<sup>144</sup> Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 236 (2002).

should be interpreted broadly, so as to leave more room for the court to interfere, or restrictively<sup>145</sup> is a matter of policy.

The delegates drafting the Statute believed that the ICC had too broad a discretion in defining these terms, as all that the Statute provides as a guideline of interpretation is that the ICC shall have “regard to the principles of due process recognized by international law.”<sup>146</sup> In addition, the OTP addressed the difficulties in interpreting the “unwillingness” of the state that has jurisdiction, and assessed that “it will often require the Court to infer its conclusions from highly circumstantial evidence, and those conclusions will often implicate ‘politically sensitive’ issues.”<sup>147</sup>

Nevertheless, scholars have suggested some very detailed and complex interpretative criteria for both “unwillingness” and “inability.” In some cases, scholars have relied on the interpretation of relevant international norms and standards accounted for by various international law instruments—such as international treaties,<sup>148</sup> the decisions of human rights courts and committees,<sup>149</sup> the reports of international committees,<sup>150</sup> and U.N. instruments<sup>151</sup>—likely to prove that their suggested criteria do not stem merely from a subjective analysis.

Stigen interprets “unwillingness” according to three factors mentioned in Article 17(2): “shielding the person concerned,”<sup>152</sup> “unjustified delay” in the trial or investigative proceedings,<sup>153</sup> and lack of independence or impartiality.<sup>154</sup> He then breaks down each of the factors into elements that serve as criteria for interpreting them.<sup>155</sup> For example, he suggests that “shielding the person concerned” consists of five elements, the most intricate of which is “the purpose of shielding.”<sup>156</sup> This element alone requires assessing

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<sup>145</sup> STIGEN, *supra* note 118, at 252.

<sup>146</sup> Ellis, *supra* note 144, at 236 (citing Rome Statute, *supra* note 21, art. 17(2)).

<sup>147</sup> Leanos, *supra* note 76, at 2285.

<sup>148</sup> KLEFFNER, *supra* note 87, at 129 (discussing the concept of fair trials).

<sup>149</sup> See, e.g., *id.* at 139 (analyzing “unjustified delay”); STIGEN, *supra* note 118, at 266–67 (analyzing limited access to the justice system).

<sup>150</sup> STIGEN, *supra* note 118, at 269 (analyzing “[i]ntimidation of actors in the proceedings”).

<sup>151</sup> *Id.* at 269–70 (analyzing “[i]ntimidation of actors in the proceedings”).

<sup>152</sup> Rome Statute, *supra* note 21, art. 17(2)(a).

<sup>153</sup> *Id.* art. 17(2)(b).

<sup>154</sup> *Id.* art. 17(2)(c).

<sup>155</sup> STIGEN, *supra* note 118, at 256–309.

<sup>156</sup> See *id.* at 261–62.

twenty-three indications of such a purpose.<sup>157</sup> A few examples of those indications are: the existence of “[n]one or few successful investigations and prosecutions” on behalf of the state that has jurisdiction,<sup>158</sup> recognizing a “[s]hared purpose between the state and the suspect,”<sup>159</sup> and “inadequate legislation” on behalf of the state that has jurisdiction so that it is not able to deal with international crimes.<sup>160</sup>

Kleffner also discusses the three factors of unwillingness and bases his conclusions on, *inter alia*, a linguistic analysis of the relevant terms in the official languages of the Rome Statute,<sup>161</sup> the reports of the ICC’s preparatory committee,<sup>162</sup> decisions of international tribunals,<sup>163</sup> and international treaties.<sup>164</sup> For example, to assess the indicators of the purpose of shielding, Kleffner relates to the International Tribunal for the former Yugoslavia’s (ICTY) decision regarding command responsibility for war crimes.<sup>165</sup> Kleffner also suggests that a superior who does not submit a matter of suspicion that his subordinate committed war crimes to the investigation of competent authorities will be considered as acting under a purpose of shielding the subordinate.<sup>166</sup> Regarding the factor of unjustified delays, Kleffner analyzes the European Convention on Human Rights’ protections of the right to be tried without due delay and to a hearing within a reasonable time in the determination of criminal charges.<sup>167</sup>

The standard of inability is more straightforward and objective,<sup>168</sup> and yet it still requires some inquiry. As mentioned above, inability refers to a “total or substantial collapse or unavailability” of the state’s national judicial system that prevents the state from executing criminal proceedings and undermines the state’s ability to secure the accused or to obtain necessary evidence and testimony.<sup>169</sup> Inability is portrayed as a restrictive standard of interference

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<sup>157</sup> See *id.* at 262–88.

<sup>158</sup> See *id.* at 263.

<sup>159</sup> *Id.* at 264.

<sup>160</sup> *Id.* at 265.

<sup>161</sup> See, e.g., KLEFFNER, *supra* note 87, at 135 (discussing the purpose of shielding according to the French version of the article).

<sup>162</sup> *Id.* at 135 n.172 (discussing the terms “proceeding” and “national decision”).

<sup>163</sup> *Id.* at 137.

<sup>164</sup> *Id.* at 139.

<sup>165</sup> *Id.* at 137 n.185.

<sup>166</sup> *Id.* at 137.

<sup>167</sup> *Id.* at 139.

<sup>168</sup> KLEFFNER, *supra* note 87, at 152–53; Leanos, *supra* note 76, at 2286.

<sup>169</sup> Rome Statute, *supra* note 21, art. 17(3).

since the admissibility of cases before the court is limited, according to this standard, to cases of either a total or a substantial collapse or unavailability of the state's judicial system.<sup>170</sup> A partial collapse or unavailability, for example, would not suffice.<sup>171</sup> Nevertheless, distinguishing between a partial and a substantial collapse or deciding when the threshold of substantial collapse is met is not clearly defined in the statute.<sup>172</sup> Kleffner suggests that the distinction “can be derived from the ordinary meaning of the two terms and is confirmed by the drafting history of Article 17(3). When shifting resources can compensate such a partial collapse or transfer the trial to other venues, the threshold of substantial collapse is not met.”<sup>173</sup>

Stigen adds that the level of the collapse can be assessed according to its impact and duration, which must be “great and long enough to justify the use of the term ‘substantial.’”<sup>174</sup>

Another relevant distinction is made between collapse and unavailability. Unavailability seems to cover situations where a legal system has not collapsed but is “inadequate (not accessible or not useful) for the purpose of dealing genuinely with a given case.”<sup>175</sup> Such is the case, for example, when the judicial system has not collapsed but is too weak to carry out proceedings.<sup>176</sup> Stigen proposes four factors that may lead to a judicial system's unavailability: (1) “inadequate legal provisions” (such as lack of substantive or procedural penal legislation and lack of access to the system),<sup>177</sup> (2) “legal obstacles to the use of the system” (such as amnesties or lack of evidence and testimony);<sup>178</sup> (3) “factual obstacles to the use of the system” (such as lack of necessary personnel, judges, investigators, prosecutor; or lack of judicial infrastructure);<sup>179</sup> and (4) “the system's incapability of producing the desired result.”<sup>180</sup> These factors are relevant both for “deficiencies in the implementation of the specific legal framework for the investigation and

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<sup>170</sup> KLEFFNER, *supra* note 87, at 153.

<sup>171</sup> *Id.* (noting that the notion of “partial collapse” in earlier drafts of the Rome Statute was replaced by the notion of “substantial collapse”).

<sup>172</sup> *Id.* at 155.

<sup>173</sup> *Id.*

<sup>174</sup> STIGEN, *supra* note 118, at 316.

<sup>175</sup> *Id.* at 317.

<sup>176</sup> KLEFFNER, *supra* note 87, at 155.

<sup>177</sup> STIGEN, *supra* note 118, at 318.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

prosecution of core crimes . . . [and] the lack of implementation in domestic legal orders . . . of international standards on procedural requirements.”<sup>181</sup>

The parameters of the standard of inability were practically applied recently by the ICC in the case against Saif Al-Islam, the son of the former President of Libya, Muammar Gaddafi, in which the ICC issued an arrest warrant for the charges of war crimes and crimes against humanity.<sup>182</sup> The Pre-Trial Chamber stipulated that while the Libyan judicial system did not collapse, as “the authorities for the administration of justice may exist and function in Libya,”<sup>183</sup> the system was nevertheless unavailable for the purposes of the case.<sup>184</sup> The court added that there were legal obstacles to the use of the system, as the national judicial system was unable to obtain the accused and secure Al-Islam’s transfer from his place of detention under the custody of the Zintan militia into state authority.<sup>185</sup> It was also unable to obtain testimony because of the inability of judicial governmental authorities to ascertain control and provide adequate witness protection.<sup>186</sup> In addition, it was unable to carry out the proceedings and produce the desired result because it could not secure legal representation for the accused in view of the security situation in Libya and the risk faced by lawyers who act for associates of the former regime.<sup>187</sup> This impediment prevented the progress of proceedings against the accused as it stood in contrast with the rights and protections of the Libyan national justice system and Libya’s Constitutional Declaration,<sup>188</sup> and rendered the national judicial system unavailable and the case before the ICC admissible according to the complementarity criteria set forth in Article 17(1)(3) of the Rome Statute.

In summary of the analysis of the standards of willingness and ability, I note that it is not always necessary to examine the presence of both unwillingness and inability of a state with jurisdiction to decide the admissibility of a case before the ICC; the presence of one standard is

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<sup>181</sup> KLEFFNER, *supra* note 87, at 157.

<sup>182</sup> Prosecutor v. Gaddafi, Case No. ICC-01/11-14, Warrant of Arrest, at 3 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099329.pdf>.

<sup>183</sup> Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 215 (May 31, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* ¶ 206.

<sup>186</sup> *Id.* ¶ 209.

<sup>187</sup> *Id.* ¶ 212.

<sup>188</sup> *Id.* ¶ 214.

sufficient.<sup>189</sup> Nevertheless, the independence of the judicial system is one criterion that is common in assessing both willingness and ability of the state.<sup>190</sup> The judicial system of a state must, at a minimum, be judged as independent if it is to be viewed as not experiencing a substantial or total collapse of its institutions and therefore able to undertake prosecutions.<sup>191</sup> However, the minimum standards for judicial independence would include a judicial system that is impartial,<sup>192</sup> which is also one of the factors of (un)willingness. In Part IV, when discussing the implications of this Article's analysis for the Syrian case, I address further the criterion of independence and its central place in determining which state should have jurisdiction.

Before turning to discuss the parameters of complementarity that emerge from national legislation and the decisions of national courts (in most of these statutes referred to as subsidiarity), I should note that there is no guidance in the ICC jurisprudence regarding the standards of proof of the parameters of unwillingness and inability in determining the admissibility of a case before the ICC. As the Pre-Trial Chamber in Saif Al-Islam case mentioned:

Different standards of proof are explicitly set out in the Statute for distinct stages of the proceedings from the issuance of a warrant of arrest, to the confirmation of charges and the final trial judgment. Those standards of proof, however, do not apply to the admissibility determination which deals *inter alia* with the question as to whether domestic authorities are taking concrete and progressive steps to investigate or prosecute the same case before the Court.<sup>193</sup>

Rather, “[t]he Chamber is guided by the jurisprudence of the Appeals Chamber to the effect that the State ‘must provide the court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case.’”<sup>194</sup>

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<sup>189</sup> See *id.* ¶ 216 (describing the Court's determination in the Ghaddafi case that because “Libya has been found to be unable genuinely to carry out the investigation or prosecution against [Ghaddafi] . . . the Chamber need not address the alternative requirement of ‘willingness’”).

<sup>190</sup> Ellis, *supra* note 144, at 237.

<sup>191</sup> *Id.* at 238.

<sup>192</sup> *Id.* at 237–38.

<sup>193</sup> *Prosecutor v. Gaddafi*, *supra* note 183, ¶ 54.

<sup>194</sup> *Id.* ¶ 54 (quoting *Prosecutor v. Francis Kirimi Muthaura*, Case No. ICC-01/09-02/11, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” ¶ 48 (Aug. 30, 2011)).

### A. Subsidiarity in the Practice of Domestic Legislation and Domestic Courts

In the last few decades, the number of states legislating laws of universal jurisdiction has been rising.<sup>195</sup> In addition to Australia,<sup>196</sup> Canada,<sup>197</sup> the United States,<sup>198</sup> and New Zealand,<sup>199</sup> numerous European states have also legislated such laws.<sup>200</sup> According to the REDRESS and International Federation for Human Rights (FIDH) report,<sup>201</sup> which reviewed the legislation of member states of the European Union, twenty-nine states have extraterritorial jurisdiction.<sup>202</sup> Twenty-five states limit their jurisdiction with a subsidiarity clause.<sup>203</sup> While these clauses differ in their formulations, they include general common preconditions, such as the following: applying jurisdiction only when the territorial state, another competent state, or an international court does not,<sup>204</sup> demanding extradition to be the first resort<sup>205</sup> or conditioning jurisdiction on receiving no extradition requests from other states;<sup>206</sup> conditioning jurisdiction on the rule of double jeopardy,<sup>207</sup> and dismissing investigation or prosecution where an authority of another country or an international tribunal is investigating the alleged crime.<sup>208</sup> In addition, some of the states that appear in this survey use a very similar wording in their subsidiarity clauses to that of the ICC complementarity clause, and they subject their jurisdiction to another state's (usually the territorial or another state that has a nexus to the case) only if the latter has a "properly functioning

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<sup>195</sup> See generally REYDAMS, *supra* note 13, at 83 (presenting research on states that apply universal jurisdiction).

<sup>196</sup> *Id.* at 86–92.

<sup>197</sup> *Id.* at 119–25.

<sup>198</sup> *Id.* at 220–26.

<sup>199</sup> Juliet Hay, *Implementing the ICC Statute in New Zealand*, 2 J. INT'L CRIM. JUST. 191, 196 (2004).

<sup>200</sup> EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 1–4.

<sup>201</sup> See generally *id.*

<sup>202</sup> The states are Austria, Slovakia, Germany, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Malta, Hungary, Lithuania, Ireland, Latvia, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland. *Id.* at iv–v.

<sup>203</sup> Austria, Germany, Belgium, Bulgaria, Czech Republic, Denmark, France, Greece, Malta, Hungary, Latvia, Italy, Norway, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and Northern Ireland. See *id.* at 39.

<sup>204</sup> For example, in Austria, Bulgaria, and Hungary, the courts are subsidiary to international tribunals and the ICC; in Ireland the courts are subsidiary to the ICC; in Latvia and Spain, the courts are subsidiary both to international courts and tribunals and to other national courts that have nexus to the case. See *id.*

<sup>205</sup> See *id.* at 102, 131, 215, 219, 232 (Czech Republic, France, Portugal, Romania, and Slovenia, respectively).

<sup>206</sup> *Id.* at 166 (Italy).

<sup>207</sup> *Id.* at 148 (Greece).

<sup>208</sup> *Id.* at 253 (Switzerland).

legal system”<sup>209</sup> that has been verified as willing,<sup>210</sup> independent, impartial, and equitable.<sup>211</sup>

Except for Canada, which incorporated the ICC complementarity clause into its universal jurisdiction law almost verbatim,<sup>212</sup> states address the considerations of the ICC clause mainly indirectly or comparatively within the legislation and dicta that subject their universal jurisdiction laws to the subsidiarity principle.<sup>213</sup> Unfortunately, there is no clear consistent state practice regarding the application of the parameters of the principle of subsidiarity or the standard of proof required for its emergence.<sup>214</sup> Nevertheless, I will hereby address the universal jurisdiction legislation in four European states that address the subsidiarity principle either directly through the law or through courts’ decisions that discuss the application of universal jurisdiction.

### 1. *Belgium*

Belgium was the pioneer state in Europe for applying universal jurisdiction to prosecutions of crimes under international law.<sup>215</sup> As it was enacted in 1878, Belgium’s universal jurisdiction law allowed for a wide-ranging scope of jurisdiction.<sup>216</sup> However, in 2003 the law was amended to limit this range.<sup>217</sup> The Belgian law provides for universal jurisdiction in three cases. The first is when grave violations of international humanitarian law are committed by a person who at the time of the offense is a Belgian national or “who has been effectively habitually and legally residing in Belgium for at least three

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<sup>209</sup> *Id.* at 203, 246 (Norway, Sweden).

<sup>210</sup> *Id.* at 246 (Sweden).

<sup>211</sup> *Id.* at 80 (Belgium). The preconditions mentioned in notes 208–10 will henceforth be referred to as the “willingness and ability” conditions.

<sup>212</sup> Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24 (Can.) (Section 12 determines that the double jeopardy protection (i.e., the pleas of *autrefois acquit*, *autrefois convict* and pardon) applies unless the proceedings in the foreign court were for the purpose of shielding the person from criminal responsibility or were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.)

<sup>213</sup> *See, e.g.*, S.A.N., July 9, 2009 (R.G.D., No. 1/09) (Spain).

<sup>214</sup> Kreß, *supra* note 16, at 580.

<sup>215</sup> EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 77.

<sup>216</sup> Loi concernant le titre préliminaire du code de procédure [Law Containing the First Title of the Criminal Procedure Code (TCCP)] of Apr. 17, 1878, BELGISCH STAATSBLED [B.S.] [Official Gazette of Belgium], Apr. 17, 1878, <http://www.staatsblad.be>.

<sup>217</sup> EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 78.

years;”<sup>218</sup> the second is when the victim of the crime is a Belgian citizen;<sup>219</sup> the third case is any offense under international customary or treaty law when there is a legal requirement that the case be submitted to Belgian authorities.<sup>220</sup> All of these cases are conditioned upon a subsidiarity paragraph that determines that Belgium has jurisdiction in these cases unless

it appears . . . that . . . the case should be brought before either the international courts, the courts of the place where the offence was committed or the courts of the country of which the perpetrator is a national . . . on condition that these courts offer the standards of *independence, impartiality and fairness* required under the international commitments linking Belgium to the state concerned.<sup>221</sup>

Investigations are conducted either as a result of the federal prosecutor’s initiative or because a complaint has been lodged.<sup>222</sup> In order to decide whether to proceed with a complaint and to petition an examining magistrate to conduct the preliminary inquiry, the federal prosecutor, under the control of the indictment chamber, must verify the guarantees of impartiality, independence and fairness provided by the competing national legal system or systems that have jurisdiction over the case other than Belgium.<sup>223</sup>

According to the FIDH and REDRESS report, in practice the subsidiarity concept will be invoked only where the court receives an effective submission of a case of an international or foreign jurisdiction while the theoretical competence of another court is not sufficient.<sup>224</sup> So far, the application of the subsidiarity principle by the federal prosecutor has not been required, and therefore the courts have not been asked to consider this principle.

## 2. *Germany*

Like in Belgium, the German universal jurisdiction laws also address the principle of subsidiarity. The universality principle is grounded in the German

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<sup>218</sup> *Id.* at 86.

<sup>219</sup> *Id.* at 78 (provided that the foreigner is in Belgium and the act is punishable under the law of the place of commission by at least five years imprisonment).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 86 (emphasis added).

<sup>222</sup> *Id.* at 80.

<sup>223</sup> *Id.* In addition, the prosecutor will not proceed with a complaint if it is manifestly unfounded, where the facts in the complaint do not correspond to a relevant offense of serious violations of international humanitarian law or of any other international offense incriminated by a treaty involving Belgium, and where an admissible public action cannot derive from the complaint.

<sup>224</sup> EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 80.

Penal Code<sup>225</sup> and in the Code of Crimes Against International Law (CCAIL).<sup>226</sup> The subsidiarity principle is codified in the Code of Penal Procedure.<sup>227</sup> Section 6 of the Strafgesetzbuch (StGB) applies German law to several acts committed abroad, *inter alia*, genocide and acts that are to be prosecuted by the terms of an international treaty binding on the Federal Republic of Germany, such as grave breaches of the 1949 Geneva Conventions, torture, and hostage taking.<sup>228</sup> In order to adjust the German Penal Code to the Rome Statute of which Germany is a party, the CCAIL was legislated in June 2002. This act makes the core crimes in the ICC—genocide, crimes against humanity, and war crimes—offenses under German law.<sup>229</sup> The subsidiarity principle is codified in §153f of the German Code of Criminal Procedure (Strafprozessordnung or StPO), which states that

[T]he public prosecution shall dispense with prosecuting an offence punishable pursuant to VStGB §§6 to 14 if . . . the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offense.<sup>230</sup>

The subsidiarity clause does not address directly the ICC complementarity clause, but because “the Federal Constitution which provides that the general rules of public international law are part of the domestic legal order and have precedence over municipal laws,”<sup>231</sup> it should be read and interpreted according to the ICC complementarity clause, as proven in the *Abu Ghraib* case.

In 2004, the Center for Constitutional Rights in New York filed a criminal complaint against Donald H. Rumsfeld, then Secretary of Defense of the United States, and against others who were accused of participating in crimes according to the CCAIL, including torture and war crimes.<sup>232</sup> The general prosecuting attorney decided to dismiss the complaint and not to open an

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<sup>225</sup> *Id.* at 143.

<sup>226</sup> *See id.*

<sup>227</sup> *Id.* at 142.

<sup>228</sup> REYDAMS, *supra* note 13, at 144; EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 138–46.

<sup>229</sup> REYDAMS, *supra* note 13, at 142–43.

<sup>230</sup> STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 153f(Ger.).

<sup>231</sup> REYDAMS, *supra* note 13, at 146.

<sup>232</sup> Decision of the Prosecutor in a Complaint Against Rumsfeld et. al. Filed by the Center for Constitutional Rights, File No. 3 ARP 207/04 2 (Feb. 10, 2005), [www.brusselstribunal.org/pdf/RumsfeldGermany.pdf](http://www.brusselstribunal.org/pdf/RumsfeldGermany.pdf) [hereinafter Decision of the Prosecutor].

investigation against the accused, basing his decision on a consideration of the principle of subsidiarity as interpreted by the ICC complementarity clause.<sup>233</sup> The prosecutor explained that universal jurisdiction (referred to as “the world law principle”)<sup>234</sup> “does not legitimize unlimited criminal prosecution,” and it should be applied “in the framework of non-interference in the affairs of foreign countries.”<sup>235</sup> He based his inference on the ICC complementarity clause, which according to his analysis, “has to be seen in the context of the provisions of the CCAIL.”<sup>236</sup> Therefore, he concluded that just as the “ICC can only be active if the nation-states first called upon to adjudicate are unwilling or unable to prosecute . . . a third state cannot examine the legal practice of foreign countries according to its own standards or correct or replace it in specific cases.”<sup>237</sup> As a consequence, and since “no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures regarding the violations described in the complaint,” and considering the fact that “several proceedings have already been conducted against participant . . . the complaint must therefore be left to the judicial authorities of the United States of America.”<sup>238</sup>

### 3. *Spain*

Spanish jurisprudence is, so far in history, the most instructive for the application of the principle of subsidiarity in national universal jurisdiction laws. Before 2009, the Spanish Fundamental Law of the Judiciary authorized the Spanish legal system to apply absolute universal jurisdiction in some cases.<sup>239</sup> It stipulated that Spain could prosecute offenses where a binding international treaty includes the obligation of exercising universal jurisdiction and required no Spanish nexus to those offenses.<sup>240</sup>

In 2009, following some decisions of the Spanish courts aimed at limiting the application of universal jurisdiction in Spain,<sup>241</sup> the law was amended so as

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<sup>233</sup> *Id.* sec. B.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [Law on the Judiciary] art. 23 (Spain) [hereinafter Organic Law].

<sup>240</sup> *Id.* art. 23(4).

<sup>241</sup> See Naomi Roht-Arriaza, *International Decisions—Guatemala Genocide Case*, 100 AM. J. INT’L L. 207, 207 (2006) [hereinafter *Guatemalan Genocide Case*] (citing S.T.C., Sept. 26, 2005 (S.T.C., No. 237)); Cedric Ryngaert, *Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the*

to determine that unless international treaties or agreements request mandatory trial of the crimes under the universality principle, Spain's universal jurisdiction should be limited and require some nexus to Spain, such as the presence of the accused in Spain; the passive personality principle, i.e., that the victims of the alleged offense have Spanish nationality; or the presence of another link of outstanding importance to Spain.<sup>242</sup> This amendment also stipulated that Spanish courts could apply jurisdiction only in cases where another country or international tribunal had not begun a process involving an investigation and successful prosecution of such offenses; if another such process existed, then the Spanish court should suspend or stay its case until the other investigation and prosecution had concluded.<sup>243</sup>

These amendments were preceded by several conflicting decisions of the Spanish courts regarding the question whether universality should be limited and under which conditions. The *Guatemalan Genocide Case*<sup>244</sup> dealt with a complaint filed against Guatemalan officials allegedly responsible for crimes of terrorism, genocide, and summary executions perpetrated against Guatemala's Mayan indigenous people and their supporters during the 1970s and the 1980s.<sup>245</sup> The Spanish Constitutional Court's landmark decision in this case supported broad universal jurisdiction and rejected former Spanish courts' decisions on this case, which had subjected Spanish universal jurisdiction law to the subsidiarity principle.<sup>246</sup> According to the decision of the Spanish Constitutional Court, neither nexus between Spain and the case nor proof of the impossibility of a trial in the territorial state was required to apply Spanish jurisdiction.<sup>247</sup> Favoring the interests of preventing impunity and fearing that endorsing subsidiarity would put complainants in the "untenable position" of having to prove that they could not make a case in the territorial state, the constitutional court preferred a close-textual interpretation of the Spanish

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*Prosecution of Core Crimes by States Acting Under the Universality Principle*, 98 INST. INT'L L. 10 (2006) (discussing the effects of the *Guatemalan Genocide Case* on the Tibetan Genocide case).

<sup>242</sup> See EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 238–39.

<sup>243</sup> Article 23(4)(2) to the Organic law stipulates that "it has to be proved that no proceedings have been initiated in another competent country or an International Court leading to an investigation and effective prosecution of the offences." *Id.* at 239. Furthermore, the criminal proceedings initiated under the Spanish jurisdiction "will be provisionally dismissed when there is evidence of the starting of other proceedings on the reported actions in the country or in the Court abovementioned." *Id.*

<sup>244</sup> *Guatemalan Genocide Case*, *supra* note 241.

<sup>245</sup> *Id.* at 207.

<sup>246</sup> See Ascensio, *supra* note 110 (discussing the decisions of the Second Chamber of the Spanish Supreme Tribunal and the Criminal Chamber of the Spanish National High Court).

<sup>247</sup> *Guatemalan Genocide Case*, *supra* note 241, at 210.

universal jurisdiction law. This determined a concurrence of jurisdiction and a hierarchy between the Spanish courts and the Guatemalan court in favor of the Spanish courts.<sup>248</sup>

However, later decisions of Spanish courts followed a different trajectory and chose to subject Spanish courts' jurisdiction to the principle of subsidiarity, which was, in turn, conditioned upon evidence that territorial courts and/or an international court were unwilling or unable to effectively investigate and prosecute the crimes referred to in the complaint.<sup>249</sup> The "Tibetan Genocide" case emphasized that Spain could exercise universal jurisdiction over genocide committed in Tibet in the absence of a "national connection" with Spain. The National Court ordered the investigative judge to open an investigation because the complainants could adduce evidence that Chinese authorities failed to investigate the crimes and that the events complained of were outside the jurisdiction of the ICC.<sup>250</sup>

In the *Shehadeh Case*, the Criminal Chamber of the Spanish National High Court analyzed the subsidiarity principle in light of the ICC's complementarity clause.<sup>251</sup> The *Shehadeh Case* inquired whether Spain had jurisdiction over a complaint against several high-ranking Israeli officials who were allegedly involved in a targeted killing operation executed on July 22, 2002 in the Gaza Strip.<sup>252</sup> The operation was directed at the commander of the Hamas military wing in Gaza, Salah Shehadeh, and resulted in the deaths of Shehadeh and thirteen other civilians and the injuring of dozens of civilians in the vicinity.<sup>253</sup> In a decision on an appeal against the decision of the investigative judge on the matter, the National High Court determined that Spain had no jurisdiction over the case, *inter alia*, because of

[T]he absence of the absolute nature of the principle of universal jurisdiction in Spain, in which the criterion of alternative jurisdiction is generally given priority over the criterion of concurrence, and . . . also [because] the former principle must be modulated in each case by logical rules of rationality, proportionality and self-restriction that

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<sup>248</sup> *Id.*

<sup>249</sup> Ryngaert, *supra* note 241, at 10.

<sup>250</sup> *Id.* at 10.

<sup>251</sup> S.A.N., July 9, 2009 (R.G.D., No. 1/09) (Spain) [hereinafter *Shehadeh Case*].

<sup>252</sup> *Id.*

<sup>253</sup> *Salah Shehadeh-Special Investigatory Commission*, ISR. MINISTRY FOREIGN AFF. (Feb. 27, 2011), [http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah\\_Shehadeh-Special\\_Investigatory\\_Commission\\_27-Feb-2011.aspx](http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.aspx).

will facilitate its effective implementation in those cases in which the impunity of the possible abominable crimes committed is at risk.<sup>254</sup>

The court compromised between subsidiarity and absolute universality, which, it deduced, rested, *inter alia*, on the nuances that national law, international law, and judicial decisions have added to the principle of universal justice.<sup>255</sup> Among the sources that determine the nuances of the principle of universality, the court mentioned and cited the complementarity clause of the ICC, thus emphasizing the unwillingness and inability criteria.<sup>256</sup>

Finally, in its consideration of the factors that should limit universality in the specific case before it, the court took the unwillingness and inability criteria into account only indirectly. The court gave up its jurisdiction because the case was being genuinely investigated by Israel.<sup>257</sup> The court found that “there have been real actions, first administrative and then judicial, genuine action has been made, first, on the part of the government and then on the part of courts, to check whether an offense may have been committed.”<sup>258</sup> It also emphasized the impartiality of the investigation committee for the case appointed by Israel and suggested that there was no ground to dispute the “organic and functional separation” between the investigating committee and Israeli legal authorities such as the Executive of the Israeli Military Advocate General and the Attorney General of the state.<sup>259</sup> This analysis suggests that the court was convinced both of Israel’s genuine willingness to investigate the case and of its ability to do so; the impartiality of Israel’s legal system attested to both parameters of the complementarity clause.

The Spanish National High Court’s discussion of the principle of subsidiarity in light of the ICC complementarity clause followed a former dispute between the Spanish courts over those principles, which is extrapolated from their decisions in the *Guatemalan Genocide Case* discussed above. While the Audiencia Nacional (like the National High Court in the *Shehadeh Case*) conditioned the principle of subsidiarity on the inactivity of the territorial forum in a specific case,<sup>260</sup> the majority opinion in the Supreme Tribunal’s

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<sup>254</sup> *Shehadeh Case*, *supra* note 251.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Guatemalan Genocide Case*, *supra* note 241, at 208 (concluding that the Guatemalan court was not proven inactive).

decision of the *Guatemalan Genocide Case* rejected the idea that Spanish courts should evaluate the unwillingness and inability of other national courts. According to the majority opinion of the Supreme Tribunal, this task of evaluation was exclusively endowed to the ICC; national courts should avoid such an evaluation because it is an *ultra vires* act: they are not competent to judge the performance of other states' legal systems. Furthermore, such evaluations interfere with international relations, an exclusive realm of the government of which the judiciary should be excluded.<sup>261</sup> By contrast, the minority opinion of the Supreme Tribunal in the *Guatemalan Genocide Case* conditioned the Spanish courts' subsidiarity to the territorial court on serious and reasonable evidence proving the inactivity of the territorial court.<sup>262</sup> This was also the course of interpretation of the complementarity clause followed by the National High Court in the *Shehade Case*, as shown above.

#### 4. *France*

Universal jurisdiction in France is codified in the Code of Criminal Procedure (CCP),<sup>263</sup> providing for France's universal jurisdiction over crimes that France has a duty to prosecute under international treaties.<sup>264</sup> On August 9, 2010, the law was amended to incorporate the Rome Statute into French legislation, so that France's obligations under its universal jurisdiction law now include the duty to pursue any suspected criminal of war crimes, crimes against humanity, or genocide.<sup>265</sup>

The amendment of the CCP also demanded that France's universal jurisdiction be limited by the residence of the suspect in France, the general prosecutor's exclusive authority to begin an investigation, double criminality (i.e., that the conduct is considered a crime under the legislation both of the state where the offense was committed and of France) and by subsidiarity

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<sup>261</sup> Ascencio, *supra* note 110, at 694.

<sup>262</sup> *Id.* at 695.

<sup>263</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] (Fr.).

<sup>264</sup> *Id.* arts. 696-4, 698-11.

<sup>265</sup> *Id.* Formerly, the U.N. Security Council Resolutions that determined the establishment of the international criminal tribunals in Rwanda and former Yugoslavia were incorporated in French law so as to order France's obligation to pursue any suspected criminal of war crimes, crimes against humanity, and genocide if committed in the former Yugoslavia or in Rwanda, when the suspect is present on French territory. See EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 131.

either to the ICC<sup>266</sup> or to other states that have jurisdiction over the case and seek the suspect's extradition.<sup>267</sup>

Among the preconditions that forbid extradition to another state competing for jurisdiction, the CCP includes the following:

Where the offence for which the extradition has been requested is punished by the law of the requesting state which imposes a penalty or a safety measure contrary to French public policy;

Where the requested person would be tried in the requesting state by a court which does not provide fundamental procedural guarantees and protect for the rights of the defence.<sup>268</sup>

A comparison of the subsidiarity clause in the French legislation with the ICC complementarity clause suggests that the French legislation does not consider either the competing state's ability to apply its jurisdiction or (at least directly) its willingness. It rather focuses on the demand that the competing state "regard the principles of due process recognized by international law."<sup>269</sup> It also gives substantial importance to the procedural demands of the French law by denying extradition in cases in which the legislation of the requesting state determines a punishment or a security measure that contradicts the French public order.<sup>270</sup>

An example of how the French law subsidiarity clause focuses on the international law principles of due process can be seen in a request that was filed to a French court to extradite to Rwanda a Rwandan citizen who was alleged to have committed crimes against humanity and genocide.<sup>271</sup> The Chamber of Instruction of the Court of Appeal of Toulouse based its decision not to extradite on deficiencies in the criminal process in Rwanda that infringed upon the defendant's rights for due process. First, the court determined that the Rwandan law would be applied retroactively, in contrast to the basic principle of international criminal law forbidding retroactive criminalization. Second, the equality of arms principle (i.e., that the defense and the prosecution can equally perform their duties) was jeopardized because

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<sup>266</sup> EXTRATERRITORIAL JURISDICTION IN THE EUROPEAN UNION, *supra* note 20, at 131.

<sup>267</sup> *Id.* at 132.

<sup>268</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 696-4 (Fr.).

<sup>269</sup> Rome Statute, *supra* note 21, art. 17(2). It can be argued that a state that does not apply the principles of due process recognized by international law is deemed unwilling to conduct genuine criminal proceedings. Nevertheless, this is not necessarily the case.

<sup>270</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 696-4. (Fr.).

<sup>271</sup> *See* Cour d'appel [CA] [regional court of appeal] Toulouse, Oct. 23, 2008, 2008/00029.

the lack of means of protection for defense witnesses would have prevented the defense from presenting all of the protecting evidence it had. Third, the sentence that was expected to be imposed on the accused—twenty years of isolation—was considered by the French legal system to be a degrading and humiliating sentence.<sup>272</sup>

To conclude the general part of this Article, in the last decade the doctrine of universal jurisdiction has been entrenched by national courts and national legislation that aim to expand the jurisdiction of national courts. This was achieved by a revision of national laws to comply with states' obligations under the Rome Statute and the ad hoc international criminal tribunals to prevent impunity from the perpetrators of international core crimes.<sup>273</sup> However, the application of the doctrine of universal jurisdiction has been mitigated by the principle of complementarity, according to which national courts of foreign states will yield firstly before national courts of territorial states and secondly before the ICC or other international tribunals.<sup>274</sup> Nevertheless, those foreign national courts will not avoid applying their jurisdiction in cases where the former courts could not pursue genuine criminal procedures. As illustrated through the discussion of state practice, states that have universal jurisdiction laws carefully examine whether the terms of subsidiarity have been fulfilled, and only in such circumstances do they avoid exerting universal jurisdiction.

In the following section of this Article, I examine the implications of these conclusions for the Syrian case. Beginning with an analysis of the emergence of the Syrian state and the Ba'ath regime's take-over, I proceed with a review of the tensions among Syria's various religious and ethnic sects. Finally, in an overview of the evolution of the 2011 uprising, I discuss the question of whether and under what circumstances foreign national courts should apply the principle of mitigated universal jurisdiction to adjudicate the perpetrators of international core crimes during the bloody conflict in Syria. It should be noted that a thorough analysis of the sociological and historical reasons for the emergence of the 2011 uprising in Syria is beyond the scope of this Article. I will focus more on the dynamics of Syrian society before and during the uprising in order to assess the implications of its cohesive and divisive forces

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<sup>272</sup> *Id.*

<sup>273</sup> See Sriram, *supra* note 49, at 364.

<sup>274</sup> See, e.g., Cour d'appel [CA] [regional court of appeal] Toulouse, Oct. 23, 2008, 2008/00029. See generally Decision of the Prosecutor, *supra* note 232.

on its ability to conduct criminal legal procedures for perpetrators of international core crimes.

#### IV. THE SYRIAN CASE

##### *A. The Syrian Society: Between Factionalism and Cohesion from the French Mandate to the 2011 Uprising*

The Syrian state, now called the Syrian Arab Republic, underwent several formative stages before it finally emerged with its current borders. It was first established as a kingdom by the Hashemite Emir Faysal with British help between October 1918 and July 1920, following the destruction of the Ottoman Empire.<sup>275</sup> This kingdom was dismantled by France, which in 1920 was assigned the mandate of some parts of Syria by the League of Nations and established several states there—Greater Lebanon and a number of small states that included a Druze and an Alawi state.<sup>276</sup> In 1925, the French re-established a Syrian state through the merger of Damascus and Aleppo, but the Alawi and the Druze<sup>277</sup> areas remained separated from this state, in practical terms, until 1945,<sup>278</sup> a year before the Syrian state emerged to gain its independence.<sup>279</sup>

The process of the emergence of the state of Syria thus has the fractures in Syria's "mosaic society" folded within it,<sup>280</sup> i.e., the division between the different sects in Syria and their struggle over power.<sup>281</sup> The Druze and the Alawis are the most evident minorities in Syria,<sup>282</sup> but Syria is also religiously divided between Islamic Sunnis, who form the largest religious group in Syria,

<sup>275</sup> Itamar Rabinovich, *The Compact Minorities and the Syrian State, 1918–45*, 14 J. CONTEMP. H. 693, 695 (1979).

<sup>276</sup> *Id.*

<sup>277</sup> *See id.* at 693–94 (referring to the Alawi and the Druze as the "compact minorities").

<sup>278</sup> *Id.* at 695–96. In 1936, an attempt was made to incorporate the Druze and the Alawi areas into the Syrian state under a special status but this attempt failed and the merger was suspended in 1939. *See id.* at 696.

<sup>279</sup> *Id.*

<sup>280</sup> Raymond Hinnebusch, *Modern Syrian Politics*, 6 H. COMPASS 263, 276 (2008) [hereinafter Hinnebusch, *Modern Syrian Politics*].

<sup>281</sup> *See generally* AJAMI, *supra* note 2, at 111–34; NIKOLAOS VAN DAM, *THE STRUGGLE FOR POWER IN SYRIA* (2011).

<sup>282</sup> The Alawis constitute twelve percent of the Syrian population. *See* Daniel Pipes, *The Alawi Capture of Power in Syria*, 25 MIDDLE E. STUD. 429, 430–32 (1989). Their religious doctrines derive from the Twelver or Imami branch of Shi'i Islam, but they reject the Shari'a (Islam's sacred law) and are therefore considered non-Muslims. *See id.*; *see also* AJAMI, *supra* note 2, at 15–17. The Druze, who constitute three percent of the Syrian society, are also a "radical Shiite sect." *See* VAN DAM, *supra* note 281; Rabinovich, *supra* note 275, at 693.

Isma'ilis (1.5 percent), and Christians (14.1 percent).<sup>283</sup> Ethnically, it is divided between Syrian Arabs (around seventy-four percent), Kurds (8.5 percent), Armenians (four percent), Turcomans (three percent), and Circassians, who constitute the smallest ethnic minority.<sup>284</sup> Another line of sectarianism is the class division “between the ruling landed and commercial oligarchy, a rising radical middle class . . . and an aggrieved peasantry.”<sup>285</sup>

All of the above fractures played a role in reshaping the state of Syria, which continued after Syria gained its independence and until the coup of 1963, when the Ba'ath party gained rule over Syria.<sup>286</sup> From 1946 to 1963, the government was composed of the Sunnis, and especially the urban Sunni elite.<sup>287</sup> Eventually, the Sunnis' success in eliminating the Alawi state and the integration of this state within Syria contributed to the Alawis' “rapid rise to power.”<sup>288</sup> The Sunnis' resentment of the Alawis has not prevented the latter's over-representation in the army,<sup>289</sup> which was one of the two key factors that paved the way for the Alawis to take control of the government in Syria.<sup>290</sup> The second factor was the Ba'ath party, which the Alawis took over in February 1963 in a coup that enabled the Ba'ath coup d'état of March 1963 and the Assad coup of November 1970.<sup>291</sup> The Ba'ath coup started as a reform coup and led to a substantial change in the composition of the elite (forming a new rural elite involved in the social and national struggles of the 1950s)<sup>292</sup> and in the regime's legitimacy basis (based on nationalism, modernization, and institutional design). This latter change, in turn, led to a transformation of social structure.<sup>293</sup>

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<sup>283</sup> ZAKIR HUSSAIN, INDIAN COUNCIL OF WORLD AFFAIRS, ISSUE BRIEF: POST-ASSAD GEOSTRATEGIC POSSIBILITIES 3 (2012), <http://www.icwa.in/pdfs/IBpostassad.pdf>.

<sup>284</sup> VAN DAM, *supra* note 281, at 1.

<sup>285</sup> Raymond Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, 88 INT'L AFF. 95, 96 (2012) [hereinafter Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*].

<sup>286</sup> See generally VAN DAM, *supra* note 281. The Ba'ath rule persisted until the 2011 uprising and in fact has not completely lost control in Syria. *Id.*

<sup>287</sup> Pipes, *supra* note 282, at 440. Between 1958 and 1961 Syria created a political union with Egypt, called “the United Arab Republic” in order to revive the Arab nation. The merger ended in 1961 when Syria withdrew from the union. For a discussion of the union and its failure, see Monte Palmer, *The United Arab Republic an Assessment of Its Failure*, 20 MIDDLE E. J. 50, 50 (1966).

<sup>288</sup> Pipes, *supra* note 282, at 440.

<sup>289</sup> The Sunnis ignored the army as a tool of state and believed that reserving the top positions for themselves in the army would suffice to control the military forces. See *id.* at 440–41; AJAMI, *supra* note 2, at 24–25.

<sup>290</sup> Pipes, *supra* note 282, at 440.

<sup>291</sup> *Id.* at 442.

<sup>292</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96.

<sup>293</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 268.

This revolution was developed and deepened by the authoritarian regime of Hafiz al-Assad. Raymond Hinnebusch observes that al-Assad created a stable regime<sup>294</sup> “through the lens of neo-patrimonialism [and] the concentration of power in the regime through the construction of clientele networks around the presidency.”<sup>295</sup> Al-Assad managed to create a “‘loyalty system’ under which . . . elites were given license to enrich themselves and thereby were ‘implicated’ in the regime.”<sup>296</sup> Hinnebusch suggests that Al-Assad’s successful efforts to consolidate Syria were enabled by a “dark side,”<sup>297</sup> referring both to “the mafia-like clans . . . whose corruption and smuggling undermined state policy”<sup>298</sup> and to the role of repression in regime consolidation—a repression created through an army made up of “guard units recruited from [Assad’s] kin and sect that defended the regime”<sup>299</sup> and through the pervasive public surveillance in Syria as a *mukharabat* (intelligence) state.<sup>300</sup>

Economic factors and liberalization reforms also contributed to the stability of al-Assad’s regime.<sup>301</sup> The revolution enabled rapid social mobility for the lower classes, “especially from the villages and minorities,”<sup>302</sup> and consolidated an alliance between “Alawi power brokers and the Damascene Sunni merchant class” (a “military-mercantilist complex,” as one commentator called it).<sup>303</sup> The regime went through several cycles of liberalization in its economy, resulting in a greater scope for the private sector.<sup>304</sup> Yet, the economic liberalization was followed by only limited political liberalization, “amounting to a mere decompression of authoritarian controls and greater access for the bourgeoisie to decision-makers,”<sup>305</sup> and did not develop as a stage towards democratization.<sup>306</sup> These processes of liberalization led civil

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<sup>294</sup> That stability was slightly shaken in the 1980’s when an Islamic revolution from within was attempted, but eventually was repressed by al-Assad’s regime. See *id.* at 270; AJAMI, *supra* note 2, at 84; Eyal Zisser, *Syria, the Ba’th Regime and the Islamic Movement: Stepping on a New Path?*, 95 MUSLIM WORLD 43, 47 (2005).

<sup>295</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 269.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 273–74; Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96.

<sup>302</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 270.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 273.

<sup>305</sup> *Id.* at 274.

<sup>306</sup> *Id.*; Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 103–04.

society to demand democratization after the death of Hafiz al-Assad, but their aspirations were soon repressed by Hafiz's successor, his son, Bashar al-Assad.<sup>307</sup>

Bashar al-Assad followed the path his father had paved but intended to “upgrade” his authoritarian regime.<sup>308</sup> At the start of his rule, Bashar “was popular as a modernizer with the public, especially with the younger generation, and hence represented both continuity and change.”<sup>309</sup> Bashar's intentions were to “foster modernizing cadres” and to increase reforms in state institutions to limit corruption and waste by promoting economic, cultural, and technological liberalization (even if to a limited extent).<sup>310</sup> However, these have currently failed, contributing to the debilitation of the regime through the 2011 uprising.<sup>311</sup>

The reasons for Bashar's failure are rooted in the sectarianism of Syrian society.<sup>312</sup> Because Syria lacks a distinct national identity, the Ba'ath regime consolidated the Syrian society and bridged its sectarian ruptures through the ideology of Arabism.<sup>313</sup> “Arguably, Arab nationalism was the most successful ideology in filling the post-Ottoman identity vacuum” because it bridged the cleavages between the factions in the Syrian Arabic-speaking populations.<sup>314</sup> For the Ba'ath, it was a means for overcoming its political competitors—on the one hand, the Syrian Social National Party, and on the other hand, the religious alternative of the Muslim Brotherhood.<sup>315</sup>

However, in order for the Ba'ath to continue its hold on Syrian society through the ideology of nationalism,<sup>316</sup> it had to preserve its social basis, a mission that Bashar failed to achieve.<sup>317</sup> Bashar's initiated reforms were

<sup>307</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 274.

<sup>308</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 95.

<sup>309</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 274.

<sup>310</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 98, 104.

<sup>311</sup> *Id.* at 95, 106, 113.

<sup>312</sup> For a discussion of sectarianism in Syria and its linkage to the struggle for power in the state, see generally VAN DAM, *supra* note 2; AJAMI, *supra* note 2, at 111–34.

<sup>313</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96; Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 263–64.

<sup>314</sup> Hinnebusch, *Modern Syrian Politics*, *supra* note 280, at 264; Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96.

<sup>315</sup> Zisser, *supra* note 294, at 46–48.

<sup>316</sup> The ideology of nationalism had also some disadvantages, for example, positioning Syria against western imperialism and entangling it in the Palestinian issue. See Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96.

<sup>317</sup> *Id.* at 112.

accompanied by his restructuring of the regime's social base by abandoning the "old guard" and "retir[ing] the older generation."<sup>318</sup> The Ba'ath ideology was hence neglected; however, "no bourgeois party arose to organize supporters of [Bashar's] neo-liberalism."<sup>319</sup> Moreover, other ideologies were competing for power, especially Islamist.<sup>320</sup> Bashar tried to foster moderate Islam in order to prevent the emergence of more radical currents and to tame secular opposition to his regime.<sup>321</sup> His efforts were focused on controlling and taming Islam.<sup>322</sup> In this way, although he allowed the incorporation of Islamist representatives into parliament and assured the *ulema*,<sup>323</sup> the economic freedom to manage Islamic financial institutions, he did not allow Islamists to be fully politically incorporated or to participate in free elections.<sup>324</sup>

This exclusion of the Islamists from fully participating in politics illustrates Bashar's aversion to democracy in Syria and his inflexible attitude to the activities of human rights organizations.<sup>325</sup> Even though Bashar's first year of ruling, known as "the Damascus Spring," allowed for economic reforms and openness to the West—including the establishment of human rights organizations, civic forums, and even the release of political prisoners—this period ended with the arrest of large numbers of human rights activists during summer and autumn of 2001.<sup>326</sup> Because of the "exceptional thirst of the Syrian middle class for freedom,"<sup>327</sup> however, a majority of Syrian oppositional groups, parties, and independents signed the Damascus Declaration in 2005, demanding gradual democratic reform.<sup>328</sup> Twelve figures leading this initiative were sentenced to serve time in prison in 2008, and no one else stepped forward to oppose Bashar until 2011.<sup>329</sup>

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<sup>318</sup> *Id.* at 98–99.

<sup>319</sup> *Id.* at 112.

<sup>320</sup> Zisser, *supra* note 294, at 54–59.

<sup>321</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 105.

<sup>322</sup> *Id.* at 112.

<sup>323</sup> The *ulema* are "those who have had special training in the knowledge of Muslim religion and law, and are regarded by Muslims as the authorities on these matters." *Ulema*, OXFORD ENGLISH DICTIONARY (2015).

<sup>324</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 104–05, 112.

<sup>325</sup> See Lungren-Jörum, *supra* note 2, at 13.

<sup>326</sup> *Id.*

<sup>327</sup> AJAMI, *supra* note 2, at 8. The author cites Professor Burhan Ghalioun, a Homs-born professor of political sociology at the Sorbonne University in Paris who left Syria in 1971 but visited as an active participator in the Damascus Spring events and in the Damascus Declaration of 2005. Lungren-Jörum, *supra* note 2, at 14. Ghalioun was a member of the civic leadership of the 2011 uprising. *Id.* at 16.

<sup>328</sup> Lungren-Jörum, *supra* note 2, at 13.

<sup>329</sup> *Id.*

The 2011 Syrian uprising started as a civil rebellion motivated by the demand for political rights and civil liberties for the Syrian people.<sup>330</sup> In March 2011, a group of young children in Dar'a were arrested and brutally tortured for writing graffiti against the regime. Non-violent protests against the regime broke out, gradually spreading to other towns and villages,<sup>331</sup> and soon became a nationwide uprising against the regime.<sup>332</sup> Facing the regime's harsh military reaction to the civil demonstrations, the struggle evolved into a military insurgency, initially with the establishment of the Free Syrian Army in July 2011.<sup>333</sup> The struggle later saw the emergence of other rebel militia alliances, such as the Syrian Islamic Liberation Front, the Syrian Islamic Front, and the Islamic State in Iraq and the Levant (ISIL), mainly religious groups expressing different interpretations of Sunni Islamist ideology and whose motivations for the struggle differ from those of the original demonstrators.<sup>334</sup> The Kurds also formed a militia group called the Democratic Union Party, which is a Syrian Kurdish franchise of the PKK organization.<sup>335</sup>

For the purpose of this Article, it is important to inquire into the rebel groups' and demonstrators' motivations for initiating the struggle, as well as their aspirations for the future of Syria. Equally important is the question of the level of cohesiveness and unification that could be created between the different rebel groups.

In contrast to the above description of Syria as a divided and sectarian state, the prominent speakers of the coalition of committees formed by the opposition to the regime inside and outside of Syria<sup>336</sup> resist the view of Syria as a mosaic society.<sup>337</sup> They intend to defeat the regime's strategy of "divide

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<sup>330</sup> Ismail, *supra* note 2, at 542; Lungren-Jörum, *supra* note 2, at 13; AJAMI, *supra* note 2, at 10–13.

<sup>331</sup> Another notable event that sparked the uprising occurred in Hama, where the body of a young and terribly abused cement layer was dragged from the Orontes river. AJAMI, *supra* note 2, at 10. The protests then spread to more towns and villages, including "the coastal cities of Baniyas and Latakia, the outskirts of Damascus, and then, Homs, Hama and the smaller towns of Rastan, Talbiseh, Maaret al-Noman, Jisr al-Shughour and Idlib." *Id.* at 88.

<sup>332</sup> Ismail, *supra* note 2, at 539. The regime succeeded in keeping Aleppo and Damascus—the capital city in which the regime struggled desperately to survive—outside the rebellion by placing military camps and loyal Alawi migrants at the strategic approaches to both cities. See AJAMI, *supra* note 2, at 90–92.

<sup>333</sup> Lungren-Jörum, *supra* note 2, at 18.

<sup>334</sup> Jonathan Spyer, *Fragmented Syria: The Balance of Forces as of Late 2013*, 17 MIDDLE E. REV. INT'L AFF. 9, 12–13 (2013).

<sup>335</sup> *Id.* at 14.

<sup>336</sup> See Lungren-Jörum, *supra* note 2, at 16–18, for the interviews with Burhan Ghalioun, as well as with Michel Kilo, a senior opposition activist and a member of the Committee for Coordination of Democratic Change established in June 2011.

<sup>337</sup> *Id.* at 17.

and rule' . . . [which] perpetuated social antagonism and resentment along sectarian and ethnic lines."<sup>338</sup> Their vision for the future of Syria is of a unified Syrian people and a sense of solidarity, and they motivate a dialogue among Syrians of all backgrounds and religious affiliations.<sup>339</sup> They view future Syria as a civil, democratic state, possibly with an Islamic reference depending on the outcomes of elections.<sup>340</sup> They insist that the uprising is against "the rule of a certain family" and not against a sect (i.e., the Alawi sect).<sup>341</sup> As Burhan Ghalioun states, "every individual member" of the National Syrian Council<sup>342</sup> "represents the entire Syrian people, not just people who happen to share his or her background."<sup>343</sup>

However, the unifying a-sectarian vision described above does not necessarily reflect the reality on the ground. Since the late 1920s Syria has been described as "a country . . . [which] militated against national unity and the formation of patriotic sentiment."<sup>344</sup> As Fouad Ajami observes, "[the] lines of sect and community had not gone away and that world in Greater Syria . . . had not found a way out of the hold of sectarianism."<sup>345</sup> The Syrian opposition thus faces practical realpolitik challenges. Despite its aspirations for creating a national unity government,<sup>346</sup> the opposition's disparity and the difficulties it has had joining up its forces have long been known.<sup>347</sup> With the evolution of the uprising into an armed conflict between the regime and armed groups, more groups and ideological currents have occupied territories and want to enforce their own perception of the Syrian state.<sup>348</sup> Moreover, and despite the opposition's welcoming attitude towards the Alawis, the regime's long-years protection of this sect together with the Alawis' sense of persecution might

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<sup>338</sup> Ismail, *supra* note 2, at 540–41.

<sup>339</sup> *Id.* at 543.

<sup>340</sup> Lungren-Jörum, *supra* note 2, at 26–27.

<sup>341</sup> *Id.* at 17. The Alawi community, referred to as the "esteemed community" (*al-taifa al-karima*), is viewed as innocent of the crimes of the al-Assad family. AJAMI, *supra* note 2, at 122–23.

<sup>342</sup> The National Syrian Council was established in October 2011 in an attempt to unify the demonstrators under a recognized leadership. Lungren-Jörum, *supra* note 2, at 14. The council included representatives from all parts of the ideological spectrum as well as ethnic and religious minority groups. *Id.* It has a 230-seat general assembly with fifty-five seats reserved for grass root activists inside Syria and a twenty-nine member executive committee. *Id.*

<sup>343</sup> *Id.* at 17.

<sup>344</sup> AJAMI, *supra* note 2, at 116.

<sup>345</sup> *Id.*

<sup>346</sup> In the first stages of the uprising, even the Committee for Coordination of Democratic Change, the biggest opposition bloc, aspired for cooperation with the regime if it changed its ways and met the committee's fundamental demands. See Lungren-Jörum, *supra* note 2, at 23.

<sup>347</sup> *Id.* at 13; see also Spyer, *supra* note 334, at 13.

<sup>348</sup> See generally Spyer, *supra* note 334.

very well result in the Alawis remaining loyal to Bashar al-Assad. As an Alawite writer using the pseudonym Khudr has stated: “[T]he Alawis lack [a] sense of confidence and belonging . . . They will have to “fight to the end” and stay with the Assads, doubts and all.”<sup>349</sup>

The opposition groups, therefore, understand that the fear that “Syria’s diverse religious groups . . . would retrench to positions based on narrow communal identities”<sup>350</sup> might actualize. As a consequence, the opposition, in the struggle for the future of Syria, aims at overcoming the tensions between the concept of an inclusive nation and the promotion of a civic identity of equal rights and obligations on the one hand, and the need to take into account and incorporate distinct, communally based practices and relations on the other hand.<sup>351</sup> Considering the evolution of the struggle, the increasing number of radical religious groups, and the current geographical division of Syria as more groups occupy various territories, there remains the question of whether the pioneering demonstrators’ utopian vision of unity will ever be realized. In addition, the question of the level of cohesiveness that will be achieved at the end of civil war will have implications for this society’s ability and willingness to bring perpetrators of international core crimes to justice. In the following subsection, I assess the possible answers to these questions.

### *B. Universal Jurisdiction or Local Justice in Syria?*

At the time of the writing of this Article, the international community was not pursuing criminal charges against perpetrators of international core crimes in Syria.<sup>352</sup> But when the conflict is militarily resolved and Syrian society reconstructs itself, this situation may change. The ICC will likely be prevented from intervening because it will not have jurisdiction *ratione loci* and *ratione personae*, and the U.N. Security Council will also likely be paralyzed by Chinese and Russian vetoes.

However, universal jurisdiction may be applied by foreign national courts under the following conditions. First, when the conflict ends with the victory of one or more of the fighting armies, organizations, or militias, persons who belong to the defeated force or forces may flee Syria. Some of these may be

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<sup>349</sup> AJAMI, *supra* note 2, at 124.

<sup>350</sup> Ismail, *supra* note 2, at 540.

<sup>351</sup> *Id.* at 545.

<sup>352</sup> As noted above, an initiative to pass the situation to the ICC failed because of the Chinese and Russian vetoes in the U.N. Security Council. *Russia and China Veto UN Move to Refer Syria to ICC*, BBC NEWS (May 22, 2014), <http://www.bbc.com/news/world-middle-east-27514256>.

perpetrators of international core crimes such as torture or war crimes. Therefore, the states that are parties to the 1949 Geneva Conventions<sup>353</sup> and the Convention Against Torture<sup>354</sup> will have to obey their obligations according to these conventions to either prosecute or extradite those persons.<sup>355</sup>

Second, internal post-conflict rebuilding of Syrian society, including processes of reforms and changes, will affect the measures taken by the international community regarding criminal procedures. The military resolution of the conflict in Syria will undoubtedly be insufficient to rebuild and restore Syria as a state in terms of either the cohesion of its civil society or its functioning as a political entity among the states of the international community. To achieve these goals, Syrian society will likely have to undergo a process of transitional justice, in the course of which the outcomes of the painful conflict can be processed in several ways.<sup>356</sup> Syrian society may turn to reconciliation mechanisms such as truth commissions<sup>357</sup> or to local idiosyncratic procedures of justice, such as the Gacaca courts in Rwanda.<sup>358</sup> It may otherwise decide to pursue criminal procedures against perpetrators of international core crimes. Or it can follow both trajectories—that is, apply both reconciliation and criminal justice procedures.

If the new post-conflict regime in Syria decides to pursue criminal procedures, it may apply Syria's obligations under the Convention Against Torture or the Geneva Conventions of 1949 and either prosecute or extradite persons responsible for the crimes of torture and war crimes. It may also use its own criminal system to pursue criminal charges against perpetrators of other

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<sup>353</sup> Geneva Convention III, *supra* note 98.

<sup>354</sup> Convention Against Torture, *supra* note 100.

<sup>355</sup> See Geneva Conventions I–IV, *supra* note 98.

<sup>356</sup> In the last decade there has been extensive writing on transitional justice. See, e.g., Oskar N.T. Thoms et al., *State-Level Effects of Transitional Justice: What Do We Know?*, 4 INT. J. TRANSITIONAL JUST. 329 (2010); Lisa J. Laplante & Kimberly Theison, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49 (2006-2007); TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); RUTI G. TEITEL, TRANSITIONAL JUSTICE (Oxford Univ. Press 2000).

<sup>357</sup> For a discussion of the process of truth commissions and examples of such processes throughout the world, see, for example, PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH (2d ed., 2010); TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS (2004); Susan Kemp, *The Inter-Relationship Between Guatemalan Commission for Historical Clarification and the Search for Justice in National Courts*, 15 CRIM. L. FORUM 67, 67–72 (2004).

<sup>358</sup> See, e.g., PHIL CLARK, THE GACACA COURTS, POST GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS (2010); Tully L. Danielle, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385 (2003).

international core crimes. Under such circumstances, foreign national courts willing to apply their universal jurisdiction laws will have to examine whether the terms of the subsidiarity principle are fulfilled. This examination will determine whether those states should apply their jurisdiction or waive it. In the following analysis of the parameters of subsidiarity, I assess post-conflict Syria's willingness and ability to pursue criminal procedures against perpetrators of international core crimes.

The key parameter for such assessment is the independence of the judicial system.<sup>359</sup> The minimum standards for judicial independence include a judicial system that is impartial,<sup>360</sup> and impartiality is one of the indicators of a willingness to pursue criminal procedures in good faith.<sup>361</sup> In addition, an independent judicial system is viewed as not experiencing a substantial or total collapse of its institutions and therefore *able* to undertake prosecutions.<sup>362</sup>

Applying these parameters of willingness and ability on the post-conflict judicial system in Syria reveals that Syria will not be independent, and hence will neither be able nor willing to perform criminal investigations and prosecutions. As discussed above, the inability of a state to pursue criminal procedures suggests a substantial collapse and unavailability of the judicial system.<sup>363</sup> This is most apparently the case for judicial systems of "states emerging from conflict, in which infrastructure and resources have been destroyed or are unavailable."<sup>364</sup> It is also the case for: "1. [s]tates entangled in conflict- either domestic or international, 2. [s]tates experiencing political unrest or economic crisis, [and] States in transition."<sup>365</sup> In these situations, the judicial and other bureaucratic systems of the state may suffer a shock that would render them ineffective. Furthermore, violations of rights and disrespect for the rule of law may threaten the independence of the judicial system. Finally, procedures of reform and transition to new governments may render the judicial system unavailable and therefore unable to carry out criminal procedures against the perpetrators of international core crimes.<sup>366</sup> All of these descriptions match the current conflict in Syria and indicate that Syria would most likely be unable to carry out criminal proceedings.

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<sup>359</sup> Ellis, *supra* note 144, at 237.

<sup>360</sup> *Id.*

<sup>361</sup> Rome Statute, *supra* note 21, art. 17(2)(c).

<sup>362</sup> Ellis, *supra* note 144, at 238.

<sup>363</sup> Rome Statute, *supra* note 21, art. 17(3).

<sup>364</sup> Ellis, *supra* note 144, at 237.

<sup>365</sup> *Id.* at 238.

<sup>366</sup> *Id.* at 238–39.

In addition, even when the judicial system in Syria overcomes the legal and bureaucratic chaos created by the conflict, there still remains the question of its willingness to perform criminal procedures in good faith. The sectarian trends that have characterized Syria since its establishment and which also laid the foundation for the current conflict, although denied by some leading figures of the opposition,<sup>367</sup> may jeopardize the new regime's ability to conduct genuine criminal procedures. It will be difficult to secure the rights of defendants that are not influenced by resentment against one sect or another, especially when members of some of the sects are responsible for the grievous outcomes of war crimes and crimes against humanity.

Indeed, the level of implementation of international standards of human rights is another factor that will have a crucial impact on the independence of Syria's judicial system and, as a consequence, on Syria's ability and willingness to pursue criminal proceedings. As some scholars suggest, the application of international standards of human rights is part of the due process of law.<sup>368</sup> Therefore, the unavailability of a state's judicial system also covers its lack of implementation of international standards on procedural requirements.<sup>369</sup> This is because in such cases the national judicial system will not be able "to provide justice in the case."<sup>370</sup>

It is, therefore, obvious that judicial systems of states such as monarchies and dictatorships that ignore the basic principles that are fundamental to the rule of law<sup>371</sup> render their systems unavailable with regard to pursuing criminal procedures against perpetrators of international core crimes.<sup>372</sup> According to the analysis suggested below, the Syrian legal system currently suffers from such deficiencies, and is likely to continue to do so when the conflict ends.<sup>373</sup>

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<sup>367</sup> See Lungren-Jörum, *supra* note 2; Ismail, *supra* note 2, at 540–41, 543.

<sup>368</sup> KLEFFNER, *supra* note 87, at 157. On the duty of states applying universal jurisdiction to comply with internationally recognized fair trial standards, see Krefß, *supra* note 16, at 581–84.

<sup>369</sup> KLEFFNER, *supra* note 87, at 157.

<sup>370</sup> See *id.*

<sup>371</sup> See, e.g., Ellis, *supra* note 144, at 238–69; Rome Statute, *supra* note 21, art. 67.

<sup>372</sup> Ellis, *supra* note 144, at 239.

<sup>373</sup> For examples of the Syrian judicial system's poor respect for international human rights standards, see generally DAMASCUS CTR. FOR HUMAN RIGHTS STUDIES, ALTERNATIVE REPORT TO THE SYRIAN GOVERNMENT'S INITIAL REPORT ON MEASURES TO FULFILL ITS COMMITMENTS UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2010), [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/SYR/INT\\_CAT\\_NGO\\_SYR\\_48\\_10106\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/SYR/INT_CAT_NGO_SYR_48_10106_E.pdf); HUMAN RIGHTS WATCH, FAR FROM JUSTICE: SYRIA'S SUPREME STATE SECURITY COURT (2009), <http://www.hrw.org/reports/2009/02/23/far-justice-0> [hereinafter FAR FROM JUSTICE].

Due to the Syrian Republic's establishment through the French Mandate, French law has had crucial influence over Syria's legal system, including criminal law.<sup>374</sup> Nevertheless, and even though the Shari'a (i.e., Islamic law) is not the formal law in Syria,<sup>375</sup> Shari'a is stated in the constitution as a major source of law in Syria.<sup>376</sup> This system remained in force after the Ba'ath party coup of 1963 that turned Syria into a secular unitary republic.<sup>377</sup> In 2012, Syria adopted a constitution that made it a semi-presidential republic.<sup>378</sup>

However, in practice, the Syrian authoritarian regime's<sup>379</sup> commitment to basic international legal standards of due process of law and fundamental human rights is very limited.<sup>380</sup> Syria was one of the Arab states that affirmed the 1948 Universal Declaration on Human Rights in the U.N. General Assembly<sup>381</sup> and is a member of the 1966 Covenants on Human Rights.<sup>382</sup> Nevertheless, the Syrian Constitution makes treaty law binding domestically in Syria "only when new legislation to that effect is promulgated,"<sup>383</sup> and subsequent statutes prevail over treaties in cases of conflict of laws.<sup>384</sup> In addition, in practice, and as a consequence of the *mukharabat* state established by the al-Assad's,<sup>385</sup> several fundamental human rights are very poorly observed in Syria. For example, the rights of prisoners are not strictly respected,<sup>386</sup> military courts are employed to suppress dissent,<sup>387</sup> and even

<sup>374</sup> Jacques el-Hakim, *Syria*, 1 Y.B. ISLAMIC & MIDDLE E. L. 142, 152 (1994).

<sup>375</sup> An exception is the application of Muslim law to govern the Muslim community in matters of family law and succession. *See id.* at 148.

<sup>376</sup> Article 3 of the Syrian Constitution determines that "Islamic jurisprudence is a main source of legislation." This Article was maintained in the revised Syrian Constitution of 2012. CONSTITUTION OF THE SYRIAN ARAB REPUBLIC Feb. 26, 2012, art. 3.

<sup>377</sup> Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96.

<sup>378</sup> *See* CONSTITUTION OF THE SYRIAN ARAB REPUBLIC, *supra* note 376.

<sup>379</sup> *See* Reinoud Leenders, *Authoritarianism and the Judiciary in Syria: Regime Resilience and Implications for Judicial Reform Assistance*, at 13 (Knowledge Programme Civil Soc'y in W. Asia, Working Paper No. 17, 2010); Hinnebusch, *Syria: From Authoritarian Upgrading to Revolution?*, *supra* note 285, at 96. *See generally* Annette Büchs, *The Resilience of Authoritarian Rule in Syria Under Hafez and Bashar Al-Assad* (Ger. Inst. of Glob. and Area Studies (GIGA), Working Paper No. 97, 2009).

<sup>380</sup> *See supra* note 373 and accompanying text.

<sup>381</sup> Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 216 (1990).

<sup>382</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>383</sup> Arzt, *supra* note 381, at 221.

<sup>384</sup> *Id.* at 222.

<sup>385</sup> *See* Hinnebusch, *Modern Syrian Politics*, *supra* note 280 and accompanying text.

<sup>386</sup> AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2014/2015: SYRIAN ARAB REPUBLIC (2015); FAR FROM JUSTICE, *supra* note 373, at 12–13.

<sup>387</sup> Arzt, *supra* note 381, at 226.

though the constitution determines the independence of the judiciary, scholars have observed the opposite to be true.<sup>388</sup> It should also be mentioned that Syria does not object to capital punishment, as this kind of punishment is not proscribed by Shari'a.<sup>389</sup> This fact alone, however, would not render the Syrian legal system unable to provide justice in a case. Despite the facts that the Rome Statute does not include capital punishment<sup>390</sup> and that international human rights law tends to prescribe its abolition,<sup>391</sup> this type of punishment is not formally proscribed by international human rights law. Therefore, the meting out of capital punishment to perpetrators of international core crimes would not necessarily evoke the parameters of unwillingness and inability.<sup>392</sup>

Truly, the opposition's vision of the future Syrian state is of a civil democratic state with prominence for human rights. However, the questions are, first, whether the civic forces including human rights activists and forums that initiated the uprising will have the upper hand at the end of the conflict, and second, whether they will be able to realize their plans given the underlying preconditions of the post-conflict state and society. If they fail in

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<sup>388</sup> *Id.* at 206–07; Leenders, *supra* note 379, at 7.

<sup>389</sup> William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 223, 231–34 (2000-2001).

<sup>390</sup> Rome Statute, *supra* note 21, art. 77 (determining that “the Court may impose one of the following penalties on a person convicted of a crime under Article 5 of [the] Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”)

<sup>391</sup> *See, e.g.*, The Second Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 15, 1989; The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty as Amended by Protocol No. 11, May 11, 1994, E.T.S.155; Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Jan. 9, 2003; Human Rights Committee, General Comment 20, Article 7 (Forty-fourth Session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 30 (1994).

<sup>392</sup> Note, for example, that when capital punishment was meted out to Saddam Hussein by the Iraqi Special Tribunal, the U.N. Secretary General, Ban Ki Moon, supported the court's decision and stated that “the issue of capital punishment is for each and every Member State to decide.” *See Ban Ki-Moon Takes Over as UN Secretary-General, Calls for Common Action to Face Crises*, U.N. NEWS CTR. (Jan. 2, 2007), [http://www.un.org/apps/news/story.asp?NewsID=21137#.VAsNqD\\_lp9A](http://www.un.org/apps/news/story.asp?NewsID=21137#.VAsNqD_lp9A). For an English summary of the Appeals Court's decision, see RAID AL-SAEEDI, SUMMARY OF THE VERDICT OF 1991 CASE (2010), <http://law.case.edu/Academics/AcademicCenters/Cox/GrotianMomentBlog/documents/1991IHTverdict.pdf>. Nevertheless, the fairness of the trial's proceedings, including the legality of the punishment inflicted upon Hussein according to international law, was criticized by other jurists and scholars. *See, e.g.*, SONYA SCEATS, THE TRIAL OF SADDAM HUSSEIN (2005), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bptrialhussein.pdf>. Sceats mentions that “because of the death penalty, European investigators have reportedly refused to contribute to mass grave excavations and a number of states have declined to commit funds to the Court.” *Id.*

realizing their vision, then it is more likely that Syria will be considered unwilling and unable to perform genuine criminal proceedings against the perpetrators of international core crimes. Foreign national courts of states that legislated universal jurisdiction laws, such as those described in Part III of this Article, will have legal authorization to apply these laws.

### CONCLUSION

More than a decade after the Princeton Principles and almost a decade after the Institut de Droit International resolution on universal jurisdiction, this concept has been and still serves as a prominent tool for the international community to prevent impunity from the perpetrators of international core crimes. In this Article, I examined the development of the concept of universal jurisdiction in order to assess its application to the post-Syrian civil war case.

My analysis supports the concept of universal jurisdiction and its crucial role in preventing impunity and securing justice. However, because universal jurisdiction in its absolute version jeopardizes the interests of societies in transition (such as their ability to reconstruct themselves on foundations that secure justice for their members), I argued that the concept of mitigated universal jurisdiction, expressed through the complementarity principle (also referred to as subsidiarity), can bypass this obstacle in a way that both secures the values of preventing impunity and strengthens societies in transition, struggling for their political and legal independence. I discussed the cornerstone parameters of this principle, i.e., “willingness and ability,” delving into interpretations of scholars and of the ICC’s jurisdiction, and showed how this principle was incorporated both by the Rome Statute and by states that enacted universal jurisdiction laws.

However, I argued that because the ICC’s jurisdiction is limited by various legal preconditions, it cannot always interfere to achieve global justice. After discussing the circumstances under which the ICC is unable to apply its jurisdiction, I suggested that in those situations, states that enact universal jurisdiction laws could take the ICC’s place. I showed that, like the ICC, those states also limited their universal jurisdiction laws through the principle of subsidiarity, and I illustrated the application of this principle in both the legislation and courts’ decisions in several prominent European states that have enacted and applied universal jurisdiction laws in several cases.

Lastly, I examined the implications of the above conclusions to the Syrian case. Basing my analysis on a historical description of the establishment of the

Syrian state, the construction of Syrian society, and the development of the Syrian uprising (including a discussion of the motivations of its generators), I suggested that even though the Syrian society may be willing to conduct genuine criminal proceedings for the investigation and prosecution of the perpetrators of international core crimes, it will likely face conspicuous difficulties in performing this mission. I contended that the post-conflict Syrian legal system will most likely not be considered independent and hence will not be “willing and able” to conduct criminal procedures. Therefore, the international community will have room to apply universal jurisdiction after considering the parameters of complementarity—the willingness and ability of Syria to conduct those procedures by itself—and reaching the conclusion that the Syrian society does not live up to those parameters.

The above notwithstanding, in practice, there is still doubt whether foreign national courts will realize their legal rights to adjudicate the perpetrators of international core crimes in Syria. International relations and political considerations may influence states’ decisions; hence, some states, desiring to preserve good relations with the new Syrian state, may abstain from meddling in Syria’s internal affairs,<sup>393</sup> at least where Syria’s legal actions are in “a grey area” and especially if the international community is willing to tolerate the imperfect application of the rule of law in a state coming out of the turmoil of a revolution.<sup>394</sup> While it is therefore impossible to predict how states will choose to apply the legal tool of universal jurisdiction they have developed and endorsed, it is nevertheless important to note the legality of its application. It is to be hoped that—at least in evident cases where impunity should be prevented and the rights and interests of victims should be secured—states will choose to apply universal jurisdiction laws to adjudicate perpetrators of international core crimes in Syria.

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<sup>393</sup> For similar considerations to avoid the application of universal jurisdiction, see Langer, *supra* note 28, at 2–5.

<sup>394</sup> See Lama Abu Odeh, *On Law and Revolution*, 34 U. PA. J. INT’L L. 341, 344–45 (2013) (discussing the application of the rule of law in post-revolution Egypt). *Cf. Cases and Situation: Libya*, COAL. FOR INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=libya> (last visited Nov. 5, 2015) (noting that the ICC exerted its jurisdiction over al-Gaddafi and claimed that Libya was unable to conduct a genuine investigation and prosecution). However, there is no guarantee that, if the case had been examined by states instead of the ICC, political considerations such as the ones discussed above would not have tilted the balance against applying universal jurisdiction.