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No Hiding from Justice: Universal Jurisdiction in Domestic Courts

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No Hiding from Justice: Universal Jurisdiction in Domestic Courts

HEIDI R. GILCHRIST*

TABLE OF CONTENTS

INTRODUCTION	21616
I. BACKGROUND UNIVERSAL JURISDICTION	217
II. BACKGROUND ON SYRIA	220
III. HURDLES FOR JUSTICE AGAINST SYRIAN OFFICIALS IN INTERNATIONAL COURTS.....	222
IV. THE FIRST CASE AGAINST A SYRIAN OFFICIAL USING UNIVERSAL JURISDICTION – PAVING THE PATH AGAINST IMPUNITY	224
V. THE ROLE OF EMOTION	230
<i>A. Victim-Centered</i>	231
<i>B. News and Social Media</i>	233
<i>C. Non-Governmental Organizations and Academics</i>	234
<i>D. Abandoned by World</i>	235
VI. MORE PROSECUTIONS COMING.....	236
VII. SANCTIONS AND DETERRENCE	236
CONCLUSION	2387

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Without justice, there cannot be peace in Syria.

-Mazen Darwish, Syrian torture survivor, journalist and lawyer¹

They gave us watches and took away time

They gave us shoes and took the paths

They gave us parliaments and took freedom

They gave us playground swings and took celebrations

...

They gave us guards and locks and took safety

They gave us rebels and took the revolution

-Muhammad Al-Maghout, a Syrian writer and poet²

INTRODUCTION

The first trial worldwide has now taken place prosecuting an employee of Bashar Al-Assad's brutal Intelligence Services. The trial did not take place in an international court, but in a German domestic court using universal jurisdiction. The Syrian people have endured a half-century history of torture, brutality, and detention without process for any indication of disloyalty to the regime, led first by Hafez al-Assad and now his son, Bashar al-Assad. The fear in Syria of the *mukhabarat*, the secret service, has always been immense. However, it was not until the beginning of demonstrations and the civil war that the Syrian regime's tactics became increasingly systematic and widespread thereby garnering worldwide attention. And with this attention came the hope of action by victims of the regime. Then came the moral outrage as the international community failed to act. Activists had to think creatively and now there is some hope in the fight against impunity. The use of universal jurisdiction has enabled German domestic courts to prosecute members of the Syrian regime.

This Article uses this first case of universal jurisdiction against a member of the Syrian intelligence service to examine and assess the use of universal jurisdiction in domestic courts. This case gives the opportunity to see both the incredible impact of universal jurisdiction and look at potential problems that need to be addressed in future cases. I argue that although criticism that the first case was against a low-level officer is valid, what matters most is this is a step against impunity. It is a message to brutal regimes that they will no longer be able to retire to Germany or the French Riviera. Additionally, the individual was tried fairly, and his relatively short sentence reflects his low stature. This Article highlights the role of emotion

1. EUR. CTR. FOR CONST. AND HUM. RTS., *Human Rights Violations in Syria: Torture Under Assad* (Mar. 2021), https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Syria_2021March.pdf.

2. MARWAN HISHAM & MOLLY CRABAPPLE, *BROTHERS OF THE GUN: A MEMOIR OF THE SYRIAN WAR* 7 (2018).

and moral outrage as the movement to prosecute Syrian officials has been victim driven. The international community was not able to prosecute Syrian officials, so the victims needed to be creative and find other paths forward—such as universal jurisdiction. This case also highlights the incredible impunity of the officers as the cases being brought are based on the officers' own testimony to German authorities. Also, the conflict in Syria brought the regime's cruel and ruthless tactics to the world stage; but it is important to remember that these same tactics have been used for decades.

Section I explains the background on the use of universal jurisdiction in domestic courts - what it is and why it is needed. The section reviews some of the benefits it has brought to the vindication of human rights around the world, as well as some of the criticisms of it. Section II gives a background to the Syrian context specifically. The section looks at the history of the brutality of the Assad regime. Torture, detention without process, and surveillance of the population has marked the Syrian regime since the current president's—Bashar al-Assad—father, Hafez al-Assad, was president. The Syrian civil war has intensified these tactics, making them more systematic. Section III details how despite a strong consensus around the world that members of the Syrian regime have committed grave war crimes and should be held accountable by the international community, repeatedly prosecutions against them have failed in international courts.

Section IV describes and evaluates the first trial worldwide in Germany using universal jurisdiction against a member of the Syrian Intelligence Services, Eyad Al-Gharib. With the international community at a standstill against the Syrian regime, the international community needed to be creative. Germany, in a unique position because it has a large number of Syrian refugees and because it enacted a law in 2002 that allows the country to prosecute certain heinous crimes using universal jurisdiction, stepped in to prosecute members of the Syrian regime that were present in Germany. This paper focuses on the trial and the lessons learned from it.

Section V follows on Section IV by looking at the way emotion has led to the creativity and action required to at least some action – the trial in Germany, sanctions. The outrage and need of victims for something to be done for the immense torture and brutality of the Syrian regime has prompted these trials. Finally, Section VI briefly reviews some possible future prosecutions against members of the Syrian regime.

I. BACKGROUND UNIVERSAL JURISDICTION

Universal jurisdiction gives domestic courts the ability to prosecute certain heinous crimes even if they were not committed on its territory, by one of its nationals, or against one of its nationals.³ It is used when no other state can or will exercise jurisdiction using

3. See *Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly*, HUM. RTS. WATCH (Oct. 19, 2009, 8:45 AM), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>; see also *The Princeton Principles on Universal Jurisdiction*, UNIV. OF MINN. HUM. RTS. LIBR. (Jan. 15, 2022), <http://hrlibrary.umn.edu/instree/princeton.html> (Discussing how in November 2000, a group of leading legal and international relations scholars met at Princeton University and produced *The Princeton Principles on Universal Jurisdiction*. Principle 1(1) defines universal jurisdiction as “universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state

traditional doctrines.⁴ The idea behind universal jurisdiction is that some crimes are so grave they are of universal concern. The domestic court acts as a “surrogate for the international community.”⁵ Universal Jurisdiction was codified in the 1949 Geneva Conventions on the laws of war, which provide that state parties must prosecute or extradite those suspected of grave breaches of the conventions.⁶ Universal jurisdiction enabled Israel to abduct from Argentina and prosecute a senior Nazi official, Adolf Eichmann, in 1961 for his role in the Holocaust during World War II.⁷ The 1998 arrest of General Augusto Pinochet in London under a Spanish arrest warrant for human rights crimes committed in Chile during his seventeen-year rule was heralded by Human Rights Watch as a “wake-up call” to tyrants everywhere.⁸ Although Pinochet was eventually found not to have the mental capacity to stand trial and was released and returned to Chile, it set forth an important precedent as a British court found that he could be extradited to Spain on charges of torture and conspiracy to commit torture.⁹ Additionally, “an equally important effect of the case has been to give hope to other victims that they can bring their tormentors to justice abroad.”¹⁰ Universal jurisdiction can be viewed as a mechanism to ensure that victims of the most heinous international crimes have a “right of access to justice.”¹¹

Maximo Langer and Mackenzie Eason argue that universal jurisdiction has been quietly expanding with a significant growth in the number and frequency of universal jurisdiction trials, and in the geographical scope of the litigation.¹² This is likely the result of states adopting “International Criminal Court implementing statutes, the creation of specialized international crimes units by states, institutional learning by states and non-governmental organizations (NGOs), technological changes, new migration and refugee waves to universal jurisdiction states, criticisms of international criminal law as neo-colonial and the search of new venues by human rights NGOs.”¹³ In an earlier work, Maximo Langer examined the trials that were brought under universal jurisdiction and found that states only brought such cases where the international community has broadly agreed “that they may be prosecuted

exercising such jurisdiction.”)

4. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 103 (2001).

5. *Id.* at 96.

6. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GC II) art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

7. See generally *Attorney General of Israel v. Eichmann*, 36 INT’L L. REP. 277 (Sup. Ct. Israel 1962).

8. *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, HUM. RTS. WATCH (Nov. 1, 1998), <https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad>.

9. *Id.*

10. *Id.*

11. Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT’L L. 427, 455 (2018).

12. Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT’L L. 779, 779 (2019).

13. *Id.*

and punished, and whose State of nationality has not defended.”¹⁴ The defendants in 24 of the 32 trials that had been brought in 2009 were either Rwandans, former Yugoslavs, or Nazis.¹⁵

The expansion of universal jurisdiction, according to Langer and Eason, was a positive development.¹⁶ To make this conclusion, they used the fact that predictions that the use of universal jurisdiction would deeply disrupt international relations or transitions to peace did not happen.¹⁷ Additionally, the fear that universal jurisdiction would lead to “global vigilante justice” infringing on the sovereignty of states has not happened.¹⁸ However, the fact that the pattern of prosecutions has mostly concentrated on residents of the prosecuting states rather than the most widespread of serious international crimes is problematic.¹⁹ These problems go to the heart of the issue of whether universal jurisdiction should be viewed as a way to ensure a state is not a haven for perpetrators of core international crimes or whether universal jurisdiction is viewed as a way to prevent and punish core international crimes committed anywhere in the world.²⁰

The situation in Syria has been an impetus for the recent use of universal jurisdiction. The 2020 Annual Review of Universal Jurisdiction indicated that the use of universal jurisdiction is increasing.²¹ Many of the prosecutions are against Syrians, although human rights activists are concerned that many are being prosecuted using terrorism charges rather than as international crimes.²² They made the following key findings: 22 countries of commission, 16 countries of prosecution, at least 207 suspects, 40% more named suspects than in 2018, 11 accused on trial, 16 convictions, 2 acquittals, 37 terrorism charges, 146 crimes against humanity charges, 92 torture charges, 21 genocidal charges, and 141 war crimes charges.²³

Human rights activists need to be creative to achieve justice. The situation in Syria, and the inability of the international community to act²⁴ has led to the use of universal jurisdiction as a path forward against Syrian officials who have found refuge in Europe, especially Germany. Beth Van Schaack has examined how the failure of the international community to prosecute war crimes has led to national courts stepping in and prosecuting Syrian cases.²⁵ And the fact that it is incredibly unlikely that Syrian society post-conflict would be able to prosecute the crimes makes the use of universal jurisdiction the best option.²⁶

14. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Role of Political Branches in the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 9 (2011).

15. *Id.*

16. Langer & Eason, *supra* note 12, at 814.

17. *Id.*

18. *Id.*

19. *Id.* at 815.

20. *Id.*

21. *Universal Jurisdiction Annual Review 2020*, TRIAL INT'L, at 13, https://redress.org/wp-content/uploads/2020/03/UJAR_2020_WEB.pdf.

22. *Id.*

23. *Id.*

24. See discussion *infra* Section IV, at 14.

25. Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts*, SSRN ELEC. J. (Feb. 2, 2019), <http://dx.doi.org/10.2139/ssrn.3327676>.

26. Hilly Moodrick-Even Khen, *Revisiting Universal Jurisdiction: The Application of the Complementarity Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War*, 30 EMORY INT'L L.

Critics of universal jurisdiction point out that it is selectively applied based on political calculations.²⁷ The cases that go forward are generally brought against defendants from poor, weak states. Scholars and journalists have criticized that fact that the International Criminal Court has disproportionately prosecuted African defendants.²⁸ Powerful states such as the United States, Russia, and China can shield themselves as well as their allies from prosecution by the International Criminal Court.²⁹ In fact, when former prosecutor Fatou Bensouda requested investigation into torture by United States personnel and other crimes related to Afghanistan, and it was authorized by the ICC Appeals Chamber, the Trump administration placed her and one of her senior staff on a United States sanctions list.³⁰ When cases are brought domestically against actors from powerful states, prosecutors often decline to prosecute, as was the case with German litigation against Donald Rumsfeld on allegations of torture or Spanish litigation against United States officials for torture at Guantanamo.³¹

II. BACKGROUND ON SYRIA

The Syrian regime under the Assads has always been a brutal dictatorship marked by intense surveillance of the population under a vast secret service (the *mukhabarat*), detention without any process, and torture.³² The Assad government rules by emergency powers, enacted in 1963, that make it easy to arbitrarily arrest people and detain them in the intelligence service prisons.³³

In 1982, Hafez Al-Assad wiped out large parts of a town that attempted an uprising.³⁴ The Syrian branch of the Muslim Brotherhood led an uprising in Hama, a city in central Syria.³⁵ In response, Assad ordered 12,000 troops to besiege the city.³⁶ His brother led the assault, which reduced large “parts of Hama to rubble.”³⁷ Human rights groups estimate that

REV. 261 (2015).

27. Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 293 (2017).

28. See Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L. J. ONLINE 161, 164 (2001); Mary Kimani, *Pursuit of Justice or Western Plot?*, AFR. RENEWAL (Oct. 2009), <https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot>; Kate Cronin-Furman, *Is the International Criminal Court Really Targeting Black Men?*, WASH. POST (June 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/06/17/is-the-international-criminal-court-really-targeting-black-men/>.

29. Wolfgang Kaleck and Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 187 (2018).

30. <https://ccrjustice.org/home/press-center/press-releases/international-criminal-court-shutters-investigation-us-torture#:~:text=September%2027%2C%202021%E2%80%94Prosecutor%20Karim,nexus%20thereto%2C%20and%20at%20so%2D>

31. Wuerth, *supra* note 27, at 294.

32. See Anchal Vohra, *Assad's Horrible War Crimes Are Finally Coming to Light Under Oath*, FOREIGN POL'Y (Oct. 16, 2020), <https://foreignpolicy.com/2020/10/16/assads-horrible-war-crimes-are-finally-coming-to-light/>; Andrew Rathmell, *Syria's Intelligence Services: Origins and Development*, 16 J. OF CONFLICT STUD. 75 (1996) (describing Assad's use of the *mukhabarat*).

33. *Id.*

34. See Deborah Amos, *30 Years Later, Photos Emerge from Killings in Syria*, NAT'L PUB. RADIO (Feb. 2, 2012), <https://www.npr.org/2012/02/01/146235292/30-years-later-photos-emerge-from-killings-in-syria>.

35. *Id.*

36. *Id.*

37. *Id.*

10,000 or more died.³⁸ However, the Muslim Brotherhood claims at least 40,000 died with another 100,000 expelled and 15,000 disappeared.³⁹

After the death of Hafez Al-Assad in 2000, there was hope in Syria and in the international community that there would be improvement with his son, Bashar Al-Assad in charge.⁴⁰ Unfortunately, that did not happen except for a brief window in 2000 when Bashar Al-Assad released some political prisoners and allowed the founding of independent newspapers.⁴¹ Those few changes gave Syrians hope and led them to organize demonstrations.⁴² At first, as the Judges in Germany found, the government did not react with great force.⁴³ Then, in March 2011, the situation escalated when teenagers in Dar'a spray-painted slogans on a wall, were arrested by the *mukhabarat*, and had clear signs of torture when they were released. This led to further demonstrations, which resulted in demonstrators being shot at and killed. On April 18, 2011, the Central Crisis Management Cell (CCMC)—established in March to deal with this new situation—decided and detailed in a letter “the phase of tolerance and cooperation is over.” The CCMC determined, “we have to win this battle by the use of armed violence.” The Judges in Germany were convinced that it was at this point that the deaths of civilian victims increased significantly. People died on April 23, 2011, at a demonstration “by the use of water guns, live ammunition and tear gas.”

On April 25, 2011, the Syrian army stormed Damascus and the subsequent blockade lasted until April 29, causing up to 200 deaths of Syrians by the Security Forces.⁴⁴ There were similar instances and many deaths in Dar'a, Duma, and Hama. Increasingly, any peaceful demonstration was met with extreme violence. In May 2011, both the European Union and the United States placed sanctions on the Syrian government. However, the number of arrests and wanted persons in Syria still increased. In July 2011, Hama was stormed, and many civilians were killed.⁴⁵ The Judges found the conflict increased in August 2011.

At this time, after a meeting on August 5, 2011, the CCMC “condemned the security forces’ ‘lax’ response to the demonstrations” in a letter and “told the National Security Office that daily raids shall be conducted by the military and the Intelligence Services.”⁴⁶ The letter also stated that all demonstrations would be crushed and all supporters of the protesters would be found and transferred to the Intelligence Services. After this letter, the violence against

38. *Id.*

39. *Id.*

40. See Susan Sachs, *Transition in Syria: Apprehension and Hope for Stability in the Mideast*, N.Y. TIMES (June 11, 2000), <https://www.nytimes.com/2000/06/11/world/transition-in-syria-apprehension-and-hope-for-stability-in-mideast.html>.

41. Brian Whitaker, *Syria to free 600 political prisoners*, THE GUARDIAN (Nov. 17, 2000), <https://www.theguardian.com/world/2000/nov/17/brianwhitaker; Syrian President Bashar al-Assad: Facing down rebellion>, BBC (Aug. 31, 2020), <https://www.bbc.com/news/10338256>; Alan Makovsky, *Syria under Bashar al-Assad: The Domestic Scene and the ‘Chinese Model’ of Reform*, WASH. INST. NEAR EAST POL’Y (Jan. 17, 2001), <https://www.washingtoninstitute.org/pdf/view/9573/en>.

42. Makovsky, *supra* note 41.

43. See *Inside the Raslan Trial: The Al-Gharib Verdict in Detail*, SYRIA JUST. AND ACCOUNTABILITY CTR. (Mar. 18, 2021), <https://syriaaccountability.org/updates/2021/03/18/inside-the-raslan-trial-the-al-gharib-verdict-in-detail/> [hereinafter *Inside the Raslan Trial*].

44. *Id.*

45. *Id.*

46. *Id.*

peaceful protesters increased. In Duma, the government cut electricity, water, and the internet to all the town's inhabitants.

The Judges highlighted in their opinion that, at this time, the regime tried to project an image to the world that terror attacks were taking place in Syria.⁴⁷ They allowed the Arab League, which wanted to mediate, to cover the situation. It was then that the regime “palmed arms off on the demonstrators” to justify their violent actions. The regime took members of the Intelligence Services to the hospital to present fake injuries in front of members of the media who interviewed them. When the Arab League visited Branch 251, all of the detainees were transferred out and the guards pretended to be the detainees. The violence continued in 2012, despite efforts by the Arab League. For example, in March 2012, children and adults were killed by regime troops in Homs while the regime continued to claim they were countering “terror” attacks.

The *mukhabarat*, as detailed by the Judges, played an integral part in retaining power for Hafez Al-Assad in the past, and now Bashar Al-Assad, especially in quelling the uprising.⁴⁸ There are five branches: the Office of National Security, the Military Intelligence Directorate, the Air-Force Intelligence Directorate, the General Intelligence Directorate, and the National Security Council. The Branches have their own detention facilities, and torture was widespread when Hafez Al-Assad was in power. Judge Kerber found that in the course of the uprising, the number of detainees and deaths increased steadily. While initially the arrests were to gain information, starting in at least 2012 the goal became to intimidate and exterminate the opposition. In the detention facilities, people were tortured, starved, and suffocated. Individuals were also tortured and murdered in military hospitals like Tishreen, Al-Mazze, and Harasta. Military photographers took pictures of the corpses, and the number of these photographs significantly increased over time. Relatives of the detainees were never informed about where their loved ones were or whether they died.

Branch 251, a branch of the General Intelligence Directorate, was used to detain protesters.⁴⁹ They were beaten upon arrival of the so-called ‘welcoming party.’ The cells were so overcrowded that people could only sit or lay down in shifts. Detainees were not allowed to wash or shower. In most cases, there was no daylight inside the cells. The unhygienic conditions caused many skin conditions that were left untreated. The air was ‘miserable’ and nutrition insufficient detainees were only given enough food to stay alive. Detainees could hear the screams and sounds of torture day and night and were never informed of how long they would be detained or if they would make it out alive. During ‘interrogations,’ detainees were constantly mistreated or tortured—usually with cables, poles, or electroshocks. Detainees were hung from the ceiling and beaten in that position. An Amnesty report discussed the methods of torture used during interrogations, including: Falaqa, Doulab, Shabh, Flying Carpet, fingernail removal, and beating with plastic sticks or electricity cables.⁵⁰

III. HURDLES FOR JUSTICE AGAINST SYRIAN OFFICIALS IN INTERNATIONAL

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

COURTS

Unfortunately, international courts have not been able to move forward on war crimes in Syria. The International Criminal Court (“ICC”) does not have jurisdiction over crimes committed in Syria because Syria has signed, but not ratified, the Rome Statute.⁵¹ Efforts by the United Nations to refer the situation in Syria to the ICC have also failed as they have been blocked by Russia and China.⁵² Russia and China both vetoed a 2014 resolution by the United Nations that would have referred the situation in Syria to the ICC.⁵³

Some human rights scholars, including Beth Van Schaack, have argued for a hybrid tribunal, but that has also not received sufficient multilateral support.⁵⁴ A hybrid tribunal could be created within the judicial system of one or two of the border states that have been most impacted by the Syrian war, such as Turkey or Jordan.⁵⁵ They could use the effects or protective theory of jurisdiction.⁵⁶

Because Russia and China consistently blocked the Security Council in any attempted action against Syria, the United Nations had to think of other avenues for addressing the crisis there. In Resolution S-17/1, the UN Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic in August 2011.⁵⁷ The Commission’s mandate is to investigate all alleged violations of international human rights law since March 2011 in Syria.⁵⁸ In December 2016, the General Assembly established the International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.⁵⁹

The Mechanism is innovative as it seeks to facilitate fair and independent criminal proceedings in the national, regional and international courts that have or may have jurisdiction in the future over the crimes and atrocities committed in Syria.⁶⁰ The Mechanism seeks “to conduct the essential preparatory work grounded in criminal law methodologies that will be needed for accountability processes, regardless of what judicial avenues may emerge in the future.”⁶¹ As the Head of the Mechanism, Catherine Marchi-Uhel, stated:

In establishing the Mechanism, the first body of this kind ever established,
and in calling upon all States, all parties to the conflict as well as civil

51. *See State Parties to the Rome Statute*, INT’L CRIM. CT. (July 17, 1988) (The statute entered into force in July 1998, but the Syrian Arab Republic did not sign it until November 29, 2000. They have yet to ratify it).

52. *Russia, China block Security Council Referral of Syria to International Criminal Court*, UNITED NATIONS (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>.

53. *Id.*

54. Van Schaack, *supra* note 25, at 2.

55. Beth Van Schaack, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (May 29, 2014), <https://www.justsecurity.org/10968/alternative-jurisdictional-bases-hybrid-tribunal-syria/>.

56. *Id.*

57. H.R.C. Res. S-17/1, U.N. Doc. A/HRC/S-17/1 (Aug. 22, 2011).

58. *Id.* para 12.

59. *See* G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Dec. 21, 2016) [hereinafter *The Mechanism*].

60. *See* Catherine Marchi-Uhel, *Klatsky Endowed Lecture in Human Rights*, 51 CASE W. RES. J. OF INT’L L. 223, 224–25 (2019).

61. *Id.*

society to cooperate fully with it, the General Assembly has taken an initiative that I view as a historic step towards accountability. The Mechanism's creation sends a signal that impunity for those responsible for the most heinous crimes committed in Syria is not acceptable. It also signals that the pursuit of accountability no longer requires a choice between national and international (or hybrid) jurisdictions. On the contrary, the Mechanism can be seen as a model integrating different jurisdictional avenues at the national, regional or international level. It also constitutes a model for bridging the gap between human rights fact-finding and criminal prosecutions through proactive cooperation between investigative and prosecutorial authorities, UN entities, and civil society.⁶²

During conflict, there is generally a debate as to what should come first – peace or justice. The debate is viewed as whether it is morally permissible to allow conflict, and the incredible human suffering that comes with it, with the hope of advancing justice “in the form of accountability against the perpetrators of the violence.”⁶³ Alternatively, if accountability is delayed or even prevented in the effort to achieve peace more rapidly is the resulting harm acceptable?⁶⁴ Paul R. Williams, Lisa K. Dicker, and C. Danae Paterson have argued that the failure of efforts to introduce accountability measures at the United Nations Security Council have placed the conflict squarely in the peace-first approach.⁶⁵ However, they have also pointed to the creativity of victims and other actors in weaving justice into the process by documenting violations, laying the foundation for victim catharsis and engaging in new options for prosecutorial activity.⁶⁶

IV. THE FIRST CASE AGAINST A SYRIAN OFFICIAL USING UNIVERSAL JURISDICTION – PAVING THE PATH AGAINST IMPUNITY

Germany has conducted the first trial worldwide prosecuting employees of Bashar Al-Assad's Intelligence Services using universal jurisdiction.⁶⁷ This is an important first step in holding those in power responsible for their crimes. Germany enacted a Code of Crimes against International Law in 2002 that allows German courts to exercise universal jurisdiction over genocide, crimes against humanity, and war crimes.⁶⁸ Germany is home to over 800,000 Syrian refugees placing them in a unique position to gather information about potential war crimes.⁶⁹ Germany also has an interest in ensuring individuals who have committed war crimes are not living freely in their territory. In this historic trial, prosecutors stressed in their closing statement, “Germany was not, is not, and will never be a safe haven for perpetrators

62. *Id.*

63. Paul R. Williams, et al., *The Peace vs. Justice Puzzle and the Syrian Crisis*, 24 ILSA J. INT'L & COMPAR. L. 417, 419 (2018).

64. *Id.*

65. *Id.* at 420.

66. *Id.*

67. Q&A: *First Syria State Torture Trial in Germany*, HUMAN RTS. WATCH (Jan. 6, 2022), <https://www.hrw.org/news/2022/01/06/qa-first-syria-state-torture-trial-germany#> (last visited Feb. 10, 2022).

68. See *Völkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law]*, §§ 6–8 (Ger.); Andrew Johnson, *How Universal is Universal Jurisdiction*, AM. U. J. OF GENDER, SOC., POL'Y, & L. BLOG (2019), <https://jgspl.org/how-universal-is-universal-jurisdiction/>.

69. Deborah Amos, *Landmark Verdict in Germany Sentences Syrian for Aiding Crimes against Humanity*, NAT'L PUB. RADIO (Feb. 24, 2021), <https://www.npr.org/2021/02/24/970663111/landmark-verdict-in-germany-sentences-syrian-official-for-crime-against-humanity>.

of international crimes.”⁷⁰ Germany is also the first state to initiate ‘structural investigations’ focusing not on specific suspects, but on situations or conflicts.⁷¹ Accordingly, they have opened a structural investigation in regards to Syrian war crimes.⁷² Germany has a large number of refugees that have escaped conflicts and is using these investigations as a “unique opportunity through cooperation between immigration and criminal justice authorities to be proactive in gathering information and evidence and identifying potential victims and witnesses for future criminal proceedings” as it is easier to collect evidence during the ongoing conflict than years later.⁷³

The trial is being conducted before the Koblenz Higher Regional Court in Koblenz, Germany and began against two defendants: Eyad Al-Gharib and Anwar Raslan.⁷⁴ However, for fairness purposes, the two trials were bifurcated so that Al-Gharib’s right to be tried in a timely and fair manner would not be violated.⁷⁵ Therefore, the trial against Al-Gharib has concluded. He has been found guilty of aiding and abetting torture and severe deprivation of liberty.⁷⁶ Eyad Al-Gharib was arrested in Rhineland-Palatinate therefore giving the Koblenz court jurisdiction.⁷⁷ Al-Gharib defected from the Syrian government in early 2012 and left Syria in February of 2013.⁷⁸ He eventually arrived in Germany on April 25, 2018 and was arrested in February of 2019 in Zweibrücken, Rhineland-Palatinate.⁷⁹

Although criticized for the fact that he was a low-level officer, Eyad Al-Gharib’s first trial and conviction is a step in the path towards ending impunity. His role in the arrest of peaceful demonstrators who were then imprisoned, tortured or even killed was critical to intelligence services in Syria.⁸⁰ The trial also documented some of the abuses of Syrian intelligence.⁸¹ Eyad Al-Gharib worked at division 40, known to be one of the most brutal subdivisions of the General Intelligence Directorate, and was found guilty of aiding and abetting crimes against humanity.⁸² The judges found that the requirements for a “widespread and systematic attack” had been met at least since the end of March 2011.⁸³ As part of this attack, Al-Gharib aided and abetted torture (§7(1) 5 VStGB) and severe deprivation of liberty

70. *Inside the Raslan Trial*, *supra* note 39.

71. Hovell, *supra* note 11, at 448; *see also Trial of Anwar Raslan*, SYRIA JUST. & ACCOUNTABILITY CTR., https://syriaaccountability.org/wp-content/uploads/211201_Trial-Report-50_public.pdf (last visited Feb. 10, 2022).

72. Hovell, *supra* note 11.

73. *Id.*

74. HUMAN RTS. WATCH, *supra* note 67.

75. SYRIA JUST. & ACCOUNTABILITY CTR., *SCRATCHING THE SURFACE: ONE YEAR INTO THE KOBLENZ TRIAL 15* (2021), https://syriaaccountability.org/wp-content/uploads/Koblenz-Interim-Report_English_PUB-1.pdf.

76. Amos, *supra* note 69.

77. *The Al-Khatib Trial on State Torture in Koblenz, Germany: Q&A on the Legal Background*, EUR. CTR. FOR CONST. AND HUMAN RTS. (Aug. 2020), https://www.ecchr.eu/fileadmin/Q_As/QA_Koblenz_Syria_2020August.pdf.

78. *SJAC to Monitor First Trial of Senior Government Official*, SYRIA JUST. & ACCOUNTABILITY CTR. (Mar. 26, 2020), <https://syriaaccountability.org/updates/2020/03/26/sjac-to-monitor-first-trial-of-senior-government-official/>.

79. *Id.*

80. Jeremy Bowen, *Syria torture: German court convicts ex-intelligence officer*, BBC NEWS (Feb. 24, 2021), <https://www.bbc.com/news/world-europe-56160486>

81. *Id.*

82. *Id.*

83. *Inside the Raslan Trial*, *supra* note 43.

(§7(1) 9 VStGB) in 30 cases.⁸⁴ His sentence of 4.5 years reflected the fact that he was a low-level officer. “Human rights lawyers are divided as to whether [universal jurisdiction] cases should ... be brought ‘from the top down’ or ‘from the bottom up.’⁸⁵ However, in reality, the key is for the cases to be brought fairly.

The defense centered their argument on duress.⁸⁶ They also argued that even if he was found guilty, he should be given a sentence of two years on parole for significantly contributing to the prosecution of Col. Anwar Raslan, who oversaw torture at Branch 251.⁸⁷ In response, the prosecution argued that all defendants, including Nazi prison guards, claim duress.⁸⁸ The defense countered by showing the regime created an intense “aura of fear” by using the prosecution’s own witnesses and a Human Rights Watch Report.⁸⁹ The witnesses and Human Rights Watch Report confirmed that even suspicion of disloyalty was sufficient to discipline members of the Intelligence Services.⁹⁰ Traitors receive the death sentence under the Syrian Penal Code.⁹¹ The defense argued that, on the day Al-Gharib allegedly committed the crimes, Hafez Makhoul, head of Section 40 of the Intelligence Services, was present and shot at protestors for “fun” and ordered others to do the same.⁹² The European Union sanctioned Makhoul in 2011 for his involvement in violence against demonstrators.⁹³ Additionally, the United States expanded pre-existing sanctions against him in 2011 because of his involvement in killing demonstrators in Daraa, Syria.⁹⁴ The defense argued, “[t]here would be no doubt that in disobeying these orders, one would have had to fear for his life. He would have either been executed or interrogated and then killed.” Al-Gharib also feared for his family and felt especially vulnerable being Sunni and with a pregnant wife and four children. Additionally, becoming a member of the intelligence services was one of the only ways to make a decent living in Syria. It is estimated that one out of 153 civilians in Syria is in the Intelligence Services.⁹⁵ Since the trial was held in Germany, under the German Constitution, no one is obliged to give his own life or limb; not even if a high number of other lives are at risk.⁹⁶

His lawyers also emphasized that Al-Gharib helped as a witness against the other defendant, Raslan, and that Al-Gharib showed remorse as he had defected from Syria and apologized to the victims in a handwritten statement.⁹⁷ However, during the trial he was mostly silent.⁹⁸

84. *Id.*

85. Peter Weiss, *Universal Jurisdiction: Past, Present and Future*, 102 AM. SOC’Y INT’L L. PROC. 406, 408 (2008).

86. *Trial of Anwar Raslan and Eyad Al-Gharib*, at 1, https://syriaaccountability.org/wp-content/uploads/210504_TR27_public.pdf [hereinafter *Trial of Raslan & Al Gharib*].

87. *Id.* at 10; Jenny Hill, *German court finds Syrian colonel guilty of crimes against humanity*, BBC NEWS (Jan. 13, 2022), <https://www.bbc.com/news/world-europe-59949924>.

88. *Inside the Raslan Trial*, *supra* note 43.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Assad Henchmen’s Russian Refuge*, GLOBAL WITNESS (Nov. 11, 2019),

<https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/assad-henchmens-russian-refuge/>.

94. *Id.*

95. *Trial of Raslan & Al Gharib*, *supra* note 86, at 22.

96. *Id.* at 16.

97. *Id.* at 21.

98. *Id.* at 14.

In deciding Al-Gharib's guilt, the judges examined the overall situation in Syria, actions taken by the regime, the role of the intelligence services generally, and then focused on the branch where he worked and the specific actions he took.⁹⁹ The judges were satisfied that he knew of the conditions at the prison partly because he told the German Federal Criminal Police that one could hear the screams of torture, even at the cafeteria at Branch 251 where he worked.

Al-Gharib was not found to have tortured anyone himself;¹⁰⁰ however, he facilitated the torture of peaceful protesters by arresting demonstrators and transporting them to the notorious prisons where they would be tortured, and possibly die. In September or October 2011, there was a peaceful demonstration at a mosque in Duma with around 3,000 to 6,000 protesters.¹⁰¹ About 1,000 security forces were ordered to confront the demonstrators, including Branch 251 and Division 40; and Division 40 was ordered to shoot people.¹⁰² "Hafez Makhoul himself took shots and ordered 'everyone who loves the president shall shoot the traitors.'"¹⁰³ He hit at least five people. Al-Gharib was found to not have shot anyone, but rather stepped back.¹⁰⁴ However, when demonstrators tried to flee, the security forces, including Al-Gharib, followed and arrested them.¹⁰⁵ The judges found that at least two vans took people from Duma to Branch 251 where they endured the so-called "welcoming party" in which the security forces severely beat the detainees and hit them with metal poles.¹⁰⁶

Although the judges were not able to determine whether Al-Gharib himself beat any of the detainees, they determined that he was involved in the transportation of at least two buses of detainees for a total of at least thirty people, who were subsequently tortured and endured physical pain.¹⁰⁷ Judge Kerber explained that Al-Gharib, as a member of the intelligence service whose task was to suppress demonstrations, knew about the "widespread and systematic attack of the Syrian government."¹⁰⁸ As an employee for over a year at Branch 251, he knew about the torture practices and indescribable detention conditions. The cells were so overcrowded people could only sit or lay down in shifts.¹⁰⁹ Detainees were not allowed to wash or shower. In most cases, there was no daylight inside the cells.¹¹⁰ The unhygienic conditions caused many skin conditions that were left untreated.¹¹¹ The air was "miserable" and nutrition insufficient – detainees were only given enough food to stay alive.¹¹² Detainees could hear the screams and sounds of torture day and night, and they were never informed how long they would be detained or if they would make it out alive. During

99. *Inside the Raslan Trial*, *supra* note 43.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

“interrogations,” detainees were constantly mistreated or tortured – usually with electroshocks or beatings with cables and poles. Detainees were hung from the ceiling and beaten in that position. Judge Kerber recalled Al-Gharib saying that “the punishment increased, and the guards just did whatever they wanted.”

The judges said that the defense of duress was not applicable.¹¹³ Although recognizing that draconian punishment was indeed possible for disobedience, the judges could not say with any certainty that Al-Gharib thought about leaving or involuntarily stayed due to the possibility of consequences. The judges pointed to the fact that he did not make any statements on these points. The judges also stated that it was possible for him to have left.¹¹⁴ As there were 250 members of the Division at the demonstration, the judges thought he could have left undetected. Additionally, they found he could have pretended to be injured by tripping or pretended to have a sprained ankle or faked some other type of illness prior to the demonstration.¹¹⁵

One of the witnesses in the case, Wassim Mukdad, summed up the ruling best by saying, “[t]he ruling is a relief... But it’s just the beginning. Because it’s Bashar al-Assad and his inner circle who we’re after.”¹¹⁶ Although the case involved low-level officers, they are an essential part of the mechanism of the regime and thus should be held accountable.

At time of writing, Anwar Raslan is currently on trial¹¹⁷ as the alleged head of the interrogation division of the feared Branch 251 of the General Intelligence Directorate in Damascus. He was recognized in Syria by a Syrian refugee and survivor. Raslan is charged with complicity in torture, forced imprisonment, and killing as crimes against humanity, as well as killings and sexual violence under German law.

The first trial additionally gives an opportunity for lessons learned. The importance of language and cultural expertise was extremely apparent. For example, when the judges determined the number of people who Al-Gharib transported, they did not know that Arabic has a dual form. The judges said it was plural, so at least two buses. However, since Arabic has a dual form, by using the plural it would be at least three buses. Syria also has its own unique dialect so language experts should be familiar with that particular dialect, not only Modern Standard Arabic. The incredible fear of the witnesses is another example. It is hard to truly comprehend how terrified the Syrian population is of the regime. Witnesses fear for the safety of loved ones still in Syria. There should have been witness protection. The ICC has a victim and witness protection program and acknowledges how critical it is.¹¹⁸

Another issue in the trial was the lack of public translation as the trial was conducted in German. “It was really frustrating,” said Ameenah Sawwan, an activist with the Syria Campaign.¹¹⁹ Although she speaks German, she could not understand the legal courtroom

113. *Id.*

114. *Id.*

115. *Id.*

116. *For Syrians, the road to justice begins in Europe*, FRANCE24 NEWS (Mar. 9, 2021), <https://www.france24.com/en/live-news/20210309-for-syrians-the-road-to-justice-begins-in-europe> [hereinafter *For Syrians*].

117. Deborah Amos, *Syrians Have Stared Down Threats To Testify Against Assad’s Regime In A Landmark Trial*, NPR NEWS (Sept. 28, 2021), <https://www.npr.org/2021/09/28/1038326725/germany-syrian-torture-witnesses-threats>.

118. *Witnesses*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/witnesses> (last visited Nov. 6, 2021).

119. Seeking Justice for Syria: How an Alleged Intelligence Officer was Put on Trial in Germany, Human Rights Watch, <https://www.hrw.org/feature/2022/01/06/seeking-justice-for-syria/how-an-alleged-intelligence-officer-was-put-on-trial-in-germany>.

language.¹²⁰ She told Human Rights Watch when Al-Gharib's verdict was read in both German and Arabic – an exception to the rule – it “made a huge difference.”¹²¹ Syrians, those most affected by the trial, in some cases were not able to follow the trial because of the language barrier.¹²²

There should be an official trial transcript or audio recordings because the trials unveil and document the crimes of the Syrian regime and intelligence services. While NGOs stepped in to fill the gap, providing some record of the proceedings, there should be official documentation that can be used in future trials in Germany, and around the world. The Syria Justice and Accountability Centre provided daily updates from the trial but had to use a footnote stating “[t]hroughout this report, [information located in brackets are notes from our trial monitor] and ‘information placed in quotes are statements made by the witness, judges or counsel.’ Note that this report does not purport to be a transcript of the trial; it is merely an unofficial summary of the proceedings. The names of witnesses have been redacted.”¹²³

As the Syria Justice and Accountability Centre [SJAC] has pointed out, the trials have taken years showing how labor and resource intensive the investigation into the system of Syrian state-torture is.¹²⁴ Documentation is needed for future transitional justice processes and so people around the world and in the future can engage with and evaluate the proceedings.¹²⁵ German law allows audio recordings of criminal trials for “scientific and historic purposes of trials that are of paramount significance.”¹²⁶ SJAC and other international human rights organizations and academics requested audio recordings at least three times, but the Court rejected each request finding that the trial is not of significant importance to Germany itself, even though it is generally historical.¹²⁷

The trial raises the issue of whether there should be basic universal standards for universal jurisdiction. For example, the need for a transcript should be standardized so that if various jurisdictions engage in prosecutions there can be a record of each. Similarly, the need for witness protection would be necessary no matter where the trial is brought.

It is hard to underestimate the level of impunity of the Syrian regime. In fact, most of the evidence against the defendants came from their own statements to German officials potentially demonstrating their self-perceived level of impunity. On August 16, 2018, the Office of the Federal Prosecutor interviewed Al-Gharib as a witness one month after they had begun questioning Raslan.¹²⁸ Al-Gharib mentioned a torture tactic, used even prior to 2011,

120. *Id.*

121. *Id.*

122. *A Missed Opportunity: Court Denies Recording of Closing Statements in Koblenz*, SYRIA JUST. AND ACCOUNTABILITY CTR. (Sept. 30, 2021), <https://syriaaccountability.org/a-missed-opportunity-court-denies-recording-of-closing-statements-in-koblenz/>.

123. *Trial of Raslan & Al Gharib*, *supra* note 86, at 1.

124. *A Missed Opportunity: Court Denies Recording of Closing Statements in Koblenz*, SYRIA JUST. AND ACCOUNTABILITY CTR. (Sept. 30, 2021), <https://syriaaccountability.org/a-missed-opportunity-court-denies-recording-of-closing-statements-in-koblenz/>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Inside the Raslan Trial*, *supra* note 43.

that included pouring boiling water over detainees' bodies.¹²⁹ He then stated that following 2011, intelligence officers had even more freedom to use other torture methods. Al-Gharib added that "around 100 people were detained at checkpoints on a daily basis, and he identified the location of these checkpoints using [G]oogle Maps during the questioning."¹³⁰ The judges stressed that "Al-Gharib incriminated himself with the BAMF [German Federal Office for Migration and Refugees] as well as with the BKA [German Federal Criminal Police Office] and his verdict is significantly based on these statements."¹³¹ In his questioning, he elaborated that he had witnessed people beaten with metal poles at Branch 251 and even beaten to death.¹³² He additionally stated that he saw five or six transports of about ten corpses from Branch 251 in 2011.¹³³

Judge Kerber later repeated when delivering the opinion of the court that without Al-Gharib's own statements there would not have been a verdict.¹³⁴ The judge stated, "[h]e did not hide his past affiliation when he arrived in Germany, as revealed in court testimony. He provided a 30-page document on Branch 251, where he reportedly included the detail that he could hear the daily screams of torture victims, as German broadcaster Deutsche Welle reported.¹³⁵ His testimony helped prosecutors build a case against his former supervisor, Anwar Raslan, the primary defendant.¹³⁶ But soon after Gharib was called as a witness, his status was transformed to a suspect and he was arrested by German police."¹³⁷

Specifically in Germany, the trial represents a statement to both the world and Syrian regime officials that Germany is not a host for war criminals. It provides an even graver warning to Syrian officials that they should not try to hide among refugees coming to Germany, or Europe more generally, as they may get recognized at the corner café. The trials may deter refugees from Germany, especially since these first two trials are being prosecuted based on the defendants' statements to German officials.

The Syrian regime under the Assads has always tortured and detained individuals for little or no reason. However, the international community was unable to act. It is only now with the civil war causing these methods to become more widespread and systematic that they became international crimes and therefore subject to universal jurisdiction.¹³⁸ Although some argue that nothing will change in Syria with these trials, it is still a beginning. The fact that the international community is watching can make a difference.

The role of emotion and language in the courtroom is powerful. As Emiliano J. Buis has pointed out, "[t]he emotional component, which has been traditionally concealed in legal

129. *Inside the Raslan Trial: Details on Branch 251*, SYRIA JUST. AND ACCOUNTABILITY CTR. (June 25, 2020), <https://syriaaccountability.org/updates/2020/06/25/inside-the-raslan-trial-details-on-branch-251/> [hereinafter *Details on Branch 251*].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Defense calls for acquittal of Syrian on trial for torture*, Deutsche Welle, Feb. 21, 2021, <https://www.dw.com/en/defense-calls-for-acquittal-of-syrian-on-trial-for-torture/a-56632291>.

136. *Id.*

137. Amos, *supra* note 69.

138. *Universal Jurisdiction*, CTR. FOR JUST. & ACCOUNTABILITY (Feb. 13, 2022), <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/#:~:text=What%20is%20Universal%20Jurisdiction%3F,crimes%2C%20genocide%2C%20and%20torture.>

studies, becomes, in my opinion, an essential tool for understanding the verbal and physical interactions that define—as Aristotle could have put it—the cathartic role of trials and the rhetorical and ‘theatrical’ staging of international justice.”¹³⁹ To demonstrate the importance of language: what everyone called a “welcoming party” was really brutal torture. The Caesar Files included 26,935 photos of 6,821 people who died in Syria after torture who were either still in detention or had been transferred to a military hospital.¹⁴⁰ Presiding Judge Kerber remarked, “I would like to make a personal statement about these files: I will never ever forget these photos.”¹⁴¹ The photos and powerful testimony of survivors were an essential part of bringing the reality of the Syrian regime’s brutality into the courtroom.

V. THE ROLE OF EMOTION

Emotion was an animating force in this first step bringing Syrian officials to justice, fueled by the moral outrage of the victims of the Syrian regime and the world. News media used emotion-laden headlines which in turn stirred up emotional responses on social media. Emotion was on display in the trial.

A. *Victim-Centered*

Syrian torture survivors are leading the fight against impunity. As explained by trauma expert Judith L. Herman, “[t]rauma robs ... victim[s] of a sense of power and control over [their] own li[v]es; therefore, the guiding principle of recovery is to restore power and control to the survivor.”¹⁴² She details the different stages of trauma recovery including: first, the establishment of safety; second, remembrance and mourning; and third, the reconnection with ordinary life.¹⁴³ For a significant minority of survivors, one of the final stages is social action or pursuing justice.¹⁴⁴ They may focus on helping others who have been similarly victimized or on legal or educational prevention efforts.¹⁴⁵ Survivors recognize a need to promote awareness so that the past is not repeated.¹⁴⁶ Additionally, the survivors recognize that “holding the perpetrator[s] accountable for [their] crimes is important not only for [the survivors’] personal well-being but also for the health of the larger society.”¹⁴⁷

After completing a survey of the use of universal jurisdiction to examine which community was motivating the prosecution, Devika Hovell found that most cases were driven by the individual victims within the acting foreign state.¹⁴⁸ She argues “[s]tates are not, by

139. Emiliano J. Buis, *Aristotle in the Hague: Artistic Pleading and Emotional Theatricality in International Criminal Proceedings*, 114 *AJIL UNBOUND* 133, 137 (2020).

140. *Trial of Raslan & Al Gharib*, *supra* note 86, at 6.

141. *Id.*

142. Judith L. Herman, *Recovery from Psychological Trauma*, 52 *PSYCHIATRY & CLINICAL NEUROSCIENCES* 145, 145 (1998).

143. *Id.* at 146.

144. *Id.* at 149.

145. *Id.*

146. *Id.*

147. *Id.*

148. Hovell, *supra* note 11, at 449.

and large, valiant global enforcers of individual criminal accountability for international crimes, either individually in defense of domestic or international interests or out of a sense of comity to each other.”¹⁴⁹

The sense that action is being taken or that change is happening is essential to survivors. In the words of a Syrian who was tortured in the al-Khatib detention facility: “This process in Germany gives hope, even if everything takes a long time and nothing happens tomorrow, or even the day after tomorrow. The fact that it continues at all gives us as survivors hope for justice. I am ready to testify.”¹⁵⁰ He is ready to testify, and face potential further abuse, in the hopes of justice finally happening.

The moral outrage and need for action by victims of Syria’s brutal torture and detention is palpable in the story of Mazen al-Hamada. Mazen, a victim of unspeakable torture, spoke around the world, including with lawmakers in Washington, students at Princeton University, human rights investigators, and many journalists.¹⁵¹ People cried with him. And then, nothing happened.¹⁵² He said in the documentary *Syria’s Disappeared*, “I will not rest until I take them to court ... Even if it costs me my life, I will pursue them and bring them to justice, no matter what.”¹⁵³ His friends detailed how he became increasingly upset that telling his story was a waste of time and that he felt exploited by the organizations that invited him to speak at their events.¹⁵⁴ Nothing was happening to bring justice to the victims.¹⁵⁵ He said, “I want to go back to my country — enough. Even if that means going back to regime areas, it is better than here ... I don’t want to integrate! It is more honorable for me to die in my country.”¹⁵⁶ And then one day, he did return to Syria and has not been heard from since then.¹⁵⁷ “Hamada’s frustrations are shared by the many people who have campaigned, without result, for war-crimes charges to be brought against the Assad regime,” said Stephen Rapp, who investigated Syrian war crimes as the Obama Administration’s Ambassador-at-Large for the Office of Global Criminal Justice.¹⁵⁸

Emotions matter. The feeling of moral outrage has propelled action. As Susan Bandes has stated “the progress of law depends on giving voice to moral emotions. The passion for justice is fueled by emotions like moral outrage.”¹⁵⁹ The frustration felt when the international community was unable to act fueled creativity and new tactics to achieve justice. Jeff Goodwin has pointed out that “[e]motions help to explain not only the origin and spread of social movements, but also their decline ... Frustration can cause groups to change tactics or disband altogether.”¹⁶⁰ When efforts to prosecute Syrian officials at the ICC failed, human

149. *Id.*

150. *First Criminal Trial Worldwide on Torture in Syria Before a German Court*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court> (last visited Nov. 6, 2021).

151. Liz Sly, *He Told the World About His Brutal Torture in Syria. Then, Mysteriously, He Went Back*, WASH. POST (Mar. 4, 2021), <https://www.washingtonpost.com/world/interactive/2021/arab-spring-anniversary-syria-assad-mazen-hamada/>.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Susan Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of the Law*, 89 *FORDHAM L. REV.* 2427, 2429 (2021).

160. JEFF GOODWIN ET AL., *INTRODUCTION TO PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS*

rights groups moved their efforts to domestic courts and are now achieving the first steps of success in Germany.¹⁶¹

The importance of feeling like some amount of justice is being done is felt in the words of Wassim Mukdad, a refugee in Germany who testified in the German case against Al-Gharib and Raslan after having been tortured in the al-Khatib prison in Syria.¹⁶² “I finally had the feeling that my story counted, that the sufferings were not for nothing.”¹⁶³

The organizations working for accountability for the atrocities committed by the Syrian regime recognize the importance of a victim-led recovery.¹⁶⁴ One organization, Ta’afi, means “recovery” in Arabic and is a “Syrian survivors’ led, survivors’ centered initiative that aims to support and protect victims of detention, torture, and enforced disappearance upon their release and settlement at a secure location, so that they may continue to peacefully support human rights change in Syria and pursue justice and accountability.”¹⁶⁵ They adopted “the philosophy that those who are most affected by detention, torture, and enforced disappearance should be at the forefront of making the changes.”¹⁶⁶ Therefore, Ta’afi is focused on prisoners of conscience and detainees, and is led by their experiences, voices, and ambitions for a human rights-respecting Syria.¹⁶⁷

Similarly, many of those held wrongly without charges after 9/11 have a need for an apology.¹⁶⁸ Charges were brought against United States officials, including Rumsfeld,¹⁶⁹ but no one has been held accountable. The victims are fighting the impunity of the officials and seeking a real recognition that what was done to them was wrong.

The need for action and accountability is evident in the transitional justice realm. Susanne Karstedt has discussed the importance of emotion in the transitional justice realm and how the primary aim of truth telling, accountability, and justice is the emotional recovery and healing of the survivors.¹⁷⁰ However, she also argues that victims testifying or sharing their stories alone does not lead to emotional healing as claimed.¹⁷¹ Rather, research shows that the modes of response are key for emotional recovery.¹⁷² Justice, or at least the perception of it, has been found to reduce anger and anxiety among victims who testified in court.¹⁷³

21 (Jeff Goodwin et al. eds., 2001).

161. See *For Syrians*, *supra* note 116 (“Cases have been filed in Germany, Austria, Sweden and Norway against officials in Assad’s regime by around 100 refugees, backed by Berlin NGO, the European Center for Constitutional and Human Rights (ECCHR)”).

162. *Id.*

163. *Id.*

164. *Who We Are*, TA’AFI INITIATIVE SYRIA, <https://taafi-sy.org/who-we-are/> (last accessed Jan. 16, 2022).

165. *Id.*

166. *Id.*

167. *Id.*

168. See Heidi Gilchrist, *Released But Not Free: The Unexonerated*, 14 NORTHEASTERN L. REV. 113 (2022).

169. Jen Nessel, *Donald Rumsfeld Charged with Torture During Trip to France*, CTR. FOR CONSTITUTIONAL RTS. (Oct. 26, 2007), <https://ccrjustice.org/home/press-center/press-releases/donald-rumsfeld-charged-torture-during-trip-france>.

170. Susanne Karstedt, *The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective*, 8 EMOTION REV. 50, 51 (2015).

171. *Id.* at 53.

172. *Id.*

173. *Id.* at 54.

“The legal setting and the language of justice create a unique environment that delivers the cognitive responses that victims strive for. Procedural justice mechanisms facilitate the recognition and validation of suffering that victims expect as socioaffective responses.”¹⁷⁴ In addition to the substantive rights of victims not to be tortured, international law mandates, for example, the right to truth or the right to anti-impunity or accountability.¹⁷⁵ The right to truth is separate from doing justice.¹⁷⁶ However, Melanie Klinkner and Howard Davis argue that “[t]he same intensity of suffering has not been said to follow from a failure to prosecute and punish.”¹⁷⁷

B. News and Social Media

The headlines paint pictures of the images that came out of Syria that were so awful they “shocked the world.” A few are as follows: *Syria air strike sisters photo: Behind the image that shocked the world*,¹⁷⁸ *Boy in the ambulance: shocking image emerges of Syrian child pulled from Aleppo rubble*,¹⁷⁹ *Photos of the Drowned Syrian Boy Shook the World, But Not For Long*.¹⁸⁰ And they come with the following warning: “this article contains images that readers may find distressing.”¹⁸¹ Almost the whole world seemed united in the moral outrage and horror from these images, but the difficulty of translating that moral outrage into action was immediately apparent.

Social media has a double role. The users of Facebook and Twitter realized that the Syrian government was using such platforms to find and eliminate dissenters. Also, social media companies were flagging and permanently removing ‘terrorist’ content, but they may have also been removing evidence of war crimes, as Human Rights Watch has pointed out.¹⁸²

Across Europe, activists are using social media to form networks to track down Syrian regime officers who they say are trying to blend in among the wave of refugees that arrived in Europe.¹⁸³

174. *Id.*

175. See Ruti Teitel, *Transitional Justice and Judicial Activism- A Right to Accountability?*, 48 CORNELL INT’L L. J. 385, 385, 409 (2015) (“Victims of systemic rights abuses, their families, and non-governmental organizations are turning to international and regional human rights tribunals to address the failure of states to investigate, prosecute, and remedy past human rights violations.”).

176. MELANIE KLINKNER & HOWARD DAVIS, *THE RIGHT TO TRUTH INTERNATIONAL LAW: VICTIMS’ RIGHTS IN HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW* 60-61 (Routledge, 2021).

177. *Id.* at 61.

178. *Syria Air Strike Sisters Photo: Behind the Image that Shocked the World*, BBC NEWS (Aug. 1, 2019), <https://www.bbc.com/news/av/world-middle-east-49186145>.

179. Elle Hunt, *Boy in the Ambulance: Shocking Image Emerges of Syrian Child Pulled from Aleppo Rubble*, THE GUARDIAN (Aug. 18, 2016), <https://www.theguardian.com/world/2016/aug/18/boy-in-the-ambulance-image-emerges-syrian-child-aleppo-rubble>.

180. Jeffrey Roberts, *Photos of the Drowned Syrian Boy Shook the World, But Not For Long*, MEDIUM (Nov. 24, 2015), <https://medium.com/vantage/ai-ap-pro-photo-daily-in-focus-photo-of-syrian-boy-shook-the-world-but-not-for-long-df66e4f318df>.

181. Hunt, *supra* note 179.

182. *Social Media Platforms Remove War Crimes Evidence*, HUMAN RTS. WATCH (Sept. 10, 2020), <https://www.hrw.org/news/2020/09/10/social-media-platforms-remove-war-crimes-evidence#>.

183. *For Syrians*, *supra* note 116.

C. Non-Governmental Organizations and Academics

The importance of NGOs in the battle against impunity cannot be understated. When the moral outrage of the world moves on to the next injustice, it is NGOs that work to continue the fight and translate that emotion into concrete action. In the German trials, the German government did not provide recordings or transcripts of the trial, so the Syrian Justice and Accountability Centre made their own unofficial daily summaries.¹⁸⁴ They also created country-specific guides for victims to bring universal jurisdiction cases around the world.¹⁸⁵ The Commission for International Justice and Accountability is working to collect material proof of war crimes¹⁸⁶ and has collected, preserved, and analyzed 1.3 million original Syrian Regime and IS documents and digital materials.¹⁸⁷ Some of the evidence was collected from buildings that the Syrian regime abandoned, leaving stacks of documents.¹⁸⁸ The founder of the CIJA stated that they “made deals with armed opposition groups to not destroy them. Our teams were close to the operation and could run out to get the documents or people would get calls from their contacts from security intelligence services.”¹⁸⁹ He added, “[w]hat was most dangerous was transporting the documents out of Syria even as the frontlines were changing constantly.”¹⁹⁰

Mazen Darwish, president of the Syrian Center for Media and Freedom of Expression, stated “[w]e are facing some challenges collaborating with European war crimes units in addition to facing issues with a lot of European countries’ domestic laws that lack the principles of universal jurisdiction...Nevertheless, we need to professionalize the work of Syrian civil society organizations and give them the essential tools to sustain their support and contribution to universal jurisdiction and the fight against impunity.”¹⁹¹

Naz K. Modirzadeh reflects on the role of emotion for the academic observer to war and international law and argues there should be “passionate reasoning.”¹⁹² He writes, “[t]his kind of thinking and writing, at a time when one’s own nation is at war, invites scholars to reflect on their own responsibilities, on the morality and ethics of their own engagement with international law during wartime, the burdens of speaking about war in one way and not another. Contextual, connected, passionate writing allows, and even demands of, the author

184. *Trial Monitoring*, SYRIA JUST. & ACCOUNTABILITY CTR., <https://syriaaccountability.org/trial-monitoring/> (last visited Nov. 6, 2021).

185. *Universal Jurisdiction*, SYRIA JUST. AND ACCOUNTABILITY CTR., <https://syriaaccountability.org/resources/universal-jurisdiction/> (last visited Jan. 16, 2022).

186. *See, e.g.*, COMM’N FOR INT’L JUST. AND ACCOUNTABILITY, <https://cijaonline.org/> (last visited Nov. 6, 2021) (explaining the Commission’s goal of investigating, documenting, and preserving evidence from alleged war crimes).

187. 2019/2020 CIJA ANNUAL REPORT, COMM’N FOR INT’L JUST. AND ACCOUNTABILITY at 12 (2020), <https://static1.squarespace.com/static/56706cbb841aba81145cadea/t/5f5baf02a871f324968f4daa/1599844159116/CIJA+Annual+Report+2019-2020.pdf>.

188. *For Syrians*, *supra* note 116.

189. *Id.*

190. *Id.*

191. *Applying Universal Jurisdiction to Prosecute International Crimes and the Implications for Syrian Victims*, INT’L CTR. FOR TRANSITIONAL JUST. (Dec. 23, 2020), <https://www.ictj.org/news/applying-universal-jurisdiction-prosecute-international-crimes-and-implications-syrian-victims>.

192. Naz K. Modirzadeh, *Cut These Words: Passion and International Law of War Scholarship*, 61 HARV. INT’L L. J. 1, 62 (2020).

to reflect upon the responsibilities that law, legal structures, and wartime legal scholars themselves may bear in seemingly endless war.”¹⁹³ He points out that legal scholarship in the field of international law has the potential to be a source of law or at least can contribute to discerning what international law is.¹⁹⁴ “You can’t just be a neutral witness to something like war. It crawls down your throat,” said Journalist Joe Galloway in a documentary about the Vietnam War.¹⁹⁵

D. Abandoned by World

Denmark is the first European country to revoke residency permits of Syrian refugees insisting that the security situation in parts of Syria has “improved significantly” and is safe to return to.¹⁹⁶ From summer 2020 to spring of 2021, at least 189 Syrians had applications for renewal of temporary residency status denied.¹⁹⁷ Meanwhile, Syrians filed over 10,000 applications for asylum in the European Union in the first two months of 2021,¹⁹⁸ showing many Syrians are still fearful for their lives in Syria.

The better path forward is a sustainable peace in Syria. As Mazen Darwish stated, “Syrian civil society organizations acknowledge that justice is not a tool for political revenge, but rather a guarantee for sustainable peace in Syria. Without justice and accountability, refugees will never return to Syria voluntarily and extremism will not be defeated.”¹⁹⁹

The inaction by the international community and world is felt in the words of an activist: “Our disappointment is not from the regime, we know the regime, we survived the regime,” the Syrian activist told Human Rights Watch. “Our disappointment is with the world. They use human rights when they need it.”²⁰⁰

VI. MORE PROSECUTIONS COMING

More prosecutions are on the horizon, although some arrest warrants are mostly symbolic. However, at least they ensure that members of the Syrian government and intelligence services will not be spending their retirements in the French Riviera. French prosecutors have issued international arrest warrants for Ali Mamlouk, the security chief, and two other senior government officials for alleged collusion in war crimes.²⁰¹ Germany issued

193. *Id.*

194. *Id.* at 12.

195. *The Vietnam War: A Film by Ken Burns and Lynn Novick*, N.H. PUB. BROAD. SERV., <https://nhpbs.org/veterans/vietnam-summary.pdf>.

196. Bethan McKernon, *Denmark strips Syrian refugees of residency permits and says it is safe to go home*, THE GUARDIAN (Apr. 14, 2021), <https://www.theguardian.com/world/2021/apr/14/denmark-revokes-syrian-refugee-permits-under-new-policy>.

197. *Id.*

198. *EASO: Over 10,000 Syrians Sought Asylum in EU Countries in First Two Months of 2021*, SCHENGENVISAINFO NEWS (June 14, 2021), <https://www.schengenvisainfo.com/news/easo-over-10000-syrians-sought-asylum-in-eu-countries-in-first-two-months-of-2021/>.

199. *Applying Universal Jurisdiction to Prosecute International Crimes and the Implications for Syrian Victims*, INT’L CTR. FOR TRANSITIONAL JUST. (Dec. 23, 2020), <https://www.ictj.org/news/applying-universal-jurisdiction-prosecute-international-crimes-and-implications-syrian-victims>.

200. “*These are the Crimes we are Fleeing*” – *Justice for Syria in Swedish and German Courts*, HUMAN RTS. WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

201. Emmanuel Jarry, *France issues arrest warrants for senior Syrian officials*, REUTERS (Nov. 5, 2018),

an arrest warrant for General Jamil Hassan in 2018 based on a criminal complaint by the European Center for Constitutional and Human Rights filed on behalf of nine Syrian refugees living in Syria. In February 2019, Al-Jazeera reported that General Hassan was in Lebanon for medical treatment and German authorities had asked Lebanon to extradite him to face trial in Germany.²⁰² The United States issued a short letter supporting extradition.²⁰³ As Sarah Cleveland said, “[t]he extreme scale of atrocities in Syria and the absence of other avenues for accountability in this case demonstrate why universal jurisdiction for such crimes is important and should be supported by the United States. The United States’ support for Germany’s extradition request is therefore an important milestone for international justice.”²⁰⁴

A Syrian doctor practicing in Germany was indicted in July 2021. The German Federal Prosecutor’s Office announced the charges that Alaa Mousa “killed at least one detainee with a lethal injection and tortured at least another eighteen.”²⁰⁵

VII. SANCTIONS AND DETERRENCE

The world needs every tool in the toolbox against brutal individuals who torture and commit other atrocities. International arrest warrants and universal jurisdiction help. War criminals now know they cannot retire to the French Riviera and sip rosé. Sanctions can also help. Mohammad Makhoul, an uncle of Bashar al-Assad, petitioned to be removed from a list of leading Syrian figures banned from entering the EU and whose assets in the bloc are frozen.²⁰⁶ His argument shows how useful the sanctions were, he argued that they violated his right to privacy because they prevented him from “ensuring that his family had a standard of living comparable to that which it had previously.”²⁰⁷

Secretary of State Blinken announced on July 28, 2021, “[t]he United States is sanctioning eight Syrian prisons, five Assad regime officials in the institutions that run those facilities, two militia groups, and two militia leaders. These actions underscore the U.S. commitment to promote respect for human rights and accountability for abuse against Syrians.”²⁰⁸

<https://www.reuters.com/article/us-syria-crisis-france/france-issues-arrest-warrants-for-senior-syrian-officials-idUSKCN1NA11L>.

202. Ryan Goodman, *United States Supports Germany’s International Arrest Warrant for Accused Syrian War Criminal*, JUST SEC. (Mar. 6, 2019), <https://www.justsecurity.org/63079/breaking-united-states-supports-germanys-international-arrest-warrant-accused-syrian-war-criminal-a-rare-exercise-universal-jurisdiction-general-jamil-hassan/>.

203. *Id.*

204. *Id.*

205. Christopher F. Schuetze, *Syrian Doctor Indicted in Germany for Crimes Against Humanity*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2021/07/28/world/europe/syria-doctor-indicted-germany.html>.

206. Press Release No 8/15, *The General Court Confirms the Restrictive Measures Against Mohammad Makhoul, a Close Associate of Bashar Al-Assad*, GENERAL CT. OF THE EUR. UNION (Jan. 21, 2015).

207. *Id.*

208. Press Release, *Imposing Sanctions in Defense of Human Rights in Syria*, U.S. DEP’T OF STATE (July 28, 2021), <https://www.state.gov/imposing-sanctions-in-defense-of-human-rights-in-syria/>.

CONCLUSION

“Our disappointment is not from the regime, we know the regime, we survived the regime,” one Syrian activist told Human Rights Watch. “Our disappointment is with the world. They use human rights when they need it.”²⁰⁹ From these words we grasp the importance of the first trial in German court prosecuting an employee of Bashar Al-Assad’s brutal intelligence services using universal jurisdiction. The trial is a starting point. A beginning. When international courts were unable to move forward with prosecutions of Syrian officials, human rights activists had to think creatively about other paths forward fueled by the moral outrage of the victims who were tortured and abused. The trial is an opportunity to reflect on the significance of the use of universal jurisdiction and lessons learned.

209. *“These are the Crimes we are Fleeing,” supra note 200.*