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# A Delicate Balance: Adopting the French Court of Cassation's Dual Criminality Interpretation

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# A DELICATE BALANCE: ADOPTING THE FRENCH COURT OF CASSATION'S DUAL CRIMINALITY INTERPRETATION

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ABSTRACT

This Note recommends potential language to be added to various States' criminal codes to incorporate the French Court of Cassation's interpretation of the Dual Criminality requirement for prosecutions under universal jurisdiction. This recommendation stems from research into the concept of universal jurisdiction, leading to the discovery of the May 2023 Court of Cassation's decision that created a pathway for countries to have jurisdiction over specific international crimes despite the crime being committed in another country. Specifically, this Note details the history of universal jurisdiction and its dual criminality requirement from the 17th century to modern times. Next, the Note details the development of the doctrine and the dual criminality requirement in France through an in depth look at different historic French cases invoking the doctrine to Article 689 of the French Criminal Code which outlines the universal jurisdiction and the dual criminality requirement for specific international crimes. This historical analysis culminates with the two French Court of Cassation's decisions which created the interpretation at issue. Finally, this Note argues for the inclusion of a dual criminality requirement for all universal jurisdiction codes along with the addition of specific language allowing for States to prosecute individuals even if their crime is not penalized in the country of origin for the crime.

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Through the addition of this language in foreign states, it allows for criminal prosecutions of crimes under universal jurisdiction to be increased, thus holding individuals accountable for their heinous acts, while still respecting individual state sovereignties, thus creating a balance of international accountability and appeasement.

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## I. INTRODUCTION

"No country in the world allows murder or acts of barbarism to go unpunished in its criminal legislation."[1]

After months of waiting, the gavel resonated through the courtroom to signal the creation of a new path towards justice. On May 12, 2023, the highest court in the French judicial system, the Court of Cassation,[2] passed judgement on two appeals to

[1] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

[2] The Court of Cassation, or Cour de Cassation, is the highest court in the French judicial system. *About the Court*, COUR DE CASSATION, https://www.courdecassation.fr/en/about-court

allow the conviction of two Syrian nationals for War Crimes and Crimes against Humanity committed in Syria.[3] As each word announcing the ruling of the court echoed through the halls of the Palais de Justice, a wave of reprieve washed over the victims as if they were plants, deprived of the waters of hope and solace, desperately awaiting the high tide of justice atop the cliffs of retribution–until at last, they tasted the waters of vindication.[4] In the wake of this decree, victims of crimes so abominable perpetrators need be branded *hostis humani generis* (or, enemies of mankind) are now rightfully bestowed their catharsis from the cruelties committed against them.[5]

With the passing of this edict comes a shift in international law as the Court reinterpreted the "dual criminality" requirement for prosecutions under universal jurisdiction within French law.[6] Under the then active version of French Criminal

(last visited Oct. 21, 2024). The Court is split into six different branches with each governing a different area of law. *Id.* Three of the courts cover civil cases while the remaining three cover commercial, labor, and criminal matters. *Id.* Each division creates rulings with the authority on the level of the United States Supreme Court within the American judicial system. However, there are certain cases which garner greater attention and delicacy than can be handled by a single court leading to situations where the presiding judges and elder judges of each court's chambers merge together to handle a decision. *Id.* This unification of chambers is what occurred in the case at hand.

[3] While technically giving two separate opinions, these rulings were a joint decision made by the Court. Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.). War Crimes in French law is defined in article 461-1 as encompassing all crimes outlined in articles 461-2 through 461-31 of the French criminal code. CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 461-1 (Fr.). The crime of Crimes against Humanity is defined in book II, title I, subtitle 1 of the criminal code and is encompassed by articles 211-1 through 213-4-1. CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 211-1 to 213-4-1 (Fr.). Generally, crimes constituting Crimes against Humanity include torture, Genocide, slavery, deportation, and others; however, the Court has also interpreted the definiton multiple times throughout its history. *Id.*; *see also* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 322–53 (1994).

[4] The Court of Cassation holds its decisions in the Palaca of Justice or Palais de Justice. *The Palais de Justice in Paris: A Monumental Witness to French History*, HIST. TOOLS (May 27, 2024) https://www.historytools.org/stories/the-palais-de-justice-in-paris-a-monumental-witness-to-french-history.

[5] The term *hostis humani generis* is Latin for "enemies of mankind" and was originally used in maritime cases but is now used to describe a broader group of individuals who commit international crimes. Luigi Corrias & Wouter Veraart, *The Hostis Generis Humani: A Challenge to International Law*, NETH. J. LEGAL PHIL. 2, 107–11 (2018).

[6] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.). The term "dual criminality" or "double criminality" will be used interchangeably throughout this Note as these are the primary terms used by legal scholars to reference this requirement. However, the concept applies in other aspects of international law, such as

Code article 689-11 (2) and (3), to prosecute Crimes against Humanity or War Crimes through the doctrine of universal jurisdiction the acts must be "punishable under the legislation of the State in which they were committed or . . . the State of which the suspect is a national is a party to the [Rome Statute]."[7] Although both appellants contended that French courts lacked jurisdiction to prosecute these crimes because Syria does not codify either crime within their criminal code, the court read the provisions of article 689-11 differently.[8] The Court's new interpretation concentrated on the lines of "punishable under the legislation of the State in which they were committed,"[9] of article 689-11 by noting:

> [T]he condition of double criminality . . . does not imply that the criminal characterization of the acts be identical in both legislations, but only requires that they be criminalized by both. The condition of criminalization by foreign law can be fulfilled through a common law offence constituting the basis of the crime prosecuted[.][10]

Now, these two Syrian nationals face years in a French prison for crimes committed in a different country, one which declines to prosecute such crimes, against people bearing no relation to the state of France.[11] This ruling signifies a departure

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extradition, where it is often referred to in other names such as "dual culpability, double incrimination, dual liability, equivalency of offences" and more. Neil Boister, *A History of Double Criminality in Extradition*, 25 J. HIST. INT'L L. 218, 219 (2023). While the names used as reference and the specific doctrine within international law that the requirement is being applied to may vary, they all relate to the concept that the crime an individual is accused of must be criminalized in both states at issue to some capacity.

[7] CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2020] (Fr.).

[8] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, No. 22-80.057, Bull. crim. at 37 (Fr.) (holding that the dual criminality requirement is met when the acts committed by an individual meet the criteria of "lesser" criminal acts under another state's criminal code and meet the requirements under the atrocity crime being prosecuted by French courts). For example, should an individual commit acts that constitute Genocide under French law in a state that does not criminalize Genocide, the requirement may still be met if the aforementioned state criminalizes the act of murder. As Genocide may generally be described as murder on an exponential scale, the dual criminality requirement is thus satisfied as the act is criminalized both in France and the state where it took place. Of important Note is that while Genocide will often be the example used to define the Court's interpretation, Genocide under French law does not require dual criminality.

[9] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2020] (Fr.).

[10] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

[11] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

from the prevailing interpretation of the dual criminality requirement by the majority of countries practicing the doctrine.[12]

Some question if the doctrine of universal jurisdiction truly allows for the fair administration of justice.[13] However, for many places around the world, such as in Syria, prosecutions under universal jurisdiction offer a beacon of retribution amidst the shroud of injustice cast by their inadequate legal system.[14] While this Note does not intend to suggest a solution for the alleged atrocities committed in countries like Syria, there are many groups that call for some form of retribution against alleged crimes committed against their people including the invocation of universal jurisdiction by foreign countries.[15]

With no help domestically, one can only hope to turn to international assistance. Yet for a variety of reasons, to be touched on further in this Note, a number of the international avenues for justice are blocked.[16] As the atrocities around the world continue to add in number and the importance of political dominion to ensure criminal accountability continues to grow, the ability to prosecute atrocity crimes through international avenues seems to be limited at almost every turn.[17] For individuals affected by atrocity crimes, such as War Crimes, Crimes against Humanity, Genocide, and Torture, justice feels like a fleeting dream.[18] However, universal jurisdiction creates a delicate thread that allows victims to navigate the labyrinthine challenges of the criminal justice system and capture the evanescent feeling of legal accountability.

Derived directly from the preamble of the Rome Statute, universal jurisdiction provides a doctrine of jurisdiction limited only by individual States and their self-imposed restrictions on the doctrine.[19] It is a doctrine that "puts an end to impunity

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[12] *Infra* note 113.

[13] *See generally* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (2001); George Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580 (2003).

[14] HUM. RTS. WATCH, WORLD REPORT 2024: EVENTS OF 2023, at 598 (2024); Mia Swart, *National Courts Lead the Way in Prosecuting Syrian War Crimes*, ALJAZEERA (Mar. 15, 2021), https://www.aljazeera.com/news/2021/3/15/national-courts-lead-the-way-in-prosecuting-syrian-war-crimes.

[15] *See, e.g.*, SYRIAN ACCOUNTABILITY PROJECT, https://syrianaccountabilityproject.syr.edu (last visited Oct. 21, 2024).

[16] *Infra* Part IV; Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/2011, at 2 (Oct. 2011).

[17] *Infra* Part II, Sec. D.

[18] Simon Adams, Glob. Ctr. for the Resp. to Protect, Speech at the Human Rights Council event on Accountability and Prevention of Mass Atrocities (June 8, 2017); *Simon Adams*, AURORA HUMANITARIAN INITIATIVE, https://auroraprize.com/en/simon-adams (last visited Oct. 21, 2024).

[19] Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute is the treaty that established the creation of the International Criminal Court ("ICC") on July 17, 1998. *Id.* In conjunction with establishing the ICC, the Rome Statute also established the four core international crimes of Genocide, Crimes

for the perpetrators of these crimes," by ensuring that "the most serious crimes of concern to the international community . . . [do] not go unpunished[.]"[20] Yet, it is not a doctrine that provides free rein for States to prosecute alleged atrocity crimes as the invocation of universal jurisdiction comes with various legal hurdles one must overcome to invoke the doctrine. Dual criminality is one such hurdle. That said, in May of 2023, the French Court of Cassation decided this hurdle must be lowered.[21]

This Note will contend that the dual criminality requirement based on the Court of Cassation's 2023 interpretation should be adopted by every country that currently exercises universal jurisdiction. Through an in-depth analysis of the different countries' criminal codes, this Note will analyze potential options for the adoption of the Court of Cassation's interpretation into different domestic laws. While the interpretation's adoption will be the main argument behind this Note, both the positives of the requirement and the potential negatives will also be examined.

Part II of this Note will look at: (1) the history of universal jurisdiction and its rise to relevancy today, (2) the doctrine's origins, and (3) the different requirements countries apply to the exercise of universal jurisdiction. This section will also include reference to each country's criminal codes that implement universal jurisdiction in order to understand the differences in its application around the world.[22]

Part III will explore dual criminality in more detail by looking at: (1) the development of the doctrine of universal jurisdiction and dual criminality in French law, (2) the amendments and development of article 689-11 that dictates the use of universal jurisdiction, and (3) provide an examination of the cases which brought about the Court of Cassation's decision.

Part IV will then analyze the Court of Cassation's reasoning behind their ruling, dissect the arguments for and against the dual criminality requirement in general, and an argument for the Court's interpretation of the requirement's inclusion in each state's criminal codes. To do so, this Note will look to the potential options for other States to adopt this interpretation into their legal system through either their own reinterpretation of the requirement or the addition of language into their criminal codes.

Before beginning the discussion there are a couple of caveats worth noting. First, and most importantly, the statute governing the Court of Cassation's decision was altered by the legislature in November of 2023, a mere six months following the Court's decision.[23] This alteration removed the dual criminality requirement from the

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against Humanity, war crimes, and the crime of aggression. *Id.* at art. 5. The Rome Statute continues on to define Genocide, War Crimes, and Crimes against Humanity in articles 6 through 8. *Id.* at art. 6–8.

[20] *Id.* at pmbl.

[21] Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

[22] *Infra* note 57.

[23] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.).

French criminal code.[24] While this is an unfortunate decision by the French legislature, the argument of this Note does not change; merely, the focus will be on the language of the 2020 version of the provision and the Court of Cassation's decision interpreting such version. This Note will address the legislature's decision to remove the provision and why it was wrong to do so.[25] Second, this Note will not look to offer any solutions to political debates regarding the doctrine of universal jurisdiction itself, although some aspects of the arguments align with the reasoning in favor of the dual criminality requirement's adoption. Third, this Note will not attempt to offer any solution to the Syrian conflict and will merely detail the use of dual criminality with a primary focus on the two Syrian cases ruled on by the Court of Cassation. It is of mere coincidence that the Court of Cassation chose to reinterpret the requirement to prosecute two Syrian regime members. Fourth, any hypothetical examples used to explain the doctrine of universal jurisdiction and its requirements are not to be interpreted as commentary on a country's criminal codes but are examples used to create a better understanding of the law at hand.

## II. THE HISTORY AND DEVELOPMENT OF UNIVERSAL JURISDICTION

> "The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[26]

Indirectly derived from Robert H. Jackson's opening speech at the Nuremburg Trials, universal jurisdiction seeks to prosecute individuals for "crimes against the peace of the world."[27] The principle of universal jurisdiction stems from the belief that there are certain crimes that pose such a serious threat to both humanity as a whole and the international community that all States have a moral duty to prosecute potential perpetrators of such crimes.[28] Due to this moral duty, no country should

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[24] *Id.*

[25] *Infra* Parts III–IV.

[26] Trial of the Major War Criminals Before the International Military Tribunal: Nuremburg, 14 November 1945 – 1 October 1946, Vol. II, at 98–99 (Oct. 1, 1946) [hereinafter Nuremburg Opening Statement]. Robert H. Jackson is a former United States Supreme Court Justice, United States Attorney General, and was the United States' chief prosecutor for the Nuremburg Trial following World War II where the victorious allies prosecuted the Nazi officials responsible for the Holocaust. Office of the Solicitor General, *Solicitor General: Robert H. Jackson*, U.S. DEP'T OF JUST. (Sept. 18, 2023), https://www.justice.gov/osg/bio/robert-h-jackson; *see also The Nuremburg Trials*, THE NAT'L WORLD WAR II MUSEUM, https://www.nationalww2museum.org/war/topics/nuremberg-trials (last visited Oct. 10, 2024). He is the last Supreme Court Justice to have passed the bar exam without ever graduating from law school and served on the Supreme Court bench from 1940 until 1954 with a brief stint away from the court to prosecute the Nuremburg Trials. *Id.*

[27] Nuremburg Opening Statement, *supra* note 26.

[28] Amnesty Int'l, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/2011, at 4 (Oct. 2011).

allow sanctuary for individuals who have committed such heinous crimes regardless of the location where the atrocity was committed.[29]

As with most things relating to international criminal law, universal jurisdiction in modern times generally stems from the Nuremburg trials following the defeat of Nazi Germany and the end of World War II.[30] Currently, universal jurisdiction is defined as "jurisdiction to prescribe without a nexus or link between the forum and the relevant conduct at the time of its commission."[31] Continuing from this description, universal jurisdiction applies "[i]n circumstances where there is no link of territory, nationality, or otherwise."[32] "[U]niversal jurisdiction] permits the assertion of jurisdiction because the crimes at issue have been prescribed by international law."[33] However, before discussing the modern interpretation of universal jurisdiction further, the history of the doctrine's roots in the centuries before World War II should be explored.

### *A. Origin of Universal Jurisdiction*

Irrespective of the modern definition of universal jurisdiction, historically there were two main theories of thought: the normative universality position and the "pragmatic policy-oriented" position.[34] As Cesare Beccaria discusses in his work *On Crimes and Punishments*, the normative universalist theory of the doctrine stemmed from nations with a set of common values.[35] Similar to the international law concept of customary law, the idea expresses the view that these common values lead to countries enforcing the same or similar laws around these values.[36] From these mutual understandings, these values were protected from one country to the next.[37] While

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[29] Rome Statute, *supra* note 19.

[30] *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788–89 (1998); Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419, 427–28 (2011).

[31] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 687–88 (Oxford Univ. Press 8th ed. 2012) (1966).

[32] *Id*. at 688.

[33] *Id.*

[34] Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 45 (Stephen Macedo ed., 2004).

[35] *Id.* at 43. While this Note will exclusively focus on criminal prosecutions under the doctrine, universal jurisdiction is not limited to purely criminal cases. The doctrine can extend to civil liability cases as seen by the Alien Tort Act put forth by the United States. 28 U.S.C. § 1350; *see, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that the court had jurisdiction over cases that involved an alien suing for an alleged tort committed by another party in violation of the law of nations. The suit brought forth at the time fell under the wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, and other international declarations established at this time.).

[36] Bassiouni, *supra* note 34, at 43.

[37] *Id.* at 42.

there is not a clear declaration of criminal jurisdiction for these crimes, the concept stood for the proposition that "one who offends mankind deserves universal condemnation, and to have all of mankind as his enemy."[38]

In *The Law of War and Peace*, Hugo Grotius expressed his views on universal criminal punishment and the theory of "enemies of the human race" through the practical concept of piracy and the right of individuals on the high seas.[39] This was the creation of the more "pragmatic policy-oriented" position of universal jurisdiction.[40] Focusing on the right of individuals to be able to freely navigate the high sea, Grotius argued violations of this right must be punished universally by whichever countries are available to do so.[41] This theory provides a more pragmatic approach to universal jurisdiction and is why many scholars look to piracy as the beginning of universal jurisdiction in criminal law.[42] Stemming from this concept of "enemies of the human race" Grotius spoke of, the prosecution of piracy, for the centuries prior to the Nuremburg trials and the creation of the United Nations, spearheaded the doctrine of universal jurisdiction into what it has become today.[43]

As outlaws of the world, pirates rampaged in the time before either international intervention and communication seen today was possible.[44] From as early as the

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[38] *Id.* at 43 (quoting CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 135 (Edward D. Ingraham trans., Philip H. Nicklin 2d Am. ed. 1819) (1764)).

[39] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 207 (A. C. Campbell trans., Batoche Books 2001) (1625).

[40] Bassiouni, *supra* note 34, at 43.

[41] GROTIUS, *supra* note 39, at 208.

[42] Michael P. Scharf & Thomas C. Fischer, *Foreword*, 35 NEW ENG. L. REV. 227, 228 (2001) ("Most scholars point to piracy as the first crime of universal jurisdiction recognized by the international community, and liken other crimes to piracy in order to justify, by analogy, the application of universal jurisdiction to those crimes."); *see also* MITSUE INAZUME, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 50 (2005) (citing Joseph W. Bingham, *Research in International Law IV: Piracy (Draft of Convention Prepared for the codification of International Law*, 26 SUPP. AM. J. INT'L L. (1932)); Louis Sohn, *Introduction* to BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980) ("The first breakthrough [for punishing 'international crime'] occurred when international law accepted the concepts that pirates are 'enemies of mankind' and . . . . [o]nce this concept of an international crime was developed in one area, it was soon applied by analogy in other fields."); Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, WORLD POL'Y J., Spring 2001, at 101, 105 ("Piracy on the high seas is sometimes presented as the classic inspiration for the concept of universal jurisdiction."); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 335 (2003) ("The universality principle is perhaps best illustrated by the jurisdiction that every state traditionally has over pirates.").

[43] *See* CRAWFORD, *supra* note 31 and accompanying text; *see also* GROTIUS, *supra* note 39.

[44] *Compare The Golden Age of Piracy*, ROYAL MUSEUMS GREENWICH, https://www.rmg.co.uk/stories/topics/golden-age- piracy) (last visited Oct. 21, 2024)

seventeenth century, countries believed there to be jurisdiction for individuals caught on the high seas committing acts of piracy regardless of an individual's origin of nationality.[45] William Blackstone followed in line with Grotius and Beccaria by calling piracy an "offence against the universal law of society," and by engaging in piracy perpetrators have declared "war against all mankind."[46] Blackstone called for humanity to "declare war against [pirates]… to inflict that punishment upon [pirates]."[47]

The United States Supreme Court noted the importance of prosecuting piracy regardless of the perpetrator's country of origin in *United States v. Smith*.[48] The *Smith* court continued to push the concept of piracy as "an offence against the universal law of society," by deeming pirates once again as "an enemy of the human race."[49] An outright declaration of piracy as the adversary of the world is the notion which helped shape the modern definition of universal jurisdiction.[50]

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(establishing that the peak of piracy was between 1650 and 1720), *with infra* Part II, section B and note 66 (looking at the Geneva convention's definitions of universal jurisdiction in the late 1940s following World War II). Under modern international law, piracy is defined in the UN Convention on the Law of the Sea article 101 as:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> > (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> >
> > (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

U.N. Convention on the Law of the Sea, part XI art. 101 (a)–(c), Dec. 10, 1982, 1833 U.N.T.S. 397. [Hereinafter "The Law of the Sea"].

[45] 4 WILLIAM BLACKSTONE, COMMENTARIES *71.

[46] *Id.*

[47] *Id.*

[48] United States v. Smith, 18 U.S. 153, 162 (1820) ("And the general practice of all nations in punishing all persons, whether native or foreigners, who have committed [piracy] against any persons whatsoever . . . .").

[49] *Id.* at 161 (reasoning that due to the common law recognition and punishment of piracy as an offense against the law of nations, it became an offense against the human race and its established "universal law of society").

[50] *See* CRAWFORD, *supra* note 31 and accompanying text.

The prime example of this comes from *The Harvard Research Draft Convention on Jurisdiction with Respect to Crime*.[51] Created by Manley O. Hudson, *The Harvard Research in International Law* was a collection of advisory boards posted in the American Journal of International Law during the late 1920s and 1930s.[52] In this draft, piracy was specifically outlined to be given "universality" for States' jurisdiction over the crime as outlined in international law in article nine.[53] In article ten of the draft the convention outlined "universality" for crimes other than piracy and included certain provisions that are still used today.[54]

Of primary concern for this Note is the provision stating a state has jurisdiction over a crime "[w]hen committed not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime *is also an offence by the law of the place where it was committed*[.]"[55] Other provisions provide similar requirements to those seen today, such as the need for an attempt at extradition to the country of origin and some form of a statute of limitations constraint.[56] The Harvard Research outlined each country which instituted some form of 'universality' jurisdiction for piracy including, but not limited to, Argentina, Canada, China, France, Great Britain, and the Netherlands.[57] While the Harvard Research gave a general outline of potential universal jurisdiction that was to come, it acknowledged that there were some who sought to have jurisdiction similar to that of piracy for other crimes.[58] The convention acknowledged this concept in saying "proponents of this view should adopt international cooperation for the repression of certain crimes as the test for determining whether there is to be universal jurisdiction with respect to such crimes on the same basis as in the case of piracy."[59] Yet, following this acknowledgement,

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[51] *See generally Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L., 439–42 (1939) [hereinafter "Harvard Draft"]. The Harvard Draft also discusses extradition and included in its proposed terms covering extradition the inclusion of the dual criminality requirement. *Id.* at 21–31.

[52] *Id.* at 493.

[53] *Id.* at 440 ("A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.").

[54] *Id.* at 440–41 ("Article 10. Universality–Other Crimes").

[55] *Id.* at 440–41 (emphasis added). The language expressed in this article constitutes the basis for the dual criminality requirement of universal jurisdiction.

[56] *Id.*

[57] *Id.* at 50, at 564–65. The complete list includes Argentina, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, France, Great Britain, Greece, Mexico, Netherlands, Panama, Poland, Siam, Spain, United States, Uruguay, and Venezuela. *Id.*

[58] *Id.* at 571.

[59] *Id.*

they laid some doubt that "any such principle of international law has yet matured."[60] However, within decades, this very principle emerged.

### *B. Post World War II to the late 1900s*

Following the horrendous acts committed by Nazi Germany and the Axis Powers in World War II, the victors were left to decide how to punish the perpetrators of these atrocities.[61] Despite the absence of explicit language acknowledging universal jurisdiction as the basis for the post-World War II tribunals, they are commonly believed and cited to be the contemporary beginning of the doctrine.[62] At these tribunals, the perpetrators of the Holocaust and initiators of the war were charged with a new crime: Crimes against Humanity.[63] The tribunals granted jurisdiction to countries such as the United States, Russia, the United Kingdom, and others to try the Axis powers in States which neither the crimes were perpetrated nor the suspects came from.[64] At the commencement of the tribunals, prosecutor Robert H. Jackson set forth in his opening statement that this was a trial for "crimes against the peace of the world . . . the wrongs which [the Allies] seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored

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60 *Id.* (stating the term "matured' is used synonymously with the term "developed" to reference that an explicit definition of universal jurisdiction by an international body of law has yet to be developed).

61 *Yalta Conference*, HISTORY.COM, https://www.history.com/topics/world-war-ii/yalta-conference (last visited Oct. 21, 2024). The Yalta Conference was a meeting between U.S. President Franklin Roosevelt, British Prime Minister Winston Churchill, and Soviet Premier Joseph Stalin following World War II. At this conference, the three world leaders discussed the post-war punishments for Germany and other Axis powers within Europe. It was here where the parties agreed to the Nuremburg trial. *See War Crimes on Trial: The Nuremberg and Tokyo Trials*, THE NAT'L WORLD WAR II MUSEUM (Nov. 24, 2020), https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials.

62 *See* Randall, *supra* note 30, at 788–89 (1988); Coombes, *supra* note 30, at 427–28.

63 *Nuremberg Trial Proceedings Vol. 1,* CHARTER OF THE INT. MILITARY TRIBUNAL, Art. 6 (c); *War Crimes on Trial: The Nuremburg and Tokyo Trials*, https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials (last visited Oct. 21, 2024). The decision to create this new charge brought criticism due to the lack of previous precedent for punishing this crime. *Compare* Charles E. Wyzanski, *Nuremberg – A Fair Trial?*, THE ATLANTIC (1946), *with* Matsiko Samuel, *The Anatomy of the Nuremberg Legacy: Strengths, Flaws and Relevance Today*, SOC. SCI. RSCH. NETWORK 9–11 (2015). Much of the criticism for the prosecution of the crime stemmed from the same reasoning as one of the defenses put forward by the defense attorneys at Nuremberg in that the court was using positive law to punish the perpetrators for acts that were legal under Nazi Law. *Id.* at 6–7 (noting that many of the criticisms involved the "discriminatory nature of the trial," "the criminalization of the war of aggression," the Soviets "moral authority," and the "retroactive character of the Nuremberg Charter"). The court at Nuremberg denied this reasoning stating that positive law is valid, even when seen as unjust, in situations where the law is "manifestly unlawful to an intolerable level[.]" *Id.* at 7.

64 INAZUE, *supra* note 42.

because it cannot survive their being repeated."[65] Similar to Grotius, Blackstone, and the Harvard Researchers, the tribunals focused on crimes perpetrated against the human race.[66] Crimes that stain the annals of human history, leaving behind nothing but a scar– a haunting reminder of the sickening depths of human cruelty.

After the creation of the United Nations (hereinafter "UN") and the end of the Nuremburg Trials, universal jurisdiction laid in somewhat of a phantom zone regarding the doctrine's use moving forward. In the short period following World War II, the UN had opportunities to officially announce the doctrine of universal jurisdiction but never recognized it as part of contemporary international law.[67] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "the Genocide Convention"), the UN declined to ultimately include universal jurisdiction as a basis for other States to claim jurisdiction for the crime of Genocide.[68] Article VI of the Genocide Convention explicitly laid out the jurisdiction for States seeking to prosecute individuals for Genocide under the convention and included no reference to any form of universal jurisdiction.[69] Universal jurisdiction

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[65] Nuremburg Opening Statement, *supra* note 26. Jackson's statement is eerily similar to the historical reasoning behind universal jurisdiction. *Supra* Part II.A. Just as the international community sought to prevent piracy due to its view as an "enemy of humanity," the world now sought to condemn the actions of the Axis powers due to their "crimes against the peace of the world." Nuremberg Opening Statement, *supra* note 26.

[66] While the path to a more modern definition of universal jurisdiction started to become clearer, there still lacked an official declaration in support of the doctrine for crimes committed outside of World War II. UN Secretary-General Trygve Lie acknowledged this lack of official declaration in a 1949 memo to the UN General Assembly.

> [I]t is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be...subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory powers... had made use of a right belonging to any nation.

U.N. Secretary-General, *The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary-General*, 80, U.N. Doc. A/CN.4/5 (1949).

[67] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc.

[68] *Id.* While included in the first version of the convention, the drafters of the convention explicitly declined to include universal jurisdiction in the final version as they were focused on the doctrine being solely exercised by the custodial state (or state in which the accused was present) rather than be used by any state to avoid potential violations of state sovereignty. *See* Amina Adanan, *Reflecting on the Genocide Convention at 70: How Genocide Became a Crime Subject to Universal Jurisdiction*, BLOG OF THE EUR. J. OF INT. L. (May 16, 2019), https://www.ejiltalk.org/symposium-on-the-Genocide-convention-reflecting-on-the-Genocide-convention-at-70-how-Genocide-became-a-crime-subject-to-universal-jurisdiction/.

[69] Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 67, at art. VI. ("Persons charged with Genocide…shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.")

was argued for and proposed twice during the drafting of the Genocide Convention, as many States and individuals believed that was the goal of the UN when defining the punishment for Genocide.[70] One year after the Genocide Convention, the UN seemed to almost assert universal jurisdiction in the 1949 Geneva Convention.[71] Article 146 of the fourth Geneva Convention declared as follows:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also . . . hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[72]

Many view this as a proclamation for universal jurisdiction against crimes violating the Geneva Conventions.[73] While this helped clear the fog, complete clarity was still lacking. In the years following there was no further precedent to develop the doctrine; however, a decade later, the doctrine was applied in the well-known case of *Israel v. Adolf Eichmann* (hereinafter "Eichmann trial") occurred.[74]

In the Eichmann Trial, Adolf Eichmann was suspected of assisting in the orchestration of the Holocaust and systematically killing millions of Jewish people during World War II.[75] Eichmann played a key role in implementing the Nazi's "Final Solution" including the deportation and murder of millions of Jewish people in Europe.[76] Following World War II, Eichmann fled to Austria and eventually made his way to Argentina.[77] It was in Argentina where Israeli forces captured Eichmann and arrested him in May 1960.[78] On May 23, 1961, Israeli Prime Minister Dabid Ben

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[70] *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 355–60 (Cambridge Univ. Press 2000).

[71] Geneva Convention Relative to the Treatment of Prisoners of War art. 146, Aug. 12, 1949, 6 U.N.T.S. 202.

[72] *Id.* (emphasis added).

[73] *See, e.g.*, 2 Y.B. Int'l L. Comm'n 1952, U.N. Doc. A/CN.4/SER.A/1952/Add.l (1958); Raymund T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 426 (1952).

[74] CrimC (DC Jer) 40/61 Attorney General v. Adolf Eichmann, PD 5721 (1961) (Isr.).

[75] *Id.*

[76] *Id.* While there are more details that go into the exact crimes he committed, this Note will not discuss these details and instead will focus on the charges brought against him and the final result of the district court and Supreme Court of Israel.

[77] *See* ZVI AHARAON & WILLHELM DIETL, OPERATION EICHMANN PURSUIT AND CAPTURE 44 (1997).

[78] *Infra* notes 79–80.

Gurion announced publicly that Adolf Eichmann, "one of the greatest Nazi war criminals," was captured.[79]

Many of the problems that arose during the trial derived from the question of jurisdiction.[80] The first of the jurisdictional problems came prior to trial when Argentina questioned the jurisdiction of Israel in the capture and transportation of Eichmann to Israel from Argentina.[81] This was ultimately resolved by UN Security Council intervention after much debate between the two parties.[82] At trial, Israel prosecuted Eichmann under the Nazis and Nazi Collaborators (Punishment) Act of 1950 and indicted him on fifteen counts, including crimes against the Jewish people, his involvement in the "killing of millions of Jews, Crimes against Humanity, War Crimes, and membership in an organization declared criminal by the Nuremburg Tribunals."[83] During the district court case, Eichmann's defense argued that Israel did not have jurisdiction to prosecute the crime.[84] The three judges responded that "jurisdiction to try [the crimes indicted] under international law is universal."[85] Acknowledging the history of universal jurisdiction and its relation back to maritime nations and piracy, the district court declared universal jurisdiction as the basis for Israel's jurisdiction and found that article 6 of the Genocide Convention allowed for the use of the doctrine.[86] Israel's Supreme Court upheld the district court's reasoning stating:

> Not only do all the crimes attributable to [Eichmann] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction . . . to try [Eichmann].[87]

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79 MOSHE PEARLMAN, THE CAPTURE AND TRIAL OF ADOLF EICHMANN 11 (1983).

80 *See* U.N. SCOR, 15th Sess., Supp., Apr.-June 1960, at 25, U.N. Doc. S/4334 (1960).

81 *Id.*

82 *See generally* U.N. SCOR, 15th Sess., 865th mtg. at 2, U.N. Doc. S/4336 (Jun. 22, 1960); U.N. SCOR, 15th Sess., 868th mtg., at 1, U.N. Doc. S/4349 (Jun. 23, 1960). While there was much political discourse between Argentina and Israel regarding the capture and transportation of Eichmann to Israel, this Note will not discuss this in much detail. For further discussion on the topic see Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45 (2002).

83 *See* Attorney-General v. Adolf Eichmann (indictment) *reprinted in* PETER PAPADATOS, THE EICHMANN TRIAL 111 (1964).

84 CrimC (DC Jer) 40/61Attorney General v. Adolf Eichmann, PD 5721 (1961) (Isr.).

85 *Id.* at 8.

86 *Id.*

87 Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968 (English translation).

Just as Robert H. Jackson noted in his opening speech at Nuremburg, the Israeli Supreme Court supported their basis of universal jurisdiction by noting the devastating impact these crimes have on the entire international community.[88] Thus, the Eichmann trial represented the first application of universal jurisdiction by a singular State for modern crimes covered under the doctrine. Yet, it is of note that the doctrine used in the Eichmann trial was based on an interpretation of the Genocide Convention and other international laws rather than language within Israel's own domestic laws.[89]

### *C. The Rome Statute and Princeton Principles*

The greatest developments of universal jurisdiction in modern international law came during a three-year span from 1998–2001. The first, and seemingly most important, came from the establishment of the International Criminal Court (hereinafter "ICC") and the Rome Statute.[90] Following years of ad hoc international tribunals to prosecute atrocity crimes committed throughout the world, the creation of a permanent international criminal court occurred in 1998 with the establishment of the ICC.[91] The document establishing the court and its guiding articles is the Rome Statute.[92] As previously mentioned, the preamble of the Rome Statute noted that because "such grave crimes threaten the peace, security, and well-being of the world, [a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . . it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[.]"[93] The statute went on to outline the crimes that the ICC would have jurisdiction for in article 5 §1 as it listed "(a) the crime of Genocide; (b) Crimes against Humanity; (c) War Crimes; [and] (d) the Crime of Aggression."[94] All four of the crimes were then defined in articles 6–8 and these definitions became the basis for many countries' domestic definitions of the crimes.[95] With the Rome Statute as a baseline, many States followed the articles set out by the statute by implementing domestic laws to include the definitions given and prescribe universal jurisdiction for these crimes.[96]

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88 Nuremburg Opening Statement, *supra* note 26.

89 *Id.* Israel and other countries had yet to implement the doctrine of universal jurisdiction within their own domestic laws so that they may pursue prosecutions against crimes such as Genocide or War Crimes outside of those related to World War II.

90 *See generally* Rome Statute, *supra* note 19.

91 *Id.*

92 *Id.*

93 *Id.* at pmbl.

94 *Id.* art. 5 (a)–(d).

95 *Id.* art. 6–8.

96 *See* Stefaan Smis & Kim Van der Borght, *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 INT'L LEGAL MATERIALS 918, 922 (1999); *see also* MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW:

Three years later, in 2001, a group of scholars sought to provide further guidance and push the principle of universal jurisdiction and accountability in international criminal law in what came to be known as the "Princeton Principles".[97] Led by Stephen Macedo as the Project Chair, a group of 30 scholars[98] developed the Princeton Principles on Universal Jurisdiction which outlined jurisdiction for the following crimes: piracy, slavery, War Crimes, crimes against peace, Crimes against Humanity, Genocide, and torture.[99] The principles defined universal jurisdiction as "criminal jurisdiction based solely on the nature of the crime, without regard as 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 exercising such jurisdiction."[100] The principles laid out multiple provisions both outlining the use of

EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW, 52–53 (Intersentia 2005).

97 Marilyn Marks, *Jurists Announce "Princeton Principles"*, PRINCETON UNIV. (July 23, 2001, 10:08 AM), https://www.princeton.edu/news/2001/07/23/jurists-announce-princeton-principles.

98 A full list of the 30 scholars and their occupation at the time of formation includes: Adrian Arena (Secretary General of the International Commission of Jurists); Lloyd Axworthy (Director of the Liu Centre for the Study of Global Issues); Gary Bass (Assistant Professor at Princeton University); M. Cherif Bassiouni (Professor of Law and President of the International Human Rights Law Institute at DePaul College of Law); Nicolas Browne-Wilkinson (Law Lord at the UK House of Lords); William Butler (President of the American Association for the International Commission of Jurists); Hans Corell (Under-Secretary-General for Legal Affairs at the UN); Param Cumaraswamy (UN Special Rapporteur on the Independence of the Judiciary); E.V.O. Dankwa (Professor of Law, University of Ghana Chair); Richard Falk (Law Professor, Princeton University); Jerome Shestack (Former President of the American Bar Association); Stephen Schwebel (Former President, International Court of Justice ("ICJ")); Kuniji Shibahara (Professor Emeritus, University of Tokyo); Anne-Marie Slaughter (Professor of Law, Harvard Law School); Turgut Tarhanli (International Law Professor Istanbul Bilgi University); Wang Xiumei (Senior Researcher, Renmin University of China); Tom Farer (Dean of Graduate School of International Studies, University of Denver); Cees Flinterman (Professor of Human Rights, Utrecht University); Mingxuan Gao (Professor of Law, China Law Institute); Menmo Kamminga (Professor of Public International Law, Maastricht University); Michael Kirby (Justice, High Court of Australia); Bert Lockwood (Professor of Law, University of Cincinnati College of Law); Stephen Macedo (Professor of Politics, Princeton University); Stephen Marks (Francois Xavier Bagnoud Professor, Harvard School of Public Health); Michael O'Boyle (Section Registrar, European Court of Human Rights); Diane Orentlicher (Professor of Law, American University); Stephen Oxman (Member of the Board of Directors, American Association for the International Commission of Jurists); Vesselin Popovski (Professor of Law, University of Exeter); Michael Posner (Executive Director, Lawyers Committee for Human Rights); and Yves Sandoz (Former Director of Principles and International Law, International Committee of the Red Cross). PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 59–61 (Stephen Macedo ed., 2001).

99 *Id.* at 29.

100 *Id.* at 28

universal jurisdiction and acknowledging limitations for it.[101] In the years following the implementation of the Rome Statute and the release of the Princeton Principles, multiple States altered their domestic laws to include provisions for universal jurisdiction.[102]

### *D. Contemporary interpretations of universal jurisdiction, its use, and the dual criminality requirement introduction*

This now brings this Note to the modern interpretations of universal jurisdiction. Twenty-three countries have recognized some form of universal jurisdiction in their domestic laws.[103] Despite the guidelines provided by the Rome Statute and Princeton Principles, domestic laws have differed on the specific requirements for the doctrine's use.[104] Thirteen countries have invoked universal jurisdiction during domestic prosecutions thus far.[105] Of these cases, some of them include Australia's conviction

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[101] *Id.* at 30–34. Of note is principle 10, which lays out the grounds for a State to refuse to extradite a criminal based on universal jurisdiction, as most domestic laws based on universal jurisdiction and the Rome Statute give express doctrines for extradition.

[102] *See supra* note 96.

[103] The list includes Algeria, Andora, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Denmark, Finland, France, Germany, Ireland, Israel, Mexico, Netherlands, Senegal, Slovenia, Spain, Switzerland, Turkey, the United Kingdom, and to some extent the United States. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 1–2 (2001), https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530042011en.pdf; *see supra* note 6.

[104] *Compare supra* note 103.

[105] The countries that have invoked the doctrine thus far are: Australia (Polyukhovich v. Commonwealth, 172 CLR 501 (High Court of Austl. 1991) (holding that Australia does have jurisdiction to prosecute an Australian citizen for crimes committed outside of Australia under the Australian War Crimes Act)); Belgium (*see* Jessica Harrah, *A Trial of "The Butare Four" in Belgium*, 218 WAR CRIMES MEMORANDA 1, 7–18 (2003)); Finland (HELSINKI DIST. CT., JUDGEMENT IN A CRIMINAL CASE OF GENOCIDE PROSECUTOR V. FRANCOIS BAZARAMBA (2010)); France (*see supra* note 2); Germany (RHEINLANDPFLAZ, OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz], *Life Imprisonment Due to Crimes Committed Against Humanity and Murder Sentencing of a Suspected Member of the Syrian Secret Service* (Jan. 17, 2022), https://olgko.justiz.rlp.de/presse-aktuelles/detail/life-imprisonment-due-to-crimes-committed-against-humanity-and-murder-sentencing-of-a-suspected-member-of-the-syrian-secret-service); Israel (Eichmann Trial, *supra* note 83); Malaysia (*See* Richard Falk, *Kuala Lumpur Tribunal: Bush and Blair Guilty*, AL JAZEERA (Nov. 28, 2011), https://www.aljazeera.com/opinions/2011/11/28/kuala-lumpur-tribunal-bush-and-blair-guilty (finding former U.S. President George W. Bush guilty *in absentia* of War Crimes)); Netherlands (Mike Corder, *Dutch Court Convicts Pro-Syrian Government Militia Member of Illegally Detaining, Torturing Civilian*, ASSOCIATED PRESS (Jan. 22, 2024), https://apnews.com/article/netherlands-syria-war-crimes-torture-conviction-court-cf58e317a8c1b13999c46afc31d3b0e5); Senegal (Hissene Habre v. Republic of Senegal, ECW/CCJ/JUDG/06/10 (Econ. Cmty. W. Afr. St. Ct. Justice Nov. 18, 2010), https://www.internationalcrimesdatabase.org/Case/220); Spain (Naomi Roht-Arriaza, *International Decisions–Guatemala Genocide Case*, 100 AM. J. INT'L L. 207, 207 (2006));

of Ivan Tomofeyevich Polyukhovich in 1991 for War Crimes,[106] Belgium prosecuting four Rwandan citizens for their role in the Rwandan Genocide in 2001,[107] and more recently Germany's conviction of Anwar Raslan in 2022 for crimes committed in Syria.[108] All of the countries that implement universal jurisdiction enforce certain restrictions on the use of the doctrine.[109] Of these restrictions, States often require some form of connection between the perpetrator and the prosecuting state.[110] This connection ranges from needing the victims to be a national of the forum state[111] to requiring that the perpetrator reside in the State after the crime has been committed.[112] Other requirements can include requiring the perpetrator be extradited to the country where the crime took place and the right to a fair trial.[113] Of primary importance for this Note is the requirement of dual criminality.[114]

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Sweden (Stockholms tingsrätt [TR] [District Court] 2022-07-14 B 15255-19 (Swed.), https://www.domstol.se/nyheter/2022/07/iransk-medborgare-doms-till-livstids-fangelse-for-avrattningar-av-politiska-fangar-i-iran-1988/) (sentencing an Iranian citizen to life for executing political prisoners)); Switzerland (OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN SWITZERLAND 6 (2017)); Turkey (*Uighurs in Turkey File Criminal Case Against Chinese Officials*, AL JAZEERA (Jan. 4, 2022), https://www.aljazeera.com/news/2022/1/4/turkey-uighurs-file-criminal-complaint-against-chinese-officials); United Kingdom (Devika Hovell, *The 'Mistrial' of Kumar Lama: Problematizing Universal Jurisdiction*, EUR.J. OF INT. L.: BLOG (Apr. 6, 2017), https://www.ejiltalk.org/the-mistrial-of-kumar-lama-problematizing-universal-jurisdiction/).

106 Polyukhovich v. Commonwealth, 172 CLR 501 (High Court of Austl. 1991).

107 *See* Jessica Harrah, Trial of "The Butare Four" in Belgium, 218 WAR CRIMES MEMORANDA 1, 7–18 (2003).

108 RHEINLANDPFLAZ, OBERLANDESGERICHT KOBLENZ [Higher Regional Court of Koblenz], *Life Imprisonment Due to Crimes Committed Against Humanity and Murder Sentencing of a Suspected Member of the Syrian Secret Service* (Jan. 17, 2022), https://olgko.justiz.rlp.de/presse-aktuelles/detail/life-imprisonment-due-to-crimes-committed-against-humanity-and-murder-sentencing-of-a-suspected-member-of-the-syrian-secret-service.

109 *See supra* note 105.

110 *See infra* note 110.

111 Justice for Victims of War Crimes Act, 18 U.S.C. § 2441 (2023).

112 Crimes against Humanity and War Crimes Act, S.C. 2000 c.24 (Can.).

113 *Id.*; *Universal Jurisdiction*, THE CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/ (last visited Oct. 21, 2024).

114 In other words, dual criminality is defined as "a. . . . requirement in the context of universal jurisdiction entailing that the conduct for which a person faces prosecution must be punishable in both the state where it was committed and in the forum state exercising universal jurisdiction." Mona Ghyoot & Waleed Mahmoud, *Universal Jurisdiction: Arguments for a More 'Universal' Double Criminality Requirement in France*, OPINIO JURIS (July 21, 2023), https://opiniojuris.org/2023/07/21/universal-jurisdiction-arguments-for-a-more-universal-double-criminality-requirement-in-france/.

Five of the eighteen countries implementing universal jurisdiction require dual criminality to prosecute.[115] Generally, dual criminality requires the atrocity crime a state is attempting to prosecute be criminalized in the state prosecuting and the state where the crime was perpetrated.[116] However, as previously noted, the French Court of Cassation recently reinterpreted the requirement so that while the crime must still be penalized in both States, only the underlying act constituting the crime need be penalized in the state where it took place.[117] Before analyzing further the dual criminality requirement, including both the benefits and negatives of adopting the requirement, this Note will first analyze the historical development of France's universal jurisdiction.

## III. DEVELOPMENT OF UNIVERSAL JURISDICTION IN FRANCE TO THE FRENCH COURT OF CASSATION RULING

"[T]he establishment of universal jurisdiction . . . is an important new development which expresses the willingness of France to collaborate as efficiently as possible in the prosecution of such crimes."[118]

### *A. Historical development and case law*

Universal jurisdiction in France has a long history, similar to that of the overall doctrine's history. While starting with prosecutions of pirates in the 16th and 17th centuries, modern universal jurisdiction derived directly from the French Constitution of 1958.[119] It allowed for international treaties to take precedence over national law; however, offenses such as Crimes against Humanity and Genocide were not covered

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115 Austria (STRAFGESETZBUCH [StGB] [PENAL CODE] § 65 (Austria)), France (LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 126 (2003) (see for Denmark code)), Finland (OPEN SOCIETY JUSTICE INITIATIVE, UNIVERSAL JURISDICTION LAW AND PRACTICE IN SWITZERLAND 12 (2017) (limiting the doctrine's scope as it only applies when the victims or perpetrator is a Finnish national)), and France (Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.)); Republic of Senegal (Information and Comments by Senegal on General Assembly Resolution 74/192, U.N. Doc. A/75/151 (2020), https://www.un.org/en/ga/sixth/75/universal_jurisdiction/senegal_e.pdf).

116 STRAFGESETZBUCH [StGB] [PENAL CODE] § 65 (Austria).

117 *See supra* note 8 and accompanying text. To reiterate, a lesser crime can be seen as a crime that punishes the same acts constituting an atrocity crime. Using the same example as noted in note 8: should a state wish to prosecute an individual for Genocide it need not require Genocide to be criminalized in the state where the act took place. Rather, it would only need murder to be criminalized in that state. As both murder and Genocide punish intentional killing of others, the requirement is met.

118 LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 133 (2003).

119 Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927, 936 (2009) (citing Jeanne Sulzer, *Implementing the Principle of Universal Jurisdiction in France*, *in* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 125, 128 (2007)).

under the provision.[120] Articles 113-6 and 113-7 of the French Criminal Code provided limited jurisdiction over Genocide cases.[121] This understanding went on for almost forty years until 1994.

In 1994, the case of *Javor et al. v. X* altered this understanding so that national law was looked at as supreme over international treaties.[122] Additionally, the magistrate interpreted the Genocide Convention so that there was a lack of universal jurisdiction which the Court of Cassation later affirmed.[123]

However, soon after, France became the first European State to implement legislation allowing universal jurisdiction as a basis for prosecutions in French courts for crimes that related to the International Criminal Tribunal of Yugoslavia (hereinafter "ICTY") and the International Criminal Tribunal of Rwanda (hereinafter "ICTR").[124] Although the tribunal's statutes did not expressly provide for universal jurisdiction, Luc Reydams noted in *Universal Jurisdiction* that the "French Minister of Justice explained that 'the establishment of universal jurisdiction, which is not required by the UN Security Council Resolution, is an important new development which expresses the willingness of France to collaborate as efficiently as possible in the prosecution of such crimes'."[125] This led to a case in March of 1996 against Rwandan priest Wenceslas Munyeshyaka, a Rwandan refugee in France, for the crimes of Genocide, torture, and inhuman and degrading treatment.[126] The French Court of Appeal Indictment Division found that there was a lack of jurisdiction to try crimes committed abroad by foreigners against other foreigners since the French Code of Criminal Procedure did not provide for such jurisdiction.[127] Yet, three years later, the French Supreme Court ordered for the proceedings to be reinstated as the Indictment Division erred by only considering the acts under Genocide when torture also would have provided for universal jurisdiction under article 689-2.[128] The case

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120 *Id.*

121 CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 116–6 to 7 (Fr.).

122 REYDAMS, *supra* note 118, at 135–36.

123 *Id.* (citing Tribunal de Grande Instance de Paris, 6 May 1994 and Cour de Cassation, 26 March 1994).

124 Wolfgang, *supra* note 119, at 936.

125 REYDAMS, *supra* note 118, at 133.

126 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 6, 1998, No. 96-82491 (Fr.).

127 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.).

128 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-2 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 6, 1998, No. 96-82491 (Fr.).

against Munyeshyaka recently dropped in 2019 after almost 25 years of legal proceedings.[129]

In 2005, French courts convicted their first criminal on the basis of universal jurisdiction.[130] The proceedings for this historic conviction began in July 1999 when French officials arrested Ely Ould Dah in France while he was attending a training program in Montpellier.[131] French authorities indicted him soon after for torture committed in the early 1990s in Mauritania.[132] He later escaped back to Mauritania in April of 2000.[133] Following debates, an appellate court decided he should still be tried *in absensia* in 2002 and the Court of Cassation affirmed this decision when it denied Ould Dah's appeal.[134] In the Court's denial of this appeal, it referenced articles 689-1 and 690-2 of the French Code of Criminal Procedure and reaffirmed the use of universal jurisdiction in French courts.[135] This led to the final decision in July of 2005 where the Cour d'assises of Nimes sentenced Ould Dah to ten years in prison.[136]

Three years after the Ould Dah decision, French officials indicted Khaled Ben Saïd, a former Tunisian Vice-Consul in France, for crimes of torture.[137] The Court of Cassation ultimately found Saïd guilty of torture under international laws and convicted him.[138]

These two cases exemplify that the French court system shows no hesitation in pursuing prosecution of criminals under the doctrine of universal jurisdiction. Despite this steadfast determination, there has been a lack of convictions under the doctrine since.

In the years following these two decisions, legislative and judicial support waned for the doctrine lacked. Clemence Bectarte, a lawyer for the International Federation

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129 Laurent Larcher, *Case Dropped Against Rwandan Catholic Priest Accused of Genocide*, LACROIX INT'L (Nov. 14, 2019), https://international.la-croix.com/news/religion/case-dropped-against-rwandan-catholic-priest-accused-of-Genocide/11266.

130 *Ely Ould Dah Convicted After Six Years of Proceedings. Our Perseverance Paid Off*, INT'L FED'N FOR HUM. RTS. (Feb. 7, 2005), https://www.fidh.org/en/issues/litigation/litigation-against-individuals/Ely-Ould-Dah-Case/Ely-Ould-Dah-convicted-after-six.

131 *Id.*

132 *Id.*

133 *Id.*

134 Cour de Cassation [Cass.] [supreme court for judicial matters] crim., Oct. 23, 2002, No. 02-85379 (Fr.).

135 *Id.*

136 *Ely Ould Dah Convicted After Six Years of Proceedings. Our Perseverance Paid Off*, *supra* note 127.

137 Ben Saïd Case, *Khaled Ben Said, Former Tunisian Vice-Consul in France, Condemned for Torture by the Criminal Court of Strasbourg*, FIDH (Dec. 16, 2008), https://www.fidh.org/en/issues/litigation/litigation-against-individuals/Ben-Said-Case/Khaled-Ben-Said-former-Tunisian.

138 *Id.*

for Human Rights, noted, "[t]he principle of universal jurisdiction was not really endorsed by the executive, which did not look favourably on these judicial 'interferences' in its diplomatic relations."[139] Until the implementation of the doctrine in the criminal code for crimes other than torture, the support for prosecutors' offices to use the doctrine dwindled.[140] Once the legislative branch implemented universal jurisdiction for other crimes in 2010, the judicial system followed.[141]

The creation of a major international crimes prosecutor's office in 2011 and the Central Office for the Fight against Crimes against Humanity (OCLCH) in 2013 sparked prosecutions in France under universal jurisdiction.[142] In the years following the creation of these two offices French international prosecutions focused heavily on alleged crimes committed in Syria. In 2019, French officials opened two separate investigations against Syrian nationals for Crimes against Humanity, torture, and War Crimes committed as part of the Assad Regime.[143] It is these two cases that are central to the Court of Cassation's newfound interpretation. However, before discussing the cases, a brief outline of the French statutes governing these cases is required.

### *B. The French Code of Criminal Procedure and its development*

Article 689 of the French Code of Criminal Procedure provides universal jurisdiction in France.[144] The provision introduced universal jurisdiction in some form in 1976 as it provided that "any French citizen who, outside the territory of the Republic, has been guilty of an act classified as an offence under French Law may be prosecuted and tried by the French courts if the act is punishable by the legislation of the country where it was committed."[145] The provision was then amended in 1994, 1999, and finally in 2009.[146] For the crime of torture, which both the Saïd and Ould Dah cases stemmed from, French courts may prosecute under universal jurisdiction as

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139 Lena Bjurstrom *Universal Jurisdiction: How did France Become a Safe Haven for War Criminals?*, AMNESTY INT'L (July 26, 2022), https://www.amnesty.fr/actualites/competence-universelle-france-ukraine-justice-internationale-cpi.

140 *Id.*

141 *See* Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

142 Bjurstrom, *supra* note 139.

143 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

144 Jurisdiction of the French Courts, 2009 (art. 689/2009) (Fr.).

145 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689 (Fr.).

146 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689 [1994] (Fr.); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689 [1999] (Fr.); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689 (Fr.).

soon as a potential suspect enters French territory under articles 689-1 and 689-2.[147] For Crimes against Humanity, Genocide, and War Crimes, it is article 689-11 that outlines the requirements of universal jurisdiction.[148]

Created on August 11, 2010, article 689-11 provides French courts universal jurisdiction over crimes that fall within the jurisdiction of the International Criminal Court pursuant to the Rome Statute so long as four requirements are met.[149] These requirements have come to be known as the "four locks"[150] and are: (1) the perpetrator must be a habitual resident in the territory of France, (2) *the crime must be criminalized in the State which the crime occurred* (otherwise known as the "dual criminality requirement"), (3) only the public prosecutor's office may bring a charge, and (4) prosecutors must verify that there is no other court, international or national, that has asserted jurisdiction before opening any investigation.[151] This Note primarily focuses on the second "lock", the dual criminality requirement.

In the 2010 version of 689-11, one is subject to universal jurisdiction in France when "*the acts are punishable under the legislation of the State in which they were committed* or if that State . . . is a party to the [Rome Statute]."[152] In stating this requirement the legislature acknowledged the dual criminality requirement for universal jurisdiction when it pertains to Genocide, Crimes against Humanity, War Crimes, and the Crime of Aggression.[153] The provision has been amended twice since

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147 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-1 (Fr.) (general provision giving universal jurisdiction for all international conventions); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689–2 (Fr.) (provision giving universal jurisdiction under the 1984 Convention against Torture).

148 Jurisdiction of the French Courts, *supra* note 144; Rome Statute, *supra* note 19.

149 The Rome Statute lays out four crimes that fall under the ICC's jurisdiction: Genocide, Crimes against Humanity, War Crimes, and the Crime of Aggression. Rome Statute, *supra* note 19, at Part 2, Art. V, "Crimes within the Jurisdiction of the Court"; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2010] (Fr.).

150 The term was first coined by Jeana Sulzer, an international justice lawyer and head of the international justice commission when she referred to the four requirements as "locks". Jan van der Made, *How Far is France Prepared to Go in Support of Universal Human Rights*, RFI (Jun. 30, 2022), https://www.rfi.fr/en/international/20220630-how-far-is-france-prepared-to-go-in-support-of-universal-human-rights. Multiple other sources have since referred to the requirements as the "four locks." *See* Bjurstom, *supra* note 136; *France's Trial for Atrocities Committed in Liberia*, HUM. RTS. WATCH, (Oct. 5, 2022), https://www.hrw.org/news/2022/10/05/frances-trial-atrocities-committed-liberia; Juliette Rémond Tiedrez, *France's Highwest Court Confirms Universal Jurisdiction*, BLOG EUR. J. INT'L L. (Jun. 1, 2023), https://www.ejiltalk.org/france-is-back-on-the-universal-jurisdiction-track/; Jake Palmer, *Loosening the Four Locks: French Universal Jurisdiction in the Chaban and Nema cases*, REDRESS (May 30, 2023), https://redress.org/news/loosening-the-four-locks-french-universal-jurisdiction-in-the-chaban-and-nema-cases/.

151 CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2010] (Fr.) (emphasis added).

152 *Id.* (emphasis added).

153 *Id.*

its inception prior to the seminal case at hand. The first came in 2019 when the dual criminality requirement was removed from Genocide, but still given to both Crimes against Humanity and War Crimes.[154] The second amendment came in 2020 where the third lock was altered so that it was no longer the prosecutor's office that brings a charge but specifically the counter-terrorism public prosecutor that must bring a charge under 689-11.[155]

As Noted in Part I, the French legislature altered the criminal code in November 2023, after the Court of Cassation's decision, removing the language requiring dual criminality.[156] While the 2023 version removed the dual criminality language, it *did* include the language given by the Court of Cassation regarding what constitutes habitual residence on French territory.[157] The intent of the legislature is clear based on these actions. It wanted to incorporate the Court's ruling on what constitutes habitual residence but erase the dual criminality requirement.[158] Before discussing the negatives of the legislature's decision, the Court of Cassation's November decision must be fully explored.

### *C. The Chaban and Nema cases and the Court of Cassation's ruling on dual criminality*

In 2019, French officials opened two investigations against alleged members of the Syrian regime in France.[159] The first began on February 15, 2019 when prosecutors at the *Tribunal de Grande Instance de Paris* (Paris Tribunal of First Instance) opened an investigation into, arrested, and indicted Abdulhamid Chaban, a

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154 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2019] (Fr.).

155 CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2020] (Fr.).

156 *Compare* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.), *with* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2020] (Fr.). In 2020, the article included the language of "if the acts are punishable by the legislation of the State where they were committed," in both section 1 and 2 of the code. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2020] (Fr.). The 2023 version of the provision removed this language altogether. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.).

157 CODE DE PROCEDURE PENALE [C. PR. PEN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

158 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 [2010] (Fr.).

159 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

former soldier of the Syrian army.[160] The second came months later as French officials filed a complaint at the Paris Tribunal of First Instance in June 2019 which then led to an arrest in January 2020 of Majdi Nema, a former leader of a militant group in Syria.[161]

For the first case, French officials charged Chaban with complicity in Crimes against Humanity committed in Syria between March 2011 and August 2013.[162] Legal proceedings then followed for the next few years. In August 2019, Chaban's lawyer filed a petition for the annulment of the official statement of arrest, police custody, and other acts on the grounds that the French officials lacked jurisdiction and there was no serious or corroborating evidence of Chaban's involvement in the alleged crimes.[163] On February 18, 2021, the Chamber of the *Cour D'appel de* Paris (Court of Appeals of Paris) ruled that French courts did have jurisdiction.[164] The Criminal Chamber of the Court of Cassation reversed the decision of the appellate court on November 24, 2021, and stated that French courts lacked jurisdiction to hear this case as Syria is neither party to the Rome statute nor has domestic laws criminalizing Crimes against Humanity.[165] This decision was appealed and brought together with the second case to be heard in front of the Plenary Court of Cassation.[166]

In the second case, French officials received a complaint in June 2019 concerning acts constituting torture, Crimes against Humanity, War Crimes and complicity in these crimes by members of the Salafist Islamist group Jaysh Al-Islam.[167] This led to the arrest of Majdi Nema in January 2020 in France.[168] Nema arrived to France three months prior to his arrest as a student.[169] Two days after his arrest, Nema was charged with torture, complicity in torture, complicity in enforced disappearances, War Crimes and associate complicity, and participation in a group formed or an agreement established with a view of preparing War Crimes.[170] In July of 2020, Nema filed a

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160 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

161 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

162 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*; Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

167 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

168 *Id.*

169 *Id.*

170 *Id.*

petition for annulment of the prosecution based on the incompetence of French authorities to handle the alleged offenses.[171] The Court of Appeals dismissed Nema's claim to which he then filed an appeal to the Court of Cassation.[172]

After a request was filed by the Prosecutor-General of the Court of Cassation, the First President Christophe Soulard ordered that the case of Chaban and Nema be heard in front of a plenary session of the Court of Cassation.[173] In the plenary session, the Court focused on two main aspects of the appeals: (1) the failure to meet the dual criminality requirement due to Syria not criminalizing Crimes against Humanity and (2) whether Nema was to be considered a "habitual resident" under article 689-11.[174]

Set out in Chaban's first plea and Nema's fourth, both parties sought to annul the case due to the same understanding as that of the 2021 Criminal Court of Cassation decision.[175] Both parties argued France lacked jurisdiction due to Syria not criminalizing Crimes against Humanity and because Syria is not party to the Rome Statute.[176] The Court took Note of article 689-11 and Noted the contextual elements of War Crimes and Crimes against Humanity.[177] In lieu of these contextual elements, the Court gave two interpretations.[178] Under the first, "the condition of double criminality is only fulfilled if . . . the legislation takes into account the fact that they were committed in execution of a concerted plan or during an armed conflict and in

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171 *Id.*

172 *Id.*

173 *Id.*; Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.). A plenary session of the Court of Cassation involves the President and three judges from the six different chambers of the Court (three Civil chambers, a Criminal chamber, a Commercial chamber, and the Labor chamber) hearing and deciding a case together. *See supra* note 2.

174 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

175 *Id.*; Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

176 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

177 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.) (noting in both provisions for War Crimes and Crimes against Humanity that the language dictated the need for it to be criminalized in France and the state in which it took place, leading them to interpret this in two ways.).

178 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

relation to that conflict."[179] The second interpretation differs in that article 689-11 "merely requires that the acts be punished in the State where they were committed, without taking into account the qualification which they could be prosecuted."[180]

When deciding between the two given interpretations, the legislative history of 689-11 made it clear which interpretation should be adopted. As Noted by the Court, when discussing the dual criminality requirement, the rapporteur of the Law Commission of the National Assembly stated that "[t]his condition is only the translation of the principle of legality of penalties . . . . It does not imply, however, that the acts *must be criminalized in the same way in both States*. The acts must indeed be *punished in the other country* even if they *are qualified differently*[.]"[181] The Court then Noted two additional quotes when deciding the cases. The first came from the Secretary of State to the Minister of Justice and Freedoms Michele Alliot Marie where she stated that "[t]his criterion of double criminality . . . does not prevent the prosecution of serious offences . . . *neither the qualifications nor the penalties incurred are required to be identical.*"[182] The second quote the Court acknowledged was from the French legislature stating "[i]t is not necessary, for the application of the article, that the denominations of the crimes be identical . . . *it is sufficient that the acts be criminally sanctioned; and all the States of the world criminalize assassination and murder*."[183]

Based on this legislative history, the Court's decision to adopt the second interpretation was an obvious one.[184] The Court stated "[i]t should therefore be Noted that the condition of double criminality… does not imply that the criminal characterization of the acts be identical in both legislations, but only requires that they be criminalized by both."[185] The Court continued, "[t]he condition of criminalization by foreign law can be fulfilled through a common law offence constituting the basis of the crime prosecuted, such as murder, rape, or torture."[186]

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179 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

180 *Id.* The phrase "taking into account the qualifications" refers to this interpretation's ability to look to the physical actions that constitute the acts of Genocide, War Crimes, and Crimes against Humanity. To continue to use Genocide as the example, the second interpretation looks at that the act being punished is killing another human being. Taking away the "qualification" required of Genocide (that it be a targeted systematic killing of some specific group), both Genocide and murder punish the same acts. It is well established that for an act to constitute Genocide there are more elements that must be met, and that Genocide does not necessarily have to involve killing to be prosecuted. However, for sake of the example, mass targeted killings as a definition of Genocide is what is used.

181 *Id.* (emphasis added).

182 *Id.* (emphasis added).

183 *Id.* (emphasis added).

184 *Id.*

185 *Id.*

186 *Id.*

Furthermore, the Court Noted that article 696-3 of the criminal code governing the requirements for extradition also includes a form of dual criminality.[187] The Court recognized it is up to the French courts to determine whether acts referenced in the extradition are punishable under French law "regardless of what the qualification given by the requestion State[.]"[188] It further Noted that the Criminal Chamber of the Court of Cassation when interpreting 696-3 has stated "[t]he condition of double criminality of acts qualified as Crimes against Humanity by the requesting foreign State may be met in national legislation through common law offenses, in particular the crime of murder[.]"[189] Thus, through statutory interpretation, the Court reasoned that the interpretation of 689-11 covering universal jurisdiction should match that of 696-3 which covers extradition.[190]

The Court clarified that their interpretation of 689-11, "does not deprive the condition of double criminality of all significance", offering examples of how certain offenses constituting Crimes against Humanity and War Crimes do not have a lesser or equivalent counterpart to match this interpretation, thus the requirement would not be met.[191] Thus, because Syria's penal code criminalizing murder, acts of barbarism, rape, violence, and torture and these acts make up the crimes covered in 689-11, the Court overruled the prior 2021 Criminal Court of Cassation decision for Chaban and ruled that dual criminality requirement for universal jurisdiction is satisfied to prosecute both Chaban and Nema.[192]

As such, the final decision of this case created the interpretation that is the focus of this Note. While still requiring the "lock" of dual criminality, the Court loosened the lock so that prosecutions under universal jurisdiction can be brought at a more frequent rate.

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187 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 696-3 (Fr.).

188 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.); Cour de Cassation [Cass.] [supreme court for judicial matters] Crim., Mar., 21, 2017, appeal No. 16-87.122, Bull. Crin. 2017, No. 75 (Fr.).

189 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.); Cour de Cassation [Cass.] [supreme court for judicial matters] Crim., July 12, 2016, appeal No. 17-86.340, Bull. Crin. 2018, No. 102 (Fr.).

190 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

191Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.). For example, the Court looked at article 461-8 which outlines the act of ordering there be no survivors or threatening the adversary with no survivors and how some this is not systematically criminalized, even in substance, like murder or rape are. *Id.*; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 461-8 (Fr.). Thus, in a situation involving 461-8, the dual criminality requirement would fail under the Court's interpretation of 689-11.

192 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-82.468, Bull. crim. 2023, No. 669 (Fr.).

## IV. ADOPTING THE COURT OF CASSATION'S INTERPRETATION, WHY TO DO IT AND HOW

"These decisions allow victims — who have no recourse to justice in their own countries or at the International Criminal Court — to bring cases in France to allow it to play an important role in the fight against impunity."[193]

With this newfound change in international law, it is imperative that all States attempt not to fall far behind and change their own interpretations of the requirement or implement new legislature that would allow for the adoption of the doctrine of universal jurisdiction and the dual criminality requirement. The dual criminality requirement is not one that is simple window dressing, but for various reasons is imperative to the use of universal jurisdiction.

### *A. The Why: Striking a balance between political risks and potential justice*

Why is the limitation of dual criminality necessary at all? Why can States not just prosecute crimes regardless of if they are crimes where the act took place? Why make it harder for States to prosecute atrocity crimes through universal jurisdiction? These answers are the same for why universal jurisdiction was created and why the Court of Cassation's interpretation of dual criminality is needed.

#### 1. In support of universal jurisdiction

Universal jurisdiction stems from the idea that impunity from crimes against the human race should be denied by all States across the world.[194] There are an untold number of individuals that have committed acts against other humans so heinous as to constitute an atrocity crime under international law yet continue to escape prosecution.[195] These individuals walk free knowing they may never face the due process of law for their acts.[196] Many of these individuals still reside in the State where

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193 *RSF and Eight Human Rights Organization Call for Reform of France's Universal Jurisdiction Law*, REP. WITHOUT BORDERS, https://rsf.org/en/rsf-and-eight-human-rights-organisations-call-reform-frances-universal-jurisdiction-law (last visited Oct. 23, 2024) (citing Jeanne Sulzer).

194 Many of the reasons that favor dual criminality in extradition remain the same for the requirement under universal jurisdiction. *See* Amnesty Int'l, *supra* note 28, at 4; *see also supra* Part II.

195 Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT'L L. 467, 470–71 (2020) ("[I[t may be argued that a weak court delivering so few convictions has fallen short of its goal of fighting impunity and deterring the commission of atrocity crimes.").

196 CHARLES JALLOH, UNIVERSAL CRIMINAL JURISDICTION 211, 212 (2018), https://legal.un.org/ilc/reports/2018/english/annex_A.pdf ("Much like the pirates of earlier eras, the perpetrators of such crimes are deemed to be *hostes humani generis*—enemies of all humankind—who do not deserve safe haven anywhere in the world. In sum, when taken together, the logic underpinning the exercise of universal criminal jurisdiction is that States can and should act against individuals who may not otherwise be held accountable by anyone.");

the acts took place. Some leave those States, whether by choice or force, seeking refuge elsewhere to find a new home for themselves or to find shelter from the storm of just punishment that awaits them. Under the Universal Declaration of Human Rights, "everyone has the right to seek and to enjoy in other countries asylum from persecution."[197] However, this right does not fall to, "case[s] of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[198] To allow perpetrators to continue to be granted asylum from retribution is against the concept of international law as whole.[199]

To stop this continued asylum, it is imperative that States implement laws allowing them to prosecute individuals for acts committed outside of their territory. As the preamble of the Rome Statute Notes, "to put an end to impunity for the perpetrators of these crimes . . . it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[.]"[200] Victims need to be given an opportunity for justice. Universal jurisdiction allows for this. It provides an avenue for victims to seek justice against the crimes so heinous they shake the foundation of humanity.[201] It allows States to end impunity for the perpetrators of these heinous crimes. It grants States the ability the exercise the full power of their criminal systems against these enemies of mankind. The question then arises: why limit universal jurisdiction? Why implement the dual criminality requirement at all if the goal is to end impunity? The answer lies in the dangers behind an unrestricted universal jurisdiction and the political backlash that may arise from it.[202]

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Ghyoot & Mahmoud, *supra* note 114 ("Trying perpetrators of international crimes by way of universal jurisdiction should not be halted on the account of legality – or lack thereof – due to absence of double criminality."); *see also* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 484–85, n. 187 (1990); Milena Sterio, *Rethinking Amnesty*, 34 DENVER J. OF INT. L. AND POL. 373, 373 (2006) ("Accordingly, states have an international obligation to provide for individual accountability mechanisms in order to hold human rights violators responsible for the atrocities committed.").

197 Universal Declaration of Hum. Rts., at 6, U.N. Doc. ST/HR/3/Rev.1 (2014) (ARTICLE 14) (adopted and proclaimed in G.A. Res. 217 (III) Declaration of Human Rights (Dec. 10, 1948)).

198 *Id.*

199 Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 27 (1996) ("Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation.").

200 Rome Statute, *supra* note 19.

201 *See* Nuremburg Opening Statement, *supra* note 26.

202 Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT. L. 1, 46 (2011) ("[A]ccepting a higher level of prosecutorial discretion in a given state may result in narrowing that state's statutory restrictions on universal jurisdiction such as triable crimes, presence requirements, and the double-criminality rule.").

2. The risks and a need for limits

The employment of universal jurisdiction without restriction bears multiple inherent risks.[203] The first risk, which is also seemingly the root of all other risks, stems from the potential infringement on a State's sovereignty.[204] Generally, States are given jurisdiction over crimes committed within their borders and defined in their criminal codes. States may vary in what they may seek to criminalize with their borders. Full discretion is given to the government of these countries to decide what is a crime and what is not. Consequently, an individual who may break the law in one State may not break it in another. As such, it is the duty of each State to enforce the laws within their land only. However, universal jurisdiction and the need for international law seemingly goes against this idea as it pertains to certain crimes due to the heinous nature of the act.[205] Thus, a State seeking to prosecute under universal jurisdiction for a crime that is not criminalized in the State in which the act took place would be directly infringing on a State's right to pick and choose what acts constitute a crime within their borders.[206] A direct violation of a State's sovereignty. From this infringement, States may seek some type of political, or even military, retribution.

The second risk arises from potential targeting of individuals for political reasons rather than humanitarian ones. Free rein of universal jurisdiction allows States to prosecute individuals for crimes that they may not otherwise have been tried for outside of the state where the act was committed.[207] Countries often disagree with one another's practices in regard to human rights so any disagreement could lead to States targeting prosecutions on the basis of political disagreement.[208] Furthermore, the arrest and prosecution of an individual for a crime that is not penalized in their country of origin may lead to physical confrontations between States as this prosecution may be hypothetically interpretated as an act of intimidation, aggression, or retribution.

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203 Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 86 (2001).

204 Jonathan Hafen, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191, 194 (1992) ("[T]he double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognized as criminal by the requested State.") (citing Ivan Shearer, *Extradition in International Law* (1971)). While this statement stems from dual criminality in regards to extradition, there is no fundamental difference between what is required of dual criminality in universal jurisdiction and extradition nor is there between the reasoning behind them.

205 *See supra* Part II.

206 George P. Fletcher, *Against Universal Jurisdiction*, 1 J. OF INT. CRIM. JUST. 508, 583 (2003) ("The very idea that a totally disconnected country would bring the case is an offence to the jurisdictions that have the primary responsibility to resolve the conflicts inherent in the trial.").

207 *See supra* note 195 and accompanying text.

208 *See generally* Onyi Lam & Drew Desilver, *Countries Have Different Priorities When They Review Each Other's Human Rights Records*, PEW RSCH. CTR. (Mar. 20, 2019) https://www.pewresearch.org/short-reads/2019/03/20/countries-have-different-priorities-when-they-review-each-others-human-rights-records/.

Should a state disagree politically with another country, they may attempt to prosecute specific individuals caught in the prosecuting country through the doctrine of universal jurisdiction. This changes the doctrine from a tool of justice into a weapon. A weapon used to harm their political enemies rather than provide a path to vindication for the victims of these heinous crimes. A weapon which allows the righteous wielders of justice to become malicious abusers of power.

Therefore, restraints are needed to mitigate these risks so that impunity for atrocity crimes can be prevented, State sovereignty respected, and the doctrine used for humanitarian reasons rather than political.[209] Dual criminality provides such limitation.

3. A balance of anti-impunity and respecting sovereignty

To mitigate infringement on State sovereignty and the abuse of the doctrine, dual criminality under the Court of Cassation's interpretation allows for States to still prosecute these atrocity crimes while also respecting the domestic laws of the State where they took place.[210] This will, in turn, moderate the intrusion on a State's right to its own criminal jurisdiction whilst granting victims a greater opportunity for justice against the perpetrators of their suffering and torment. Prosecuting countries will still need to ensure that the acts committed violate the laws in the act's country of origin. While what is criminalized in the country of origin may not be the crime a defendant is charged with in the prosecuting country, the fact still remains that the perpetrator's conduct violated the country of origin's law. With a legal basis created in both States, there is less of an argument to be made that the prosecuting State is ignoring or denying the country of origin's laws. This then reduces the likelihood of major retaliation as the perpetrator of the atrocity crimes can be seen as a potential criminal by the country of origin. Prosecuting countries will be able to still respect state sovereignty while utilizing the doctrine of universal jurisdiction. The worries of the drafters of the Genocide Convention when choosing to not implement universal jurisdiction will be mitigated by this requirement.[211] Additionally, countries will be more aware of what crimes within their own legal system can constitute an underlying act of atrocity crimes.

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209 Kissinger, *supra* note 203.

210 *But see* Langer, *supra* note 196, at 4–5.

> Supporters of universal jurisdiction have tended to dismiss political considerations as improper obstacles in the fight against impunity. They have sought to avoid the potential dangers of universal jurisdiction through legal means, relying on rule-like restrictions such as the requirement that the defendant be present in the prosecuting state's territory, the extension of immunity to foreign incumbent officials, the application of a principle of transnational complementarity, the prohibition of transnational double jeopardy, and the barring of double criminality.

The dual criminality requirement under the Court of Cassation's interpretation mitigates these political considerations considerably as there is less risk of political discourse affecting a prosecution under universal jurisdiction.

211 *See supra* note 68 and its accompanying text.

Furthermore, prosecuting countries will now be limited in the crimes they can prosecute potential perpetrators for. With more limitation on who can be arrested, there becomes less of a potential for the doctrine to become a political weapon to be abused. This allows for humanitarian reasons to remain as the primary purpose behind the doctrine of universal jurisdiction and for prosecutors to continue the goal of ending impunity for atrocity crimes.

As a result, dual criminality strikes a much-needed balance. A balance between the need to stop impunity for atrocity crimes and the need to respect state sovereignty. However, this balance is still lopsided. Questions surrounding the dual criminality requirement remain. Why not just have dual criminality as it is? Why follow the more lenient interpretation endorsed by the Court of Cassation?

Simply put, traditional dual criminality creates too large of a legal gap for victims and States to bridge. It fails to balance the scales. It places all perpetrators in States that are not party to the Rome Statute or that criminalize atrocity crimes in a place that is untouchable by international law. This denies victims within these States of any avenue for justice for these crimes. The original interpretation does mitigate the risks presented by universal jurisdiction but fails to alleviate the roadblocks for justice facing victims of these crimes.

Crimes such as murder, rape, and torture are criminalized in every country around the world. The Court's interpretation allows for large scale perpetrators of these crimes to not be given impunity in countries around the world, but still allows prosecuting States to respect another State's right to sovereignty. The Court's view on dual criminality allows victims, regardless of the state where the act took place, to be given an avenue for freedom. It also does not allow free rein for prosecutions as the underlying acts of the atrocity crime must fit under the country of origin's laws. Additionally, as the Court Noted, it limits what crimes under the prosecuting countries War Crimes and Crimes against Humanity definitions can be prosecuted.[212] Should an act constituting War Crimes in the prosecuting country not have a lesser version of it criminalized in the country of origin, then the doctrine fails.[213]

This delicate balance created by the Court of Cassation is one that serves both sides of the argument for or against dual criminality. It is these exact reasons why the French legislature erred in removing the language from 689-11.[214] They seemingly destroyed this balance by giving way to a less restricted version of universal jurisdiction, allowing for the risks previously mentioned to potentially lead to political or military backlash. While some may argue that this is a win for human rights, this ignores the risks previously mentioned that stem from unchecked authority.[215]

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212 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

213 Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 12, 2023, appeal No. 22-80.057, Bull. crim. 2023, No. 668 (Fr.).

214 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 689-11 (Fr.).

215 *RSF and Eight Human Rights Organizations Call for Reform of France's Universal Jurisdiction Law*, REP. WITHOUT BORDERS (May 17, 2023) https://rsf.org/en/rsf-and-eight-human-rights-organisations-call-reform-frances-universal-jurisdiction-law.

As Jeana Sulzer put it, "[this interpretation] allow[s] victims — who have no recourse to justice in their own countries or at the International Criminal Court — to bring cases in France to allow it to play an important role in the fight against impunity."[216] This also allows prosecuting States easier routes to prosecute these heinous crimes. This interpretation lowers the hurdle for prosecutions under universal jurisdiction drastically while ensuring not to remove it entirely.

Therefore, the Court of Cassation strikes the perfect balance between creating an opportunity for victims to find justice outside of the country, respecting a State's sovereignty, and limiting potential politicization of prosecutions. Yet, one question remains: how can this interpretation be adopted by others?

### *B. The How: solutions for how to adopt the interpretation in other countries*

As noted previously, only four other countries currently require dual criminality: Austria, Denmark, Finland, and Senegal.[217] Each of these have instilled the requirement by their domestic legislation, just as France has.[218] While they may vary slightly, they give the same overall language that the crime must be penalized in both the State prosecuting and the State where the crime occurred.[219] Due to this, there are two options that States can take in order to alter their laws to adopt this interpretation.

First is the same as France: a case must arise for them to prosecute under universal jurisdiction where a similar situation potentially bars jurisdiction due to the requirement. Specifically, the States would need to attempt to prosecute criminals found in their countries that committed an atrocity in a State that does not recognize the Rome Statute and does not have domestic laws criminalizing atrocity crimes such as Genocide or War Crimes. Should any of these States have such a case arise, it would require judicial interpretation similar to the Court of Cassation. However, this is not a simple ask.[220] It may take years or even decades for this to occur, if it ever does at all. Due to this, this solution is simply not as practical as the second option.

The second option would stem from a direct amendment to each State's domestic legislation. Amendments to each legislation would involve including definitions for what may constitute 'being a crime in the country where the act occurred'. The exact verbiage used can vary depending on the State, but the amendment would need to in essence state "so long as the underlying act – regardless of qualifications and requirements – is punishable in another state". So long as the language clarifies that the dual criminality requirement is met should the underlying act constituting the atrocity crime be punishable in another state, then that is sufficient to create the standard set forth by the Court of Cassation. This process would likely be extensive

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216 *Id.* (citing Jenna Sulzer).

217 *See supra* note 115 and accompanying text.

218 *See supra* note 115 and accompanying text.

219 *See supra* note 115 and accompanying text.

220 Sadly, Finland is the only one of the four that has invoked the doctrine to prosecute an individual. Prosecutor v. Francois Bazaramba, R09/404 (2010). This indicates that any potential solutions through judicial interpretations are far off.

as each country has different processes for how amendments to legislation fall into place. However, there is a far greater chance of success in this method than that of a judicial interpretation due to there not being the requirement of a case coming before the judiciary.

To show an example of what a change may look like, the current Austrian penal code reads, "[f]or other criminal acts committed abroad than those referred to in sections 63 and 64 applies the Austrian criminal code, if the act is punishable also according to the law of the state where the act was committed."[221] An alteration to adopt the Court of Cassation's interpretation could adjust the statement to read, "if the *underlying* act is punishable according to the law of the state where the act was committed *regardless of the state's criminalization of the charged crime*." This would allow for States like Austria to look at the foundational acts committed and their criminalization within the state of origin rather than be limited to the charged crime of Genocide, Crimes against Humanity, and any other international crime. This legislative adoption would avoid the problem presented by judicial adoption by allowing States without a pending criminal case to adopt this interpretation.[222] As such, this is the more practical option for States that currently implement the dual criminality requirement to adopt the Court of Cassation's interpretation.

While the first segment covers the countries that currently do require dual criminality, this is merely only four countries out of the eighteen that practice some form of universal jurisdiction domestically. For the rest, there is only one option. The option for these States that currently institute universal jurisdiction within their State's laws is to create new legislation adopting both the dual criminality requirement for their universal jurisdiction laws and the Court of Cassation's interpretation of the requirement. An example of such language may look like this: jurisdiction is permitted for the crimes of War Crimes, Crimes against Humanity, and Genocide should the act – regardless of qualifications and requirements – be punishable in the state where the act occurred. Each of the remaining fourteen States can follow Austria, Denmark, Finland, and France by implementing domestic legislation that adds the dual criminality requirement along with language adapting the Court of Cassation's interpretation through this language. Thus, they allow for the limiting of universal jurisdiction to avoid the risks previously stated, while still allowing victims a greater opportunity for due process of law.

## V. CONCLUSION

As countries bicker and fight amongst one another, it is often the citizens of these countries that face the brunt of the damage.[223] It is just as often that hiding amongst these countries' disputes are individuals who abuse this shroud of conflict to commit acts of violence so heinous as to brand the perpetrators an enemy of mankind. Yet,

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221 STRAFGESETZBUCH [STGB] [PENAL CODE] § 65 (Austria).

222 It should also be noted that this language would be endorsed for any countries considering the adoption of dual criminality into their legal systems that may not require it at all at this time as well.

223 *The Civilian Consequences of Conflict*, COUNCIL ON FOREIGN RELATIONS (Oct. 10, 2023), https://world101.cfr.org/understanding-international-system/conflict/civilian-consequences-conflict.

avenues to legal justice for the victims of these crimes are often sparse. Across the world these victims are placed behind layers upon layers of legal roadblocks. They are denied their opportunity to be given the due process of law by the same country that provides their wrongdoers reprieve from the looming shadow of the judge's gavel. Although shameful to admit, these roadblocks will never be fully removed. Victims will always face a difficult path seemingly meant to prevent them from reaching peace with the harm committed against them. However, little by little these roadblocks can be shaven down so that victims have a visible route towards justice.

France and the Court of Cassation has taken a step towards this path by mitigating the risks presented by universal jurisdiction while also bridging the gap between victims and legal justice. Through the loosening of the dual criminality requirement, a seemingly impenetrable barrier to justice for some has been removed. It is undeniable that the doctrine of universal jurisdiction is continuously growing in the field of international law. Debates over the merits and deficiencies of the doctrine will continue for decades to come. However, it is no mistake just how far the doctrine has progressed to this point. While there are still ways for perpetrators of these crimes to avoid the court of law, the Court of Cassation has provided a way to prevent the laws of differing countries from allowing impunity to continually exist. It is the hope of this Note that the rest of the world follows suit and helps to create a path towards justice for victims of atrocity crimes.