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I. Introduction

The conflict in the Syrian Arab Republic, one of the most devastating and barbaric in the world today, has been ongoing for over a decade. Many actors have committed atrocities and continue to do so with virtual impunity. The UN Security Council's attempt to refer the situation to the International Criminal Court ('ICC') was blocked by Russia and China in 2014. Two years later, the UN General Assembly created the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic, to 'closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights (…) abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes'. There is an immense wealth of documentation on the Syrian conflict; besides these UN-mandated institutions, investigative non-profits, human rights NGOs, journalists, and domestic war crimes units have collected an enormous amount of evidence on the crimes committed on Syrian soil. It has been said that there are 'more hours of footage of the Syrian civil war on YouTube then there actually are hours of the war in real life'.

Despite the route to the ICC being blocked, there are important developments and initiatives with respect to individual criminal liability.[1] First, there have been many domestic trials against foreign terrorist fighters, including women. Second, there is a small yet significant number of cases in various European countries against (former) Syrian government agents, often on the basis of universal jurisdiction. The most noteworthy case is the Al-Khatib trial in Germany. On 24 February 2021, the Oberlandesgericht Koblenz found Eyad A. guilty of aiding and abetting crimes against

humanity and sentenced him to four and a half years in prison. The court is expected to reach a verdict against the main defendant, Anwar R., at the end of the year.[2] These two trials are a milestone in the international community's response to torture committed by the Syrian regime, and other criminal investigations are underway. In June 2018, Germany issued an arrest warrant for Jamil Hassan, head of the Syrian Air Force Intelligence Service, and in October 2018, French authorities issued arrest warrants for him and two other high ranking government officials. Last April, three human rights NGOs filed criminal complaints in Sweden for chemical attacks against the civilian population in Syria, following similar complaints in France and Germany. Criminal complaints have also been brought against high-ranking officials of Al-Assad's government in Norway, Sweden, and Austria, and the UK War Crimes Unit is examining allegations against Asma Al-Assad for encouraging and inciting terrorism. Third, States including France, Germany, Belgium, and the Netherlands have initiated investigations into or prosecutions of corporate actors for their involvement with crimes committed by government forces or terrorist groups.

With respect to State responsibility, a US District Court has held the Syrian government liable for the extrajudicial killing of Sunday Times correspondent Marie Colvin and ordered the government to pay over 300m USD in punitive damages. In March of this year, Canada joined the Netherlands in the decision to invoke Syria's responsibility under international law for breaches of the UN Convention against Torture, thereby opening up the possibility of a case before the International Court of Justice ('ICJ'). Another potential avenue for establishing State responsibility for gross human rights violations in Syria is the European Court of Human Rights ('ECtHR' or 'the Court'), as has been suggested by others (see here, here and here). Of course, these cases would not focus on the responsibility of the Syrian government, but on the responsibility of two Council of Europe member States that are involved in the conflict, namely Turkey and Russia. A case before the ECtHR has the added value of offering Syrian victims direct redress, as opposed to a civil claim in a US Court or inter-State proceedings before the ICJ. In this blog post, we briefly describe the involvement of Turkey (**II**) and Russia (**III**) in Syria, and the potential breaches of their obligations under the European Convention on Human Rights ('ECHR') in the context of the Syrian armed conflict, provided that the victims fall within their 'jurisdiction' in the sense of Article 1 ECHR. Although various media outlets have reported that individual applications have been lodged against both States, as far as we can tell from searches in the Court's database (HUDOC), no cases have been communicated to the respondent State at this moment in time.[3] The publicly available information online suggests that the applications have been rejected on admissibility grounds, more specifically, the requirement to exhaust all domestic remedies (**IV**). We conclude by offering some reflections on this (**V**).

II. Involvement of Turkey

Turkey has opposed the government of Bashar Al-Assad since the beginning of the Syrian war. Initially, Turkey furnished military assistance to the Free Syrian Army ('FSA') (a Syrian non-State actor, also referred to as the Syrian National Army ('SNA')) in the form of weapons, training and logistic support, but in August 2016, with operation Euphrates Shield, Turkey went further, occupying parts of northern Syria west of the Euphrates. The goal of this operation was to fight Da'esh and to contain the expansion of Kurdish-held territory in northern Syria.[4] Early 2018, Turkey and the FSA launched operation Olive Branch – allegedly with Russia's blessing – in Afrin, northwest Syria, against the Syrian Democratic Forces ('SDF') and the Kurdish People's Protection Units ('YPG'), which Turkey considers a terrorist organisation due to its affiliation with the Kurdistan Workers' Party ('PKK'). In their letter to the UN Security Council, Turkey stated that this

military operation, based on the right to self-defence, was 'aimed at ensuring (...) border security, neutralizing terrorists in Afrin and saving the brotherly Syrians.' The operation would 'target only terrorists and their hideouts, shelters, emplacements, weapons, vehicles and equipment. All precautions have been taken to avoid collateral damage.' Reputable human rights groups such as Amnesty International have documented evidence that this is absolutely not the case: Syrian armed groups supported by Turkey have subjected the local population in Afrin to arbitrary detentions, enforced disappearances, confiscation of property and looting. The confiscation of property – and prevention of return – leave many people displaced.

Turkey launched another major operation in 2019. In another letter to the UN Security Council, Turkey once again claimed it acted in self-defence. We will not go into the details of this justification, but there is substantial evidence suggesting that Turkey's response has been far from 'proportionate, measured and responsible' – as Turkey claimed – and that not enough has been done to avoid 'collateral damage'. To the contrary, the Turkish military and the Turkish-backed FSA have targeted civilians and civilian objects. Amnesty International has documented breaches of international humanitarian law, namely summary executions and indiscriminate attacks on civilian buildings. Last August, the Independent International Commission of Inquiry on the Syrian Arab Republic ('Commission of Inquiry') explicitly recommended that 'Turkey exert more efforts to ensure public order and safety in the areas under its control to prevent such violations [looting of property] by the Syrian National Army, and refrain from using civilian homes for military purposes.' The report also detailed disturbing accounts of sexual and gender-based violence against Kurdish women in Afrin and Ra's Al-Ayn. Following the publication of Commission of Inquiry's report, the UN High Commissioner for Human Rights voiced her alarm concerning grave violations of international humanitarian law and human rights law 'in Afrin, Ras al-Ain, and Tel Abyad, where increased killings, kidnappings, unlawful transfers of people, seizures of land and properties and forcible evictions have been documented. (...).' The High Commissioner urged Turkey to investigate the incidents.

Before Turkey's responsibility under the ECHR can be examined, it must be determined whether the applicants – the victims – have been within Turkey's 'jurisdiction' in the sense of Article 1 ECHR. As is well known, 'jurisdiction' in Article 1 operates as a threshold criterion, and while it is primarily territorial, the Court 'has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries' (see *Al Skeini v UK* §132 and *Georgia v Russia (II)* §81). To date, the Court has accepted two grounds for extraterritorial jurisdiction, namely where an agent of the Contracting State has authority and control over an individual, or where the Contracting State has effective control over an area outside its own territory, as a consequence of lawful or unlawful military action. Roger Lu Phillips, Legal Director at the Syria Justice and Accountability Centre ('SJAC'), has argued that Turkey's occupation in northern Syria has 'opened the door to the [ECtHR] for Syrian victims.' If this occupation can be qualified as genuine effective control over an area, Turkey owes Conventions obligations towards the people in that area. We will not elaborate on this further here, but if Turkey's jurisdiction can indeed be established, the acts and omissions by Turkey could be qualified as breaches of obligations under the ECHR, namely the right to life, the prohibition of torture, the right to respect for private and family life, and the right to peaceful enjoyment of property.

III. Involvement of Russia

Russia has supported the government of Bashar Al-Assad politically and militarily since the beginning of the Syrian war, and, following a request by the Syrian government, launched its own military operation in Syria in September 2015, in the form of a major aerial bombing campaign (see Rulac and Jørgensen and Wiley (2020)). Russia's position is that the air strikes are directed against Da'esh and other terrorist groups, but observers maintain that Russia has directly or indirectly targeted civilians and civilian infrastructure. In their 2021 report, the Commission of Inquiry concluded that 'the Syrian military and the Russian air force attacked civilian neighbourhoods, including crowded markets during the day, with explosive bombs with wide-area effects, killing and injuring civilians in attacks that amounted to war crimes.' (See §25-27.) Russia has not only denied this, but also spread disinformation. The deliberate and indiscriminate attacks on civilians are not isolated incidents; in 2016, the Syrian Observatory for Human Rights found that within the first six months of Russia's intervention, Russian warplanes had killed 2000 Syrian civilians, and according to Airwars, the number of civilian deaths caused by Russian forces by October 2019 was estimated to be more than 7000. Earlier this year, Deutsche Welle reported that over the past decade, Syrian hospitals have been attacked more than 400 times, and Human Rights Watch has recently published a report on the targeting of civilian life in Idlib. Many of these attacks happened in 2016, one of them being the bombing of the Al-Quds in Aleppo (see also Commission of Inquiry 2016 report §48).

On 27 April 2016, the building was destroyed, killing many patients and doctors. At the time, neither Médecins Sans Frontières and the International Committee of the Red Cross, who support Al-Quds hospital, nor the Commission of Inquiry attributed the attack to any specific party, but international media and various NGOs point to the Assad regime and the Russian air force. Following British accusations of war crimes in October 2016, the Russian Ambassador to the UK defended Russia's policies on Twitter by stating that 'Most "hospitals" are unmarked rebels' field facilities. Keeping civilians as a human shield is well known terrorist tactics', thereby indirectly referencing the customary IHL exception that medical units 'must be respected and protected in all circumstances [but] lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.' Following the Al-Quds attack, a cardiologist at the hospital, Dr Al-Awad, reportedly lodged a complaint with the Court in October 2016. The application invoked the right to life (Article 2), the right to be free from torture and inhuman and degrading treatment (Article 3), and the right to respect for private and family life (Article 8). Again, before any judge can conclude that these rights have been violated, it would first have to be argued that the applicants were within Russia's jurisdiction in the sense of Article 1.

We have not been able to ascertain how the applicant substantiated this. While for Turkey the applicability of the ECHR could arguably be triggered by Turkey's control over the area, this seems impossible for Russia, based on existing case law. Other international human rights bodies have developed a more flexible approach to the notion of jurisdiction (see especially HRC General Comment no 36 on the right to life §63), but the ECtHR made clear in *Georgia v Russia (II)* that it was 'not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date', and that if the Contracting States wished the Court to examine acts of war in the context of an international armed conflict outside the territory of the respondent State, the Contracting States must 'provide the necessary legal basis for such a task' (§141-142). There is however an interesting line of case law on the 'jurisdictional link' with respect to the procedural limb of Article 2. In the recent case of *Hanan v Germany*, the Court found that Germany's investigation into the deaths caused by an airstrike in Afghanistan, was, in and of itself, not enough to establish a jurisdictional link, but that other 'special features' could do so (§134-

142). The Court has not felt the need to define *in abstracto* what these special features are, but in *Hanan* and *Georgia v Russia (II)*, the obligation to investigate under the relevant rules of international humanitarian law and the State's domestic law, along with other factors, created such a link. This would arguably be the case for Turkey with respect to its operations in Syria, and also for Russia.

IV. Exhaustion of domestic remedies

This brings us to the individual complaints. Different media have reported that approximately 20 applications have been submitted to the Court in 2018 concerning Turkey's conduct in Syria. Apparently all applications have been rejected due to the failure to meet the admissibility requirements, namely to bring the case before the relevant domestic forum as required by the Article 35 ECHR (see here and here). Dr Al-Awad's application concerning Russia's responsibility for the destruction of the hospital in Aleppo has likely been rejected for the same reason. It is quite possible that all these applications were rejected by a single judge, pursuant to Article 27 ECHR and Rule 52A of the Rules of Court. In this case, in accordance with the current rules, the decision would only contain a summary reasons which is communicated to the applicant (see also Rule 104A). In 2015 or 2016, when Dr Al-Awad would have submitted his complaint, the rules were slightly different: in 2015 and 2016, Rule 33 (4) stipulated that the Court 'periodically [made] accessible to the public general information about decisions taken by single-judge formations pursuant to Rule 52A § 1'. Unfortunately, we have not been able to find any further information. In any event, it remains likely that the complaints were rejected due to the failure to exhaust all domestic remedies.

Purpose and application of the rule

The Court has established a strict checklist of criteria which applicants must meet in order to have their case considered on the merits. The criterion we focus on here is the rule of exhaustion of domestic remedies in Article 35 (1) ECHR: 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'. The purpose of this rule, which is based on the principle of subsidiarity that underpins the competence of essentially all international courts and other institutions, is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court (see *Belgian Linguistic' case* §10, *Akdivar and Others v Turkey* §65, *Aksoy v Turkey* §51, *Selmouni v France* §74, *Chiragov and Others v Armenia* §115, and *Hanan v Germany* §148). The other side of the coin is that States have the obligation to offer an effective remedy (Article 13 ECHR) and properly investigate, prosecute and punish unlawful killing as part of their procedural duties (Article 2 ECHR). The exhaustion rule is strict, but not absolute. The Practical Guide on Admissibility Criteria[5] states that the Court has 'frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism, given the context of protecting human rights' (see *Kozacıoğlu v Turkey* §40).

To determine if the formal remedies in the domestic legal system in question are available and effective in practice, the Court must take the general legal and political context in which they operate and the personal circumstances of the applicant into account and consider whether the applicants did everything that could reasonably be expected of them to exhaust domestic remedies (*Khashiyev and Akayeva v Russia* §116-117). In this context, the Court has noted that 'borders, factual or legal, are not an obstacle *per se* to the exhaustion of domestic remedies; as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted

from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding' (Demopoulos and Others v Turkey §98, 101). Applied to our case at hand: can the victims in Syria seeking to lodge a claim in Strasbourg against Turkey or Russia reasonably be expected to raise their claim with the Turkish and Russian judiciary respectively, all the way to the highest court? The fact that they have limited access to the judicial system of Turkey and Russia respectively is not persuasive in and of itself. The Court requires 'serious arguments from the applicant if it were to accept that the general rule could not be applied in his case' (see Bannikov v Latvia §75, citing *Demopoulos and Others*).

Inapplicability of the rule

Then there are circumstances where the rule is inapplicable. This is so 'where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective' (see *Akdivar* §67, *Aksoy* §52, Georgia v Russia (I) §125, *Georgia v Russia (II)* §98). These criteria, i.e. 'repetition of acts' and 'official tolerance', are cumulative and must be sufficiently substantiated. According to the Court, a *repetition of acts* is 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'. An *official tolerance* means that the acts 'are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied'. The Court adds that 'it is inconceivable that the higher authorities of a State should be (...) unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected' (see *Georgia v Russia (II)* §102, citing other case law.)

Based on the information above, Turkey and Russia's conduct in Syria is repetitious and goes well beyond the threshold of tolerance; Turkey has occupied parts of Syria, and Russia has launched a bombing campaign which has been described as 'a clear pattern of indiscriminate and targeted attacks that [do] not correspond to the presence of military targets'. Turkey and Russia's respective conduct has led to grave and disproportionate harm to civilians and serious damage to civilian objects. As far as we can tell, neither Turkey nor Russia have made an attempt to discharge their procedural obligations under Article 2 ECHR by conducting criminal investigations into the respective situations. Turkey has invoked the right to self-defence (see the letters to the Security Council, referred to above), and Russia has made clear that it accepts no blame or responsibility (see e.g. the former Ambassador's tweets, referred to above). In general, if a complaint relates to the lack of an effective criminal investigation as per the procedural limb of Article 2, the requirement to exhaust domestic remedies is met when the complainant has challenged the effectiveness of the investigation before the competent national court (*Hanan v Germany* §149-151); the lack of any investigation by Russia – or Turkey for that matter – as such would not necessarily change this. But if the applicants would argue that the lack of an effective investigation is part of an *administrative practice*, they would certainly have a stronger case.

Burden of proof

Lastly, as for the distribution of the burden of proof, the Government claiming non-exhaustion of domestic remedies must prove that the applicant has not used a remedy that was both available and effective. Subsequently, the burden shifts to the applicant to show that the remedy was in fact not adequate or effective or that there are special circumstances absolving them from the requirement. In *Akdivar*, the Court held that '[o]ne such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. (…)' (§68. See also *Selmouni* §76 and *Cyprus v Turkey* §116). In this case, the burden of proof shifts back to the Government to show what has been done in response to the scale and seriousness of the matters complained of. It almost goes without saying that both Turkey and Russia are 'totally passive' with respect to the allegations of war crimes in Syria, for the same reasons highlighted above.

V. Reflections

We acknowledge that the ECtHR is not – and should not be – a court of first instance. The ECtHR is also not a war crimes court. However, this does not negate the fact that the conduct of two Council of Europe member States that are involved in the Syrian conflict would likely amount to a systematic breach of obligations under the ECHR, provided the jurisdictional threshold is met. After a decade of near impunity in general and very little in terms of State responsibility in particular, we submit that it is time for the Court to examine individual applications brought against Turkey and Russia. Such cases would be a bold and principled move on the part of the Court, and demonstrate that the ECtHR, as a central human rights and rule of law mechanism in the Council of Europe, does not turn a blind eye to the victims in Syria and the responsibility of Council of Europe member States in this conflict. As it has done with other high-profile cases, such as the MH17 case, the Court could make a preliminary statement of the facts and put questions to the parties. More specifically, the Court could ask if and how the applicants have complied with the requirements of Article 35 (1) ECHR. The applicants could consider the following.

First, it is highly questionable whether the domestic remedies to which victims in Syria could theoretically avail themselves in Turkey and Russia would be available and effective in practice. With respect to Turkey, Human Rights Watch has documented abusive prosecutions against lawyers and violations of fair trial rights. The report names a lawyer who has been targeted by police and prosecution services in connection with his work on human rights violations by the authorities in an area close to the Turkish-Syrian border. An arrest warrant was issued against him for his alleged involvement with a 'terrorist organisation', i.e. the PKK. More broadly, the continued detention of Selahattin Demirtaş and non-compliance with the ECtHR's ruling shows that the Turkish authorities equate alleged links to the PKK with terrorism offences, despite condemnation from other States, the European Parliament and the ECtHR. This would likely be a problem for the predominantly Kurdish victims in Syria and their lawyers seeking access to Turkish courts. As for Russia, it is important to consider the position of the Russian Federation on the world stage and within the Council of Europe. While this blog is not the place to debate this, Russia's track record has been far from exemplary. The Russian delegation's voting rights in the Parliamentary Assembly were suspended due to the annexation of Crimea in 2014, only to be readmitted five years later. The Council of Europe, including the Court, is stuck between a rock and a hard place – on the one hand, aggravating Russia may have the result of a 'Ruxit' from the Council of Europe, which would deprive a great number of people from bringing their cases before the Court and

holding the government to account. On the other hand, Russia is blatantly flouting the rule of law; the treatment of Alexei Navalny being the latest illustration. In addition, the conduct of Turkey and Russia in Syria can be classified as an 'administrative practice', meaning the applicants would not be required to exhaust domestic remedies at all. We cannot tell if any of the applications made thus far have made this argument, but as SJAC's recent blog post rightly points out, other individual complaints, as well as any cases mentioned therein, would be further evidence of a repetition of acts. The continuous failure to conduct any kind of investigation and subsequent denial of any wrongdoing demonstrate an official tolerance.

So where does this leave us? With respect to individual criminal liability, the German courts have paved the way for trials based on universal jurisdiction, and the path to the ICC is not excluded. With respect to the responsibility of Syria under international law, it is not unrealistic that the matter will end up before the ICJ, as it is unlikely that negotiations and arbitration will go anywhere, given the Syrian government's reported response (see e.g. here and here). With respect to the responsibility of Turkey and Russia under the ECHR, if the jurisdictional threshold is met, the Court will be able to examine both States' responsibility for breaching their Convention obligations, including but certainly not limited to the procedural limb of the right to life. As detailed in Beth van Schaack's *Imagining Justice for Syria*, there will not be one solution or one quick fix for the victims of Syria. Van Schaack's work shows the multitude of options available, both internationally and domestically. The law is in place and the evidence is there. What is needed is a wide variety of actors and fora, ready to take these cases forward. The ECtHR could – and should – still be one of these avenues.

[1] While this goes beyond the scope of this piece, we would like to note Pre-Trial Chamber III's decision of November 2019 concerning the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar. Based on this decision, the ICC may exercise jurisdiction over crimes where part of the criminal conduct in question takes place on the territory of a State Party, i.e. Bangladesh. In their Amicus Curiae Observations in this case, Guernica 37 International Justice Chambers submitted that this decision may have an impact on the situation in Syria, as 'the situation concerning Syria and Jordan, is akin to that involving Myanmar and Bangladesh'. See further Amicus Curiae Observations Section 7, p. 60-62. See also Beth Van Schaack, *Imagining Justice for Syria* (2020) p. 190-197.

[2] For those interested in learning more about the trial, we recommend listening to the excellent podcast 'Branch 251'.

[3] Text Search: Syria; Respondent State: Turkey OR Russia; Article: 2; Document Type: Communicated Case.

[4] We have chosen the term Da'esh to designate the group which calls itself 'Islamic State', following the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD).

[5] Version last updated 28.02.2021.

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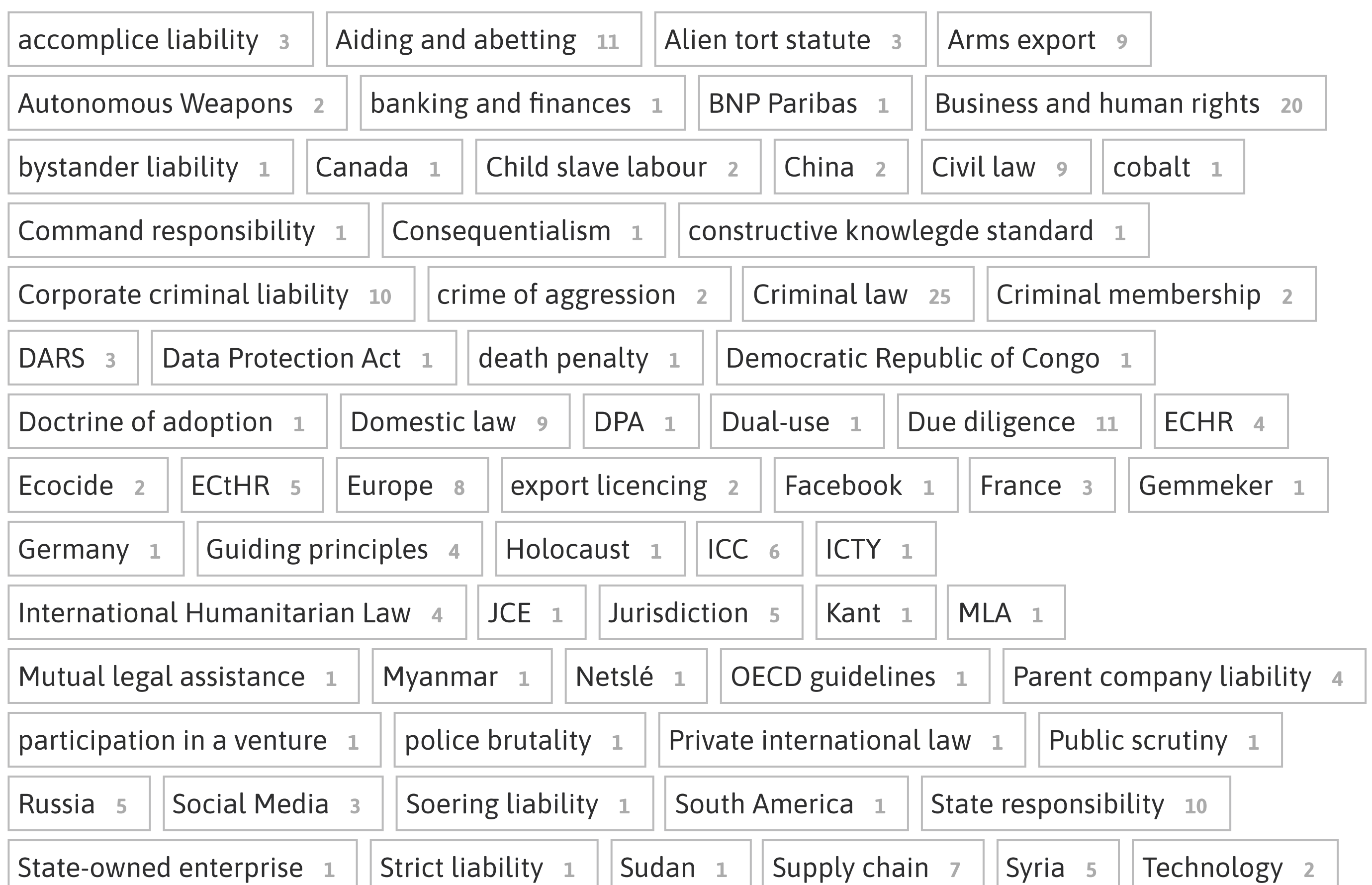

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