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Impunity in Syria & Universal Jurisdiction in Europe: Is a revival of the 'global enforcer' approach in order?

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Abstract *As the Syrian conflict enters its tenth year, the chief perpetrators of atrocity crimes therein continue to enjoy virtually complete impunity. With no recourse to conventional international criminal justice mechanisms, universal jurisdiction in Europe, home to a large Syrian refugee population, is now in the spotlight. The conditions for its application, however, present clear obstacles to bringing within its scope Syrian regime actors not present in the forum. This article argues that the infamous 'global enforcer' approach to universal crimes demands reinstatement given the current state of affairs. Upon assessing the legislative universal jurisdiction models of a number of European states, it proceeds to discuss the legal basis and merits of adopting a progressive approach. The discussion also explores the shifts in the international legal landscape and the challenges in curbing the principle's abuse. This article concludes that the 'no safe haven' model is effectively futile to the endeavour of holding Syrian government figures accountable. A model incorporating elements of a 'global enforcer' approach, conversely, appears the only viable way such individuals may be brought to justice.*

1. Introduction

The war in Syria has raged for a decade. The era-defining mass atrocities committed in the country since 2011 have killed more than half a million civilians, displaced over twelve million, and destroyed entire civilian infrastructures.[1] Peaceful protests against the regime of President Bashar Al-Assad were swiftly and harrowingly met with bullets[2] and eventually bombs. Armed opposition groups and other militias formed in response and continued to proliferate, and the so-called Islamic State seized an opportunity to surface. International actors throughout the course of the conflict have participated therein, leaving a trail of war crimes in their wake.[3] While it is imperative to hold all parties to the

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[1] See Syrian Observatory for Human Rights, 'Syria: 560,000 killed in seven years of war' (2018) <https://www.syriahr.com/en/108829/>; Phillip Connor, 'Most displaced Syrians are in the Middle East, and about a million are in Europe' (*Pew Research Center,* 29 January 2018) <https://www.pewresearch.org/fact-tank/2018/01/29/where-displaced-syrians-have-resettled/>; World Bank Group, 'Syria Damage Assessment' (2017) <http://documents1.worldbank.org/curated/en/530541512657033401/pdf/121943-WP-P161647-PUBLIC-Syria-Damage-Assessment.pdf>;

[2] Human Rights Watch, 'Syria: Stop Shooting Protestors' (2011) <https://www.hrw.org/news/2011/04/05/syria-stop-shooting-protesters>

[3] See, e.g., Amnesty International, 'Syria: US-led Coalition's bombardment of Raqqa killed more than 1,600 civilians' (2019) <https://www.amnesty.org.uk/press-releases/syria-us-led-coalitions-bombardment-raqqa-killed-more-1600-civilians-new-findings>; Amnesty International, 'Syria: Damning evidence of war crimes…by Turkish forces...' (2019) <https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>

conflict responsible for their commission of international crimes, this article is focused on seeking accountability for atrocities committed by individuals within the Syrian regime apparatus, the party overwhelmingly and disproportionately responsible for their perpetration.[4] The harm suffered by civilians at the hands of other parties is no less profound and their victims are deserving of justice all the same.

Since 2011, the Syrian government has employed a military strategy calculated to inflict extraordinary harm on the civilian population as a punitive measure for protesting against the 50-year-old dictatorship.[5] This has entailed the orchestration of starvation-inducing sieges[6], aerial bombardment campaigns targeting hospitals and schools[7], and chemical weapons attacks[8], forcing civilians to shelter in caves[9] and medics to operate in underground hospitals.[10] The regime also adheres to a perpetual policy of systematic torture of forcibly disappeared perceived dissidents held in its notorious detention centres, the conditions and practices of which amount to extermination as a crime against humanity.[11] The world continues to witness the seemingly perennial perpetration of almost every war crime and crime against humanity by the government and its allies, whom are conceivably emboldened by the failure of the international community to adequately respond to one of the worst humanitarian crises in modern history and the concomitant growth of a grievous culture of impunity.

The sheer magnitude of the crisis and the reverberation of its attendant effects globally have naturally elicited strong calls for justice. Attached to the modern birth of international criminal law (ICL) was its foundational promise that acts of this kind would not go unpunished. The pathways to its traditional venues, however, are obstructed in this context. Syria's domestic courts are wholly incompetent forums for the prosecution of the country's war criminals[12] and the establishment of an international criminal tribunal is effectively precluded by virtue of unfaltering vetoes at the United Nations (UN) Security Council by Russia and China. This has also eliminated the possibility of a

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[4] Syrian Network for Human Rights (SNHR), '… Parties…in Syria and the Death Toll Percentage Distribution…' (2016) <http://sn4hr.org/wp-content/pdf/english/six_main_Actors_that_kill_civilians_in_Syria_2016_en.pdf>

[5] Hafez Al-Assad, the incumbent president's father, seized power in 1970.

[6] Tania Ocampos, 'Starvation-inducing sieges: A tactic of war in Syria' (*MEE*, 23 July 2016) <https://www.middleeasteye.net/opinion/starvation-inducing-sieges-tactic-war-syria>

[7] Syria war: Strikes on Idlib 'target schools and hospitals'' (*BBC*, 25 February 2020) <https://www.bbc.co.uk/news/world-middle-east-51638381>

[8] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (CoI Syria) (September 2017) UN Doc A/HRC/36/55 [67].

[9] Priyanka Gupta, 'Syrians fleeing attacks in Idlib find shelter in caves' (*Al Jazeera*, 25 February 2020) <https://www.aljazeera.com/news/2020/02/syrians-fleeing-attacks-idlib-find-shelter-caves-200225093444302.html>.

[10] Osama Javaid, 'Syria: Secret underground hospital established…' (*Al Jazeera*, 25 November 2017) <https://www.aljazeera.com/news/2017/11/syria-secret-underground-hospital-established-treat-injuries-171125123450897.html>.

[11] CoI Syria, 'Out of Sight, Out of Mind: Deaths in Detention in [Syria]' (2016) UN Doc A/HRC/31/CRP.1.

[12] Shelby Black, 'Universal Jurisdiction and Syria: A Treaty Based Expansion of Universal Jurisdiction as a Solution to Impunity' (2018) 21 International Trade & Business Law Review 177.

referral to the International Criminal Court (ICC)[13] whose founding statute Syria is not party to. Faced with this state of affairs, and to tackle the impunity which 'festers in gaps left by the international criminal justice system'[14], the focus has turned to the principle of universal jurisdiction, which has emerged in this respect as a powerful weapon against impunity. Once deemed 'in its death throes'[15], the principle has garnered considerable momentum in recent years, with European courts prominently emerging as 'fertile grounds for justice'[16] in the Syrian context. The influx of hundreds of thousands of Syrian refugees into the continent has provided the impetus for the initiation of proceedings, to which the testimonies of the diasporic community have been crucial.[17]

A myriad of factors, however, prompted the restriction of the principle's scope in recent decades. The former champions of a liberal approach, Belgium and Spain, applied it in an infamously contentious manner, triggering intense political backlash which forced both states to considerably narrow the doctrine's reach. The failure of the International Court of Justice (ICJ) in the *Arrest Warrant* case[18] to pronounce on the admissibility of universal jurisdiction further solidified the principle's waning favourability. The extent to which universal jurisdiction in Europe is of utility to combating impunity in Syria is therefore questionable.

Rather than frame the evolution of universal jurisdiction within a 'rise and fall' narrative, Langer observes that its trajectory has been that of a competition between two conceptions of the role states should play in the principle's regime: the 'no safe haven' approach, which denotes that a state should not be a refuge for international criminals, and the 'global enforcer' paradigm, according to which states should assume an active role in punishing the latter group regardless of where they are in the world.[19]

Certain European states' universal jurisdiction models seem to embody a 'no safe haven' conception, requiring, *inter alia*, the presence or habitual residence of the alleged offender to initiate investigations. These approaches typically require other nexuses to be satisfied which are of dubious doctrinal compatibility, such as a link to the interests of the state and the nationality of the victim or perpetrator. Although the 'no safe haven' approach has its political merits, its stringent prerequisites render it virtually defunct in relation to the Syrian conflict. The 'global enforcer' approach thus warrants serious reconsideration.

Whereas the 'no safe haven' approach has allowed for coincidental, episodic investigations and

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[13] UNSC Draft resolution (22 May 2014) UN Doc S/2014/348.
[14] Black (n 12) 177.
[15] Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589.
[16] Beth Van Schaack, *Imagining Justice for Syria* (Oxford University Press 2020) 266.
[17] Ibid 272.
[18] *Arrest Warrant of 11 April 2000 (DRC v. Belgium)* Judgement of 14 February 2002, ICJ Reports 2002.
[19] Máximo Langer, 'Universal Jurisdiction Is Not Disappearing' (2015) 13 Journal of International Criminal Justice 245, 246.

prosecutions of low-ranking Syrian war criminals that fail to accurately reflect the scale of the international crimes committed and the perpetrators thereof[20], states with progressive models which do not precondition the initiation of investigations on the presence or residence of the offender have been able to pursue offenders in a strategic fashion. This has resulted in the investigation of senior regime personnel both in and out of the forum.[21]

This article argues that, to effectively utilize the ever-evolving principle with respect to the Syrian conflict, an approach to universal jurisdiction which integrates elements of a 'global enforcer' approach, enabling the investigation of regime actors without their presence in the forum, is not only better equipped to take on the incumbent challenge of bringing to justice this century's most heinous transgressors, but also the only realistic way of ensuring denting the impunity which they have thus far enjoyed. This paradigm thus carries significant value that ought not be eclipsed by the taints of its controversial past. It also empowers states to fulfil their obligations by upholding the contemporary international legal order's most sacred norms and safeguarding its interests.[22]

Upon assessing the doctrine's rationale and investigating the current conditions for its exercise in a number of states, this article examines the restrictive conditions with a view to demonstrating their futility to Syria. The discussion then explores the conventional and customary legal basis for the adoption of a progressive approach, highlighting its normative and practical advantages thereafter. The final chapter demonstrates the suitability of this approach by discussing developments in international law consistent with the expansion of the universal jurisdiction regime and ways in which the entrenched concerns that plague the principle may be assuaged.

2. Universal jurisdiction & Europe: A primer

2.1. Canvassing the concept

An inventive concept such as universal jurisdiction requires proper elucidation prior to any discussion of its application in practice. Despite there being 'no generally accepted definition of universal jurisdiction in…international law'[23], it may nevertheless be defined as prescriptive jurisdiction[24] over specific crimes irrespective of the place of commission, the nationality of the offender or the victim, or any other recognized ground of jurisdiction in international law. Although the

[20] Van Schaack (n 16) 271.
[21] Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond…' (2018) 16 Journal of International Criminal Justice 165, 176.
[22] See Morten Bergsmo and Emiliano Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Critical Thinkers* (Torkel Opsahl Academic EPublisher, 2018).
[23] *Arrest Warrant* (n 18) Dissenting Opinion of Judge *ad hoc* Van den Wyngaert [44].
[24] Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735, 745.

absence of a traditional link has been described as the feature 'captur[ing] the essence of universal jurisdiction'[25], a notion of greater profundity lies behind this 'façade'.[26]

The 1949 Geneva Conventions first breathing positive life into the concept[27], universal jurisdiction is underpinned by the idea that certain crimes represent an attack on the legal norms that the international community in all its diversity has accepted as fundamental, hence vesting in every member an interest in and entitlement to prosecuting the alleged offenders. While some have asserted that universal jurisdiction may only be exercised over piracy under customary international law[28], it is now widely accepted that genocide, crimes against humanity, war crimes, and torture fall within the principle's scope of application.[29]

Amongst publicists, there is a 'marked terminological inconsistency'[30] regarding universal jurisdiction and a dizzying discrepancy as far as its apparent typology is concerned. Cassese, for instance, distinguishes between 'absolute' and 'conditional' universal jurisdiction, positing that only the latter's exercise is contingent upon the presence of the suspect in the forum[31], whereas Yee identifies categories of situations that either characterize or resemble universal jurisdiction. These include 'pure universal concern jurisdiction' and 'universal concern plus presence jurisdiction'.[32] As O'Keefe explicates, universal jurisdiction is a subset of jurisdiction to prescribe, hence the inaccuracy of speaking of a universal jurisdiction '*in absentia*'.[33] The rule mandating the presence of a suspect as a precondition for initiating an investigation falls within the distinct ambit of enforcement jurisdiction.[34] If, at the time of the offence's commission, no conventional link exists between the prescribing state and the offender, the exercise in question is universal jurisdiction '*tout court*'.[35] For the purpose of this article, exercises *in absentia* refer to investigations into, and international arrest warrants against, suspects absent from the forum.

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[25] Christian Tomuschat, Rapporteur of the IDI Commission on Universal Criminal Jurisdiction, quoted in IDI 71(II) Annuaire de l'IDI. (2006), 257.
[26] Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 Chinese Journal of International Law 503, 505.
[27] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, art 50; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 7S UNTS 135, art 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, art 146.
[28] *Arrest Warrant* (n 18) Separate Opinion of President Guillaume [12].
[29] Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010).
[30] O'Keefe (n 24) 754.
[31] Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13(4) European Journal of International Law 853, 856.
[32] Yee (n 26) 508.
[33] O'Keefe (n 24) 750.
[34] Ibid 756.
[35] Ibid 755; (translation: *without further addition or qualification; simply*).

Another pivotal factor establishing the backdrop against which universal jurisdiction is legislated and applied today is its jurisprudential history, throughout which oscillating perceptions of the admissibility of certain exercises have been conveyed. Perhaps the first exercise of the principle in the post-1945 era was the *Eichmann* trial[36], which, despite drawing criticism for its enforcement methods[37], was lauded as a triumph for the new accountability project.[38] Similarly, Switzerland and Germany prosecuted several atrocity perpetrators in Rwanda and the former Yugoslavia who later resided in the respective states.[39] The paradigmatic example of universal jurisdiction's exercise that is the Pinochet experience, however, adversely shaped perceptions of the principle among states, consequently occasioning an apprehension towards applying it for high-level offenders.

Other notable investigations include those into Abdoulaye Yerodia, Ariel Sharon, and the Bush Six, which prompted the general curtailing of far-reaching universal jurisdiction legislation in Europe[40], most strikingly in Belgium[41] and Spain.[42] Ingrained in the image that universal jurisdiction evokes, then, are these cautionary tales which serve to discourage its application over the masterminds of mass atrocities and cordon off the 'global enforcer' approach. It must be noted, however, that universal jurisdiction has nevertheless been 'persistently, if quietly, expanding', numerically and geographically.[43] The individuals tried have primarily been resident low-level offenders, which indicates a decline of the 'global enforcer' model rather than universality altogether.[44]

Finally, it is important to note that, although the rationale of universal jurisdiction is inextricably linked to the concept of *jus cogens* norms, states are not obliged to exercise it in response to violations thereof.[45] Even so, notwithstanding contentions of its inadvisability, the 'right to punish war crimes…is possessed by any independent state whatsoever'.[46] The vitality of universal jurisdiction to the enforcement and protection of peremptory norms is readily discernible.

2.2. Legislation & case law

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[36] See Itamar Mann, 'The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the 'Court of Critique'' (2010) 1(4) Transnational Legal Theory 485.
[37] See Kenneth Randall, 'Universal Jurisdiction under International Law' (1988) 66 Texas Law Review 785, 812.
[38] See, e.g., William Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26(3) Leiden Journal of International Law 667.
[39] Cryer et al. (n 29) 55.
[40] See Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 Michigan Journal of International Law 927.
[41] See Roozbeh Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' (2009) 16 ILSA Journal of International & Comparative Law 141.
[42] See Claudia Jiménez, 'Combating impunity for international crimes in Spain: from the prosecution of Pinochet to the indictment of Garzón' (2011) Institut Català Internacional per la Pau.
[43] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) European Journal of International Law 779, 781.
[44] Langer (n 19).
[45] *Armed Activities on the Territory of the Congo* (New Application: 2002) *(DRC v. Uganda)* ICJ Reports 2006 [64].
[46] UN War Crimes Commission, 15 War Crimes Reports 26 (1949).

Across several European states, universal jurisdiction has been utilized to bring Syrian war criminals to account, albeit primarily non-state actors present in the forum. However, some efforts to investigate Syrian regime members have been made. Among the eight jurisdictions within which such investigations are taking place, each adheres to a distinct understanding of the doctrine, mandating the fulfilment of certain conditions for its operation. To capture the span of the principle's exercise in the continent and the extent to which government actors have been implicated, this section reviews the conditions imposed by European states exercising universal jurisdiction in the Syrian context and their nascent case law.

In Germany, a suspect need not be present for the initiation of an investigation into or the issuance of an arrest warrant against him or her.[47] The state is currently conducting a structural investigation into the Syrian regime[48] which has produced the most significant cases to emerge from the war; the German Federal Court of Justice has issued an international arrest warrant against the former head of the Syrian Airforce Intelligence Directorate, Jamil Hassan[49], and Syrian torture victims have witnessed former officials in Syria's security apparatus on trial for crimes against humanity.[50] Throughout the course of the conflict, Germany has prosecuted several non-state actors residing in the forum.[51]

France, which is jointly conducting a structural investigation with Germany[52], requires the habitual residence of the suspect in the forum for the principle to apply.[53] France's structural investigation is therefore based on the residence, as opposed to mere presence, of the suspect on French territory, and accordingly seeks to try only this category of culpable individuals. A former intelligence officer was arrested as a result.[54] French judiciary have also issued international arrest warrants against Jamil Hassan and other senior government figures, ostensibly, however, on the basis of passive personality.[55]

Another state conducting a structural investigation into the conflict is Sweden, whose laws deem neither the presence nor residence of a suspect necessary for the establishment of jurisdiction.[56] At the time of writing, Sweden is investigating a criminal complaint filed by torture survivors against multiple senior regime officials.[57]

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[47] Völkerstrafgesetzbuch (June 26, 2002), s153f.
[48] Kaleck & Kroker (n 21) 178.
[49] Trial International, 'Universal Jurisdiction Annual Review' (2020) <https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf>, 47.
[50] ECCHR, 'First criminal trial worldwide on torture in Syria before a German court' (2020) <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/>
[51] See, e.g., Trial International (n 49) 50.
[52] Ibid 29.
[53] French Code of Criminal Procedure, art. 689-11.
[54] Trial International (n 49) 29.
[55] Ibid 30.
[56] Swedish Criminal Code, Chapter 2, s3(6).
[57] Trial International (n 49) 73.

Norway allows for universal jurisdiction's exercise over alleged perpetrators who are either domiciled in Norway for no less than a year or another Nordic country, and are present in Norway, if only temporarily.[58] If neither of these conditions are satisfied, the suspect may be investigated if the victim is either domiciled in Norway or is a Norwegian national.[59] The state is currently investigating a complaint against Syrian regime personnel filed by torture survivors.[60]

In Switzerland, where attempts have been made to hold Syrian war criminals to account, investigations based on universality can be launched into putative perpetrators only upon their presence or entry into the forum.[61] While Swiss courts have interpreted this condition liberally[62], prosecutors possess discretionary powers to terminate an investigation if the suspect has left the forum and is not expected to return.[63] A Swiss-based organization, at the behest of resident victims, has sought the prosecution of Rifaat Al-Assad, but prosecutors have dismissed witness testimonies as they were given when the suspect was no longer present in Switzerland.[64]

The issue of a presence condition characterized by a perplexity as regards the jurisdictional time frame also appears in the Netherlands, which can exercise universal jurisdiction when the suspect is on Dutch soil.[65] Upon his or her departure from the forum, however, Dutch jurisdiction ends.[66] The principle may otherwise be exercised if either the victim or the suspect is a Dutch national.[67] The Netherlands has thus far prosecuted members of non-state armed groups.[68]

After undergoing considerable modification in a series of amendments, Spain's legislation authorizes the principle's application if either the victims are Spanish nationals, the alleged perpetrator is present in Spain, or there is any other relevant link to Spain.[69] Treaty obligations may also invoke the exercise of universal jurisdiction.[70] Upon the release of the 'Caesar' files, a Spanish citizen of Syrian origin was able to identify her missing brother among the sea of photos of mutilated bodies and consequently sought proceedings against high-ranking figures within the Syrian government.[71] The case went through a number of national courts before it was finally dismissed for lack of jurisdiction.[72]

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[58] Norwegian Penal Code (amended 29 March 2020), section 5.
[59] Ibid.
[60] Trial International (n 49) 66.
[61] Swiss Criminal Code, arts 6(1), 7(1-2).
[62] Federal Criminal Court (14 November 2018) TPF BB.2018.167, [2.3].
[63] Criminal Code (n 61) 264m(2).
[64] Trial International (n 49) 76.
[65] International Crimes Act (2003) (ICA), art 2.
[66] Open Society Justice Initiative, 'Universal Jurisdiction Law and Practice in the Netherlands' (2019) <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-The-Netherlands.pdf>, 11.
[67] ICA, art 2(1).
[68] See Van Schaack (n 16) 292-294.
[69] Organic Law 6/1985, July 1, on the Judiciary (amended 2014) art 23(4).
[70] Ibid art 23(2)(a).
[71] See Preliminary Proceedings Summary Procedure 0000011/2017, Central Court of Instruction No. 006 (27 March 2017).
[72] Trial International (n 49) 70.

Similar proceedings have been instituted in Austria, where the exercise of universal jurisdiction is contingent upon either the perpetrator or victim being an Austrian citizen, the perpetrator being present in Austria or having habitual residence, or the infringement of Austrian national interests by the act in question.[73] The state has prosecuted at least one opposition fighter[74] and is currently investigating a complaint against multiple Syrian intelligence officials on behalf of torture survivors, among whom is an Austrian citizen.[75]

3. The Conditions for universal jurisdiction's exercise: Relevance to Syria & congruence with the rationale

As the preceding section reveals, each of the European jurisdictions discussed mandate varying preconditions for the activation of universal jurisdiction. From the habitual residence requirement to the nationality of victim complainants, these specifications pose clear obstacles to the prosecution of international criminals residing in Syria. This chapter assesses these conditions with a view to determining their relevance to the conflict and the extent to which they comport with universal jurisdiction's *raison d'être*.

3.1. The presence requirement

One of the most debated issues in the discourse concerning the scope of universal jurisdiction is the condition stipulating the presence of a suspect in the territory of the state applying the principle. As such, it cannot be categorically stated that any consensus on the matter has formed. To Judge Ranjeva, a connection *ratione loci* must exist as a precondition for universal jurisdiction's exercise.[76] Similarly, Judge Rezek contends that '[a]ctivism which would lead a State to seek outside its territory…a person…accused of [international] crimes…is in no way authorized by international law…'.[77] Many states seemingly took heed of this, as evidenced by their conservative post-*Arrest Warrant* universal jurisdiction laws, which coincided with the Rome Statute's entry into force. Another conceivable reason for this approach is the range of treaties imposing a presence condition under the distinct *aut prosequi aut dedere* principle.[78] Similarly, courts have interpreted the Geneva Conventions' penal sanctions provisions as obliging High Contracting Parties to simply deny harbour to war criminals

[73] Austrian Penal Code, s64.
[74] Trial International (n 49) 21.
[75] Ibid 22.
[76] *Arrest Warrant* (n 18) Declaration of Judge Ranjeva [6].
[77] Ibid, Separate Opinion of Judge Rezek [6].
[78] Cassese (n 15) 593.

in order to justify legislation interdicting the principle's enforcement *in absentia.*[79] But '[i]s it a *true example of universality*, if the obligation to search is restricted to the own territory?'[80]

At this stage, it should be noted that no prohibitive rule in international law to the effect of proscribing the exercise of universal jurisdiction *in absentia* exists.[81] The decision to adopt this model is based on the idea that a liberal one 'may be *politically* inconvenient…because it is not conducive to international relations'.[82] Be that as it may, the circumscribed 'no safe haven' model's contributions to international justice are, by definition, limited by virtue of the presence requirement. While the paradigm was of relevance in the twentieth century with respect to the prosecution of Nazis[83] and former Yugoslavs[84], it cannot be anticipated to wield the same force in relation to non-European war criminals.

One must question the utility to Syrian torture survivors of states' insistence on the presence of their tormentors for investigations to be launched. It is hardly imaginable that, neither during the conflict nor after it, they would set foot in Europe for a sufficient time duration to enable a thorough investigation, still less one leading to charges and arrests. What is even less probable is the prospect of the perpetrators in question establishing a 'habitual' residence, which is defined as 'physical presence qualified by some degree of stability…and…evidenced intention to create a stable life in the country'.[85] The category of persons satisfying this criterion may include opposition fighters and perhaps low-ranking Syrian army soldiers, as has been predominantly the case. The individuals whose policies the latter group were executing, however, remain unperturbed and beyond the reach of justice.

The deficiencies of the restrictive approach are particularly pronounced in the Swiss case against Rifaat Al-Assad, the uncle of Syria's incumbent president. His presence in Switzerland in late 2013 triggered the lodging of a criminal complaint against him with the Attorney General's office.[86] In 2018, the federal prosecutor dismissed parts of victims' testimonies regarding the Tadmor prison massacre in the 1980s, citing the lack of the suspect's presence on Swiss territory at the time the complaint was filed.[87] Despite confirming the decision, the Federal Criminal Court held that investigations can commence even where the alleged perpetrator is merely anticipated to enter Swiss territory in the near future.[88] In another case, the court confirmed the retention of Swiss jurisdiction in

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[79] Spanish Supreme Court, Criminal Division, Judgement no. 797/2016.
[80] *Arrest Warrant* (n 18) Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [31] (emphasis added).
[81] See Chapter IV (A) (1).
[82] Judge Van den Wyngaert (n 23) at [56].
[83] See David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press 2005).
[84] Kaleck (n 40) 945-949.
[85] Agne Limante, 'Establishing habitual residence of adults under the Brussels IIa regulation' (2018) 14(1) Journal of Private International Law 160, 170.
[86] Trial International, 'Evidentiary Challenges in Universal Jurisdiction Cases' (2019) 68.
[87] Ibid.
[88] Federal Criminal Court (n 62).

the face of a suspect's departure from the forum.[89] The case has nevertheless been at a standstill. Enveloping this presence requirement, then, is an air of disagreement as to its operation, leading to serious contradictory applications in practice.

A state which equally lays bare the shortcomings of the 'no safe haven' approach is the Netherlands, particularly in relation to its jurisdictional time frame. Whereas the Swiss judiciary and prosecutors differ on whether jurisdiction remains operative in light of a suspect's departure, Dutch law makes explicit that investigations into suspects may only endure so long as they are present in the forum. Should they depart, the investigation must cease accordingly.[90] Again, one must query whether this *modus operandi* allows for testimonies to be given or investigations to be effectively conducted, if at all. Suppose the accused lands on Dutch soil numerous times throughout the year, yet keeps each visit short, thereby hampering investigative efforts. It is unclear whether, upon the re-entry of the suspect, Dutch authorities are competent to resume the investigation. In any case, the Netherlands would in effect be barred from carrying out efficient investigations on account of the impracticality of the pursuit. Paradoxically, this approach grants war criminals a 'safe retreat'.

The impediments of the presence requirement to reining in regime actors are stark. Although one can appreciate the political merits of its design of enabling the prosecution of 'low-cost defendants'[91], it renders universal jurisdiction, as a venue for holding accountable Syrian regime offenders, all but futile. A 'blow to universality'[92] indeed, 'strait-jacketed' universal jurisdiction models such as these will arguably remain largely dormant in this respect.

3.2. Additional nexuses: Dissonant or reconcilable?

Constituting the very logic of universal jurisdiction is the notion that, due to the odious character of the crimes concerned, traditional links to the perpetrator or victim are redundant.[93] Also embedded in the rationale is the idea that the international community as a whole is affected by the commission of these crimes. It is curious, then, that certain states have conflictingly required related nexuses to be satisfied in this respect.

When a state requires the victim of an atrocity crime to be a national in order to activate its jurisdiction, the exercise in question is that of the passive personality head of jurisdiction, rather than universal jurisdiction. The requirement that the alleged offender be a national of the state asserting jurisdiction equally subverts the logic of universality. Assuming the Geneva Conventions play a role in illuminating the characteristics of the doctrine, it must be highlighted that all four explicitly provide for

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[89] Federal Criminal Court (25 July 2012) TPF BB.2011.140 [3.1].
[90] See Chapter II (B).
[91] Langer (n 19) 253.
[92] Cassese (n 15) 589.
[93] See Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 Journal of International Criminal Justice 811, 813-814.

the prosecution of grave breaches regardless of the alleged offenders' nationalities.[94] These discordant conditions thus 'distort the institution of universal jurisdiction in terms of both its content and object'.[95] Not only do they practically impede the application of universal jurisdiction, but they also convey a sense of aversion towards the regime. It stands to reason that to insist on them undermines both the idea embodied in the concept and the significance of its conception in international law.

Equally bewildering is the alternative requirement of a 'relevant' link to the state. Atrocity crimes are of a universal character, ergo their perpetration is a matter of universal concern, thus establishing a 'link' to every state in the world. The execution of these crimes, by virtue of their peremptory character, constitute violations of obligations *erga omnes*, thereby endowing all states with an interest in responding to their commission.[96] Indeed, in these situations, states 'merely have, one and all, a common interest'.[97]

In addition to affirming the universal character of the defendant's crimes, Israel's Supreme Court in the *Eichmann* trial partially grounded the justification of universality in the idea that 'they are crimes whose…effects were so widespread as to shake the stability of the international community to its very foundations'.[98] Alongside the birth of the contemporary international order, which is arguably sustained by the universal acknowledgement of the egregious nature of *jus cogens* crimes and respect for the prohibitions thereof, was the consensus that attacks thereon represent threats to international peace and security, a fundamental objective of the rules-based system that had risen from the ashes of the second world war. Every member of the international community, therefore, has an interest in upholding and defending these norms.

Moreover, jurisdiction which necessitates the infringement of national interests for its activation relates to the protective principle. This principle entitles a state, to safeguard its interests, to prosecute foreigners who commit crimes abroad. Following the preceding logic, however, international interests correspond to that of states. This nexus is then conspicuously antithetical to the understanding of universal jurisdiction as a transcendent jurisdictional head which is both denoting and affirmative of an 'international community' with 'universal interests'.[99]

These additional nexuses arguably betray an apathy on the part of European states towards the commission of atrocity crimes elsewhere. While the ostensible purpose of their imposition is to curb unbridled investigations into politically prominent individuals around the globe, it nevertheless forges a degree of dissonance between the principle's theoretical and practical dimensions, thereby hindering

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[94] See Geneva Conventions (n 27).
[95] Jiménez (n 42) 37.
[96] *Prosecutor v Furundžija* (Judgement) ICTY-95-17-T Ch (10 December 1998) at [156].
[97] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.
[98] Supreme Court of Israel 336/31, AG v. Eichmann, 36 ILR 28 [12].
[99] Cassese (n 31) 859.

the growth of universality.

4. Paving a path to justice: Revisiting the 'global enforcer' approach

As the last chapter demonstrates, pursuing a narrow approach to universal jurisdiction which proscribes the investigation of those who have unrelentingly defied the rules of civilization in a manner reminiscent of the rampant barbarities of eras past, bears little fruit, if any. An obvious impediment to enforcing accountability, the 'no safe haven' method's value to Syria is to be impugned. The 'global enforcer' approach must consequently be revisited.

Preliminarily, it is relevant to note that the 'global enforcer' approach and its dichotomous counterpart define ends of a spectrum.[100] In essence, the determination of whether a state's model conforms to either approach requires an assessment of not only statutes and judicial decisions but also the 'perceptions and contextual understanding' of the system's participants.[101] For the purpose of this discussion, this model will be characterized by its ceding of the presence condition.[102] Admittedly, the 'global enforcer' approach is not appropriate in any and every circumstance, as past instances have shown. In situations, however, where impunity prevails owing to a staggering inaccessibility to virtually all accountability mechanisms, the case should differ. The following chapter thus explores the legal basis for an application of universal jurisdiction which forfeits the presence requirement for the initiation of investigative proceedings.

4.1 The justification for a liberal model

4.1.1 The legality of universal jurisdiction's enforcement in absentia

Before considering the basis for embracing a progressive approach, regard must be given to the preliminary issue of its legality, particularly on account of the ICJ judges' division in *Arrest Warrant*.

To Judge Guillaume, universal jurisdiction's exercise *in absentia* is 'unknown to international conventional law'.[103] This, however, 'confuses what is mandatory with what is permissible'.[104] Despite the opinion that the application of the *Lotus* principle[105] is irrelevant in this respect[106], it is discernibly germane to the discussion due to its invocation by Judges Higgins, Kooijmans, Buergenthal[107], and Van den Wyngaert.[108]

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[100] Langer (n 19) 250.
[101] Ibid.
[102] By implication, conditions pertaining to nationality are antithetical to the 'global enforcer' paradigm.
[103] President Guillaume (n 28).
[104] O'Keefe (n 24) 751.
[105] *France v. Turkey* PCIJ, Ser. A, No. 10, (1927) 19 *et seq.*
[106] Claus Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 Journal of International Criminal Justice 561, 572.
[107] Judges Higgins, Kooijmans and Buergenthal (n 80) at [49].
[108] Judge Van den Wyngaert (n 23) [48-58].

In accordance with the seminal case's judgement, enforcing universal jurisdiction *in absentia* is permissible unless an international rule to the contrary exists. Conventional and customary international law reveal an absence thereof.[109] Importantly, states' insistence on the presence requirement cannot in itself constitute evidence of *opinio juris*.[110] There may be practical or political justifications for this 'negative practice'[111], and absent the acknowledgement that their abstention is due to the exercise's perceived illegality, no rule of custom can be generated.[112]

Universal jurisdiction's philosophy is also pertinent to this assessment. As Judges Higgins, Kooijmans, and Buergenthal explain, if the purpose of designating particular acts as international crimes is the authorization of expansive jurisdiction over the perpetrators thereof, 'there is no rule of international law…which makes illegal co-operative overt acts designed to secure their presence' within the forum.[113] It follows that international arrest warrants that succeed investigations into atrocity perpetrators are in conformity with international law. The 2001 Princeton Principles on Universal Jurisdiction[114] and the 2005 Resolution of the Institut de Droit international[115] take this same view in relation to investigative measures, with the former regarding this type of exercise as permissible partly in the interests of avoiding 'stifling the evolution of universal jurisdiction'.[116]

Due to the variance in this regard, international law lacks a rule that prohibits the exercise of absolute universality.

4.1.2 Custody & the offender: Post-WWII practice

Traversing the historical application of the principle is of pertinence in this respect, as it sheds light on its early conceptualizations and attendant exercise, thereby providing an interpretive guide of sorts. This practice, occurring around the time of universal jurisdiction's modern conception, evinces the adoption of a rather broad approach thereto. Two matters must be emphasized, however. First, the concept of universality at the time, with respect to atrocity crimes at least, was in its infancy. Secondly, this approach was advanced by WWII's victors, and may be criticized on grounds of political opportunism. But as this practice is progressively espoused by some states today and is consonant with the objectives of the international criminal justice project, it merits consideration.

Following the cessation of hostilities in Europe, the Allied Powers prosecuted several war

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[109] Ibid [58]; Judges Higgins, Kooijmans and Buergenthal (n 80) at [54].
[110] Ibid [56]
[111] Ibid.
[112] Tim Kluwen, 'Universal Jurisdiction *in Absentia* Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity?' (2017) 8 Goettingen Journal of International Law 7, 25.
[113] Judges Higgins, Kooijmans and Buergenthal (n 80) [58].
[114] The Princeton Principles on Universal Jurisdiction (Princeton University 2001) 44.
[115] IDI Resolution on Universal Criminal Jurisdiction (2005) [3(b)].
[116] Princeton Principles (n 114) 43.

criminals in occupied Germany and elsewhere.[117] In responding to the jurisdictional question, the respective judicial bodies premised their findings on the parallel notion. In both the *Almelo* and *Zyklon B* trials, the British military courts held that 'under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish…war criminals *in its custody* regardless of the nationality of the victim or the place where the offence was committed'.[118] Similarly, in the *Hadamar* trial, a United States (US) military commission established the lawfulness of assuming jurisdiction on the basis of universality, 'according to which every…State has…jurisdiction to punish…war criminals in its custody…where, for some reason, *the criminal would otherwise go unpunished*'.[119]

Both readings uniformly suggest that war criminals may be 'punished' when the offender is in the asserting state's custody. Yet it remains unclear, as El Zeidy notes, *how* such persons could be found in a state's custody.[120] Given the historical context, the formulation could be construed as referring to the capture of suspects on the territory of the detaining power or their surrender thereto.[121] Nothing negates, however, an interpretation of securing an offender's presence as materializing by way of extradition. Not only is the language ambiguous, but the reference to punishing offenders may serve to substantiate this understanding. 'Punishment' in the Allies' tribunals' findings is contingent upon having the suspect in custody, and hence may plausibly refer to the act of prosecution, or conviction as a result. The logical supposition, then, is that the presence of the suspect was a prerequisite for trials rather than investigations.

Furthermore, the *Hadamar* judgement's allusion to impunity is especially noteworthy. The military commission's ruling on jurisdiction held that it is established where, *inter alia*, 'the criminal would otherwise go unpunished'.[122] This position thus recognizes universal jurisdiction as a last resort in circumstances where a climate of impunity would otherwise prevail. It is also appreciative of the imperative of accountability and the utilization of this enforcement mechanism for its achievement.

This approach was thus able to efficiently weaponize universal jurisdiction to combat impunity. The idea was arguably to enforce norms as a way of establishing order in the aftermath of catastrophic events. The approaches to universal jurisdiction today are largely predicated on later political experiences, which are of important consideration, but too far a departure from the understandings prevailing at the time of the principle's contemporary genesis arguably creates a degree of amnesia as

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[117] See Matthew Lippman, 'Prosecution of Nazi War Criminals Before Post-World War II Domestic Tribunals' (2000) 8(1) University of Miami International and Comparative Law Review 1.
[118] *The Almelo Trial*, Law Reports of Trials of War Criminals (UN War Crimes Commission 1947) 42; *The Zyklon B case*, 103 (emphasis added).
[119] Ibid, *The Hadamar Trial*, 53 (emphasis added).
[120] Mohamed El Zeidy, 'Universal Jurisdiction in Absentia: Is It a Legal Valid Option for Repressing Heinous Crimes?' (2003) 37 International Lawyer 835, 841.
[121] Ibid.
[122] *The Hadamar Trial* (n 118), 53.

regards its intended application.

4.1.3 The system of the 1949 Geneva Conventions

In determining the appositeness of pursuing a liberal way forward, one must consult the instruments upon which much of the modern understandings have ostensibly been based. The materiality in referring to the Geneva Conventions for this purpose is also derived from their citation in the separate and dissenting opinions in *Arrest Warrant* in relation to their authorization of 'absolute' universal jurisdiction.

It is reasonable to conclude the legality of exercising universal jurisdiction *in absentia* under the 1949 Conventions. As Judges Higgins, Kooijmans, and Buergenthal demonstrated, a textual interpretation of the provisions lends no support to the view that arrest warrants may not be issued for foreign offenders.[123] Further, Judge Van den Wyngaert propounded that a teleological interpretation of the Geneva Conventions diametrically conflicts with a reading of Article 146 of the Fourth Geneva Convention as imposing a limitation on a state's exercise of universal jurisdiction.[124] Since the Conventions 'mandate, and *a fortiori* permit, the extension of national criminal jurisdiction over grave breaches on the basis of universality'[125], the issuance of international arrest warrants is a lawful exercise thereof. The obligation to bring suspects before national courts thus presupposes their presence at the trial stage.[126]

Beyond the established fact of mere permissibility, however, it must be asked whether the system of the Geneva Conventions envisages the adoption by the High Contracting Parties of a 'global enforcer' approach. An analysis of none other than the first of its provisions is essential in this respect.

Common Article 1 to the 1949 Geneva Conventions dictates that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.[127] Prominently placed at the beginning of each of the four Conventions,[128] both its text and position 'were clearly designed…to convey the notion that the [Conventions] were to be regarded as endowed with a special character'.[129] In elucidating the provision, the 1958 Commentary of the International Committee of the Red Cross (ICRC) to the Fourth Geneva Convention promulgates the following:

"in the event of a Power failing to fulfil its obligations, the other Contracting

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[123] Judges Higgins, Kooijmans and Buergenthal (n 80) [57].
[124] Van den Wyngaert (n 23) [54].
[125] O'Keefe (n 93) 830.
[126] Ibid 828.
[127] See, e.g., Fourth Geneva Convention (n 27) art 1.
[128] Jean Pictet, *The Geneva Conventions of 12 August 1949, Commentary, [Geneva Convention IV]* (ICRC 1958) 15.
[129] Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125, 130.

> Parties…may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally".[130]

The Commentary expressly adopts a 'state-compliance' interpretation of the undertaking, according to which contracting parties are to take measures against *other* contracting parties for their failure to comply with the Conventions.[131] This view is also rooted in the *ut res magis valeat quam pereat* principle.[132]

The first element of significance to note is that Article 1 imposes a positive obligation on contracting parties by using the term 'ensure' followed by 'respect'. Contemplating obligations *erga omnes*[133], the provision apparently mandates the assumption of an active role by states in responding to breaches of the Convention. In so doing, it has invalidated the politically preferable idle position many states have opted to maintain in light of the rampant commission of war crimes by their fellow contracting party, Syria.

Averring that the compliance of these states themselves is insufficient, the Commentary tasks contracting parties with fostering respect for the treaty series precisely because the Conventions' system of protection is incapable of effectuation without this incumbent role's fulfilment. Given the historical context of the Conventions' adoption, common Article 1 appreciates the consequences that not only a failure to abide by the Conventions' principles would produce but also a lack of accountability therefor. When read in conjunction with the penal sanctions provisions[134], one may conclude that relegating universal jurisdiction to the position of a subservient and therefore rarely utilized mechanism in the face of war crimes functions to inhibit bringing to fruition the protection system intended by the 1949 Conventions.

A further striking aspect of the Commentary's formulation lies in its assertion that contracting states 'should do everything in their power to ensure that the humanitarian principles underlying the Conventions are *applied universally*'.[135] The language here, in addition to embracing the concept of

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[130] Pictet (n 128) 16.
[131] Focarelli (129) 127.
[132] Ibid 128; '*Ut res magis valeat quam pereat*' (Latin): "A principle of legal instrument construction dictating that one should avoid reading the instrument in a manner that would render language in the instrument redundant, void, or ineffective". Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009).
[133] Ibid 127.
[134] See Geneva Conventions (n 27).
[135] Pictet (n 128) 16 (emphasis added).

universality, has placed contracting parties in the position of guardians of the Conventions, vesting in them the power to *enforce* its principles *globally.* Considering that the Commentary refers to reactivity in the event of a party's non-compliance, it may be reasoned that 'ensuring' the Conventions' application *vis-à-vis* fellow contracting states can only take place after the fact of a breach. It follows that exercising universal jurisdiction is one such way 'application' can manifest.

In view of the Geneva Conventions having garnered universal ratification, the elucidation advanced by the 1958 Commentary evidently embodies the very notion of a 'global enforcer' approach, in that it saddles states with the authority to, for example, punish war crimes wherever they are committed. It further asks that states do all that is within their power to ensure universal application, ostensibly as a key component to observing common Article 1. Although the meaning of 'power' here is shrouded in vagueness[136] , it arguably suffices, for the purposes of this discussion, to recall that it is at least within a state's legal power to expand its universal jurisdiction legislation so as to bring within its remit non-resident war criminals.

It is thus difficult to reconcile the 'no safe haven' approach with common Article 1. This model is grounded in the idea that a state shall remain unconcerned with grave breaches of the Conventions committed by other contracting states, still less assume a role in punishing them, unless by way of nexuses that may only be satisfied in rare circumstances, in direct contrast to the letter and spirit of the provision. Regardless of protests against the idea of states becoming 'global policemen'[137], Article 1 is evidently 'no mere empty form of words, but has been deliberately invested with imperative force'.[138]

Lastly, although the term 'undertake' in common Article 1 denotes an obligation, it has acquired a 'recommendatory meaning' in international practice[139], which is reinforced by the terms 'may, and should' in the ICRC commentary.[140] This does not, however, detract from the fact that a 'highly effective system of repression was required and intended by the drafters'.[141] Accordingly, responses by third states to breaches of the Conventions is an indispensable means to give effect to their 'lofty' motive[142] and attain their desired protection system.

4.1.4 The repression of international crimes: Jus cogens *& obligations* erga omnes

Central to the international legal order as it stands is the classification of inviolable, overriding norms that both define and protect the international community's values. They proscribe acts deemed wholly incompatible with the vision of an order founded on the objectives of peace and security. The

[136] See Focarelli (129) 150.
[137] Carlos Divar, quoted in (and translated by) Jiménez (n 42) 35.
[138] Pictet (n 128) 17.
[139] Focarelli (129) 171.
[140] Pictet (n 128) 16.
[141] El Zeidy (n 120) 852.
[142] Pictet (n 128) 15.

implication emanating from characterizing a norm as *jus cogens* is the establishment of obligations *erga omnes*, or 'flowing to all'. All states are accordingly vested with a legal interest in protecting this category of norms.[143]

Among the acts belonging to this hierarchically superior normative category are crimes against humanity, war crimes, and torture, all of which have been perpetrated by Syrian regime forces on an industrial scale.[144] The international community of states, in consequence, has an especially exigent duty to respond to these infractions in view of the Security Council's paralysis and the ICC's lack of jurisdiction. Confusion surrounds, however, the exact legal implications of an obligation *erga omnes*.

First acknowledged by the ICJ in the 1970 *Barcelona Traction* case[145], it is clear that the concept does not merely generate a right of standing. In Bassiouni's view, obligations *erga omnes* are 'those of a duty' rather than discretionary rights.[146] But for this understanding, '*jus cogens* would not constitute a peremptory norm of international law'.[147] Significantly, the publicist emphatically posits that '[a]bove all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes'.[148] States are thus duty-bound to bring such offenders to justice.

As previously discussed, requiring the presence of the suspect to initiate investigations presents discernible obstacles to the punishment of those who have contravened norms at the apex of the international legal system. Both the duty to protect these norms and punish such transgressors are arguably incapable of being discharged due to the limitations of the 'no safe haven' approach. The obligation to repress core crimes and combat impunity entails the employment of all legal means, which evidently includes the enforcement of universal jurisdiction *in absentia*. With respect to securing an offender's presence in the forum, Stern argues that 'all legal devices' should be deployed.[149] A progressive approach to universal jurisdiction would therefore appear concordant with states' obligations. A 'no safe haven' approach which implicitly fails to adequately address impunity in Syria, on the other hand, is tenuously defensible in this regard.

Protecting non-derogable values by way of punishing perpetrators of atrocity crimes is arguably integral to maintaining and strengthening the international rule of law. The corollary to the rationale of universal jurisdiction is that each state is 'a guardian of international law and an agent for its

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[143] ILC Report, 'Peremptory norms of general international law…' (2019) UN Doc A/74/10.
[144] See, e.g., Ian Black, 'Syrian regime document trove shows evidence of 'industrial scale' killing of detainees' (*Guardian*, 21 January 2014) <https://www.theguardian.com/world/2014/jan/20/evidence-industrial-scale-killing-syria-war-crimes>.
[145] *Barcelona Traction, Light and Power Company, Limited, Judgement,* ICJ Reports 1970 [33].
[146] M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) Law and Contemporary Problems 63, 65.
[147] Ibid.
[148] Ibid 66.
[149] Brigitte Stern, 'Better Interpretation and Enforcement of Universality of Jurisdiction' (1998) 14 NEP 175, 180.

enforcement'.[150] Denying this responsibility would not only be a 'travesty of law and a betrayal of the universal need for justice'[151] but also a blow to universal jurisdiction's constitutive function of imagining and 'cultivating an international community'.[152]

4.2 The merits of a progressive response to international crimes

Having established the justification for the adoption of a liberal approach to universal jurisdiction, this section outlines the potential value of its application in practice to Syria and the wider accountability framework.

The scale of suffering in Syria and the impunity which encircles its architects has triggered a wave of accountability-related legal creativity. The most remarkable manifestation of this innovation is Germany's structural investigation technique, which combines both conceptions of the state's role with regard to international crimes and enables the pursuit of a strategic approach to hold to account those bearing the greatest responsibility for atrocity crimes.[153] By ceding the presence requirement, German prosecutors have achieved nuance in the quest for accountability in Syria, investigating both those present and absent from the forum. This has also successfully demonstrated the approach's ability to 'fill the gaps in (the incomplete and imperfect) system of [ICL]'.[154]

As regards the advantages of this approach, consideration must first be given to those pertaining to investigations. First, as Kaleck and Kroker highlight, an open investigation enables authorities to react promptly upon the suspect's entry into the forum.[155] If investigations are dependent on the suspect's entry, there is little that can be acted upon in the event of that development. Secondly, the evidence produced may assist and expedite future proceedings in national and international fora.[156] In this sense, these investigations may complement the work of the UN's International, Impartial and Independent Mechanism for Syria (IIIM).[157]

A further significant set of benefits relate to international arrest warrants. The first of these concerns their norm stabilizing effect.[158] In line with states' obligations, they work to reaffirm and uphold peremptory norms. In this regard, it is important to recall Addis' conception of universal

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[150] Supreme Court of Israel (n 98) 299.
[151] *Prosecutor v Tadić* (Decision) ICTY-94-1-AR72 AC (2 October 1995).
[152] Adeno Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 Human Rights Quarterly 129, 144.
[153] Patrick Kroker & Alexandra Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany' (EJIL: Talk! 2016) <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/>
[154] Kaleck & Kroker (n 21) 189.
[155] Ibid 179.
[156] Ibid.
[157] See Christian Wenaweser and James Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15 Journal of International Criminal Justice 211.
[158] Kaleck & Kroker (n 21) 186.

jurisdiction's constitutive nature as a means by which communitarian values are identified and subsequently protected, in the aggregate creating a particular version of an 'international community'.[159]

In a similar vein, such measures communicate to violators of fundamental norms that consequences will inevitably ensue and that the impunity which they enjoy is by no means absolute. It signals the international community's intolerance to the perpetration of core crimes[160], and may, for fear of the prospect of prosecution, apply pressure on the individuals concerned to cease their criminal activities. There is evidence to suggest that Syrian government figures are seriously alarmed by the prosecution of their associates in Europe, indicating the palpable effect of efforts to combat impunity outside the country's borders.[161]

Lastly, international arrest warrants signify that the punishment of the offenders is already in motion in that it restricts their ability to travel freely[162], thereby cornering them and partly encapsulating international law's intended approach to and perception of *hostis humani generis*.[163]

Capable of effectively puncturing the shield of impunity surrounding the Syrian government, an approach to universal jurisdiction which progressively incorporates elements of a 'global enforcer' model appears the sole way in which Syrian offenders may be brought to justice in the foreseeable future. A hybrid model which combines both the latter and the 'no safe haven' approach offers a 'modern and pragmatic approach'[164] to universal jurisdiction in Europe. Germany's model is a paragon in this respect, as evidenced by its issuance of an international arrest warrant against Jamil Hassan[165], a Syrian resident, and the ongoing prosecution of Anwar Raslan[166], a German resident, for his role within the state's torture complex. A pure 'no safe haven' model, in contrast, tends to institutionalize *de facto* impunity.[167]

5 Accepting an expansive approach today: Developments & reassurances

5.1 International law: A changing landscape

As the exercise of universal jurisdiction has at times been repudiated, the prospect of an expansive approach thereto being accepted may be questioned. The history of international law and the dynamics of international relations, however, have invariably involved change, leading to the reform of

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[159] Addis (n 152) 159-160.
[160] Kaleck & Kroker (n 21) 187.
[161] Anwar Al-Bunni during 'Syria's state torture on trial…' webinar (The Syria Campaign, 2020).
[162] Kaleck & Kroker (n 21) 187.
[163] See David Luban, 'The Enemy of All Humanity' (2018) 2 Netherlands Journal of Legal Philosophy 112.
[164] Kaleck & Kroker (n 21) 190.
[165] Trial International (n 49) 47.
[166] ECCHR (n 50).
[167] Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (Routledge 2017) 208.

the status quo and the once unimaginable to manifest. A number of matters must be taken into consideration in this respect.

No international law institution was conceived in a vacuum. From the Peace of Westphalia to the Hague Conventions, the establishment of the Nuremberg tribunal to the ICC, it is dramatic events in the international sphere and their consequent propellant effects that trigger imaginative responses. The latter of the two developments represented a paradigm shift[168] in the attitudes to the commission of atrocities. Although dating back to the Grotian epoch[169], the concept of accountability required the construction of a modern system for its actualization; legal creativity was thus exercised to accomplish this. Under the present circumstances too, the employment of progressive legal means that are better equipped to challenge impunity is a compelling imperative. Considering the nature and magnitude of the crimes in Syria, a reformed liberal approach is far from radical. On the contrary, it is at such critical moments, when the very ability of the international justice project to achieve its purpose is impugned, that resourceful responses should be adopted. When one also considers the progressive prioritization of human rights vis-à-vis state sovereignty, the expansion of universal jurisdiction appears very much in line with the overall trajectory.

The case of Syria may hence prove a catalyst for change, similar to that of Nazi Germany. In this respect, Jessberger describes Germany's investigative technique as a 'creative moment in law that is, in some ways, like the Nuremberg trials'.[170]

Relatedly, a salient development has also emerged in practice. Pursuant to its momentous international arrest warrant against Jamil Hassan in June 2018, Germany formally requested the extradition of the military general from Lebanon in February 2019.[171] Days later, the US government issued a statement in support of the request, thereby placing itself on the record as endorsing Germany's model of universal jurisdiction.[172] Where this practice was once condemned for 'by-passing the rules of international relations'[173], it has now received the support of a state previously averse to it.[174]

These developments challenge Judge Guillaume's contention that 'absolute' universal jurisdiction has never been desired at any point in ICL's evolution.[175] Resonating almost two decades later, conversely, is the prescient assertion that '[t]he passage of time changes perceptions'.[176] Several

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[168] See Michael Scharf, 'Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 Cornell International Law Journal 439.
[169] Hugo Grotius, *De Jure Belli Ac Pacis* (1925) 504.
[170] Cathrin Schaer, 'Alleged Syrian war criminals face landmark trial in Germany' (*Al Jazeera,* 23 April 2020) <https://www.aljazeera.com/indepth/features/alleged-syrian-war-criminals-face-trial-germany-200421085132322.html>
[171] Michael Scharf, Milena Sterio, and Paul Williams, *The Syrian Conflict's Impact on International Law* (Cambridge University Press 2020) 107.
[172] Ibid.
[173] Chinese embassy's spokesperson in Spain, 2009, quoted in Jiménez (n 42) 33.
[174] Scharf et al. (n 171) 107.
[175] President Guillaume (n 28) [15].
[176] Judges Higgins, Kooijmans and Buergenthal (n 80) [39].

states' universal jurisdiction statutes, within and beyond the borders of Europe, at present encompass elements of a 'global enforcer' approach.[177] As recent as 2014, the Constitutional Court of South Africa went so far as to oblige the state to enforce universal jurisdiction *in absentia*.[178] This expansion is plausibly a product of the growing appetite for international justice in recent years.[179] With Germany resurrecting an abandoned accountability model and paving the way for other states to follow suit, the possibility of a customary norm crystallizing in the future cannot be discounted. Indeed, Scharf et al. have argued that the Syrian conflict likely represents a 'Grotian moment'[180], highlighting its distinctive impact on international law.

5.2 Criticisms & concerns

As previously discussed, the exercise of universal jurisdiction is not without controversy. Against the complex historical backdrop, it is only natural to consider with caution the proposition of reviving a heavily criticized model. The fledgling business of international criminal accountability, however, innately entails the elicitation of some degree of outcry. In a nascent order wherein the struggle to strike a balance between the equally vital considerations of peaceful international relations and retribution for atrocity perpetrators is ever extant, criticisms of accountability schemes are pervasive regardless of the international justice forum.

One cannot overlook, however, the instances in which the principle was applied in a liberal fashion without subsequent condemnation (on its merits), such as Israel's prosecution of Adolf Eichmann. Nazi atrocities, indeed, 'shocked the conscience of nations'.[181] It may therefore be reasoned that, on account of a consensus that was established as to the gravity of the crimes and the culpability therefor, the prosecution of the perpetrators was palatable. Similarly today, states which have issued arrest warrants against Syrian regime officials [182] have successfully evaded the unfortunate repercussions faced by the former champions of the 'global enforcer' approach.

Acknowledging the inevitability of provoking the state whose governmental figures are under investigation does not change the fact that exercising universal jurisdiction in an expansive manner renders it open to abuse. Anchors to moderate its application must therefore be in place to avoid the 'judicial chaos'[183] that may ensue.

First, a 'global enforcer' approach to state-perpetrated universal crimes should only come into

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[177] See United Kingdom: Arabella Thorp, 'Universal jurisdiction' HoC Library (2010); Argentina: UN Secretary-General, 'The scope and application of [universal jurisdiction]' (2018) UN Doc A/73/123 [6].
[178] Kluwen (112) 24.
[179] Some notable developments: the 'Chautauqua blueprint' for a statute for a Syria tribunal, and the establishment of the IIIM and the Independent Investigative Mechanism for Myanmar.
[180] Scharf et al. (n 171) 173-179.
[181] Israel, Jerusalem DC, *Eichmann* (1961) 36 ILR 5 [12].
[182] Germany and France.
[183] President Guillaume (n 28) [15].

play when a) its judicial organs are corrupted and b) access to the ICC and international criminal tribunals established by the UN Security Council is blocked. This accords with customary international law, under which universal jurisdiction operates as a '*default* jurisdiction'.[184] Consider, for example, a situation in which a state issues an international arrest warrant against war criminals residing in Libya as these individuals are concurrently on trial at the ICC. This condition is therefore essential to preserving order within the international criminal system.

Secondly, procedural immunities must be duly observed.[185] In *Arrest Warrant*, the Democratic Republic of the Congo eventually conceded to the legality of Belgium's exercise of universal jurisdiction *in absentia*[186] and rightly disputed its disregard for the head of state immunity enjoyed by its foreign minister. Respecting immunities in the application of universal jurisdiction is therefore necessary not only for the avoidance of sound criticism but also to lend credibility to the endeavour. The pursuit of justice must ultimately conform to the rule of law.

Lastly, investigations should only be initiated at the request of victims or their relatives.[187] This would, *inter alia*, allay concerns of legal imperialism, principally by precluding politically motivated investigations. In Europe, it is the resolute pursuance of accountability by refugee communities[188] that has reinvigorated the 'global enforcer' model. As Scharf et al. note, the problem of impunity was 'quite literally delivered to the doorsteps of the European states by [Syrian] refugees'[189], arguably rendering them suitable candidates to adopt an expansive approach to universality.

6. Conclusion

A year prior to the outbreak of the Syrian war, states affirmed that 'one of the major achievements in international law in recent decades had been the shared understanding that there should be no impunity for serious crimes'.[190] Over a decade later, the dissonance between rhetoric and reality could not be more pronounced than in the case of the Levantine state.

With the unremitting carnage by the Syrian regime and the obstruction of the pathways to conventional ICL enforcement mechanisms, universal jurisdiction emerges as all but the last hope for Syrian victims to receive justice.

Across Europe, however, minimal efforts to hold to account those disproportionately responsible for flagrant international law violations have been made. As this article has sought to demonstrate, the 'no safe haven' model to which many states in the continent subscribe is unduly

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[184] Cassese (n 15) 593.
[185] Judges Higgins, Kooijmans and Buergenthal (n 80) [79].
[186] Ibid [9].
[187] Ibid [59].
[188] See e.g., Ben Knight, 'Refugees in Germany reporting dozens of war crimes' (*DW*, 11 April 2016) <https://www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291>
[189] Scharf et al. (n 171) 109.
[190] UN Secretary-General, 'The scope and application of [universal jurisdiction]' (2010) UN Doc. A/65/181 [7].

limited, and thus incapable of contributing to the endeavour at hand. Between requiring the presence of the offender to initiate investigations and masquerading other jurisdictional heads as universal jurisdiction, the approach virtually excludes the chief war criminals from its reach.

To bring to justice the architects of violence, a progressive universal jurisdiction model which embraces characteristics of a 'global enforcer' paradigm, primarily by relinquishing the presence condition and other arbitrary nexuses, offers the only viable way of eroding the impunity shield surrounding the Syrian regime apparatus under the present circumstances. Given the unsustainable status quo, it is critical to reckon with the fatal flaws of circumscribed approaches through political courage.

Despite a degree of support in international practice for the insistence on such requirements, their justifiability as a matter of policy is contentious. As this article has argued, a basis for the adoption of a liberal model, particularly in situations of pervasive impunity, exists, and its normative and practical benefits to the Syrian accountability project are tangible. Evidence of a transformation of accountability paradigms is perceptible as well, in addition to ways in which this approach may be regulated. Notwithstanding prior controversies regarding its application, the value of a strategically propitious approach to holding accountable Syrian government offenders demands the revival of an imaginative yet long-shunned model to be reconsidered. Ultimately, 'the short history of international criminal justice, from Nuremberg to the present, is full of…improbable…ideas that have pushed the project forward'.[191]

[191] Alex Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15(2) Journal of International Criminal Justice 231, 236.