Title

HOSTIS HUMANI GENERIS: INTERNATIONAL CRIMES IN UKRAINE AND PROSPECTS FOR PROSECUTIONS UNDER THE PRINCIPLE OF UNIVERSAL JURISDICTION BEFORE THE COURTS OF ENGLAND

Author

Gureghian Hall, Mischa

Publication Date

2023-06-26

Undergraduate

HOSTIS HUMANI GENERIS: INTERNATIONAL CRIMES IN UKRAINE AND PROSPECTS FOR PROSECUTIONS UNDER THE PRINCIPLE OF UNIVERSAL JURISDICTION BEFORE THE COURTS OF ENGLAND

Mischa Gureghian Hall

ABSTRACT

In the wake of Russia's 2022 invasion of Ukraine, perhaps no avenue of international legal study has seen as much interest as universal jurisdiction. With this recent spotlight, the United Kingdom's robust, yet in many respects inadequate, incorporation of universal jurisdiction offenses within its national law is worth examination. This article provides a theoretical, doctrinal, and statutory overview of universal jurisdiction in the UK, tracing its roots and analyzing its jurisdictional framework. Based on preliminary evidence, members of the Russian armed forces and Kremlin-aligned separatist militias in Eastern Ukraine, operating under the overall control of the Russian State, appear *prima facie* liable for gross transgressions of international humanitarian law and international human rights law. English criminal law is well suited for the prosecutions of such perpetrators, and with universal jurisdiction promising to play a cardinal role in post-conflict transitional justice in Ukraine, this paper illustrates how the United Kingdom's professed commitments to justice and accountability in Ukraine can manifest into tangible commitments to effective prosecutions.

TABLE OF CONTENTS

INTRODUCTION

The 1961 trial of Adolf Eichmann before the District Court of Jerusalem for, *inter alia*, genocide and crimes against humanity during the Holocaust represented a watershed moment for international criminal law.[1] The crimes for which the notorious Nazi functionary was convicted did not exist *malum prohibitum* at the time of their commission,[2] nor did the State whose courts would condemn him to death. While the trial's legal foundations were met critically,[3] in the time since, the *Eichmann* judgment has attained a central place in international criminal law,[4] being recognized as "one of the most momentous trials of history."[5]

The Supreme Court of Israel, upholding Eichmann's conviction, observed that despite the various questions of legality surrounding the trial, "[i]t is the particular universal character of these crimes that vests in each state the power to try and punish anyone who assisted in their commission."[6] This represented the modern genesis of what is now known as universal jurisdiction (UJ), the principle that some crimes rise to the level of gravity and depravity that they implicate the interest of the international community as a whole—and every State within

[1] See Cr.C. (Jerusalem) 40/61 *Attorney General v Eichmann* (1961) 45 PM 3, (1968) 36 ILR 5.
[2] Eichmann was prosecuted under the Nazis and Nazi Collaborators (Punishment) Law (5710-11) (1950–51) 4 LSI 154, for charges containing the material and mental elements of genocide, which was only codified as an international crime in 1948, see Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 (Genocide Convention). See also UNGA Res 96 (I) (11 December 1946).
[3] See eg, Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1963) 233–51; Helen Silving, '*In Re* Eichmann: A Dilemma of Law and Morality' (1961) 55 *American Journal of International Law* 307; Hans W. Baade, 'The Eichmann Trial: Some Legal Aspects' [1961] *Duke Law Journal* 400; Dominic Lasok, 'The Eichmann Trial' (1962) 11 *International & Comparative Law Quarterly* 355; James E.S. Fawcett, 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181; Robert K. Woetzel, 'The Eichmann Case in International Law' [1962] *Criminal Law Review* 671.
[4] See eg, *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) IT-94-1-T (10 August 1995) para 41; *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) (*Tadić* Appeals Decision) paras 55, 57; *Prosecutor v Erdemović* (Trial Judgment) IT-96-22-T (29 November 1996) para 62; *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) (*Furundžija* Trial Judgment) para 156; *Prosecutor v Jelisić* (Trial Judgment) IT-95-10-T (14 December 1999) (*Jelisić* Trial Judgment) para 68.
[5] Michael A. Musmanno, 'The Objections *in limine* to the Eichmann Trial' (1962) 35 *Temple Law Quarterly* 1, 20.
[6] Cr.A. 336/61 *Eichmann v Attorney General* (1962) 16 (3) PD 2033, (1968) 36 ILR 277 (*Eichmann* Appeal Judgement) [10].

it—in prosecuting their perpetrators, "irrespective of, or in complement to,"[7] any obligations under international law.[8] The German Federal Constitutional Court, in its *Jorgić* case concerning a Bosnian Serb paramilitary leader, defined UJ as applying "only to specific crimes which are viewed as threats to the legal interests of the international community of states" and distinguishable from other forms of extraterritorial criminal jurisdiction "in that it is not dependent on whether the act is punishable in the territory where it occurs or whether or not there is a possibility for extradition."[9] While UJ's general legality is universally recognized,[10] including by some of the late 20th and early 21st century's most prominent international jurists,[11] much of its substantive content remains debated.[12] Nevertheless, nearly all States accept UJ's most pertinent applicability to crimes against humanity, war crimes, and genocide.[13]

While UJ has primarily been applied in recent years to permit the prosecution of members of the so-called 'Islamic State' or Da'esh and former Syrian government officials for

[7] Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge UP 2017) 39.
[8] Richard R. Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes' (1951) 28 *British Yearbook of International Law* 382, 391; Kenneth C. Randall, 'Universal Jurisdiction Under International Law' (1998) 66 *Texas Law Review* 785, 788; Yoram Dinstein, 'The Universality Principle and War Crimes' (1998) 71 *International Law Studies* 17, 17–19; ILA Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000) 2.
[9] BVerfG 12 December 2000, NJW 2001, 1848, para 13(a) (official translation) (Germany).
[10] William A. Schabas, 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *Leiden Journal of International Law* 667, 692 ("The *Eichmann* precedent on universal jurisdiction stands essentially unchallenged to this day. It has been affirmed in United Nations reports, in the academic literature, and in case law of international criminal tribunals" (internal citations omitted)).
[11] See eg, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford UP 1994) 57; Antonio Cassese, *International Law* (Oxford UP 2001) 261; William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge UP 2001) 60; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford UP 2008) 303–14; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford UP 2012) 457–58; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge UP 2011) 227.
[12] See eg, International Law Commission (ILC), 'Report of the International Law Commission on the Work of its Seventieth Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, at 309.
[13] ILC, 'Draft Code of Crimes Against the Peace and Security of Mankind with commentaries' [1996] 2(2) *Yearbook of the International Law Commission* 17, UN Doc A/CN.4/SER.A/1996/Add.l (ILC Draft Code of Crimes) 31–32, commentary on art 9.

crimes against humanity in European jurisdictions,[14] with Russia's invasion of Ukraine, and emerging evidence of widescale atrocity crimes being perpetrated by Russian and Russian-aligned forces, UJ has come into renewed focus as a potential avenue for justice. Anna Ogrenchuk, President of the Association of Lawyers of Ukraine, remarked that UJ represents "not only a path to justice but also a certain manifestation of the solidarity of countries in finding the guilty and convicting them," adding that such prosecutions will reduce the burden on the Ukrainian legal system,[15] which is presently flooded with a volume of cases it is woefully ill-prepared to handle.[16] From the few cases it has already dealt with, it is also evident that the Ukrainian criminal justice system's treatment of international crimes, at present, falls short of international standards.[17] It has also been suggested that the exercise of UJ by national courts over international crimes can play an important role in resolving intricate legal dilemmas posed by the principle of complementarity in the jurisdiction of the International Criminal Court (ICC) over internationally wrongful acts committed in Ukraine.[18]

---

[14] See eg, OLG Frankfurt 30 November 2021, 5-3 StE 1/20-4-1/20 (conviction by a German court of Taha A.-J., an Iraqi national and 'Islamic State' militant on charges of genocide, crimes against humanity, and war crimes in relation to his enslavement and torture of a Yazidi mother and child, the latter of which died following severe ill-treatment); OLG Hamburg 27 July 2022, 3 St 2/22 (conviction by a German court of an 'Islamic State' militant for aiding and abetting genocide in relation to his torture, rape, and ill-treatment of a Yazidi woman as part of a broader campaign on the part of the 'Islamic State' to destroy the Yazidi ethnic group, in whole or in part).

[15] Anna Ogrenchuk, '12 friends against Russia: how universal jurisdiction allows punishment for crimes in Ukraine' (*European Pravda*, 6 June 2022) <https://www.eurointegration.com.ua/eng/news/2022/06/6/7140690/>.

[16] See Alexander Komarov and Oona A. Hathaway, 'Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression' (*Just Security*, 5 April 2022) <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieveaccountability-for-the-crime-of-aggression/>; William D. Meyer, 'Under Assault: A Status Report on the Ukrainian Justice System in Wartime' (*International Legal Assistance Consortium*, 15 July 2022) <http://ilacnet.org/wp-content/uploads/2022/07/ILAC_-Ukraine-Status-Report-on-Justice-System-July-2022.pdf>; Paul Bradfield, 'Prosecuting in a Time of War: Aggression, Immunities and the Preservation of Evidence in Ukraine' (2022) 32 *Irish Criminal Law Journal* 51; Dutton (n 19) 395–96. cf Roman Kuibida, Liana Moroz, and Roman Smaliuk, 'Justice in the East of Ukraine during the Ongoing Armed Conflict' (2020) 11 *International Journal of Court Administration* 1.

[17] For an analysis of domestic accountability efforts thus far, see Iryna Marchuk, 'Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine' (2022) 20 *Journal of International Criminal* Justice 787.

[18] See eg, Horst Fischer, 'Some Aspects of German State Practice Concerning IHL' (1998) 1 *Yearbook of International Humanitarian Law* 380, 388; Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?' (2006) 88 *International Review of the Red Cross* 375,

While the list of European and Western countries expressing interest in prosecutions of international crimes committed in Ukraine under the premise of UJ is growing,[19] a country that has been conspicuously absent from the discussion is the UK. Despite its professed solidarity with Ukraine and support for international justice mechanisms such as the ICC,[20] the UK has been mostly silent on the international stage on the potential use of UJ in relation to crimes committed in Ukraine. In an 18 May 2022 debate in the House of Lords, the Government was asked whether assurances could be made that the UK would use all tools at its disposal, including UJ, to "ensure that Ukraine's 'subsequent Nuremberg' offenders face justice without impunity."[21] This article aims to lay out how English law can be employed to accomplish this objective. Analyzing applicable domestic and international instruments, this article shall examine three pertinent questions regarding English UJ over crimes committed in Ukraine: the potential prosecution of members of the Russian armed forces, the prospects and legal issues surrounding the prosecution of pro-Russian separatist fighters, and the legal implication for UJ if Russia were to make use of nuclear, biological, or chemical weaponry in Ukraine.

1. THEORETICAL ROOTS OF UNIVERSAL JURISDICTION

A. NORMATIVE HIERARCHY IN INTERNATIONAL LAW

388–96. On the principle of complementarity, generally, see John T. Holmes, 'Complementarity: National courts versus the ICC' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford UP 2002) 667; Mohamed M. El Zeidy, 'The Principle of Complementarity' (2002) 23 *Michigan Journal of International Law* 870; Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford UP 2008); Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87; Morten Bergsmo, Olympia Bekou, and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Goettingen Journal of International Law* 791; Michael A. Newton, 'The Quest for Constructive Complementarity' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge UP 2011) 304.

[19] See Yvonne M. Dutton, 'Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?' (2023) 55 *Case Western Reserve Journal of International Law* 391, 392–93 fnn 1–11.

[20] See eg, HC Deb 20 June 2022, vol 716, cols 561–62; HC Deb 5 July 2022, vol 717, col 719; HL Deb 13 July 2022, vol 823, col 1474.

[21] HL Deb 18 May 2022, vol 822, col 483.

The basic premise of UJ, that some crimes furnish the jurisdiction of States over acts that would ordinarily be out of reach of their domestic legal systems, implies some hierarchy of criminal conduct in international law. While many may conceive such a hierarchy, centered around non-derogable or *jus cogen* norms of international law, as a relatively recent development, its theoretical roots can be found in the very nascent forms of the law of nations. While the original Roman *corpus juris* framed law as simply a body of regulations,[22] international law evolved, driven by increased legal pluralism during the Middle Ages,[23] adopting a form of "graduated normativity" which has culminated in the crystallization of *jus cogen* norms.[24]

In the 18th century, eminent German philosopher Christian Wolff remarked of a "necessary" and "absolutely immutable" law of nations from which no State can "free itself nor can one nation free another from it."[25] Sir William Blackstone similarly recognized that some crimes are repugnant to humanity as a whole.[26] The earliest such offense in English law was that of piracy, regarded as a form of high treason since the 16th century.[27] By the 1701 trial of Captain Kidd at the Old Baily, pirates were branded *hostis humani generis* or "enemies of all

[22] Roscoe Pound, 'Hierarchy of Sources and Forms in Different Systems of Law' (1933) 7 *Tulane Law Review* 475, 480; Max Radin, 'Fundamental Concepts of the Roman Law' (1924) 12 *California Law Review* 393, 396; William W Buckland, 'Interpolations in the Digest' (1924) 33 *Yale Law Journal* 343, 349.
[23] See Roberto Ago, 'Pluralism and the Origins of the International Community' (1977) 3 *Italian Yearbook of International Law* 3, 22–25; Arthur Nussbaum, 'Significance of Roman Law in the History of International Law' (1952) 100 *University of Pennsylvania Law Review* 678, 681.
[24] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 421. See also Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford UP 2012) 14.
[25] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractum* (first published 1764, Thomas Ahnert ed, Joseph H Drake tr, Liberty Fund 2017) §§ 4–6.
[26] William Blackstone, *Commentaries on the Laws of England*, vol 4 (1770) 71.
[27] Matthew Hale, *Historia Placitorum Coronæ*, vol 1 (1736) 665; Sarah Craze, 'Prosecuting privateers for piracy: How piracy law transitioned from treason to a crime against property' (2016) *International Journal of Maritime History* 654, 655. See Offences at Sea Act 1536 (28 Hen 8 c 15) s 1(1).

mankind."[28] Piracy, comprised of an offense committed on the high seas by an individual who rejects the authority of the State,[29] was recognized as a special offense, exempt from general pardons of all felonies.[30] In the early US Supreme Court case of *United States v Smith*, Justice Story described piracy as "an offense against the universal law of society, a pirate being deemed an enemy of the human race."[31] Chief Justice Marshall, delivering the unanimous opinion of the Court in *United States v Klintock*, deemed piracy to be an offense "committed against all nations" and pirates the "proper subjects for the penal code of all nations."[32] In 1934, Lord High Chancellor Sankey remarked of domestic jurisdiction over pirates in a case before the Privy Council:

> [A] according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its [territory] or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but '*hostis humani generis*' and as such he is justiciable by any State anywhere.[33]

[28] *R v Kidd* (1701) 14 Howell State Trials 123, 212–13 (Turton J). See also William Hawkins, *A Treatise of Pleas of the Crown*, vol 1 (1716) 251.
[29] Blackstone (n 26) 71. The *actus reus* of the modern offense of piracy differs slightly but remains broadly similar to the classical construction in substance. See Convention on the High Seas (adopted 29 April 1958) 450 UNTS 11, art 15; UN Convention on the Law of the Sea (adopted 10 December 1982) 1833 UNTS 3 (UNCLOS) art 101; Kai Ambos, *Treatise on International Criminal Law*, vol II (2nd edn, Oxford UP 2022) 275. See also Ivan Shearer, 'Piracy' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 8 (Oxford UP 2012) 320, 321; Maggie Gardner, 'Piracy Prosecutions in National Courts' (2010) 10 *Journal of International Criminal Justice* 797, 815.
[30] See Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton, not the Name of the Author Only, but of the Law It Selfe* (1628) 391; Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown* (1644) (Coke, *Institutes, Third Part*) 112; Hawkins (n 28) 254. For an overview of the legal perception of maritime piracy in early English law, see Christopher Harding, '"*Hostis Humani Generis*"—The Pirate as Outlaw in the Early Modern Law of the Sea' in Claire Jowitt (ed), *Pirates? The Politics of Plunder, 1550-1650* (Palgrave Macmillan 2007) 20–38.
[31] *United States v Smith*, 18 US (5 Wheat) 153, 161 (1820) (Story J). See also Henry Wheaton, *Elements of International Law* (Richard H Danna Jr ed, 8th edn, Little, Brown & Co 1866) 193.
[32] *United States v Klintock*, 18 US (5 Wheat) 144, 152 (1820) (Marshall CJ).
[33] *Re Piracy Jure Gentium* [1934] 1 AC 586 (PC) 589 (Viscount Sankey LC). For the most comprehensive study to date on the historical and doctrinal origins of UJ in respect to *piracy jure gentium* from the 17th century onwards, see Alfred P Rubin, *The Law of Piracy* (2nd edn, Transnational Publishers 1997).

Learned American jurist Henry Wheaton wrote that "[t]he judicial power of every independent state then extends … to the punishment of piracy and *other offences against the law of nations* by whomsoever and wheresoever committed."[34] This principle of universality in criminal jurisdiction was endorsed by the *Institut de Droit International* at its 1931 Cambridge conference.[35] Scholars have more recently theorized that the legality of UJ is furnished by prominent international jurist and legal sociologist Georges Scelle's classical notion of *dédoublement fonctionnel*,[36] or 'role splitting.'[37] This theory posits that States play split roles in the international legal system; when entering into treaties and agreements, States function *qua* a member of an international law-making body, and when, by means of a conflict of law question, a State adjudicates matters of international law within its own courts, it is functioning *qua* an international judicial organ.[38] Pierre-Marie Dupuy has accordingly characterized *dédoublement fonctionnel* as reflective of the "*mondialisation du droit*" (globalisation of law) as part of the "progressive diminution … of the barrier between the national and international legal orders."[39] Within the conception of *dédoublement fonctionnel*, Paola Gaeta argues that "when the domestic

[34] Wheaton (n 31) 179 (emphasis added).
[35] Institut de Droit International, 16th Committee, 'Le Conflit des Lois pénales en matière de competence. Révision des Résolutions de Munioh' (1931) 36 *Annuaire de l'institut de Droit International* 87, 93.
[36] See eg, Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 811, 823; Paola Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford UP 2012) 596, 603.
[37] See Georges Scelle, *Précis de Droit des Gens*, vol II (Sirey 1932) 10–11; Georges Scelle, 'Règles Généales du Droit de la Paix' (1933) 46 *Recueil des Cours de l'Académie de Droit International* 327, 358–59; Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem* (Vittorio Klostermann Verlag 1956) 324, 331.
[38] Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 *European Journal of International Law* 210, 212–13; Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse UP 1964) 93.
[39] Pierre-Marie Dupuy, 'Unity in the Application of International Law at the Global Level and the Responsibility of Judges at the National Level: Reviewing Georges Scelle's "Role Splitting" Theory' in Marcelo Kohen and Laurence Boisson de Chazournes (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland-Debbas* (Martinus Nijhoff 2010) 417, 417–18. cf Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

judge exercises universal criminal jurisdiction, he fills the *lacunae* of international criminal law on penalties."[40]

Piracy is often regarded as the original crime of UJ,[41] with the prohibition of piracy greatly influencing the development of modern UJ.[42] With its 1824 classification as piracy by Parliament,[43] slave trading soon joined the nascent *corpus* of early UJ offenses.[44] In its present formulation, the exercise of universal jurisdiction is considered tantamount to the duty of States to prosecute crimes to which the law of nations itself is the victim, furnishing the interest of the international community as a whole. Such crimes have come to be regarded as prohibitions derived from *jus cogen* norms,[45] which "enjoy the highest status within international law."[46] Having been referenced in arbitral jurisprudence as early as 1928,[47] and by legal scholars since 1937,[48] such norms hold peremptory character in the international legal system, absolutely

[40] Gaeta, 'National Criminal Jurisdiction' (n 36) 604.
[41] See eg, Kriangsak Kittichaisaree, *International Criminal Law* (Oxford UP 2001) 39; Gardner (n 29) 803; Sandra L. Hodgkinson, 'The Governing International Law on Maritime Piracy' in Michael P. Scharf, Michael A. Newton, and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge UP 2015) 13, 15; Ambos, *Treatise II* (n 30) 277. It should be noted that the so-called 'private ends' requirement of piracy has been done away with in subsequent UJ offenses, see Jody Greene, '*Hostis Humani Generis*' (2008) 34 *Critical Inquiry* 633, 698 (citing Randall (n 8); M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81).
[42] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Jurisdiction) [2002] ICJ Rep 3, 35 [5] (Guillaume P, separate opinion), 63 [61] (Higgins, Kooijmans, and Buergenthal JJ, separate opinion); William A. Schabas and Giulia Pecorella, 'Article 12: Preconditions to the Exercise of Jurisdiction' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 672, 675. For criticism of the piracy analogy, see Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal* 183, 235–35; Joshua M. Goodwin, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 973, 1002–7; Lauren Benton, 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction' (2011) 23 *International Journal of Maritime History* 225, 233–35.
[43] See Slave Trade Act 1824 (5 Geo 4, c 113) ss 9–10.
[44] Schabas and Pecorella (n 42) 675 fn 32 (citing Leslie C. Green, *International Law: A Canadian Perspective* (Carswell 1984) 179). But cf *Le Louis* (1817) 2 Dods 210, 248–52; 165 ER 1464, 1477–78 (High Court of Admiralty) (Sir William Scott).
[45] Alfred Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 *American Journal of International Law* 55, 58–60; M. Cherif Bassiouni, 'A Functional Approach to 'General Principles of International Law" (1990) 11 *Michigan Journal of International Law* 768, 801–9.
[46] *Committee of US Citizens in Nicaragua (CUSCN) v Reagan*, 859 F 2d 929, 940 (DC Cir 1988).
[47] *Nájera (France) v United Mexican States* (1928) 5 RIAA 466, 470, 472 (French-Mexican Claims Commission).
[48] Alfred Verdross, 'Forbidden Treaties in International Law' (1937) 31 *American Journal of International Law* 571.

binding on all States with no other postulate being able to prevail over them.[49] These *jus cogen* norms are considered hierarchically supreme.[50] The development of *jus cogens* is indicative of the evolution of an international *ordre public* based on a priority of values,[51] with *jus cogens* representing the values regarded as most fundamental to the international community.[52] As such, *jus cogen* norms represent a compromise between naturalism and positivism as both doctrines endeavor to adapt to the shifting moral and political values of international society.[53]

While some have criticized the concept of *jus cogen* norms for its vagueness or even purported lack of juridical utility,[54] as Justice Wald of the US Court of Appeals for the District of

[49] National courts have generally derived *jus cogen* norms with reference to the Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331, art 53. See eg, *CUSCN v Regan* (n 45) 940; BGE 133 II 450, E 7.1 (Belgium); *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (CA) [86] (Goudge JA) (Canada); *Jones v Minister of the Interior of the Kingdom of Saudi Arabia* (*Jones v Saudi Arabia*) [2006] UKHL 26, [2007] 1 AC 270 [42] (Lord Hoffman); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC 30 [35] (Majiedt AJ) (South Africa); *Belhaj v Straw* [2017] UKSC 3, [2017] 1 AC 964 [107] (Lord Mance JSC), [271] (Lord Sumption JSC). For the same in international courts, see eg, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons* Advisory Opinion) [83]; *Furundžija* Trial Judgment (n 4) para 155; *Jelisić* Trial Judgment (n 4) para 60; *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC-18/03) Inter-American Court of Human Rights Series A No 18 (17 September 2003) para 98; Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 [227]; Case T-306/01 *Yusuf v Council and Commission* [2005] ECR II-3533 [278]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction) [2006] ICJ Rep 6 (*DRC v Rwanda* Jurisdiction Judgment) 88 [8] (Dugard J *ad hoc*, separate opinion).

[50] See eg, *Right of Passage Over Indian Territory (Portugal v India*) (Merits) [1960] ICJ Rep 6, 123 [29] (Fernandes J *ad hoc*, dissenting); *Furundžija* Trial Judgment (n 4) para 153; *Al-Adsani v UK* (2002) 34 EHRR 273 [60]; *Domingues v United States* (Case 12.285) Report No 62/02, Inter-American Commission on Human Rights (2002) OEA/Ser.L/V/II.117 doc. 7 rev.1, para 49; *Kadi* (n 49) [226]; Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-00052 [92]; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits) [2012] ICJ Rep 99 [92].

[51] Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97, 112; Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 *European Journal of International Law* 491, 494; Vidmar (n 24) 14.

[52] *Siderman de Blake v Republic of Argentina*, 965 F 2d 699, 715 (9th Cir 1992), cert denied, 507 US 1017 (1993); *Furundžija* Trial Judgment (n 4) paras 153–54; *Goiburú v Paraguay* (Merits, Reparations and Costs, Judgment) Inter-American Court of Human Rights Series C No 153 (22 September 2006) para 128; ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682, para 365; Erika de Wet, 'The International Constitutional Order' (2006) 55 *International & Comparative Law Quarterly* 51, 76; Vidmar (n 24) 14.

[53] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge UP 2006) 324–25. See also Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford UP 1997) 183; Vidmar (n 24) 23–25.

[54] See eg, Georg Schwarzenberger, 'International *Jus Cogens*?' (1965) 43 *Texas Law Review* 455, 469; Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967)

Columbia Circuit aptly stated, "[w]ere the conscience of the international community to permit derogation from these norms, ordered society as we know it would cease."[55] Some have thus argued that "[t]he effective combating of grave crimes has … assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance."[56] Offenses involving the violation of *jus cogen* norms are accordingly considered to impute *obligatio erga omnes*,[57] that is rights which "all States can be held to have a legal interest in … protect[ing]."[58] In other words, all States have an *erga omnes* interest in combating violations of international *jus cogen* norms.[59]

On the violation of a *jus cogen* prohibition furnishing UJ, the judgment of the French *Cour de Cassation* in its case involving notorious Nazi fugitive, the 'Butcher of Lyon,' Klaus Barbie, is instructive: "[B]y reason of their nature, the crimes against humanity … do not simply fall within the scope of … municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign."[60] In its *Tehran Hostages* case, the ICJ observed that, unlike other postulates of international law,

---

61 *American Journal of International Law* 946, 963–64; Anthony D'Amato, 'It's a Bird, It's a Plane, It's *Jus Cogens'* (1990) 6 *Connecticut Journal of International Law* 2, 6.

[55] *Princz v Federal Republic of Germany*, 26 F 3d 1166, 1181 (DC Cir 1994) (Wald J, dissenting), cert denied, 513 US 1121 (1995).

[56] *Arrest Warrant* (n 42) 95 [7] (Al-Khasawneh J, dissenting).

[57] M. Cherif Bassiouni, 'International Crimes: "*Jus Cogens*" and "*Obligatio Erga Omnes*" (1996) 59 *Law & Contemporary Problems* 63, 65–66; de Wet, 'International Constitutional Order' (n 52) 61; Malcom N. Shaw, *International Law* (8th edn, Cambridge UP 2017) 92–94. See also Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537, 2542; Michael P. Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* 1, 4.

[58] *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 [33].

[59] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422 [68]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Rep 3 [41]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) 2022 <https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf> para 107; *Juridical Condition and Rights of Undocumented Migrants* (n 49) 116 [3] (Cançado Trindade P, concurring).

[60] *Fédération Nationale de Déportés et Internés Résistants et Patriotes v Barbie* (1985) 78 ILR 124, 130 (Court of Cassation) (France).

erga omnes obligations are "not merely contractual" but rather carry an "imperative character."[61] Presently, the prohibitions against genocide, crimes against humanity, grave breaches of IHL, and aggression are recognized as having attained *jus cogen* status.[62] The recognition of expanded extraterritorial jurisdiction of national systems over offenses violating *jus cogen* prohibitions reflects the growing necessity of reconciling traditional values of international law—chiefly State sovereignty—with 20th-century advancements in international values, punctuated by a respect for human rights often superseding respect for State boundaries.[63]

B. EXTRATERRITORIAL AMBIT OF CRIMINAL LAW

(i) Universality in National Criminal Jurisdictions

The extraterritorial ambit of domestic law is most commonly constructed under the 'effects doctrine,' which posits that States may claim jurisdiction over extraterritorial acts so long as such acts—or their perpetrator—demonstrate sufficient links with the forum State.[64] Other notable sources of extraterritorial jurisdiction include the protective principle, holding that a State may "assume jurisdiction over non-nationals for acts done abroad that affect the security

[61] *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Jurisdiction) [1980] ICJ Rep 3 (*Tehran Hostages* Judgment) [62] and [88].
[62] ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' in 'Report of the International Law Commission on the Work of its Seventy-third session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, at 16, 85, commentary on conclusion 22, para 3. See also Bassiouni, 'International Crimes' (n 57) 68.
[63] Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 853, 873–74.
[64] See Hersch Lauterpacht, *International Law: Collected Papers*, vol 3 (Elihu Lauterpacht ed, Cambridge UP 1970) 237–41; Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford UP 2009) 107–10; Liivoja (n 7) 27.

of the State,"[65] and flag jurisdiction, which furnishes a State's jurisdiction over all persons aboard ships flying the State's flag.[66]

However, unlike these principles, criminal UJ is premised on the absence of any nexus requirement between the offense or offender and the prosecuting State. Hugo Grotius, considered the father of modern international law, wrote in the early 17th century:

> [While ordinary crimes] should be left to the States themselves and their rulers, to be punished or condoned at their discretion … [States] have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but *excessively violate the law of nature or of nations in regard of any persons whatsoever*.[67]

Grotius concluded that if a State appeals for such a violator residing in another State to be delivered to it for punishment, that the State in which the accused resides "should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal."[68] This is the earliest articulation of the principle of *aut dedere aut judicare*, the obligation to extradite or prosecute,[69] which now appears in over 70 international instruments.[70] Eminent Swiss jurist Emmerich de Vattel went on to state that "those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the

---

[65] *United States v Yousef*, 327 F 3d 56, 110 (2nd Cir 2003), cert denied, 540 US 933 (2003). See also *Nusselein v Belgian State* (1950) 17 ILR 135, 135 (Court of Cassation) (Belgium); *Public Prosecutor v L* (1951) 18 ILR 206, 206 (Supreme Court) (The Netherlands); *Re Van den Plas* (1955) 22 ILR 205, 207 (Court of Cassation) (France); *United States v bin Laden*, 92 F Supp 2d 189, 197 (SDNY 2000).

[66] See UNCLOS (n 29) art 94(2)(b); *M/V 'SAIGA' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) 1999 ITLOS Rep 10 [106]; *M/V 'Virginia G' (Panama v Guinea-Bissau)* (Judgment of 14 April 2014) 2014 ITLOS Rep 4 [127]; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion of 2 April 2015) 2015 ITLOS Rep 4 [116]–[119].

[67] Hugo Grotius, *The Rights of War and Peace* (first published 1625, A C Campbell tr, M. Walter Dune 1901) bk 2, ch 21, § 3 and ch 20, § 40 (emphasis added). For Grotius' thinking on UJ in the context of maritime piracy, see Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (first published 1633, James B. Scott ed, Ralph van Deman Magoffin tr, Oxford UP 1916) 14–28.

[68] Grotius, *The Rights of War and Peace* (n 67) bk 2, ch 21, § 4.

[69] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford UP 2004) 36.

[70] M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995) 73.

enemies of the human race … may be exterminated wherever they are seized; for they attack and injure all nations, by trampling underfoot the foundations of their common safety."[71] These universalist framings of UJ in classical legal thought continued to dominate philosophical literature on the topic through to the 19th century.

It is in these classical writings that the modern posit of UJ finds its roots—that violations of *jus cogen* norms "offend all States … enabling any State to vindicate rights common to all."[72] In the 1948 *Eintzazgruppen* case, a US Military Tribunal at Nuremberg, in asserting its jurisdiction *ratione materiae* over Nazi crimes, stated that "[t]here is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law."[73] Later, the venerable Lord Wright, Chairman of the UN War Crimes Commission, wrote that

> According to generally recognized doctrine … the right to punish war crimes is not confined to the State whose nationals have suffered or on whose territory the act took place but is possessed by any independent State whatever, just as is the right to punish the offence of piracy … [E]very Independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offense was committed.[74]

Common law was initially hesitant towards any application of one State's penal statutes to acts committed on the territory of another. Sir Mathew Hale opined that "if a man had been

---

[71] Emmerich de Vattel, *Le Droit des gens: Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (first published 1758, Charles G. Fenwick tr, Carnegie Institution of Washington 1916) bk 1, ch 19, § 233.

[72] Randall (n 8) 831. See also A. Hays Butler, 'The Doctrine of Universal Jurisdiction: A Review of the Literature' (2000) 11 *Criminal Law Forum* 353, 356.

[73] *United States v Ohlendorf* (1948) 4 Trials of War Criminals before the Nuremberg Military Tribunals 411, 460 (US Military Tribunal II).

[74] Lord Wright, 'The Legal Basis of Courts Administering International Criminal Law' (1949) 15 *Law Reports of the Trials of War Criminals* 23, 26, citing Willard B. Cowles, 'Universality of Jurisdiction over War Crimes' (1945) 33 *California Law Review* 177. This notion was affirmed by the Dutch Special Criminal Court at Amsterdam soon after: 'There [exists] a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen … This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind.' *Re Rohrig* (1950) 17 ILR 393, 397 (Special Criminal Court of Amsterdam) (The Netherlands).

stricken in one country and died in another, it was doubtful whether he was indictable or triable in either."[75] Yet the common law tradition evolved to instead adopt a strong presumption against extraterritoriality of jurisdiction rather than a unilateral rejection of it.[76] Parliament's supremacy furnishes it with the ability to enact legislation with extraterritorial effect if it specifically prescribes so. As summarized by Lord Reid, "where there is an intention to make an English Act or part of such an Act apply to acts done outside England, that intention is and must be made clear in the Act."[77] As Lord Bingham later added, "[i]t cannot be doubted that, if Parliament had intended [an] Act to have extra-territorial application, words could very readily have been found to express that intention."[78]

The jurisprudence of other common law jurisdictions suggests that this intention can be inferred from the nature of the criminalized offense itself. In *Polyukhovich v Commonwealth*, Chief Justice Mason of the High Court of Australia stated that "externality of the conduct which the law prescribes as the foundation of the criminal offense is enough without more to constitute it as a law with respect to external affairs."[79] The US Supreme Court went further in *United States v Bowman*, holding that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction."[80] The Court went on to state that the extraterritorial application of

[75] Hale (n 27) 426.
[76] For the presumption of extraterritoriality in US law, see *American Banana Co v United Fruit Co*, 213 US 347, 357 (1901) (Holmes J); *Foley Brothers v Filardo*, 336 US 281, 285 (1949); *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991); *Morrison v National Australian Bank Ltd*, 561 US 247, 255 (2010); *RJR Nabisco Inc v European Community*, 579 US 325, 335–36 (2016). For the same in other common law jurisdictions, see eg, *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* 2004 SCC 45, [2004] 2 SCR 427 [54]–[55] (Binnie J) (Canada); *Kaunda v President of the Republic of South Africa* [2004] ZACC 5 [19]–[22] (Chaskalson CJ) (South Africa).
[77] *Treacy v DPP* [1971] 1 AC 537 (HL) 551 (Lord Reid).
[78] *R (Al-Skeini) v Secretary of States for Defence* [2007] UKHL 26, [2008] 1 AC 153 [13] (Lord Bingham).
[79] *Polyukhovich v Commonwealth* [1991] HCA 32, (1991) 172 CLR 501 [21] (Mason CJ).
[80] *United States v Bowman*, 260 US 94, 98 (1922) (Taft CJ).

criminal statutes can "be inferred from the nature of the offense" when to "limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute."[81] Similar reasoning was adopted by the UK Supreme Court in *Cox v Ergo Versicherung AG*, where Lord Sumption held that implied extraterritorial application of a statute can be inferred "the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extra-territorial effect."[82]

For its part, Parliament has prescribed extraterritorial jurisdiction over crimes for centuries, most notably under the Treason Act 1351,[83] in relation to which Lord Chief Justice Reading held in *R v Casement* that "it cannot be doubted … that [high treason] committed by a British subject abroad was triable, justiciable, in this country."[84] Attorney-General Sir Hartley Shawcross, who served as Britain's lead Nuremberg prosecutor, similarly argued in *Joyce v DPP* that "[t]he rule as to the locality of crime does not embrace treason, which is justiciable in this country even when committed abroad."[85] This was affirmed in *obiter* by Lord Chancellor Jowitt when delivering the House of Lords' judgment in the case.[86] Extraterritorial jurisdiction has also

[81] Ibid. See also *United States v Cotten*, 471 F 2d 744, 750 (9th Cir 1973), cert denied, 411 US 936 (1973); *United States v Vasquez-Velasco*, 15 F 3d 833, 840–41 (9th Cir 1994); *United States v Benitez*, 741 F 2d 1312, 1316–17 (11th Cir 1984), cert denied, 471 US 1137 (1985); *United States v Layton*, 855 F 2d 1388, 1395–96 (9th Cir 1988), cert denied, 489 US 1046 (1989).
[82] *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] 1 AC 1379 [29] (Lord Sumption JSC). See also *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] 1 AC 1 [212]–[213] (Lord Toulson and Lord Hodge JJSC); *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] 1 AC 519 [29]–[31] (Lord Lloyd-Jones JSC); *Roberts v Soldiers, Sailors, Airmen and Families Association* [2022] UKSC 29, [2022] 3 WLR 1111 [38] (Lord Lloyd-Jones JSC).
[83] Treason Act 1351 (25 Edw 3, c 2). See also Treason Act 1543 (35 Hen 8, c 2); Coke, *Institutes, Third Part* (n 30) 113; Hale (n 27) 59–60.
[84] *R v Casement* [1917] 1 KB 98 (KB) 131 (Lord Reading CJ), affd, *R v Casement* [1917] 1 KB 134 (CA). For the affirmation of the same in US law, see *Chandler v United States*, 171 F 2d 921, 930 (1st Cir 1948), cert denied, 336 US 918 (1949).
[85] *Joyce v DPP* [1946] 1 AC 347 (HL) 357 (statement of Sir Hartley Shawcross A-G).
[86] Ibid, 364 (Lord Jowitt LC).

long existed based not on the subject matter of a particular offense, but on the accused being a UK national or otherwise subject to its jurisdiction *ratione personae*.[87]

(ii) Criminal Jurisdiction in International Law

With the position of English law clear, the question is then necessarily whether the extension of one State's criminal jurisdiction to *actus rei* committed outside that State violates the State's obligations under international law. Firstly, it is important to note that the enactment of legislation by constitutionally independent State institutions can constitute an internationally wrongful act on the part of that State,[88] as can the exercise by the executive of authorities directly prescribed by the legislature.[89] The construction of statutes by judicial organs, can also constitute an internationally wrongful act of that State.[90] As Cicero wrote, "the solidity of a State is very largely bound up with its judicial decisions."[91] Given this, judicial interpretation in common law is performed under the presumption of conformity with international law, meaning that judges

[87] See eg, Offences Against the Person Act 1861 (24 & 25 Vict c 100) s 9; Foreign Enlistment Act 1870 (33 & 34 Vict c 90) s 4; Official Secrets Act 1911, s 10; War Crimes Act 1991, s 1(1); Merchant Shipping Act 1995, s 281; Sex Offenders Act 1997, s 7(2); Anti-terrorism, Crime and Security Act 2001, s 109.

[88] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] 2(2) *Yearbook of the International Law Commission* 31 UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ILC Articles on State Responsibility) art 4(1). See eg, Case 77/69 *Commission v Belgium* [1970] ECR 237 [15]; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12 [42]; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany and R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-01029 [34]–[36]; *Tomlinson v State of Belize and State of Trinidad and Tobago* [2016] CCJ 1 (OJ) [22]; *Marfin Investment Group Holdings SA v Republic of Cyprus* (Award) ICSID Case No ARB/13/27 (26 July 2018) para 671. Responsibility of States

[89] ILC Articles on State Responsibility (n 88) art 4(1). See eg, *Tippetts, Abbet, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-USCTR 219, 225–6; *Phelps Dodge Corp v Islamic Republic Iran* (1986) 10 Iran-USCTR 121, 130; *Telenor Mobile Communications AS v Republic of Hungary* (Award) ICSID Case No ARB/04/15 (13 September 2006) paras 64–70; *Chagos Marine Protected Area (Mauritius v UK*) (Award) (2015) 31 RIAA 359 [540]–[541] (Permanent Court of Arbitration).

[90] See eg, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [61]–[62]; *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) (WT/DS58/AB/R) [1999] 7 DSR 2755 [173]; Case C-224/01 *Köbler v Austria* [2003] ECR I-10239 [45]; *Artavia Murillo v Costa Rica* (Preliminary Objections, Merits, Reparations, and Costs, Judgment) Inter-American Court of Human Rights Series C No 257 (28 November 2012) paras 316–17; *Tomlinson* (n 88) [22]; *Eli Lilly & Co v Government of Canada* (Final Award) ICSID Case No UNCT/14/2 (16 March 2017) para 221; *Marfin Investment Group Holdings* (n 88) para 671; *Chevron Corp & Texaco Petroleum Co v Republic of Ecuador* (Second Partial Award on Track II) PCA Case No 2009-23 (30 August 2018) para 8.8.

[91] Marcus Tullius Cicero, *Selected Works* (Michael Grant tr, Penguin 1984) 36.

must, so far as possible, construct legislation so as to not violate international law.[92] This follows the long-held wisdom expressed by Lord Cross, "that it is part of the public policy of this country that our courts should give effect to clearly established rules of international law."[93] Acts of Parliament must be constructed as far as possible, in conformity with international law,[94] and it has long been held "[h]owever, no positive international law exists curtailing a State's jurisdiction, as the exercising and application of its jurisdiction is ultimately a matter *par excellence* attaching to a State's sovereignty."[95] While States possess the right to defend the legal interests of their nationals internationally,[96] as Lassa Oppenheim wrote in his seminal treatise: "States possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, … [they] must exercise self-restraint in the exercise of this natural power in the interest of one another."[97]

Judge Rosalyn Higgins has argued that so-called 'treaty-based' UJ[98] is not 'universal' *stricto sensu* as a State's authority to prosecute offenses provided for in a treaty is provided for by the treaty itself rather than some universal principle.[99] Yet this does not appear to reflect an accurate reading of such treaties. The Convention Against Torture, for example, provides, in Article 5(2) that "[e]ach State Party shall likewise take such measures as may be necessary to

[92] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 (CA) 143 (Diplock LJ); *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA) 757 (Diplock LJ); *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 (HL) 771 (Lord Diplock). See also *Polites v Commonwealth* [1945] HCA 3, (1945) CLR 60, 70 (Dixon J) (Australia), 79 (McTiernan J); *Daniels v White* [1968] SCR 517, 541 (Pigeon J) (Canada); *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273 [27] (Mason CJ and Deane J), [35] (McHugh J); *Yousef* (n 65) 86.
[93] *Oppenheimer v Cattermole* [1976] 1 AC 249 (HL) 278 (Lord Cross), citing *Re Helbert Wagg & Co Ltd* [1956] Ch 323 (Ch) 334 (Upjohn J). Cf *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391 (KB) 401 (Lord Alverstone CJ), articulating the oft-cited *dictum* that 'international law forms part of the law of England.'
[94] Hersch Lauterpacht, 'Is International Law a Part of the Law of England?' (1939) 25 *Transactions of the Grotius Society* 51, 57–58.
[95] Grotius, *Rights of War and Peace* (n 67) 226–27.
[96] *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* (Merits) (1938) PCIJ Rep Series A/B No 76, 16.
[97] Lassa F.L. Oppenheim, *International Law*, vol 1 (2nd edn, Longmans Green 1912) 201–2.
[98] See *Arrest Warrant* (n 42) 63 [41] (Higgins, Kooijmans, and Buergenthal JJ, separate opinion).
[99] Higgins (n 11) 64. cf Ambos, *Treatise II* (n 30) 281.

establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction."[100] Such a provision does not purport to confer upon a State jurisdiction it did not previously possess. It asks States to "take such measures as may be necessary to establish its jurisdiction," implying that States already possess the ability to establish such jurisdiction outside the context of the Convention. Accordingly, "jurisdiction to prescribe is permissive or facultative, not mandatory,"[101] meaning that "[i]f the unique feature of universal jurisdiction is the absence of any link at all between the crime and the prescribing state, then jurisdiction arising out of treaty obligations to extradite or prosecute is its antithesis."[102]

In its famous *SS Lotus* case, the Permanent Court of International Justice (PCIJ), the ICJ's predecessor, ruled on the application of criminal jurisdiction abroad, endorsing the view that a State need not evidence for the legitimacy of its jurisdiction, but rather that one contesting a State's jurisdiction must furnish evidence that a State lacks such jurisdiction:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable … [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[103]

[100] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85 (CAT) art 5(2). This is the formulation adopted by almost all international treaties containing an *aut dedere aut judicare* provision. See ILC, 'Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)': Study by the Secretariat" (18 June 2010) UN Doc A/CN.4/630, paras 90–91 and 113.
[101] Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 738, fn 12.
[102] Matthew Garrod, 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and 'Universal Jurisdiction' in the Light of the *Habré Case*' (2018) 59 *Harvard International Law Journal* 125, 132.
[103] *SS Lotus (France v Turkey)* (Merits) (1927) PCIJ Rep Series A No 10, 19, 26. See also *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) (1923) PCIJ Series B No 4, 24.

Accordingly, "a violation of international law occurs simply by virtue of enacting a statute that has an impermissible ambit."[104] As subsequent jurisprudence has clarified, "[w]hile jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is, by way of contrast, strictly territorial."[105] As such, Judge Fitzmaurice attempted to temper the *Lotus dictum* in the ICJ's *Barcelona Traction* case, stating that while international law affords States 'wide discretion' in regards to the *locus* of their domestic jurisdictions, it nonetheless "postulate the *existence* of limits" on this jurisdiction and imposes on States, as Oppenheim had suggested, "an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element."[106] This restraint, Judge Fitzmaurice attests, serves to "avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."[107]

The judges of the ICJ further developed on this qualified approach to understanding of UJ under *Lotus* in the Court's *Arrest Warrant* case.[108] The European Court of Human Rights (ECtHR), in *Banković v Belgium*, similarly affirmed the appropriateness of extraterritorial UJ as "defined and limited by the sovereign territorial rights of the other relevant States."[109] In a 2005 resolution, the *Institut de Droit International* also supported this conception of UJ, declaring:

> Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality

[104] Liivoja (n 7) 67.
[105] O'Keefe, 'Universal Jurisdiction' (n 101) 740.
[106] *Barcelona Traction* (n 58) 64 [70] (Fitzmaurice J, separate opinion) (emphasis in original).
[107] Ibid. cf Oppenheim (n 97) 202.
[108] *Arrest Warrant* (n 42) 35 [4] (Guillaume P, separate opinion), 63 [54] (Higgins, Kooijmans, and Buergenthal JJ, separate opinion), 137 [49] (Van den Wyngaert J *ad hoc*, dissenting).
[109] *Banković v Belgium* [2001] ECHR 890 [59]. See also Manfred Nowak, 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' in Mark Ginbey and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 11, 12–13.

> or nationality, with the crime, the offender, or the victim, provided that such State is clearly able and willing to prosecute the alleged offender.[110]

Thus, the contemporary consensus, as summarized by the late Judge James Crawford, indicates that "sufficiency of grounds for jurisdiction is normally considered relative to the rights of other states."[111] Thus, while Parliament can enact criminal penalties for crimes committed abroad, it cannot direct national police forces to go to another State and conduct arrests for such crimes on the territory of another State. Such legislative action would be prescribing a clear violation of the second State's sovereignty. Jurisdiction can be extraterritorial, while enforcement is exclusively territorial. As such, no positive prohibition in international law would seem to prohibit the courts of England from exercising extraterritorial jurisdiction which is prescribed to them by Parliament.

2. STATUTORY CONSTRUCTION OF UNIVERSAL JURISDICTION

English jurisprudence has long held that international law alone cannot expand domestic law absent an Act of Parliament to such an effect.[112] This has been specifically emphasized in the context of criminal statutes.[113] Similarly, the ICJ has held that violations of *jus cogen* norms are not sufficient in themselves to confer jurisdiction,[114] a notion affirmed by the House of Lords[115]

---

[110] Institut de Droit International, 17th Committee, 'La compétence universelle en matière pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre' (2005) 71 *Annuaire de l'Institut de Droit International* 296, para 3(d). See also Claus Kreß, 'Universal Jurisdiction over International Crimes and the *Institut de Droit international*' (2006) 4 *Journal of International Criminal Justice* 561, 581.
[111] Crawford (n 11) 457. See also Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford UP 2015) 39.
[112] See eg, *R v Keyn* (1876) 2 ExD 63, 203 (Lord Cockburn CJ), 239 (Lush J); *J.H. Rayner Ltd v Dept of Trade* [1990] 2 AC 418 (HL) 476–77 (Lord Templeman); *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 [235] (Lord Kerr JSC).
[113] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL) 235–36 (Lord Hope); *Hutchinson v Newbury Magistrates Court* [2000] EWHC 61 (QB), (2000) 122 ILR 499, 506 (Buxton LJ); *R v Jones* [2006] UKHL 16, [2007] 1 AC 136 [23], [28] (Lord Bingham), [102] (Lord Mance).
[114] *DRC v Rwanda* Jurisdiction Judgment (n 49) [64]; *Jurisdictional Immunities of the State* (n 50) [95]. See also *Arrest Warrant* (n 42) [60].
[115] *Jones v Saudi Arabia* (n 49) [24] (Lord Bingham).

and the courts of other common law jurisdictions.[116] Yet as Lord Griffiths famously emphasized, "crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality."[117] International and domestic law must grapple with offenses *erga omnes* and perpetrators *hostis humani generis*.[118]

While UJ is often criticized as "a body of judge-made law,"[119] in the UK as with most jurisdictions,[120] UJ is statutorily prescribed within the confines of international law specifically prescribing UJ in respect to certain crimes.[121] This arrangement has led to great debate on the extent to which national courts should consider international criminal jurisprudence when adjudicating international crimes,[122] a topic of discussion outside the scope of this paper. UK law concerning UJ is "characterized by a confusing amount of overlapping legislation."[123] Thus this section shall focus on the two most pertinent legal instruments to the application of UJ in Ukraine: the Geneva Conventions Act 1957 (GCA), the Criminal Justice Act 1988 (CJA), and the International Criminal Court Act 2001 (ICCA).[124]

---

[116] See eg, *Bouzari* (n 49) [87]–[90] (Goudge JA); *Fang v Jiang* [2007] NZAR 420 (SC) [49], [62]–[63], [65] (Randerson CJ) (New Zealand); *Zhang v Zemin* [2010] NSWCA 255 [120]–[121] (Spigelman CJ) (Australia).
[117] *Somchai Liangsiriprasert v Government of the USA* [1991] 1 AC 225 (PC) 251 (Lord Griffiths).
[118] Georges Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law' in Joseph H.H. Weiler, Antonio Cassese, and Marina Spinedi (eds), *International Crimes of State: a Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989) 141, 147.
[119] *Sosa v Alvarez-Machain*, 542 US 692, 715 (2004). See also Henry A. Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86, 89–91.
[120] See Liivoja (n 7) 39–40; Gardner (n 29) 802–3; UN Secretary-General, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General' (3 July 2018) UN Doc A/73/123.
[121] John F. Archbold, *Criminal Pleading Evidence and Practice* (T.R.F. Fitzwalter Butler and Marston Garsia eds, 34th edn, Sweet & Maxwell 1959) 27; Katherine L. Doherty and Timothy L.H. McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 *UC Davis Journal of International Law & Policy* 147, 175. cf *Polyukhovich* (n 79) [53] (Mason CJ).
[122] See eg, Kleffner (n 18) 7–56; Harmen van der Wilt, 'Equal standards? On the dialectics between national jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229, 252–68; Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 *Harvard International Law Journal* 85, 86–88.
[123] Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford UP 2003) 237.
[124] In England, UJ exists under certain other statutes, however these are not of relevance to the case of Ukraine, thus they are not discussed herein, see eg, Internally Protected Persons Act 1978, s 1(1); Aviation Security Act 1982, ss 1–4. A great many other treaties extend the principle of *aut dedere aut judicare* to acts of transnational terrorism. See eg, Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963)

In regard to all three of these instruments, it is integral that UJ applies only when "the foreign suspect is voluntarily … in the United Kingdom."[125] This embraces so-called 'limited' UJ, requiring the presence of the accused, as opposed to broader UJ, which permits trials *in absentia*.[126] *R v Horseferry Road Magistrates' Court, ex parte Bennett* set out the current position of English law, that an English court exercising criminal jurisdiction over a person unlawfully brought within that jurisdiction against their will would amount to an abuse of process.[127] This represented a departure from earlier English jurisprudence and the position of US law.[128] In *State v Ebrahim*, the South African Supreme Court framed the issue within the doctrine of clean hands, stating that "[w]hen the state itself is involved in an abduction across international borders, … its hands are not clean."[129] Moreover, such extraterritorial abduction represents a threat to the sovereignty of States[130] and violates international human rights law.[131]

---

704 UNTS 219, art 16; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970) 860 UNTS 105, art 4; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 23 September 1971) 974 UNTS 177, arts 5, 6(1), and 7; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973) 1035 UNTS 167, art 3; International Convention Against the Taking of Hostages (adopted 17 December 1979) 1316 UNTS 205, art 5; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988) 1678 UNTS 201, arts 6 and 7(1); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997) 2149 UNTS 256, arts 6 and 7(2); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999) 2178 UNTS 197, arts 7 and 10. While UJ based on any number of these treaties may be of use in prosecuting international crimes in Ukraine under certain special circumstances, for the purposes of this paper, discussion of these instruments shall be reserved for a future occasion.

[125] Reydams (n 69) 204.

[126] Cassese, *International Law* (n 11) 285.

[127] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (HL) 62–64 (Lord Griffiths). See also Andrew L.-T. Choo, 'International Kidnapping, Disguised Extradition and Abuse of Process' (1994) 57 *Modern Law Review* 626, 629–33.

[128] For past English cases supporting the exercise of jurisdiction over an unlawfully abducted defendant, see *Ex p Scott* (1829) 9 B & C 446, 448; 109 ER 166, 167 (KB) (Lord Tenterden CJ); *Ex p Elliot* [1949] 1 All ER 373 (KB) 377–78 (Lord Goddard CJ). For the same in US jurisprudence, see *Ker v Illinois*, 119 US 436, 444 (1886); *Frisbee v Collins*, 342 US 519, 522 (1952); *United States v Alvarez-Machain*, 504 US 655, 662, 669 (1992). See also *Eichmann* Appeal Judgement (n 6) 308; *Re Argoud* (1964) 45 ILR 90, 96–98 (Court of Cassation) (France); *Barbie* (n 60) 128–30.

[129] *State v Ebrahim* 1991 (2) SA 553 (AD), (1992) 31 ILM 888, 896 (Steyn JA) (South Africa).

[130] See *Arrest and Return of Savarkar (France v Great Britain)* (1911) 11 RIAA 243, 254 (Permeant Court of Arbitration); UNSC Res 138 (23 June 1960) para 1; Baade (n 3) 405; Fawcett (n 3) 197–98.

[131] *López Burgos v Uruguay*, Communication No R.12/52, UN Human Rights Committee (1981) UN Doc A/36/40, at 176, paras 12.1–14; *García v Ecuador*, Communication No 319/1988, UN Human Rights Committee (1991) UN

A. GRAVE BREACHES OF THE GENEVA CONVENTIONS

(i) Scope of International Obligations

In an 1865 legal opinion, US Attorney General James Speed concluded that those who commit atrocities contrary to *jus in bello* "are respecters of no law, human or divine, of peace or of war; are *hostes humani generis*, and may be hunted down like wolves."[132] The offense referred to by Attorney General Speed has evolved into the modern notion of war crimes.[133] The GCA was enacted as a codification into domestic law the "morally binding"[134] obligations undertaken by the UK by virtue of its ratification of the 1949 Geneva Conventions.[135] The Geneva Conventions were adopted in "response to intolerable humanitarian situations" across the globe,[136] and aim primarily to regulate the treatment of certain protected groups and objects during the conduct of international armed conflict. While an increasingly standardized framework of individual liability for war crimes having emerged since the ratification of the Geneva Conventions, the present value of the grave breaches regime is not its normative value to IHL, but rather its procedural and jurisdictional significance.[137] In this capacity, it furnishes liability in situations and States to which the Rome Statute of the ICC does not apply and

Doc CCPR/C/43/D/319/1988, at 90, paras 2.2, 5.2, and 6.1; *Celiberti de Casariego v Uruguay*, Communication No R.13/56, UN Human Rights Committee (1981) UN Doc A/36/40, at 185, paras 9–11.

[132] *Military Commissions*, 11 Op AG 297, 307 (AG 1865).

[133] Cowles (n 74) 202. See ILC Draft Code of Crimes (n 13) art 20.

[134] HC Deb 12 July 1957, vol 573, col 716.

[135] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949) 75 UNTS 31 (GC I); Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (adopted 12 August 1949) 75 UNTS 85 (GC II); Geneva Convention relative to the treatment of prisoners of war (adopted 12 August 1949) 75 UNTS 135 (GC III); Geneva Convention relative to the protection of civilian persons in time of war (adopted 12 August 1949) 75 UNTS 287 (GC IV). When referring to one of the common articles to all four conventions, this paper shall refer to 'GC.'

[136] Dietrich Schindler, 'Significance of the Geneva Conventions for the contemporary world' (1999) 81 *International Review of the Red* Cross 715, 724. See also UN War Crimes Commission, *The History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationary Office 1948) 171.

[137] Marko D. Öberg, 'The Absorption of Grave Breaches Into War Crimes Law' (2009) 91 *International Review of the Red Cross* 163, 179–80.

imposes *aut dedere aut judicare* obligations where the Rome Statute[138] or customary law does not.[139]

The scope of the Geneva Conventions, with the exception of common Article 3, is limited to conflicts of an international character.[140] In 1977, two Additional Protocols were adopted, the first expanding the protections of the original conventions in respect to international armed conflict,[141] and the second establishing specific regulation for the conduct of hostilities in non-international armed conflict.[142] The core principles of IHL, embodied principally within the Geneva Conventions and Additional Protocol I (AP I), have been considered by the ICJ to be "so fundamental to the respect of the human person and elementary considerations of humanity" that they must "be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[143] This has been affirmed in subsequent jurisprudence.[144] In subsequent cases, the ICJ has

[138] Some have argued that the preamble of the Rome Statute, in establishing complimentary jurisdiction, endorses the principle of *aut dedere aut judicare* and UJ through this following language: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation … Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3 (Rome Statute) preamble, paras 4 and 6. See eg, Philippe (n 18) 376 fn 2. But see *contra* Claire Mitchell, *Aut Dedere, Aut Judicare: The Extradite Or Prosecute Clause in International Law* (IHEID Publications 2009) paras 61–63.
[139] On the *aut dedere aut judicare* principle in customary international law, see Bassiouni and Wise (n 70) 26–50; Edward M. Wise, 'Extradition: The Hypothesis of a Civitas Maxima and the Maxim *Aut Dedere Aut Judicare*' (1991) 62 *Revue Internationale de Droit Pénal* 109, 109–34; Lee A. Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations' (1999) 39 *Virginia Journal of International Law* 425, 442–43.
[140] GC (n 135) common art 2.
[141] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3 (AP I) art 1(3).
[142] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 609 (AP II) art 1(1).
[143] *Nuclear Weapons* Advisory Opinion (n 49) [79] (internal citation omitted).
[144] See eg, *Tadić* Appeals Decision (n 4) paras 79–85; *Prosecutor v Delalić* (Appeal Judgmnet) IT-96-21-A (20 February 2001) (*Čelebići* Appeal Judgment) para 113; *Prisoners of War – Eritrea's Claim 17 (Eritrea/Ethiopia)* (Partial Award) (2003) 26 RIAA 23 [39] (Eritrea-Ethiopia Claims Commission); *Prisoners of War – Ethiopia's Claim 4 (Eritrea/Ethiopia)* (Partial Award) (2003) 26 RIAA 73 [30] (Eritrea-Ethiopia Claims Commission). For the expression of this principle before the *Nuclear Weapons* advisory opinion, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 [218].

interpreted this passage as conveying the *erga omnes* nature of core IHL principles.[145] The Geneva Conventions thus prescribe some of the most important norms within the *corpus* of *jus cogens*.[146] In this regard, the ICTY Appeals Chamber has recognized the prohibition against serious violations of IHL as "universal in nature" and "transcending the interest of any one State."[147] While UJ prosecutions for grave breaches of the Geneva Conventions only began to appear in the 1990s,[148] a number of notable UJ cases have centred around violations of the Geneva Conventions, most notably those of Refik Sarić,[149] Goran Grabež,[150] and Novislav Djajić[151] in Denmark, Switzerland, and Germany, respectively. Other times, acts qualifying as grave breaches of the Geneva Conventions have been prosecuted as other international offenses under UJ, such as crimes against humanity or as ordinary crimes within national jurisdictions.[152]

(ii) Incorporation into National Law

The GCA incorporates only certain parts of the original four conventions of 1949—excluding common Article 3 and Additional Protocol II (AP II), both of which apply to non-international armed conflict, into English criminal law.[153] The specific exclusion of provisions relating to non-international armed conflict, which are of 'direct concern to the sovereignty of

[145] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Wall* Advisory Opinion) [157]–[158]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 (*Bosnian Genocide* Judgment) [147].
[146] Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *American Journal of International Law* 348, 350; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford UP 1989) 9; M. Cherif Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997) 341–46.
[147] *Tadić* Appeals Decision (n 4) para 141.
[148] Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 *Modern Law Review* 1, 6.
[149] UfR 1995.848 L (Denmark) (*Sarić*)
[150] *Prosecutor v Djajić* (1997) 92 American Journal of International Law Supplement 78 (Military Tribunal at Lausanne) (Switzerland).
[151] BayObLG 23 May 1997, NJW 1998, 392 (Germany) (*Grabež*).
[152] See eg, BGH 13 February 1994, 14 NStZ 232 (Germany); OLG Frankfurt 29 December 2015, 12 W 52/15 (Germany). See also Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723, 725–34.
[153] Geneva Conventions Act 1957 (GCA) s 1(1).

the state in whose territory such a conflict takes place,'[154] was likely done to prevent the statutory ambiguity encountered in other jurisdictions.[155] Yet common Article 3 is still regarded as the minimum standard of conduct in armed conflict,[156] and the courts of England may still prosecute individual violations of common Article 3 and Additional Protocol II under the ICCA, however, the jurisdiction conferred by this Act is narrower than that of the GCA, as discussed in *infra* Section 2.C.

All four Geneva Conventions prescribe that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[157] The ICRC's Commentary recognizes this provision as requiring States to establish UJ over grave breaches.[158] Customary IHL also establishes the right of States to assert UJ over war crimes.[159] Section 1(1) of the GCA makes it a criminal offense for "[a]ny person, whatever his nationality … whether in or outside the United Kingdom" to commit a

[154] HR (Supreme Court) 8 July 2022, NL:PHR:2008:BG1477, para 7.3 (The Netherlands) (official translation).
[155] See eg, *Sarić* (n 149) (where the Danish High Court did not rule on the character of the conflict in Yugoslavia, *eo ipso* regarding it as immaterial to the charge of grave breaches); HR 11 November 1997, NJ 1998, 463, para 5.2 (where the Dutch Supreme Court found that the character of the armed conflict was irrelevant as common article 3 to the Geneva Conventions provided a minimum standard of conduct in all armed conflicts); *Grabež* (n 148) 79 (where a Swiss military tribunal, while classifying the conflict in Yugoslavia as an international armed conflict, stated that there would be no effect on the applicability of the Swiss penal statute if the conflict was non-international in character); *State v Basson* 2005 (1) SA 171 (CC) 179 (where the Constitutional Court of South Africa found the character of conflict immaterial as common article 3 prescribes a minimum standard of conduct in all armed conflicts).
[156] *Military and Paramilitary Activities in and against Nicaragua* (n 144) [218]; *Prosecutor v Akayesu* (Appeal Judgment) ICTR-96-4-A (1 June 2001) (*Akayesu* Appeal Judgment) para 443; *Čelebići* Appeal Judgment (n 144) para 150; *Prosecutor v Karadžić* (Decision on Hostage-Taking) IT-95-5/18-AR72.5 (9 July 2009) (*Karadžić* Decision on Hostage-Taking) para 26.
[157] GC I (n 135) art 49(2); GC II (n 135) art 50(2); GC III (n 135) art 129(2); CG IV (n 135) art 146(2).
[158] Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) (AP Commentary) para 3403. See also Yves Sandoz, 'The History of the Grave Breaches Regime' (2009) 7 *Journal of International Criminal Justice* 657, 675.
[159] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol 1 (ICRC/Cambridge UP 2005) 604.

'grave breach' of the Geneva Conventions or AP I.[160] Grave breaches are defined with recourse to Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention, Article 147 of the Fourth Convention, and Articles 11(4), 85(2), (3), and (4) of AP I.[161] A full enumeration of acts considered grave breaches under these provisions would be unnecessary for the purposes of this article, but generally, grave breaches are those acts universally considered impermissible during war,[162] such as the wilful killing of civilians and prisoners of war, targeting of civilians and civilian property absent military necessity, and torture and ill-treatment of prisoners of war or those *hors de combat*. While not explicitly stated in the GCA, grave breaches form the core of the international offense of war crimes.[163]

The GCA confers broad UJ on English courts to prosecute such offenses no matter the territorial scope of their commission or the nationality of the perpetrator, with the only exception that the initiation of prosecution requires the approval of the Attorney-General.[164] In contemplating such an approval, the Attorney-General would likely make a determination under the *prima facie* test,[165] although political considerations will undoubtedly come into play. If the UK were to request the extradition of an indicted person from another country, they would have

[160] GCA, s 1(1)
[161] Ibid, s 1(1A); GC I (n 135) art 50; GC II (n 135) art 51; GC III (n 135) art 130; CG IV (n 135) art 147; AP I (n 141) arts 11(4), 85(2), (3), and (4).
[162] There are, of course, those violations of IHL that do not rise to the level of grave breaches. See Öberg (n 137) 165; Sandoz (n 158) 674.
[163] AP I (n 140) art 85(5); ILC Draft Code of Crimes (n 13) commentary on art 20, para 10; Rome Statute (n 138) art 8(2)(a). See also AP Commentary (n 158) para 3408; Beth Van Schaack, 'The Establishment of the Permanent International Criminal Court' (1999) 17 *Chinese (Taiwan) Yearbook of International Law* 1, 52; Öberg (n 137) 164–69. Not all violations of IHL constitute war crimes, therefore, the grave breaches regime has proved useful in delaminating those violations of IHL serious enough to impute individual criminal responsibility for war crimes, see Bert V.A. Röling, 'Aspects of the Criminal Responsibility for Violations of the Laws of War' in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica 1979) 211; Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* (Aldershot 1992) 335–36.
[164] GCA, s 3(a). See also UK Foreign & Commonwealth Office, *Voluntary Report on the Implementation of International Humanitarian Law at Domestic* Level (2019) 24
[165] See text accompanying nn 167–80.

to make the argument of a *prima facie* case against them in the courts of the extraditing country.[166]

The Geneva Conventions prescribe that a *prima facie* case for grave breaches must exist for a State to bring a suspected perpetrator before its domestic courts.[167] English courts have dealt with a number of cases applying the *prima facie* standard,[168] primarily in the context of extraditions.[169] The standard was most notably interpreted in *Mallya v Government of India* as a determination of "whether a reasonable jury could draw the inference of guilt."[170] This threshold has been recognized as a low one, and does not require the exclusion of all alternative theoretical narratives.[171] The House of Lords also stated in *Norris v Government of the USA* that the potential unavailability of "significant relevant witnesses or documents" due to the passage of time may preclude the existence of a *prima facie* case,[172] although the prosecution of a Belarusian Nazi collaborator at the turn of the 21st-century appears to call this wisdom into question.[173]

---

[166] GC I (n 135) art 49(2); GC II (n 135) art 50(2); GC III (n 135) art 129(2); CG IV (n 135) art 146(2). See also Knut Dörmann et al. (eds), *Commentary on the First Geneva Convention* (ICRC/Cambridge UP 2016) (GC I Commentary) paras 2881–82; Knut Dörmann, et al. (eds), *Commentary on the Second Geneva Convention* (ICRC/Cambridge UP 2017) (GC II Commentary) paras 2988–92; Knut Dörmann et al. (eds), *Commentary on the Third Geneva Convention* (ICRC/Cambridge UP 2020) (GC III Commentary) paras 5147–48; Jean S. Pictet (ed), *Commentary on the Fourth Geneva Convention* (ICRC 1958) (GC IV Commentary) 593.
[167] GC I (n 135) art 49(2); GC II (n 135) art 50(2); GC III (n 135) art 129(2); CG IV (n 135) art 146(2).
[168] Also known as the 'probable cause' test, see eg, *Ierardi v Gunter*, 528 F 2d 929, 930 (1st Cir 1976); *Michigan v Doran*, 439 US 282, 289 (1978); *Re Surrender of Ntakirutimana*, 988 F Supp 1038, 1042 (SD Tex 1997); *Ntakirutimana v Reno*, 184 F 3d 419, 427–30 (5th Cir 1999), cert denied, 528 US 1135 (1999); *Government of the USA v Bowen* [2015] EWHC 1873 (Admin), [2015] CN 1096 [23] (Burnett LJ); *Government of the USA v Giese* [2015] EWHC 2733 (Admin), [2015] CN 1572 [18] (Aikens LJ).
[169] See eg, *Ugirashebuja v Government of the Republic of Rwanda* [2009] EWHC 770 (Admin), (2011) 142 ILR 568 [18], [58] (Laws LJ); *Devani v Republic of Kenya* [2015] EWHC 3535 (Admin) [49] (Sir Richard Aikens); *Government of the Republic of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin) [411]–[420] (Irwin LJ and Foskett J).
[170] *Mallya v Government of India* [2020] EWHC 924 (Admin) [33] (Irwin LJ and Laing J), quoting *R v Masih* [2015] EWCA Crim 477 [3] (Pitchford LJ) (emphasis omitted).
[171] *Modi v Government of India* [2021] EWHC 2257 (Admin) [47] (Chamberlain J).
[172] *Norris v Government of the USA* [2008] UKHL 16, [2008] 1 AC 920 [106].
[173] See *R v Sawoniuk* [2000] EWCA Crim 9, (2001) 2 Cr App R 220 [28] (Lord Bingham CJ).

The only case of note where an English court has directly dealt with the *prima facie* test in relation to the Geneva Convention has been *Republic of Serbia v Ganić*, where Judge Workman of the Westminster Magistrates Court denied the extradition of former Bosnian President Ejup Ganić to Serbia for alleged grave breaches. However, this case is of little assistance in regard to the *prima facie* test, as the extradition request was ultimately denied on the grounds that Ganić's prosecution was politically motivated.[174] The prima facie test has been delt with in *obiter* by the Supreme Court and High Court in *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* and *Alseran v Ministry of Defence*, respectively, though not to a particularly insightful degree.[175] In *Ugirashebuja v Government of the Republic of Rwanda*, the High Court deal in brief with the *prima facie* test in extradition proceedings against alleged Rwandan *génocidaires*. The lower court had held that a *prima facie* case existed on the basis of witness statements, many of which by alleged eye-witnesses, which "implicated all the appellants in killings and other acts associated with the genocide of 1994."[176] Lord Justice Laws, however, did not endeavor a deeper examination of this question, instead rejecting the application for extradition on the grounds of the defendants' right to a fair trial in Rwanda.[177]

The US Court of Appeals for the Sixth Circuit was also faced with the *prima facie* test in *Demjanjuk v Petrovsky*, a *habeus corpus* petition in extradition proceedings against an alleged former guard at the Treblinka concentration camp to Israel on charges of crimes against humanity.[178] Chief Justice Lively, delivering the appellate court's judgment, held that the *prima*

[174] *Republic of Serbia v Ganić* [2010] EW Misc 11, (2015) 160 ILR 651 [40] (Workman J).
[175] See *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48, [2013] 1 AC 614 [36] (Lord Kerr JSC); *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [2019] 1 QB 1251 [233] (Leggatt J).
[176] *Ugirashebuja* (n 169) [18] (Laws LJ).
[177] Ibid [142].
[178] John Demjanjuk would be convicted in Israel, a conviction which was overturned by the Supreme Court, finding that Demjanjuk had been misidentified as 'Ivan the Terrible,' a notoriously brutal guard at Treblinka. Cr.C. (Jerusalem) 373/86 *State of Israel v Demjanjuk* (1988) 5748 (c) PD 457, rev'd, Cr.A. 347/88 37 *Demjanjuk v State of Israel* (1993) 37 (4) PD 221. He would later be extradited to Germany where he would be convicted of 27,900

facie test had been correctly deemed as satisfied by the district court on the basis of a number of primary documents. The court found that a document from the SS training camp Trawniki, identifying 'Iwan Demjanjuk' as an SS guard, and eye-witness reports identifying Demjanjuk as the guard 'Ivan' at the Treblinka camp were sufficient to satisfy the *prima facie* test.[179] The shift of international evidence-gathering practice towards increasingly digital techniques in the last decade will undoubtedly make the *prima facie* test a rather simple standard to satisfy.[180] With access to Russian primary documents, absent regime change, obviously limited, digital evidence will likely play a key role in the building of *prima facie* cases against perpetrators of atrocity crimes. In Ukraine, non-governmental organizations have been particularly active in the collection of digitally derived evidence, particularly through open-source intelligence strategies.[181] With this evidence increasingly being made available through public resources,[182] experts are highlighting the vital role digital evidence will play in the prosecution of perpetrators of international crimes in Ukraine.[183] The value of digital evidence in UJ investigations has already been on full display in German, Swedish, Finnish, and Dutch prosecutions of

counts of accessory to murder during his time as a guard at the extermination camps of Sobibor, Majdanek, and Flossenbürg. See generally Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton UP 2016).

[179] *Demjanjuk v Petrovsky*, 776 F 2d 571, 576–77 (6th Cir 1985), cert denied, 475 US 1016 (1986).

[180] See Federica D'Alessandra and Kirsty Sutherland, 'The Promise and Challenges of New Actors and New Technologies in International Justice' (2021) 19 *Journal of International Criminal Justice* 9, 19–21.

[181] Julia Crawford and Franck Peti, 'Insights on the Digital Revolution for War Crimes Probes in Ukraine' (*Justice Info*, 31 May 2022) <https://www.justiceinfo.net/en/93111-insights-digital-revolution-war-crimes-probes-ukraine.html>; Lila Carrée, 'The Role Of Technology In The Exposition Of War Crimes In Ukraine: How The Use Of Cutting-Edge Technologies And Open-Sources Investigations Can Expose Human Rights Violations' (*London School of Economics*, 2 February 2023) <https://blogs.lse.ac.uk/humanrights/2023/02/02/the-role-of-technology-in-the-exposition-of-war-crimes-in-ukraine-how-the-use-of-cutting-edge-technologies-and-open-sources-investigations-can-expose-human-rights-violations/>.

[182] See eg, 'Civilian Harm in Ukraine' (*Bellingcat*, last accessed 19 March 2023) <https://ukraine.bellingcat.com/>; 'Eyes on Russia Map' (*Center for Advanced Defense Studies*, last accessed 19 March 2023) <https://c4ads.org/multimedia/eyes-on-russia-map/>.

[183] See eg, Alexa Koenig, 'From 'Capture to Courtroom' Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 *Journal of International Criminal Justice* 829; Flynn Coleman, 'To Prosecute Putin for War Crimes, Safeguard the Digital Proof' (*Foreign Policy*, 10 April 2022) <https://foreignpolicy.com/2022/04/10/prosecute-putin-war-crimes-evidence-bucha-safeguard-digital-proof/>.

perpetrators of genocide, war crimes, and crimes against humanity committed in Syria and Iraq.[184]

The GCA specifically provides that "proceedings may be taken" if an offense is committed outside the UK and that it "may for incidental purposes be treated as having been committed, in any place in the United Kingdom."[185] The context of grave breaches in the context of prosecutions under the GCA must be distinguished from the finding of foreign State breaches of the Geneva Conventions. The High Court has explicitly found that determinations of whether another State is responsible for grave breaches of the Conventions are outside the competence of the courts of England.[186] This logic is grounded in the Act of State doctrine—the practice of afforded non-intervention by English courts in matters of foreign policy that may abridge on another State's sovereignty.[187] However, criminal prosecutions do not present such an impediment. In *Rahmatullah*, the Supreme Court determined that the Act of State doctrine, as applied to grave breaches in *Al-Haq*, does not apply when the courts are not being asked to pass judgment on another *State's* compliance with its international obligation.[188] Since the International Military Tribunal at Nuremberg's famous assertion that "[c]rimes against international law are committed by men, not by abstract entities,"[189] the norm of individual

[184] See Karolina Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions' (2021) 19 *Journal of International Criminal Justice* 189, 198–208; Mark Klamberg, 'Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden' (2020) 66 *Scandinavian Studies in Law* 367, 376–79.
[185] GCA, s 4.
[186] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), (2014) 154 ILR 423 [41] (Pill LJ).
[187] See *Buttes Gas & Oil Co v Hammer (No 2)* [1975] 1 QB 557 (CA) 572 (Lord Denning MR); *Buttes Gas & Oil Co v Hammer (No 3)* [1982] 1 AC 888 (HL) 933–38 (Lord Wilberforce). See also *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin), ILDC 662 (UK 2002) [36] (Simon Brown LJ); *R v Jones* (n 113) [30] (Lord Bingham).
[188] *Rahmatullah* (n 175) [53] (Lord Kerr JSC).
[189] *France v Göring* (1946) 22 Trial of the Major War Criminals before the International Military Tribunal 411, 466.

criminal responsibility, even of State officials, has experienced a normative cascade,[190] most recently reflect in the Rome Statute.[191] Accordingly, the Acts of State doctrine would be irrelevant when prosecuting individuals under the GCA pursuant to the principle of UJ.

B. TORTURE

(i) Scope of International Obligations

Torture has been regarded as crime under customary international law since at least the 1980s,[192] and its prohibition has since been internationally recognized as bearing *jus cogen* status.[193] Lord Cooke described the right to be free from torture as a "right inherent in the concept of civilisation."[194] In English jurisprudence, most notably in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)*,[195] and more recently in *R v Taylor*,[196] state-sponsored torture has been regarded as "an international crime in the highest sense."[197] As Lord Bingham remarked in *A v Secretary of State for the Home Department (No 2)*, "[t]here can be few issues on which international legal opinion is more clear than on the condemnation of torture."[198] In the same case, Lord Rodger branded the torturer "*hostis humani*

[190] Kai Ambos, *Treatise on International Criminal Law*, vol I (2nd edn, Oxford UP 2021) 160–61; Luis Moreno-Ocampo, 'International Criminal Justice: Learning From Reality' (2015) 16(2) *Georgetown Journal of International Affairs* 47, 49–53.
[191] Rome Statute (n 138) art 27(1). See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers 2005) 157; Hans-Heinrich Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 *Journal of International Criminal Justice* 38, 44; Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Triffterer and Ambos (n 42) 979, 983–84.
[192] Hof (Court of Appeal) Amsterdam 20 November 2000, NJ 2001, 51, paras 5.1–5.2.
[193] See eg, *Furundžija* Trial Judgment (n 4) [144]; *Selmouni v France* (1999) 29 EHRR 403 [95]; *Cantoral-Benavides v Peru* (Merits) Inter-American Court of Human Rights Series C No 88 (18 August 2000) paras 103, 117; *Čelebići* Appeal Judgment (n 144) paras 172, 225; *Prosecutor v Kunarac* (Trial Judgment) IT-96-23 & 23/1-T (22 February 2001) (*Kunarac* Trial Judgment) para 466; *Kalashnikov v Russia* [2002] ECHR 596 [95]; *Baykara v Turkey* [2008] ECHR 1345 [73]; *Questions relating to the Obligation to Prosecute or Extradite* (n 58) [99].
[194] *Higgs v Minister of National Security (Bahamas)* [1999] UKPC 55, [2000] 2 AC 228 [74] (Lord Cooke).
[195] *Pinochet (No 3)* (n 113).
[196] *R v Taylor* [2019] UKSC 51, [2021] 1 AC 349.
[197] *Pinochet (No 3)* (n 113) 198 (Lord Browne-Wilkinson).
[198] *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 AC 221 [33] (Lord Bingham).

generis,"[199] echoing the well-known *dictum* of Judge Kaufman of the US Court of Appeals for the Second Circuit in *Filártiga v Peña-Irala* that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[200]

The ECtHR has remarked that the prohibition against torture "enshrines one of the most fundamental values of democratic society."[201] The UN Committee Against Torture, the body tasking with monitoring State compliance with the 1984 Convention Against Torture (CAT), has furthermore held, on a number of occasions, that the prohibition against torture is absolute, with no exceptional circumstances, including armed conflict, able to be invoked as a justification of torture.[202] The ECtHR has remarked that "[u]nder no circumstances should [States] give the impression that they are prepared to allow [torture] to go unpunished."[203] Accordingly, in its *Belgium v Senegal* case, the ICJ classified the prohibition against torture as an *erga omnes* obligation.[204] Thus, "the *ius cogen* character of the prohibition must entail its universal prosecutablity."[205]

The definition of torture in English law is grounded in the CAT,[206] Article 1(1) of which defines torture as follows:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any

[199] Ibid [130].
[200] *Filártiga v Peña-Irala*, 630 F 2d 876, 890 (2nd Cir 1980) (Kaufman J). See also *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 791 fn 20 (DC Cir 1984) (Edwards J, concurring), cert denied, 470 US 1003 (1985); *CUSCN v Reagan* (n 46) 941–42; *Siderman de Blake* (n 52) 717.
[201] *Selmouni* (n 193) [95]; *Kalashnikov* (n 193) [95].
[202] See eg, *Khater v Moroco*, Communication No 782/2016, UN Committee Against Torture (26 December 2019) UN Doc CAT/C/68/D/782/2016, para 10.2; UN Committee Against Torture, 'Conclusions and recommendations of the Committee against Torture: Belgium' (23 June 2003) UN Doc CAT/C/CR/30/6, para 7(b).
[203] *Egmez v Cyprus* (2002) 34 EHRR 2 [71].
[204] *Questions relating to the Obligation to Prosecute or Extradite* (n 59) [68].
[205] Ambos, *Treatise II* (n 30) 281.
[206] *Pinochet (No 3)* (n 113) 189, 202 (Lord Browne-Wilkinson); *A v Secretary of State for the Home Dept (No 2)* (n 138) [111] (Lord Hope); *Jones v Saudi Arabia* (n 49) [16] (Lord Bingham), [49] (Lord Hoffman).

> kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[207]

Within the meaning of this article, 'act' encompasses both positive actions and negative omissions.[208] Article 4(1) of the CAT provides that States Parties "shall ensure that all acts of torture are offenses under its criminal law."[209] The jurisprudence of the UN Committee Against Torture suggests that this obliges States to penalize torture as a district offense.[210] As such, while the CAT is an international instrument, its means of enforcement are envisioned primarily within the domestic legal systems of States Parties.[211] It has also been of great use in assessing customary international law on torture[212] and in interpreting the definition of torture in instruments that do not provide their own.[213] While the provisions of the Convention refer specifically to crimes committed within its territorial jurisdiction by a State's nationals, against its nationals, or by individuals present in its territory,[214] Article 5(3) stipulates that the

[207] CAT (n 100) art 1(1). Earlier instruments provide more rudimentary definitions and prohibitions against torture, see eg, UNGA Res 217 A (III), Universal Declaration of Human Rights (10 December 1948) art 5; International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171 (ICCPR) art 7.
[208] *R (Medical Justice) v Secretary of State for the Home Dept* [2017] EWHC 2461 (Admin), [2017] 4 WLR 198 [53] (Ouseley J), citing UN Committee Against Torture, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 18. See also Gerrit Zach, 'Article 1: Definition of Torture' in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Commentary* (2nd edn, Oxford UP 2019) 23, 42.
[209] CAT (n 100) art 4(1).
[210] Nóra Katona, 'Article 4: Obligation to Criminalize Torture' in Nowak, Birk, and Monina (n 208) 176, 183, citing UN Committee Against Torture, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 8; UN Committee Against Torture, 'Concluding Observations: Djibouti' (2012) UN Doc CAT/C/DJI/CO/1, para 8; UN Committee Against Torture, 'Concluding Observations: Russian Federation' (2012) UN Doc CAT/C/RUS/CO/5, para 7.
[211] Crawford (n 11) 663.
[212] See eg, *Prosecutor v Delalić* (Trial Judgment) IT-96-21-T (16 November 1998) (*Čelebići* Trial Judgment) para 459; *Furundžija* Trial Judgment (n 4) para 160–62; *Prosecutor v Furundžija* (Appeal Judgment) IT-95-17/1-A (21 July 2000) (*Furundžija* Appeal Judgment) para 111; *Fleury v Haiti* (Merits and Reparations, Judgment) Inter-American Court on Human Rights Series C No 236 (23 November 2011) para 71 fn 54.
[213] See eg, *Selmouni* (n 193) [97]; *İlhan v Turkey* (2002) 34 EHRR 869 [85]; *Ameziane v United States* (Case 12.865) Report No 29/20, Inter-American Commission on Human Rights (2020) OEA/Ser.L/V/II doc 39, para 139.
[214] CAT (n 100) art 5(1), (2).

Convention 'does not exclude any criminal jurisdiction exercised in accordance with internal law.'[215] The CAT makes no reference to *aut dedere aut judicare* being confined territorially.[216]

In *Pinochet (No 3)*, Lord Browne-Wilkinson stated that "[t]he purpose of the [CAT] was to introduce the principle *aut dedere aut punire*—either you extradite or you punish."[217] This obligation is non-reciprocal, applying even in cases where another country will not extradite persons in its territory to the UK.[218] Thus, the ICJ interpreted Articles 5–7 of the CAT as requiring States Parties 'to adopt adequate legislation to enable it to criminalize torture [and] *give its courts universal jurisdiction in the matter*.'[219] The *aut dedere aut judicare* principle thus obliges as State to extradite those accused of certain serious crimes or, if extradition is not possible, to prosecute such persons before its own courts.[220] In *R v Secretary of State for the Home Department, ex parte Puttick*, Lord Justice Donaldson interpreted this obligation through the lens of the *nullus commodum capere potest de injuria sua propria* principle,[221] stating that UK law "require[s] the courts to refuse to assist a criminal to benefit from his crime" in the form of refusing to extradite them to a requesting State, or declining to prosecute when extradition is not possible.[222]

---

[215] Ibid, art 5(3).
[216] Roland Schmidt, 'Article 5: Types of Jurisdiction over the Offence of Torture' in Nowak, Birk, and Monina (n 207) 194, 219.
[217] *Pinochet (No 3)* (n 113) 200 (Lord Browne-Wilkinson) (citing Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) 131).
[218] Hirst (n 123) 203 (citing Ivor Stanbrook and Clive Stanbrook, *Extradition Law and Practice* (2nd edn, Oxford UP 2000) §§ 6.83–6.93).
[219] *Questions relating to the Obligation to Prosecute or Extradite* (n 58) [91] (emphasis added).
[220] *The Universal Jurisdiction (Austria) Case* (1958) 28 ILR 341, 342 (Supreme Court) (Austria).
[221] 'No one can obtain an advantage by his own wrong.' *Black's Law Dictionary* (6th edn 1990) 1068. See *Tippetts, Abbet, McCarthy, Stratton* (n 89) 228; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 392.
[222] *R v Secretary of State for the Home Dept, ex p Puttick* [1981] QB 767 (QB) 775 (Donaldson LJ).

It should be noted that the UK's international legal obligations in regard to the punishment of torture are not merely contractual obligations of conduct[223] but rather impose an obligation of *result.*[224] As Judge Cançado Trindade argued, international human rights obligations regulate 'the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person.'[225] The CAT does not merely obligate conduct in the form of the *aut dedere aut judicare*, but rather imposes the obligation of results. The UN Committee Against Torture, the body tasked with monitoring and interpreting the CAT, has stated that the Convention embodies "a general rule of international law which should oblige all States to take *effective* measures to prevent torture and to punish acts of torture."[226] Other international bodies have similarly found that human rights provisions of similar character impart an obligation of results on States.[227]

(ii) Incorporation into National Law

Relative to UJ prosecutions for violations of the Geneva Conventions, those for torture under the CAT are a comparatively new phenomenon, with the first successful conviction in a domestic court for such an offense being in 2004 in The Netherlands.[228] English courts hold UJ over torture committed as an official act under Section 134 of the CJA. The definition of torture under Section 134(1) of the CJA mirrors that of the CAT:

---

[223] cf *Tehran Hostages* Judgment (n 61) [62].
[224] See ILC Articles on State Responsibility (n 88) 20; Andrea Gattini, 'Breach of International Obligations' in André Nollkaemper and Ilia Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (Cambridge UP 2014) 25; Tiphaine Demaria, 'Obligations de comportement et obligations de résultat dans la jurisprudence de la Cour internationale de Justice' (2021) 58 *Annuaire Canadien de Droit International* 362.
[225] *Questions relating to the Obligation to Prosecute or Extradite* (n 59) 487 [50] (Cançado Trindade J, separate opinion).
[226] *OR, NM, MS v Argentina*, Communication Nos 1/1988, 2/1988, and 3/1988, UN Committee Against Torture (23 November 1989) UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988, para 7.2 (emphasis added).
[227] See eg, *Association of Victims of Post Electoral Violence v Cameroon* (2009) AHRLR 9 [129] (African Commission on Human and Peoples' Rights).
[228] Rb (District Court) Rotterdam 7 April 2004, NL:RBROT:2004:AO7287, affd, HR 1 December 2009, NJ 2010, 101 (The Netherlands).

> A public official or person acting in an official capacity, whatever his nationality, commits the offense of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.[229]

Section 134 thus confers jurisdiction over crimes of torture committed outside the UK by non-British nationals. However, as Lord Millett observed in *Pinochet,* the requirement that the 'offence can be committed only by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity … is an essential ingredient of the offence.'[230] He observed that only in such a case could the offense of torture attract universality in jurisdiction.[231] This is commonly known as the 'public official' requirement.

As Lord Lloyd-Jones noted in *Taylor,* it is important to recall that the 'public official' requirement is no longer present in the definition of torture under IHL,[232] limiting the comparative value of IHL jurisprudence when examining torture under both the CAT and English law.[233] All four Geneva Conventions classify torture as a grave breach,[234] with AP I classifying as a grave breaches any "wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends,"[235] which a wartime act of torture would likely qualify as.[236] One of the principal utilities of the CAT's definition of torture in comparison to that of IHL is that it

---

[229] CJA, s 134(1).
[230] *Pinochet (No 3)* (n 113) 277 (Lord Millett).
[231] Ibid, 328. See also Zach (n 208) 59.
[232] Christopher K. Hall and Carsten Stann, 'Article 7(1)(f): Torture' in Triffterer and Ambos (n 42) 204, 205; Ambos, *Treatise II* (n 30) 97–98. See *Prosecutor v Kvočka* (Appeal Judgement) IT-98-30/1-A (28 February 2005) paras 139, 284; *Prosecutor v Kunarac* (Appeal Judgment) IT-96-23 & 23/1-A (12 June 2002) (*Kunarac* Appeal Judgment) para 148). In earlier cases, the *ad hoc* tribunals were less willing to dismiss the 'public official' requirement, see *Čelebići* Trial Judgment (n 212) para 473; *Furundžija* Trial Judgment (n 4) para 162; *Furundžija* Appeal Judgment (n 212) para 111; *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) (*Akayesu* Trial Judgment) para 594.
[233] *Taylor* (n 196) [20] (Lord Lloyd-Jones JSC).
[234] GC I (n 135) art 50; GC II (n 135) art 51; GC III (n 135) art 130; CG IV (n 135) art 147.
[235] AP I (n 141) art 11(4).
[236] cf *Čelebići* Trial Judgment (n 212) paras 509–11; Christopher K. Hall and Carsten Stahn, 'Article 7(1)(k): Other Inhumane Acts' in Triffterer and Ambos (n 42) 235, 240–41.

does not demand a nexus with an armed conflict. Such a nexus requirement has been explicitly rejected in regard to crimes against humanity,[237] a category of offense under which torture falls,[238] with a definition largely modelled off that of the CAT with the expectation of its non-inclusion of the 'public official' requirement.[239]

C. Offenses Under the Rome Statute of the International Criminal Court

The ICCA was passed by Parliament to give effect to the UK's ratification of the Rome Statute, incorporating the crimes within the statute into domestic criminal law and setting out parameters for the UK's cooperation with the ICC.[240] Section 50 of the ICCA defines the crimes of genocide, crimes against humanity, and war crimes in accordance with the Rome Statute,[241] with Section 51(1) codifying these crimes as offenses in English criminal law.[242] Section 51(2) extends jurisdiction over these offenses extraterritorially, applying to acts committed domestically and those committed extraterritorially 'by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.'[243]

The ICCA does provide UJ *ratione materiae*, but not UJ *ratione personae*, with its jurisdiction being 'generally based on the territorial principle.'[244] In explaining the jurisdictional parameters of the ICAA, the Government stated: 'It is our policy to assume universal jurisdiction

[237] See eg, *Tadić* Appeals Decision (n 4) paras 140–41; *Prosecutor v Šešelj* (Reconsideration of Jurisdiction Decision) IT-03-67-AR72.1 (16 June 2006) paras 20–21.
[238] ILC Draft Code of Crimes (n 13) art 18(c); Rome Statute (n 138) art 7(1)(f).
[239] Compare Rome Statute (n 138) art 7(2)(e), and International Criminal Court (ICC), *Elements of Crimes* (2013) art 7(1)(f), with CAT (n 100) art 1(1).
[240] Michael P. Hatchell, 'Closing the Gaps in the United States Law and Implementing the Rome Statute: A Comparative Approach' (2005) 12 *ILSA Journal of International & Comparative Law* 183, 199–200.
[241] International Criminal Court Act 2001 (ICCA) s 50. See Rome Statute (n 138) arts 6, 7, 8.
[242] ICCA, s 51(1).
[243] Ibid, s 51(2).
[244] Council of Europe, 'Progress Report by the United Kingdom: Implementation of the ICC Statute' (7 September 2001) Doc Consult/ICC (2001) 31, 5.

only where an international agreement expressly requires it. The Rome statute does not.'[245] This rationale is unsatisfying in light of Article 88 of the Rome Statute's vague treatment of States Parties' obligation to implement its crimes in their domestic criminal codes.[246] Moreover, the simultaneous application of the ICCA and GCA in English law leads to some confusion, with some war crimes under the Rome Statute—and thus the ICCA—possessing different elements and thresholds to corresponding grave breaches of the Geneva Conventions and AP I under the GCA.[247] Nevertheless, given the restrictive jurisdiction *ratione personae* imposed by the ICCA, it would be of little use in prosecuting international crimes committed in Ukraine. The ICCA has, however been referenced in cases dealing with its constituent offense, though not in a substantive criminal context.[248] Thus, despite its restrictive jurisdictional ambit, the ICCA can nevertheless serve as a valuable point of reference when examining the context of the *corpus jus gentium* to which the UK has agreed to in assessing UJ.

3. PROSECUTING CRIMES IN UKRAINE

A multi-pronged international effort is currently working to gather evidence of international crimes in Ukraine for use in criminal proceedings. The most high-profile of these efforts is that of the ICC Office of the Prosecutor (ICC OTP), which opened an investigation into the Situation in Ukraine in March 2022 responsive to an unprecedented 49 referrals from States

[245] HL Deb 15 January 2001, vol 620, col 929. See Daniel T. Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues (1999) 10 *Criminal Law Forum* 87, 120. But see *contra* Louise Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?' (2003) 1 *Journal of International Criminal Justice* 585, 586–87.
[246] Marco Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy' (2007) 6 *Journal of International Criminal Justice* 493, 495. See Rome Statute (n 138) art 88.
[247] Colin Warbrick, Dominic McGoldrick, and Robert Cryer, 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51 *International & Comparative Law Quarterly* 733, 739–40.
[248] See eg, *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 [26] (Lloyd-Jones J); *R (Amirifard) v Secretary of State for the Home Dept* [2013] EWHC 279 (Admin), [2013] CN 260 [32]–[27] (Lang J); *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24, [2014] 1 WLR 872 [49] (Sir Terence Etherton MR); *Richardson v DPP* [2014] UKSC 8, [2014] 1 AC 635 [17] (Lord Hughes JSC).

Parties to the Rome Statute.[249] Two separate United Nations bodies are also undertaking concurrent investigations, the delamination of which remains ill-defined. Firstly, the UN Human Rights Monitoring Mission in Ukraine (HRMMU), dispatched by the Office of the UN High Commissioner for Human Rights (OHCHR) in 2014, has been actively reporting on the human rights situation in occupied Eastern Ukraine for over eight years, and has established an impressive investigatory record, particularly as it concerns the activities of Russia-aligned separatist groups. Secondly, in March 2022, the UN Human Rights Council established the Independent International Commission of Inquiry on Ukraine (COI) with a mandate to investigate, verify, and document alleged violations of international human rights law and IHL committed within the context of Russian aggression against Ukraine.[250]

Eurojust, the judicial cooperation agency of the European Union (EU), is also supporting a Joint Investigation Team (JIT) presently composed of seven countries cooperating to amass evidence of international crimes in Ukraine to support UJ prosecutions of perpetrators in member States. The EU has maintained an advisory mission in Ukraine since 2014,[251] but recently increased the scope of the mission to include providing assistance in the investigation of international crimes.[252] The European Parliament and European Council have recognized, in recent legislation, the importance of cooperation between various national investigations under

[249] See *Situation in Ukraine* (Notification on Receipt of Referrals and on Initiation of Investigation) ICC-01/22-2 (7 March 2022); *Situation in Ukraine* (Further Notification on Receipt of Referrals and of Article 18 Letters) ICC-01/22-7 (18 March 2022).
[250] See UNHRC Res 49/1 (7 March 2022) UN Doc A/HRC/RES/49/1. See also UNHRC Res S-34/1 (16 May 2022) UN Doc A/HRC/RES/S-34/1 (expanding the mandate of the COI).
[251] See Council Decision 2014/486/CFSP of 22 July 2014 on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) [2014] OJ L217/42.
[252] See Council Decision (CFSP) 2022/638 of 13 April 2022 amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) [2022] OJ L117/38.

UJ and international investigations, most notably, that of the ICC OTP.[253] Ukraine has announced its own investigations, but these are marred by fears that the Ukrainian justice system, during and in the aftermath of a major armed conflict, will be ill-suited to fairly administer justice for complex international crimes, fuelling calls for a specialist international or hybrid tribunal for Ukraine.[254] In January 2023, the UK announced its joining of what the Government termed an 'additional core group focused on Crimes of Aggression.'[255] The nature and scope of this group remain unknown, as do the tangible commitments entailed by the UK's membership and the group's relationship with other multilateral investigations, such as that of the JIT. Such investigations, however, remain, for the most part, overshadowed by that of the ICC OTP.

On March 7, 2023, a Pre-Trial Chamber of the ICC[256] issued a warrant for the arrest of Russian President Vladimir Putin and Maria Lvova-Belova, Commissioner for Children's Rights, for the war crime of forcibly deporting civilians, in this case Ukrainian children, from occupied territories.[257] The significance of this move in the history of international criminal justice cannot be overstated. The move by the ICC OTP to seek charges against the head of state of a

[253] European Parliament and Council Regulation (EU) 2022/838 of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences [2022] OJ L148/1, para 7.
[254] See eg, Michael P. Scharf et al., 'High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine' (*Opinio Juris*, 29 July 2022) <https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/>; Oona A. Hathaway, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine' (*Just Security*, 20 September 2022) <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>.
[255] UK Foreign & Commonwealth Office, 'UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine' (*HM Government*, 20 January 2023) <https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine>.
[256] Pre-Trial Chamber II, the Chamber assigned to the *Situation in Ukraine*, is composed of Judge Rosario Salvatore Aitala of Italy (Presiding), Judge Tomoko Akane of Japan, and Judge Sergio Gerardo Ugalde Godínez of Costa Rica. See *Situation in Ukraine* (Decision assigning the situation in Ukraine to Pre-Trial Chamber II) ICC-01/22-1 (2 March 2022); *Situation in Ukraine* (Notification of the election of the Presiding Judge) ICC-01/22-15 (23 February 2023).
[257] 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (*International Criminal Court*, 17 March 2033) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

permanent member of the UN Security Council, a so-called 'great power,'[258] is a landmark moment in international law and has been described by some experts as a 'Nuremberg moment.'[259] While this arrest warrant is a testament to the potential power the ICC will wield in the pursuit of justice for atrocity crimes, it also highlights what will undoubtedly be one of its primary shortcomings. The 2022 budget of the ICC stood at about £140 million.[260] The UK Crown Prosecution Service's 2021–22 budget on the other had stood at £663 million,[261] over four-and-a-half times that of the ICC. While these figures do not tell a complete picture—the Crown Prosecution Service's entire annual budget will not be spent on investigating and prosecuting international crimes—they nonetheless illustrate a broader point: the ICC cannot afford to prosecute *every* international crime committed in Ukraine.

Despite the Rome Statute's explicit verbiage that it shall aim to prosecute all perpetrators 'without any distinction based on official capacity,'[262] in practicality, the ICC has only yet been confronted with the issue of whether a perpetrator is *too high profile* to prosecute,[263] not vice versa. In the case of Ukraine, with the sheer volume and intensity of the conflict, the ICC will likely be confronted with the fact that its resources and bandwidth will only permit its investigation and prosecution of the highest-level perpetrators under the modality of command

[258] See eg, John J. Mearsheimer, *The Tragedy of Great Power Politics* (W.W. Norton 2001) 61; Jeffrey Mankoff, *Russian Foreign Policy: The Return of Great Power Politics* (Rowman & Littlefield 2009) 13.
[259] Amy Mackinnon, Christina Lu, and Jack Detsch, 'Putin Wanted by ICC Over Alleged War Crimes' (*Foreign Policy*, 17 March 2023) <https://foreignpolicy.com/2023/03/17/putin-war-crimes-against-humanity-warrant-icc-ukraine-children-reeducation-transfer-territory-lvova-belova/>; Reed Brody, 'Putin's Nuremberg Moment' (*The Nation*, 28 March 2023) <https://www.thenation.com/article/world/putin-russia-ukraine-war/>.
[260] ICC Assembly of States Parties, 'Proposed Programme Budget for 2022 of the International Criminal Court' (16 August 2021) Doc ICC-ASP/20/10, para 5 (conversion of €158,760,000 to GBP at 0.88 EUR/GBP exchange rate).
[261] Crown Prosecution Service, *Annual Report and Accounts 2021–2022* (HC 2021–22, 487) 35.
[262] Rome Statute (n 138) art 27(1).
[263] On the prosecutions of heads of state and other high-level state officials before the ICC, see Leila N. Sadat, 'Heads of State and Other Government Officials before the International Criminal Court: The Uneasy Revolution Continues' in Margaret M. de Guzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) 96. On issues of selection of cases at the ICC generally, see Margaret M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265.

responsibility or joint criminal enterprise—those who can be linked not only to individuals atrocities, but to widespread campaigns.[264]

Accordingly, when discussing justice in Ukraine, one must bear in mind that, much like a corporation, a State "has no mind of its own any more than it has a body of its own."[265] The responsibility of the Russian State for internationally wrongful acts in a conflict setting is determined by the acts of State organs whose conduct is attributable to the State.[266] Thus far more persons bear individual responsibility for serious crimes committed in Ukraine than simply high-level Russian leadership. This elucidates a prominent potential role for UJ prosecutions in adjudicating the vast volume of cases regarding alleged international crimes that are emerging from the conflict.

While many cases will, and already have, been adjudicated by Ukrainian domestic courts, as previously discussed, such tribunals—and the Ukrainian justice system generally—is unprepared to try these cases *en mass* in a manner that international justice standards.[267] Despite support for judicial reform from the international community,[268] their implementation shall take

---

[264] cf Carla Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility' (2004) 2 *Journal of International Criminal Justice* 516 (discussing similar dynamics that were at play at the International Criminal Tribunal for the former Yugoslavia). On command responsibility and joint criminal enterprise, generally, see Lachezar Yanev, 'Joint Criminal Enterprise' in Jérôme de Hemptinne, Robert Roth, and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge UP 2019) 121; Miles Jackson, 'Command Responsibility' in de Hemptinne, Roth, and van Sliedregt (n 264) 409.

[265] *Lennard's Carrying Co Ltd v Asiastic Petroleum Co Ltd* [1915] 1 AC 705 (HL) 713 (Viscount Haldane LC).

[266] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (n 90) [62]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168 (*DRC v Uganda* Merits Judgment) [213]; *Bosnian Genocide* Judgment (n 145) [392]. See also *German Settlers in Poland* (Advisory Opinion) (1923) PCIJ Series B No 6, at 22; Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford UP 2010) 237, 239–41.

[267] cf 'Ukraine: Political interference with judicial independence must end' (*International Commission of Jurists*, 15 December 2021) <https://www.icj.org/ukraine-political-interference-with-judicial-independence-must-end/>; Mykhailo Zhernakov and Nestor Barchuk, 'Fresh challenges threaten to reverse Ukraine's judicial reform progress' (*Atlantic Council*, 12 December 2022) <https://www.atlanticcouncil.org/blogs/ukrainealert/fresh-challenges-threaten-to-reverse-ukraines-judicial-reform-progress/>.

[268] See eg, 'Ukraine: Support to the implementation of the judicial reform' (*Council of Europe*, last accessed 21 March 2023) <https://www.coe.int/en/web/cdcj/-support-to-the-judicial-reform-in-ukraine>.

time. In the meantime, it is imperative that justice is not excessively delayed, with the passage of time imperiling the availability of evidence and the reliability of testimonies.[269] UJ prosecutions in countries such as England with well-developed, robust justice systems and judges with relatively high knowledge of relevant international law will allow for perpetrators who, despite being low-level in terms of their official capacities, are nevertheless responsible for international crimes, to be investigated, prosecuted, and receive fair trials. While such perpetrators will likely never see the inside of a Hague-based courtroom, their low standing relative to other perpetrators cannot serve as a reason from them to escape accountability altogether.

A. RESPONSIBILITY OF MEMBERS OF THE RUSSIAN ARMED FORCES

(i) Grave Breaches of the Geneva Conventions and Additional Protocol I

In the words of Judge Weeramantry of the ICJ, IHL represents "the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war."[270] In order for an act constituting a grave breach *prima facie* to in fact amount to one in reality, the ICTY Appeals Chamber has found that it must have been committed in "furtherance of or under the guise of the armed conflict."[271] For the purpose of this article, this section and all those following shall assume that this requirement is met in all cases discussed. In its first report, delivered to the UN General Assembly in October 2022,[272] the COI laid out a number of potential internationally wrongful acts alleged to have been committed by members of the Russian armed forces in Ukraine that would fall under the UJ of English courts. These included

[269] See generally Maja Davidović, 'Reconciling Complexities of Time in Criminal Justice and Transitional Justice' (2021) 21 *International Criminal Law Review* 935.
[270] *Nuclear Weapons* Advisory Opinion (n 49) 443 (Weeramantry J, dissenting).
[271] *Kunarac* Trial Judgment (n 193) para 58.
[272] Independent International Commission of Inquiry on Ukraine, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533 (COI Report No 1).

the indiscriminate use of explosive weapons against predominantly civilian-populated areas,[273] the use of civilian populations and property as so-called 'human shields,'[274] direct attacks against civilians,[275] summary executions,[276] unlawful confinement, inhumane treatment, forcible transfers of populations,[277] torture, ill-treatment,[278] and sexual and gender-based violence.[279]

In its second report, delivered to the UN Human Rights Council in March 2023, the COI "found reasonable grounds to conclude that the invasion and Russian armed forces' attacks against Ukraine's territory and armed forces qualify as acts of aggression against Ukraine."[280] Moreover, this second report concludes that Russian forces have committed indiscriminate and disproportionate attacks,[281] attacks against Ukrainian civilian infrastructure,[282] acts deliberately endangering civilians,[283] summary executions of civilians or persons *hors de combat*,[284] attacks on civilians fleeing hostilities,[285] unlawful confinement of civilians and other protected persons,[286] unlawful deportation and transfer of civilians,[287] particularly Ukrainian children,[288]

[273] Ibid, paras 44–51.
[274] Ibid, paras 52–55.
[275] Ibid, para 56–59.
[276] Ibid, paras 65–74.
[277] Ibid, paras 75–80.
[278] Ibid, paras 81–87.
[279] Ibid, paras 88–98.
[280] Independent International Commission of Inquiry on Ukraine, 'Report of the Independent International Commission of Inquiry on Ukraine' (15 March 2023) UN Doc A/HRC/52/62 (COI Report No 2) para 3 (footnote omitted). The COI based the conclusion on the definition of the crime of aggression provided in UNGA Res 3314 (XXIX) (14 December 1974).
[281] COI Report No 2 (n 280) para 34.
[282] Ibid, paras 40–43.
[283] Ibid, paras 44–47.
[284] Ibid, paras 53–56.
[285] Ibid, paras 57–59.
[286] Ibid, paras 60–67.
[287] Ibid, paras 68–70
[288] Ibid, paras 95–102.

systematic and widespread torture,[289] sexual and gender-based violence,[290] and a plethora of violations of the laws of occupation under IHL.[291]

The conclusions contained in both of the COI's first two reports are bolstered by that of the OHCHR, published in March 2023.[292] This report, based on the fact-finding operations of the HRMMU, verifies many of the conclusions both of the COI and of popular media, including the widespread destruction of civilian objects,[293] including medical and educations institutions and critical infrastructure,[294] killings of civilians,[295] arbitrary detentions,[296] sexual violence,[297] forcible transfer of civilians,[298] and inhumane treatment of prisoners of war (POWs) including summary executions, medical neglect resulting in death, torture and ill-treatment, and detention in inhumane conditions.[299]

An extensive and in-depth examination of the constituent elements each grave breach, absent more detailed case-by-case information, would be inappropriate. The task of determining individual criminal liability for grave breaches shall ultimately fall to judicial institutions which prosecute alleged offenders. It is, however, worth noting which grave breaches *prima facie* appear to have been committed by members of the Russian armed forces, which would be justiciable in UJ prosecutions in English courts. Indiscriminate and disproportionate attacks both constitute grave breaches of AP I under Article 85(3)(b) and (c), respectively.[300] Attacks

[289] Ibid, paras 71–77.
[290] Ibid, paras 78–85.
[291] Ibid, paras 90–94.
[292] UN OHCHR, 'Report on the Human Rights Situation in Ukraine: 1 August 2022–31 January 2023' (24 March 2023) <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf> (UN OHCHR 35th Report).
[293] Ibid, paras 34.
[294] Ibid, paras 35–40.
[295] Ibid, paras 44–47.
[296] Ibid, paras 48–55.
[297] Ibid, paras 56–61.
[298] Ibid, paras 63–70.
[299] Ibid, para 62.
[300] AP I (n 141) art 85(3)(b) and (c).

specifically targeting civilians, rather than harming them through indiscriminate attacks, constitute grave breaches of the Fourth Geneva Convention and AP I.[301] Attacks specifically directed against Ukrainian civilian property and infrastructure also constitute grave breaches of the Fourth Convention.[302] Summary executions and torture constitute grave breaches of the First Convention and AP I when committed against wounded combatants or those *hors de combat,*[303] of the Third Convention when committed against POWs,[304] and of the Fourth Convention when committed against civilians.[305] In its landmark *Furundžija* case, the ICTY Trial Chamber found rape and sexual assault to be inhumane treatment causing great suffering for the purpose of IHL, and thus grave breaches of the Fourth Geneva Convention and AP I.[306] Accordingly, such acts by members of the Russian armed forces likely constitute grave breaches.

It is worth noting that Russian forces have likely committed a number of serious violations of the law of occupation, a fundamental component of IHL contained primarily in the 1907 Hague Regulations,[307] the Fourth Geneva Convention,[308] and AP I.[309] While the ICJ has held that the law of occupation constitutes customary IHL and is thus binding on all States,[310] there remains little opportunity for its violations to be prosecuted under UJ before English courts.

[301] GC IV (n 135) art 147; AP I (n 141) art 85(3)(a).
[302] GC IV (n 135) art 147.
[303] GC I (n 135) art 50; AP I (n 141) art 3(e).
[304] GC III (n 135) art 130.
[305] GC IV (n 135) art 147.
[306] *Furundžija* Trial Judgment (n 4) paras 165–69. See GC IV (n 135) art 147; AP I (n 141) art 85(4)(c). See also Richard J. Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277; Kelly Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkley Journal of International Law* 288.
[307] See Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907) 205 CTS 277, annex (Hague Regulations) arts 42–56.
[308] See GC IV (n 135) arts 69 and 49.
[309] See AP I (n 141) arts 27–34, 47–78, and 132.
[310] See *Wall* Advisory Opinion (n 145) [89] and [101]; *DRC v Uganda* Merits Judgment (n 266) [169].

Russian forces *prima facie* appear to have committed a wide range of violations of the laws of occupation;[311] however, of these violations, only a handful are covered as grave breaches.

The "unlawful deportation or transfer" of civilians and the "deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitute grave breaches of the Fourth Geneva Convention and AP I, respectively.[312] In its first report, the COI documented cases in which "after initial detention in Ukraine, individuals were forcibly transferred and unlawfully deported through Belarus, or directly, to the Russian Federation."[313] The COI reported more detailed findings on the subject in its second report, where it concluded that both men and women had been kept in makeshift detainment centers in Russian-occupied territories, then transferred to detention facilities in the Kursk and Bryansk regions of Russia, with some passing through Belarus before arriving in Russia.[314] The OHCHR also reported a number of such instances of forcible transfers and deportations of civilians.[315] The COI concluded that these acts constitute war crimes, specifically referring to them as grave breaches of the Fourth Geneva Conventions.[316] The OHCHR importantly observed that assessing the true scale of civilian deportations from occupied territories into Russia remains challenging due to a lack of access to Russian-occupied territories and to the areas in Russia where such persons are believed to have been deported to.[317]

Lastly, Russian authorities have implemented mass conscription efforts in the occupied Donbas region, often forcibly conscripting young men with no military background, many of

[311] See generally UN OHCHR 35th Report (n 292) paras 44–87.
[312] GC IV (n 135) art 147; AP I (n 141) art 85(4)(a). See also ibid, art 49.
[313] COI Report No 1 (n 272) para 80.
[314] COI Report No 2 (n 280) para 68–69.
[315] UN OHCHR 35th Report (n 292) para 64–66.
[316] COI Report No 2 (n 280) para 70.
[317] UN OHCHR 35th Report (n 292) para 63.

whom appear to have been abducted off the streets.[318] Such forced conscriptions have been documented by the OHCHR in both Donbas and Crimea.[319] While it remains to be conclusively determined whether these forced conscriptions are the work of Russian military authorities or the *de facto* separatist authorities, discussed in the next section, forcibly conscripting the civilian population of occupied territories constitutes a grave breach of the Fourth Geneva Conventions.[320] It should be noted that this subsection have provided a non-exhaustive overview of potential grave breaches of the Geneva Conventions and AP I for which members of the Russian armed forces could be prosecuted for in England and will likely grow as investigation efforts progress.

Lord Chief Justice Goddard famously stated that a "court should not find a man guilty of an offense against the criminal law unless he has a guilty mind,"[321] however, the Geneva Conventions fail to prescribe a *mens rea* for grave breaches.[322] However, it would appear that English courts will enjoy relatively broad authority to interpret requisite intent *lato sensu*. In the case of *Jorgić v Germany* before the ECtHR, Nikola Jorgić, a Bosnian Serb commander convicted of genocide in Germany under the principle of UJ, argued that his conviction was illegal as the German courts had applied a different *mens rea* standard for genocide that than prescribed by the Genocide Convention.[323] The ECtHR rejected this argument finding that 'it

[318] Polina Ivanova, 'Russia turns to Donbas conscripts to fill front lines' (*Financial Times*, 11 June 2022) <https://www.ft.com/content/e5b88958-b6e4-4417-ba50-eb1916092acd>; Ihor Burdyga and Regina Gimalova, 'Ukraine separatists draft anyone they can' (*Deutsche Welle*, 27 April 2022) <https://www.dw.com/en/how-ukraine-separatists-are-mass-conscripting-anyone-of-fighting-age/a-61608760>.
[319] UN OHCHR 35th Report (n 292) paras 71–72.
[320] GC IV (n 135) art 147.
[321] *Brend v Wood* (1946) 175 LTR 306 (KB) 307 (Lord Goddard CJ).
[322] GC I Commentary (n 166) para 2932.
[323] Compare Genocide Convention (n 2) art 2, with Strafgesetzbuch (StGB) [Criminal Code] (Germany) s 220a. Jorgić was convicted of genocide by the Higher Regional Court of Düsseldorf, see OLG Düsseldorf 26 September 1997, NJW-RR 1998, 490, a conviction later upheld by the Federal Court of Justice, see BGH 30 April 1999, NJW 2000, 2517, and subsequently the Federal Constitutional Court, see BVerfG (n 9).

was for the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt.'[324] Similarly, the ICRC Commentary on the First Geneva Convention clarifies that, in relation to grave breaches, "[n]ational judges will have the task of clarifying and interpreting the law in the light of the provisions of international law, leaving the judiciary with considerable room for interpretation."[325]

This jurisprudence leaves the question of *mens rea* largely open to the interpretation of English courts. They could turn to Article 30 of the Rome Statute, which prescribes a uniform *mens rea* for all crimes before the ICC,[326] of which grave breaches, in the form of corresponding war crimes, are a part.[327] This approach would demand the crime be committed 'willfully,' in that the perpetrator either acted intentionally or recklessly in intending to cause grievous bodily harm which they were reasonably aware that death was a likely consequence of.[328] Under this approach, premedication is not required.[329] Alternatively, for grave breaches involving killing, courts may turn to the *mens rea* of the common law crime of murder.[330] Section 1A(5) of the GCA states that an offense involving murder under the Act shall be punished as such,[331] lending some merit to the proposition that the *mens rea* of murder be applied to willful killing as a grave breach of the Geneva Convention. Alternatively, Alternatively, courts could proceed on a case-

[324] *Jorgić v Germany* [2007] ECHR 583 [114].
[325] GC I Commentary (n 166) para 2849 (citing ICRC Advisory Service on International Humanitarian Law, *Preventing and Repressing International Crimes*, vol 1 (2014) 33).
[326] Rome Statute (n 138) art 30.
[327] See ibid, art 8(2), defining a 'war crimes' as including those acts constituting a 'grave breach of the Geneva Convention of 12 August 1949.' See also ILC Draft Code of Crimes (n 13) 54, commentary on art 20, para 10; Öberg (n 137) 169.
[328] Knut Dörmann, 'Article 8: War Crimes – Analysis and Interpretation of Elements' in Triffterer and Ambos (n 42) 330–31.
[329] *Prosecutor v Brđanin* (Trial Judgment) IT-99-36-T (1 September 2004) para 386; *Prosecutor v Orić* (Trial Judgement) IT-03-68-T (30 June 2006) para 348; *Prosecutor v Brima* (Trial Judgement) SCSL-04-16-T (20 June 2007) para 690; *Prosecutor v Ndindiliyimana* (Trial Judgement) ICTR-00-56-T (17 May 2011) para 2143.
[330] See *R v Nedrick* [1986] 1 WLR 1025 (CA) 1028 (Lord Lane CJ); *R v Woollin* [1999] 1 AC 82 (HL) 96 (Lord Steyn), 97 (Lord Hope); *R v Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App R 461 [46]–[47] (Rix LJ). See also John Smith and Brian Hogan, *Criminal Law* (David Ormerod ed, 10th edn, Oxford UP 2009) 70–72.
[331] GCA, s 1A(5).

by-case basis as the *ad hoc* tribunals had done in their early stages, resulting in variety of standards of intent.[332] They could adopt the broad, but rather general, *mens rea* standard put forward by the ICTY Trial Chamber in its *Čelebići* case: "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental."[333] The specific *mens rea* to be applied in prosecutions of grave breaches is outside the scope of this article as it must be assessed in the context of individual perpetrators, most likely through a joint criminal enterprise,[334] and cannot be assessed from the actions of or ascribed to an entire party to a conflict generally.

(ii) Torture

It would be redundant to reiterate either the findings of the COI and OHCHR relating to the widespread torture and ill-treatment of Ukrainian POWs and civilians or the legal requirements for torture under the CAT and Section 134 of the CJA. Mock executions, the likes of which Ukrainian POWs were subjected to but which were not discussed at length above, have also been found to constitute torture.[335] Moreover, no serious contention can be made regarding the satisfaction of the 'public official' requirement in regard to members of the Russian armed forces. With members of a State's armed forces being uncontrovertibly considered organs of that State,[336] there can be little doubt regarding the satisfaction of the 'public official' requirement,

[332] GC I Commentary (n 166) para 2937 (citing Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (4th edn, Oxford UP 2020) para 462).
[333] *Čelebići* Trial Judgment (n 212) para 348.
[334] On intent in a joint criminal enterprise, see *Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999) (*Tadić* Appeal Judgment) para 228; *Prosecutor v Kvoćka* (Appeal Judgment) IT-98-30/1-A (7 February 2003) para 83; *Prosecutor v Vasiljević* (Appeal Judgment) IT-98-32 (25 February 2004) para 101; *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004) para 33; *Prosecutor v Stakić* (Appeal Judgment) IT-97-24-A (22 March 2006) para 65; *Prosecutor v Brđanin* (Appeal Judgement) IT-99-36-A (3 April 2007) para 411; *Prosecutor v Stanišić* (Appeal Judgment) IT-08-91-A (30 June 2016) para 958.
[335] See *Estrella v Uruguay*, Communication No 74/1980, UN Human Rights Committee (29 March 1983) UN Doc CCPR/C/18/D/74/1980, paras 1.6 and 8.3.
[336] See *DRC v Uganda* Merits Judgment (n 266) [213]; *Bosnian Genocide* Judgment (n 145) [392].

which simply aims to determine "whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct."[337]

In its second report, the COI specifically concluded that the torture of Ukrainians at the hands of the Russian armed forces constitutes a violation of victims' human rights under the CAT.[338] Yet one aspect of UJ prosecutions for torture by Russian soldiers worth noting is the potential for such accountability efforts to target sexual and gender-based crimes as crimes of torture. The *ad hoc* tribunals have recognized rape and sexual violence as forms of torture constituting crimes against humanity multiple times in its case law,[339] providing a clear jurisprudential framework through which English courts could assist in delivering justice for sexual violence, an often-overlooked consequence of armed conflict.

B. RESPONSIBILITY OF MEMBERS OF RUSSIA-ALIGNED GROUPS

Members of certain Russia-aligned groups in Donbas who are not themselves members of the armed forces would also be subject to UJ in English courts. The application of UJ in this context presents a number of compelling implications. Two primary Russia-aligned groups exist in Ukraine, the Donetsk People's Militia and the Luhansk People's Militia, the armed groups, respectively, of the Russian-recognized Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR).[340] These separatist militias have mobilized in support of the Russian armed forces, particularly as part of fighting in Donbas.[341] As mentioned above, the DPR and LRP have implemented mass conscription efforts in Donbas, often forcibly conscripting young men with

[337] *Kadic v Karadžić*, 70 F 3d 232, 245 (2nd Cir 1995), cert denied, 518 US 1005 (1996).
[338] COI Report No 2 (n 280) para 77.
[339] See eg, *Akayesu* Trial Judgment (n 232) para 688; *Kunarac* Trial Judgment (n 193) para 711; *Furundžija* Trial Judgment (n 4) paras 83, 264; *Prosecutor v Kvočka* (Trial Judgment) IT-98-30/1-T (2 November 2001) para 180.
[340] The international community has widely condemned and called for the non-recognition of Russian annexation of the DPR and LPR, see UNGA Res ES-11/4 (12 October 2022) paras 2–5; UNGA Res ES-11/L.7 (23 February 2023) paras 4 and 5.
[341] Golder (n 317).

no military background, many of whom appear to have been abducted off streets.[342] In its most recent report, the OHCHR has also documented such forced conscription efforts in occupied Crimea.[343]

(i) Application of International Humanitarian Law

A 2018 report from the OHCHR found a wide array of violations of IHL and human rights abuses committed by separatists of the DPR and LPR in Donbas from 2016–17.[344] Given their extensive participation in Russian hostilities, it is highly likely that separatist militia members have taken part in war crimes and torture in Ukraine. Consistent practice of international institutions demonstrates that non-State actors in armed conflicts are bound by IHL and international human rights norms.[345] For example, in Resolution 2127, the UN Security Council condemned "the continued violations of international humanitarian law and the widespread human rights violations and abuses, *perpetrated by armed groups*" in the Central African Republic.[346] In a 2002 Presidential Statement, the Security Council remarked that armed groups in the Democratic Republic of the Congo "must … ensure an end to all violations of human rights and to impunity in all areas under its control."[347]

The GCA furnishes UJ only for grave breaches of the Geneva Conventions and Additional Protocol I,[348] both of which apply only to armed conflict of an international character between States. Thus, the prosecution of DPR and LRP militia members hinges on the

[342] Ivanova (n 318); Burdyga and Gimalova (n 318).
[343] UN OHCHR 35th Periodic Report (n 292) para 71.
[344] UN OHCHR, 'Report on the Human Rights Situation in Ukraine: 16 November 2016 to 15 February 2017' (2018) <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UAReport17th_EN.pdf>.
[345] See, generally, the extensive study under taken by Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford UP 2018).
[346] UNSC Res 2127 (5 December 2013) para 17.
[347] UNSC Presidential Statement 2002/22 (23 July 2002) UN Doc S/PRST/2002/22.
[348] GCA, s 1(1).

classification of their combatancy as part of an international armed conflict between Ukraine and Russia rather than a non-international armed conflict between Ukraine and the separatists. Conspicuously, grave breaches of Additional Protocol II to the Geneva Conventions, which deals with non-international armed conflict between a State and internal non-State armed groups, do not fall under the GCA.[349] The question of whether the GCA could be used to prosecute pro-Russian separatists under UJ thus hinges on the legal classification of these separatists and their role in the international armed conflict between Russia and Ukraine. The character of the conflict after Russia's 2022 invasion is not in serious question. However, in the years and months prior, when Russian armed forces were not directly, or at least openly, operating on Ukrainian territory,[350] the liability of Russia-aligned groups for grave breaches is dependent on the classification of this pre-invasion conflict as one of international, rather than internal, character.

Firstly, the DPR and LRP militias, heavily equipped with Russian weaponry, structured into formal military-like units, and fighting in a coordinated manner, qualify as an organized armed group.[351] Prior to Russia's invasion, these armed groups could reasonably be considered part of a non-international armed conflict.[352] A non-international conflict in which an internal armed group is opposing the State becomes internationalized when another State intervenes in that conflict directly through the deployment of military forces, or when some participants in the

[349] Such grave breaches are nevertheless considered war crimes for the purpose of customary international law. See *Tadić* Appeals Decision (n 4) paras 117, 134, 137; *Prosecutor v Hadžihasanović* (Appeals Decision on Motions for Acquittal) IT-01-47-AR73.3 (11 March 2005) (*Hadžihasanović* Appeals Decision) paras 14, 30, 38.
[350] While members of the Russian armed forces were very likely directly involved in the 2014 invasion of the Crimean peninsula, Russia's use of unmarked soldiers in this annexation creates significant difficulty in the attribution of conduct under IHL. See Ines Gillich, 'Illegally Evading Attribution: Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law' (2015) 48 *Vanderbilt Journal of Transnational Law* 1191, 1220.
[351] See AP I (n 141) art 49; Michael N. Schmitt, 'The Status of Opposition Fighters in a Non-International Armed Conflict' (2012) 88 *International Law Studies* 119, 135.
[352] Shane R. Reeves and David Wallace, 'The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict' (2015) 91 *International Law Studies* 361, 399–400.

internal armed conflict act on behalf of another State.[353] In determining whether the latter avenue of internationalization is satisfied, it is necessary to examine the degree of control exercised by another State over internal armed groups.[354]

International criminal law has adopted the 'overall control' test to make a determination of this influence by another State.[355] However, the ICJ has twice endorsed the alternative and more demanding 'effective control' test,[356] causing some confusion as to which test is the most appropriate in what context. The differing tests adopted by international courts and tribunals can, however, be explained by the respective ambits of these institutions. The ICC and the ICTY before it[357] prosecute individuals, and while they are required to make determinations on States' control over armed groups, this is merely for the purpose of establishing jurisdiction over war crimes, not to make a determination as to the attribution of internationally wrongful acts to a State. Accordingly, the less stringent 'overall control' test is appropriate when a court is not "called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and

[353] *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor) ICC-01/05-01/08-424 (15 June 2009) para 220; *Prosecutor v Lubanga* (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012) (*Lubanga* Trial Judgment) para 541; *Prosecutor v Katanga* (Trial Judgment) ICC-01/04-01/07-3436 (7 March 2014) (*Katanga* Trial Judgment) para 1177.
[354] See Reeves and Wallace (n 352) 399–400; Schmitt (n 351) 121.
[355] *Tadić* Appeal Judgment (n 334) para 137; *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803 (29 January 2007) para 211; *Lubanga* Trial Judgment (n 352) para 541; *Katanga* Trial Judgment (n 353) para 1178; *Prosecutor v Ntaganda* (Trial Judgment) ICC-01/04-02/06-2359 (8 July 2019) (*Ntaganda* Trial Judgment) para 727; *Prosecutor v Ongwen* (Trial Judgment) ICC-02/04-01/15-1762 (4 February 2021) para 2687.
[356] See *Military and Paramilitary Activities in and Against Nicaragua* (n 144) [115]; *Bosnian Genocide* Judgment (n 144) [402]–[407]. For a discussion of the controversy between these conflicting tests, see Yoram Dinsetien, *War, Aggression, and Self-Defense* (5th edn, Cambridge UP 2011) 221–24.
[357] The ICTR and SCSL were not faced with the issue of classifying armed conflicts as their respective statutes specifically derived the charge of war crimes from common Article 3 of the Geneva Conventions and AP II, applicable only to non-international armed conflicts. See Statute of the International Tribunal for Rwanda (adopted 8 November 1994) UNSC Res 955, (1994) 33 ILM 1598, art 4; Agreement on the Establishment of a Special Court for Sierra Leone, Statute of the Special Court for Sierra Leone (UN–Sierra Leone) (adopted 16 January 2002) 2178 UNTS 137, 145, art 3. See also *Prosecutor v Fofana* (Appeals Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict) SCSL-2004-14-AR72(E) (25 May 2004) para 18; *Prosecutor v Semanza* (Appeals Judgment) ICTR-97-20-A (20 May 2005) para 192; *Prosecutor v Karemera* (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C) (16 June 2006) paras 28–29.

extends over persons only."[358] Thus, the 'effective control' test demands that a State "directed or enforced the perpetration of the acts"[359] for the purpose of determining State responsibility for them rather than assessing applicable IHL norms.[360] In supporting this test, the ICTY Appeals Chamber in *Tadić* cited a number of instances in which international courts and tribunals have found a version of the 'overall control' test to be appropriate when determining the liability of individuals rather than States.[361] The ICTY Trial Chamber in *Rajić* explained as follows:

> [I]n the *Nicaragua* case the [ICJ] was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras* … In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.[362]

The methodological appropriateness of different courts applying the standards most relevant to the body of law over which they hold principal jurisdiction and make decisions, cognizant of the nature of the *corpus juris* at hand, cannot be called into serious question.[363] Accordingly, in its *Bosnian Genocide* case, the ICJ observed as follows:

> [L]ogic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict

[358] *Bosnian Genocide* Judgment (n 145) [403].
[359] *Military and Paramilitary Activities in and Against Nicaragua* (n 144) [115].
[360] See ILC Articles on State Responsibility (n 224) 48, commentary on art 8, para 5.
[361] *Tadić* Appeal Judgment (n 334) paras 125–29 (citing *Stephens (United States) v United Mexican States* (1927) 4 RIAA 265, 266–67 (Mexico-US General Claims Commission); *Yeager v Islamic Republic of Iran* (1987) 17 Iran-USCTR 92 [12] [23], [37], [39], [41], [44], [45], and [61]; *Tehran Hostages* Judgment (n 60) [17]; *William L. Pereira Associates, Iran v Islamic Republic of Iran* (1984) 5 Iran-USCTR 198, 226; *Arthur Young & Co v Islamic Republic of Iran* (1987) 17 Iran-USCTR 245 [53]; *Loizidou v Turkey* (Merits) [1996] ECHR 70 (*Loizidou* Merits) [56]; OLG Düsseldorf 26 September 1997, 2 StE 8/96 (Germany)).
[362] *Prosecutor v Rajić* (Review of the Indictment) IT-95-12-R61 (13 September 1996) para 25 (citing *Military and Paramilitary Activities in and against Nicaragua* (n 144) [115]).
[363] Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 662. cf Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 279–80.

> to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[364]

Moreover, the 'overall control' test was never intended to replace the ICJ's 'effective control' test, mealy to provide a standard more tenable to criminal matters.[365] Accordingly, as Martti Koskenniemi and Päivi Leino observed, the two tests aim to distinguish "between the imputation of the acts of unorganised individuals to a state and the imputation of those of an organised military group," with the ICJ's 'effective control' test being appropriate for the former but not the latter, and vice versa for the ICTY's 'overall control' test.[366] It is therefore expectable that English courts, in adjudicating UJ prosecutions of Russia-aligned non-State armed groups, will employ the 'overall control' test in preference to the 'effective control' test as the former more appropriately appreciates the practical and legal contours of individual criminal responsibility in contrast to its State-centric counterpart.

English courts may, in fact, have some experience applying this test in the form of its counterpart in European human rights law. Rather confusingly, the ECtHR's 'effective control' test, is in large part analogous to the ICTY's 'overall control' test. The ECtHR's standard is, in fact, less stringent than the latter, demanding only territorial control over a region, not necessarily overall or effective control over entities or combatants within such territory.[367] In this way, the ECtHR's test equates territory of one State under the control of another State as

[364] *Bosnian Genocide* Judgment (n 145) [405].
[365] Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International & Comparative Law Quarterly* 493, 506–7. See also *Bosnian Genocide* Judgment (n 145) 241 [39] (Al-Khasawneh VP, dissenting).
[366] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 565.
[367] Talmon (n 365) 511.

equivalent to a "subordinate local administration" of the second State.[368] The ECtHR has added that its test demands that an internal armed group must also survive "by virtue of the military, economic, financial and political support given to it" by the second State.[369] It is, moreover, irrelevant whether a State's presence in or influence over a territory was exercised lawfully or unlawfully,[370] emphasizing that the factual rather than legal nature of a State's intervention in an armed conflict is the primary determinant of its responsibilities relating to such.[371]

It is accordingly necessary to evaluate weather forces of the DPR and LPR were under the overall control of Russia prior to the latter's 2022 invasion of Ukraine. A pair of recent judicial decisions concerning the 2014 downing of Malaysian Airlines Flight 17 (MH17) over Eastern Ukraine, one from the District Court of The Hague and the other from the Grand Chamber of the ECtHR, engaged in direct determinations of Russia's control over separatist forces in the Donbas following the annexation of Crimea. Both courts engage in an analysis that would likely parallel that conducted by an English court when examining the liability of Russia-aligned separatists for grave breaches.

On 17 November 2020, District Court of The Hague ruled in an *in absentia* criminal case against three DPR militants, charged with 298 counts of murder in relation to the attack on MH17. In evaluating the nature of the armed conflict in 2014, the court found that "an international armed conflict took place on the territory of Ukraine between Ukraine and the DPR,

[368] *Cyprus v Turkey* (1999) 2 DR 125 [102]. See also *Cyprus v Turkey* (2002) 35 EHRR 731 (*Cyprus v Turkey* Merits) [74].
[369] *Ilaşcu v Moldova and Russian Federation* (2005) 40 EHRR 1030 [392]. See also *Cyprus v Turkey* Merits (n 264) [77].
[370] See *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99 [62]; *Loizidou* Merits (n 355) [52]; *Ilaşcu* (n 369) [314].
[371] Matthew Happold, '*Bankovic v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77, 87; Talmon (n 365) 510.

which was under the *overall control* of the Russian Federation."[372] The court reached this conclusion after a thorough assessment of a number of relevant factors including ties of the defendants both to Russia and to Russian intelligence agents, frequent requests for support, including in the form of heavy weapons, from Russia by DPR leaders which Moscow granted, extensive funding and military training by Russia for the DPR, and the coordinating role played by Russia over, and its issuing of instructions to, the DPR. The court found substantial evidence for all the above factors of overall control,[373] with its analysis conforming to the requirements set in international criminal jurisprudence that 'overall control' exists when a State plays a role "in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."[374]

The court perhaps even exceeded the requirements of the 'overall control' test, which does not require "that such control … extend to the issuance of specific orders or instructions relating to single military actions."[375] The District Court found evidence of specific operational orders from Russia to the DPR, including a directive to not surrender the city of Sloviansk and instructions on how to handle the destruction of certain evidence from the MH17 crash.[376]

In the counterpart case regarding the MH17 disaster at the ECtHR, the Grand Chamber issued its decision on the admissibility of the application in *Ukraine & The Netherlands v Russian Federation* on 25 January 2023.[377] In this decision, the Grand Chamber endeavored a deeper analysis of Russia's control over the DPR than that of the Dutch court. Going beyond the

[372] Rb (District Court) The Hague 17 November 2022, ECLI:NL:RBDHA:2022:12218, s 4.4.3.1.3, para 16 (*MH17* District Court Judgment) (author's translation) (emphasis in original).
[373] Ibid, s 4.4.3.1.3, paras 4–14.
[374] *Tadić* Appeal Judgment (n 334) para 137.
[375] *Ntaganda* Trial Judgment (n 355) para 727 (alteration in original) (quoting *Tadić* Appeal Judgment (n 333) para 145).
[376] *MH17* District Court Judgment (n 372) s 4.4.3.1.3, paras 11–12.
[377] *Ukraine & The Netherlands v Russian Federation* App Nos 8019/16, 43800/14, and 28525/20 (ECtHR, 25 January 2023) (*MH17* ECtHR Decision).

district court, the ECtHR found "strong evidential support for the allegation that Russian soldiers were present in the armed groups and that regular Russian troops were deployed in their military units, notably to participate in certain battles" in the Donbas during the time of MH17's downing.[378] This finding is further supported by the Grand Chamber's prior 2021 decision on admissibility in *Ukraine v Russian Federation (Re Crimea)*.[379] Incorporating the conclusions of this subsection, the following subsections shall examine the liability of Russia-aligned non-State groups affiliated with the DPR and LPR as entities under the overall control of the Russian Federation for the purpose of determining the applicability of IHL to unlawful actions of such groups and prosecuting such actions as grave breaches.

(ii) Grave Breaches of the Geneva Conventions and Additional Protocol I

Having established the conflict in question has at all relevant times been, and currently is, international in character, the pertinent question now turns to the modalities by which non-state actors can be held responsible for violating IHL. Despite the professed sovereignty of the DPR and LPR, such claims have no effect on Russia-aligned separatists' obligations or criminal responsibility under IHL.[380] It is widely agreed that non-state actors are bound under IHL; however, disagreement exists as to how such obligations operate. Many theorize that during non-international armed conflict, non-State armed groups are bound by customary IHL,[381] including common Article 3 to the Geneva Conventions,[382] regarded as a 'minimum yardstick' of

[378] Ibid, para 610. See ibid, paras 588–609.
[379] See *Ukraine v Russian Federation (Re Crimea)* App Nos 20958/14 and 38334/18 (ECtHR, 16 December 2021) paras 42–59.
[380] Reeves and Wallace (n 352) 398.
[381] See eg, Chris De Cock, 'Counter-Insurgency Operations in Afghanistan' (2010) 13 *Yearbook of International Humanitarian* Law 97, 109; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 *International Review of the Red Cross* 1, 55–56.
[382] GC (n 135) common art 3.

protection during armed conflict.[383] Other theories posit that non-State armed groups are bound by all provisions of IHL adopted by and applicable in the State in which they reside at a given time.[384] Given that much of the Geneva Conventions, and IHL more generally, have become incorporated into the *corpus* of customary international law,[385] this theory would similarly endorse wide applicability of IHL obligations with respect to the conduct of non-State armed groups during armed conflict. Moreover, it is important to note that under Article 43 of the 1907 Hague Regulations, all law applicable in a State, including international law, remains applicable in a given territory if such territory falls under belligerent occupation, as Donetsk and Luhansk have.[386] As such, neither Russia's legally baseless annexation of these territories nor the DPR and LPR's respective claims of sovereignty over them displace IHL applicable to them.

The view that customary international law furnishes the liability of non-State armed groups under IHL is bolstered by the jurisprudence of the ICTY, with the Appeals Chamber in *Hadžihasanović* for instance, finding that "the conventional prohibition on attacks on civilian objects in non-international armed conflicts has attained the status of customary international law and that this covers 'wanton destruction of cities, towns or villages not justified by military necessity' in international and non-international armed conflict."[387] The Appeals Chamber added that such violations furnish individual criminal responsibility.[388] It must be noted that the majority of existing literature on the applicability of IHL to non-State armed groups has been

[383] *Military and Paramilitary Activities in and against Nicaragua* (n 144) [218]; *Čelebići* Appeal Judgment (n 144) para 150; *Karadžić* Decision on Hostage-Taking (n 156) paras 23–26.
[384] See eg, Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Participants in the International Legal System* (Routledge 2011) 284; Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Martinus Nijhoff 2014) 232.
[385] See eg, *Tadić* Appeals Decision (n 4) para 134; *Nuclear Weapons* Advisory Opinion (n 49) para 79; *Akayesu* Appeal Judgment (n 156) para 443; *Kunarac* Appeal Judgment (n 232) para 67; *Wall* Advisory Opinion (n 145) [157]–[158]; *DRC v Uganda* Merits Judgment (n 266) [214].
[386] Hague Regulations (n 307) art 43.
[387] *Hadžihasanović* Appeals Decision (n 349) para 30 (internal citation omitted).
[388] Ibid. See also *Tadić* Appeals Decision (n 4) para 134.

confined to non-international armed conflicts,[389] with little scholarship exploring the application of IHL to non-State armed groups fighting as part of a conflict of an international character. For present purposes, this paper shall assume that militias of the DPR and LPR, as non-State armed groups engaged in an international armed conflict, are bound by fundamental principles of IHL to the extent necessary to furnish their criminal liability for grave breaches.[390] While further exploration of this dynamic is surely warranted, this section is solely concerned with grave breaches of the Geneva Conventions and AP I, which reflect prohibitions such as that of willful killing or targeting of civilians and the mistreatment of POWs which are universally recognized as forming part of customary IHL, if not constituting *jus cogen* norms.[391]

The terminologies used by the COI and the HRMMU to refer to combatants in the conflict complicate the attribution of certain internationally wrongful acts constituting grave breaches to Russia-aligned separatist groups. In its latest report, the OHCHR includes the following footnote on terminology: "OHCHR refers to Russian armed forces as comprising all actors fighting on behalf of the Russian Federation, including the Armed Forces and National Guard Forces of the Russian Federation, *as well as affiliated armed groups of the former self-proclaimed 'republics'* and Wagner Group military and security contractors."[392] As such, it remains difficult to segregate grave breaches committed by official members of the Russian armed forces discussed in the previous section from those committed by Russia-aligned militias within the OHCHR's reports. The COI's terminology is more ambiguous yet similarly

[389] See eg, Schmitt (n 351) 124–35; Rodenhäuser (n 345) 33–60.
[390] In instances where control can be ascribed to Russia in regard to the action of DPR and LPR militias, these groups' responsibility for violations of IHL may well be rooted in Russia's obligations under the Geneva Conventions and customary IHL. cf *Mamasakhlisi v Georgia and Russian Federation* App Nos 29999/04 and 41424/04 (ECtHR, 7 March 2023) paras 411–12 (finding Russia responsible for torture committed by *de facto* authorities of Abkhazia due to Russia's effective control over the separatist enclave).
[391] See nn 145–49 above.
[392] UN OHCHR 35th Report (n 292) para 5 fn 2 (emphasis added).

problematic, stating that "the term 'Russian armed forces' will be used for all combatants who have been identified as such or as directly affiliated with the Russian armed forces."[393] The COI offers no clarification as to what groups are considered 'directly affiliated with the Russian armed forces.'

There have, however, been a number of wrongful acts specifically attributed to Russia-aligned militias in the reports of the COI and OHCHR. For instance, the HRMMU spoke with 11 Ukrainian POWs who were subject to torture and ill-treatment "during their interrogations by so-called 'prosecutors' of Russian-affiliated armed groups."[394] The COI furthermore directly implicated agents of the DPR and LPR "in the commission of unlawful confinement, torture, and sexual and gender-based violence."[395] The OHCHR also reported that a number of POWs were subject to trials lacking basic guarantees of independence and impartiality by the courts of the DPR.[396] In subjecting POWs to inhumane treatment and depriving them of fair and impartial trials, agents of the DPR are likely responsible for grave breaches of the Third Geneva Convention and AP I.[397]

(iii) Torture

The 'public official' requirement of Article 1(1) of the CAT, reproduced in Section 134(1) of the CJA, and how it applies to non-State actors possessing State-like characteristics, has long been a topic of much legal scholarship.[398] Eminent German jurist Hans Kelsen wrote, as

[393] COI Report No 1 (n 272) para 24 fn 6; COI Report No 2 (n 280) para 3 fn 2.
[394] UN OHCHR 35th Report (n 292) para 84.
[395] COI Report No 2 (n 280) para 52.
[396] UN OHCHR 35th Report (n 292) para 85.
[397] See GC III (n 135) art 130; AP I (n 141) art 85(4)(e).
[398] See eg, Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford UP 2019) 132–33; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford UP 2017) 283–84; Zach (n 207) 60–61; Paola Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture?' (2008) 6 *Journal of International Criminal Justice* 183; Robert McCorquodale and Rebecca La Forgia, 'Taking Off the Blindfolds: Torture by Non-State Actors' (2001) 1 *Human Rights Law Review* 189; Andrew Clapham and Paola Gaeta, 'Torture by Private Actors and 'Gold-Plating' the Offence in National Law' in Margaret

early as 1945, that "[b]y the effective control of the insurgent government over part of the territory and people of the State involved in civil war, an entity is formed which indeed resembles a State in sense of international law."[399] The issue was judicially confronted in *R v Zardad*, one of the few prosecutions under Section 134(1) of the CJA.[400] In this case, Faryadi Sarwar Zardad, a political and military leader of the Afghan paramilitary group Hezb-e Islami, was charged with torture allegedly committed while in command of a checkpoint in the Afghan town of Sarobi from 1991–96.[401] One of the preliminary questions in the trial was whether Zardad constituted a 'public official' for the purposes of Section 134(1) of the CJA and Article 1(1) of the CAT.[402] On this matter, Judge Treacy found that Zardad "was a *de facto* public official in an area which was totally controlled by Hezb-I-Islami and controlled by them with a degree of permanence" and that "[t]here is evidence that the Hezb-I-Islami faction exercised functions which would be functions of a state authority [over the area]."[403]

Judge Treacy also stated that "[t]here is no evidence to show that at any material time the central government exercised any governmental function over the area."[404] This is in line with the jurisprudence of the UN Committee Against Torture, which found that non-State armed groups can satisfy the 'public official' requirement of Article 1(1) of the CAT in the absence of a central government in the relevant territory.[405] However, *contra* the case law of the

M. de Guzman and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William Schabas* (Oxford UP 2018) 287, 287–95.

[399] Hans Kelsen, *General Theory of Law and State* (first published 1945, Transaction Publishers 2006) 230.

[400] *R v Zardad*, ILDC 95 (UK 2004) (Central Criminal Court, 7 April 2004).

[401] Zardad was also charged under the Taking of Hostages Act 1982, however the jury could not reach a verdict on this charge leading Judge Treacy to dismiss it.

[402] *Zardad* (n 400) [4] (Treacy J).

[403] Ibid [35].

[404] Ibid.

[405] *Elmi v Australia*, Communication No 120/1998, UN Committee Against Torture (25 May 1999) UN Doc CAT/C/22/D/120/1998, para 6.5.

Committee,[406] Afghanistan as a whole was not devoid of a central government, rather the government lacked effective control over Sarobi. Thus, Andrew Clapham described the finding in *Zardad* as endorsing the notion that "one can have torture by an authority even where that 'authority' is fighting against the state."[407]

When the affor-discussed *Taylor* case was considered by the Court of Appeal, Lord Chief Justice Burnett invoked *Zardad* in finding that "[t]he only category of perpetrator apparently excluded by the definition in section 134 is someone acting in a private and individual capacity rather than in performance *or purported performance* of official duties" and thus "[t]here is no express requirement that they should be acting or purporting to act on behalf of a recognised state."[408] Lord Burnett further recognized that the term 'public official' is "capable of applying to a person with public official status in a *de facto* government as much as in a recognised *de jure* government."[409] This formulation was upheld by the UK Supreme Court on appeal, with Lord Lloyd-Jones supporting Judge Treacy's finding in *Zardad* that "there was material on which a jury could conclude that Zardad was such a *de facto* public official in an area totally controlled by his organisation which exercised, with a degree of permanence, functions which would be functions of a state authority."[410]

Lord Lloyd-Jones also cited *Kadic v Karadžić*, in which the US Court of Appeal for the Second Circuit held that the 'public official' standard "requires merely the *semblance* of official authority" as the purpose of this requirement is ascertaining "whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not

[406] See eg, *MPS v Australia*, Complaint No 138/1999, UN Committee Against Torture (30 April 2002) UN Doc CAT/C/28/D/138/1999, para 7.4; *HMHI v Australia*, Complaint No 177/2001, UN Committee Against Torture (1 May 2002) UN Doc CAT/C/28/D/177/2001, para 4.4.
[407] Clapham and Gaeta (n 398) 292.
[408] *R v TRA (Redress Trust intervening)* [2018] EWCA Crim 2843 [25] (Lord Burnett CJ) (emphasis added).
[409] Ibid.
[410] *Taylor* (n 196) [63] (Lord Lloyd-Jones JSC) (internal citation omitted).

whether statehood in all its formal aspects exists."[411] Accordingly, Lord Lloyd-Jones concluded that the text of Section 134(1) of the CJA is "sufficiently wide to include conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises *de facto* control."[412]

Similarly to that of *Zardad*, this approach stands contrary to the jurisprudence of the UN Committee Against Torture, which holds that a State must display an absence of a central government in order for acts of non-State actors to be considered those of a 'public official.' This discrepancy can be attributed primarily to the realities imposed by the differing form and function of human rights law when applied through public international law as opposed to criminal law. Mathew Craven elaborates on the conflicting form and function of human rights treaties in the obligations they impose on States—similarly to other treaties—as opposed to the rights they purport to confer on an individual—in a manner more analogous to a constitution than a contractual treaty.[413] One can view the Committee's function in respect to the CAT as falling within the former form: operating as law between sovereign States. On the other hand, the CAT, in the context of criminal law, operates with distinct appreciation of *individual* human rights and, due in part to the subject of criminal law being individuals rather than States,[414] is able to avoid many of the questions of State sovereignty which restrict the breath with which the Committee can interpret the provisions of the CAT.[415]

---

[411] *Kadic* (n 337) 245 (emphasis added).
[412] *Taylor* (n 196) [76] (Lord Lloyd-Jones JSC). See also Ambos, *Treatise II* (n 30) 280.
[413] Mathew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *European Journal of International Law* 489, 492–93.
[414] See *France v Göring* (n 189) 466.
[415] cf *Situation in the State of Palestine* (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine') ICC-01/18-143 (5 February 2021) para 62 (finding that a territorial determinations necessary to establish a court's jurisdiction ratione loci "has no bearing" on the extent or delamination of such territory politically) (citing *SS Lotus* (n 103); *Request under Regulation 46(3) of the Regulations of the Court* (Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute") ICC-RoC46(3)-01/18-37 (6 September 2018) para 66).

In interpreting the 'public official' requirement of the CAT, the US Court of Appeal for the Ninth Circuit found, in *Barajas-Romero v Lynch*, that there is no requirement that a perpetrator both be a "public official" *and* a "person acting in an official capacity."[416] On this note, the US Attorney General issued a decision that the "standard does not categorically exclude … low-level officials from the [CAT]'s scope. Rather, regardless of rank, a public official acts under color of law when he exercise[s] power possessed by virtue of … law and made possible only because [he] is clothed with the authority of … law."[417] Acts of torture attributable to agents of the DPR and LPR have already been discussed in some length in the previous subsection, rendering their repetition here redundant. In particular, it is highly probable that intermediate detention facilities where Ukrainian POWs and civilians were kept prior to transfer or deportation to the Russian Federation, where the COI has documented widespread torture,[418] were operated at least in part by individuals associated with the DPR and LPR, exposing such individuals to individual liability for torture.

The use of UJ to prosecute crimes committed by militia associated with the DPR and LPR is of exceptional importance given the comparatively greater void of the rule of law in the occupied Donbas. As Christopher Joyner remarked, "[w]ar crimes flourish in direct proportion to the dearth of political order."[419] The regions of Eastern Ukraine under control of the DPR and LPR have been bereft of the rule of law since coming under the occupation of forces under the control of the Russian government. In June 2015, the Ukrainian government transmitted to the

[416] *Barajas-Romero v Lynch*, 846 F 3d 351, 362 (9th Cir 2017).
[417] *Matter of O-F-A-S-*, 28 I & N Dec 35, 40 (AG 2020) (alternations in original) (citing *West v Atkins*, 487 US 42, 49 (1988)). The phrase 'under color of law' is used in US federal law to refer to the 'public official' requirement, see *Matter of Y-L-*, 23 I & N Dec 270, 285 (AG 2002); *Ramirez-Peyro v Holder*, 574 F 3d 893, 900 (8th Cir 2009); *United States v Belfast*, 611 F 3d 783, 808–09 (11th Cir 2010); *Garcia v Holder*, 756 F 3d 885, 891 (5th Cir 2014).
[418] COI Report No 2 (n 280) paras 55, 73–75, and 81–82.
[419] Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law & Contemporary Problems* 153, 162.

UN Secretary-General a *note verbale* in which it stated that it could no longer guarantee the fulfilment of its obligations under the International Covenant on Civil and Political Rights in regions under the control of the DPR and LPR due to their occupation by Russia-aligned forces.[420]

C. RESPONSIBILITY OF MEMBERS OF THE UKRAINIAN ARMED FORCES

Ukraine's self-defence in the face of an asymmetric land war—the first of its magnitude since the Second World War—has been met with admiration and support from almost every corner of the world. Yet, as Sir Hersch Lauterpacht wrote, '[t]here is not the slightest relation between the content of the right to self-defense and the claim that it is above the law and not amenable to evaluation by law.'[421] While politically unsavory, post-conflict justice in Ukraine must include punishment of those members of the Ukrainian armed forces who, at whatever level, are also responsible for violations of IHL and human rights law. While it is *prima facie* evident that the vast majority of internationally wrongful acts committed during the present conflict have been at the hands of Russian or Russia-aligned forces,[422] evading calls of victors' justice will be vital to ensuring the integrity of post-conflict justice in Ukraine, no matter its forum.[423]

---

[420] UN OHCHR, 'Accountability for Killings in Ukraine from January 2014 to May 2016' (14 July 2016) <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> para 9.

[421] Hersch Lauterpacht, *The Function of Law in the International Community* (Martti Koskenniemi ed, first published 1933, Oxford UP 2011) 188. This passage was aptly cited by Judge Schwebel, then Vice-President of the ICJ, in relation to the claim that the humanitarian toll of nuclear weapons could be justified in exceptional circumstances of self-defence. See *Nuclear Weapons* Advisory Opinion (n 49) 322–23 (Schwebel VP, dissenting).

[422] See COI Report No 1 (n 272) para 109; COI Report No 2 (n 280) para 23.

[423] For discussion of victors' justice at international criminal courts and tribunals, see eg, Markus Benzing, 'The Complementarity Regime of the International Criminal Court' (2003) 7 *Max Planck Yearbook of United Nations Law* 591; Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?' (2005) 18 *Leiden Journal of International Law* 829; Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 *Journal of Human Rights* 213; William A. Schabas, 'Victor's Justice: Selecting Situations at the International Criminal Court'

In its first report, the COI identified two instances of members of the Ukrainian armed forces committing war crimes in the form of shooting and torturing persons *hors de combat,*[424] a grave breach of the First Geneva Convention and AP I.[425] In its second report, the COI was more detailed in its coverage of internationally wrongful acts committed by Ukrainian armed forces, including the use of prohibited cluster munitions and anti-personnel landmines,[426] a lack of separation between Ukrainian armed forces and civilians which placed civilians at risk,[427] torture of captured Russian combatants,[428] and alleged ill-treatment of individuals suspected of being Russian collaborators.[429] The usage of cluster munitions or antipersonnel landmines is not *stricto sensu* prohibited under IHL, rather, their usage may constitute a grave breach depending on certain contextual factors. For example, the use of cluster munitions against densely populated areas can violate the principle of distinction,[430] constituting indiscriminate attacks or extensive destruction of property not justified by military necessity and thus a grave breach of AP I and the Fourth Geneva Convention, respectively.[431] In its most recent report, the OHCHR argued that the use of anti-personnel mines is "inherently indiscriminate" and thus impermissible under IHL in all circumstances,[432] a view widely shared.[433] Failing to separate military and civilian persons

(2010) 43 *John Marshal Law Review* 535; Lars Waldorf, 'A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal' (2010) 33 *Fordham International Law Journal* 1221.

[424] COI Report No 1 (n 272) para 61.

[425] See GC I (n 135) art 50; AP I (n 141) art 85(3)(e).

[426] COI Report No 2 (n 280) para 36. The COI noted that, unlike Russia, Ukraine is party to the Ottawa Treaty prohibiting the use of anti-personnel landmines, see Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997) 2056 UNTS 211.

[427] COI Report No 2 (n 280) para 46.

[428] Ibid, para 86.

[429] Ibid, paras 87–88. The COI did, however, note that unlike other violations detailed in its report, "it has not been in a position to corroborate these allegations." Ibid, para 89.

[430] See AP I (n 141) art 48.

[431] See ibid, art 85(3)(b) and (c); GC IV (n 135) art 147.

[432] UN OHCHR 35th Periodic Report (n 292) para 36.

[433] See eg, Louise Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' (1999) 52 *Naval War College Review* 24, 34; Stephen Townley, 'Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law' (2021) 50 *Vanderbilt Journal of Transnational Law* 1223, 1226–27.

would likely not constitute a grave breach, although it may violate Article 49 of the Fourth Convention and Article 58 of AP I which require belligerent parties to remove civilian populations from the vicinity of military objectives and avoid locating military objectives in or near densely populated areas.[434]

The alleged torture of Russian POWs likely constitutes the clearest internationally wrongful act by Ukrainian armed forces detailed in the COI's second report, with torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health all constituting grave breaches of the Third Geneva Convention.[435] These acts moreover constitute the offense of torture under the CAT and are thus prosecutable as such under Section 134 of the CJA. In the case of mistreatment of alleged Russian collaborators, the COI notes allegations that "[i]n some situations, there were reportedly no arrest warrants, and some detainees were held incommunicado, sometime for several days."[436] If true, this would constitute a deprivation of the judicial rights of civilians possibly amounting to grave breaches of the Fourth Convention and AP I.[437] Such measures would also endanger fundamental human rights outside the purview of this article.[438] International investigation efforts are clearly focused on the internationally wrongful conduct of Russia and its allies—rightfully so, to some degree, as these actors *prima facie* appear responsible for the greatest volume and gravity of crimes committed during the conflict. However, as the international campaign for justice progresses, it is vital to remember that the legitimacy of *all* accountability efforts will be hampered if *some* crimes appear beyond the reach of prosecution due purely to the political or national affiliation of their perpetrators.

[434] See GC IV (n 135) art 49; AP I (n 141) art 58.
[435] See GC III (n 135) art 130.
[436] COI Report No 2 (n 280) para 88.
[437] See GC IV (n 135) art 147; AP I (n 141) art 85(4)(e).
[438] See eg, ICCPR (n 207) art 14; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) 213 UNTS 221, art 6.

CONCLUSION

Following his visit to Sarajevo in 1992, the late Christopher Hitches remarked that "[t]he next phase or epoch [in human history] is already discernible; it is the fight to extend the concept of universal human rights, and to match the 'globalisation' of production by the globalisation of a common standard for justice and ethics."[439] Two decades later, Judge Cançado Trindade of the ICJ declared that "[i]n this second decade of the twenty-first century—after far too long a history—the principle of universal jurisdiction … appears nourished by the ideal of a universal justice, without limits in time … or in space."[440] Yet nevertheless, the commitments of governments thus far to accountability for atrocities in Ukraine have been largely *viva voce*.[441] In this regard, one can never too quickly recall the words of Albert Camus, that "[t]here is always a philosophy for lack of courage,"[442] or of Dante towards those who stand neutral in the face of injustice: "The world allows no fame of them to live; Mercy and Justice hold them in contempt. Let us not talk of them; but look, and pass."[443]

While international criminal law shows little promise of putting an immediate end to fighting on the ground—indictments from the Crown Prosecution Service, or the ICC for that matter, against Russian military and political leaders are unlikely to put their war of aggression to an end—it is far from powerless. As Oona Hathaway has recently remarked, "[t]he law is helping states that agree on little else unify in opposition to the invasion. The law has brought

[439] Christopher Hitchens, *Letters to a Young Contrarian* (Basic Books 2001) 136.
[440] *Questions relating to the Obligation to Prosecute or Extradite* (n 59) 487 [177] (Cançado Trindade J, separate opinion).
[441] See eg, HL Deb 1 April 2022, vol 820, cols 1786–87.
[442] Albert Camus, *Notebooks, 1942-1951* (Justin O'Brien tr, Knopf 1963) 15.
[443] Dante Alighieri, 'Inferno III' in *The Divine Comedy*, vol I (first published c 1317, Courtney Langdon tr, Harvard UP 1918) 26, 31.

together an unprecedented global coalition of states to oppose the Russian intervention."[444] Similarly, while UJ has been described as "a subject that generates more heat than light,"[445] the war in Ukraine demands of current leaders a display of courage, and equipped with the tool of UJ, the UK, in particular, faces a choice that will determine if history, when judging its actions, will merely 'look and pass.'

[444] Oona A. Hathaway, 'International Law Goes to War in Ukraine: The Legal Pushback to Russia's Invasion' (*Foreign Affairs*, 15 March 2022) <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>.
[445] Schabas, 'Eichmann Trial' (n 10) 693.

REFERENCES

Abi-Saab, Georges. 'The Concept of "International Crimes" and its Place in Contemporary International Law' in Joseph H.H. Weiler, Antonio Cassese, and Marina Spinedi (eds), *International Crimes of State: a Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989) 141.

Ago, Roberto. 'Pluralism and the Origins of the International Community' (1977) 3 *Italian Yearbook of International Law* 3.

Aksamitowska, Karolina. 'Digital Evidence in Domestic Core International Crimes Prosecutions' (2021) 19 *Journal of International Criminal Justice* 189.

Alighieri, Dante. 'Inferno III' in *The Divine Comedy*, vol I (first published c 1317, Courtney Langdon tr, Harvard UP 1918) 26.

Ambos, Kai. 'Article 25: Individual Criminal Responsibility' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 979.

———. *Treatise on International Criminal Law*, vol I (2nd edn, Oxford UP 2021).

———. *Treatise on International Criminal Law*, vol II (2nd edn, Oxford UP 2022).

Arbour, Louise. 'Will the ICC have an Impact on Universal Jurisdiction?' (2003) 1 *Journal of International Criminal Justice* 585.

Archbold, John F. *Criminal Pleading Evidence and Practice* (T.R.F. Fitzwalter Butler and Marston Garsia eds, 34th edn, Sweet & Maxwell 1959).

Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1963).

Askin, Kelly. 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkley Journal of International Law* 288.

Baade, Hans W. 'The Eichmann Trial: Some Legal Aspects' [1961] *Duke Law Journal* 400.

Barrat, Claudie. *Status of NGOs in International Humanitarian Law* (Martinus Nijhoff 2014).

Bassiouni, M. Cherif. 'A Functional Approach to 'General Principles of International Law'' (1990) 11 *Michigan Journal of International Law* 768.

———. 'International Crimes: "*Jus Cogens*" and "*Obligatio Erga Omnes*" (1996) 59 *Law & Contemporary Problems* 63.

———. *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997).

———. 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81.

———. 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case' (2002) 13 *European Journal of International Law* 853.

———. *The Legislative History of the International Criminal Court* (Transnational Publishers 2005).

———. *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge UP 2011).
——— and Edward M. Wise. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995).
Baxter, Richard R. 'The Municipal and International Law Basis of Jurisdiction over War Crimes' (1951) 28 *British Yearbook of International Law* 382.
Bellal, Annyssa, Gilles Giacca, and Stuart Casey-Maslen. 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 *International Review of the Red Cross* 1.
Benton, Lauren. 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction' (2011) 23 *International Journal of Maritime History* 225.
Benzing, Markus. 'The Complementarity Regime of the International Criminal Court' (2003) 7 *Max Planck Yearbook of United Nations Law* 591.
Bergsmo, Morten, Olympia Bekou, and Annika Jones. 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Goettingen Journal of International Law* 791.
Bianchi, Andrea. 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 *European Journal of International Law* 49.
Black's Law Dictionary (6th edn 1990).
Blackstone, William. *Commentaries on the Laws of England*, vol 4 (1770).
Bradfield, Paul. 'Prosecuting in a Time of War: Aggression, Immunities and the Preservation of Evidence in Ukraine' (2022) 32 *Irish Criminal Law Journal* 51.
Brody, Reed. 'Putin's Nuremberg Moment' (*The Nation*, 28 March 2023) <https://www.thenation.com/article/world/putin-russia-ukraine-war/>.
Brownlie, Ian. *Principles of Public International Law* (7th edn, Oxford UP 2008).
Buckland, William W. 'Interpolations in the Digest' (1924) 33 *Yale Law Journal* 343.
Burdyga, Ihor and Regina Gimalova, 'Ukraine separatists draft anyone they can' (*Deutsche Welle*, 27 April 2022) <https://www.dw.com/en/how-ukraine-separatists-are-mass-conscripting-anyone-of-fighting-age/a-61608760>.
Burgers, Herman and Hans Danelius. *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988).
Butler, A. Hays. 'The Doctrine of Universal Jurisdiction: A Review of the Literature' (2000) 11 *Criminal Law Forum* 353.
Camus, Albert. *Notebooks, 1942-1951* (Justin O'Brien tr, Knopf 1963).
Carrée, Lila. 'The Role Of Technology In The Exposition Of War Crimes In Ukraine: How The Use Of Cutting-Edge Technologies And Open-Sources Investigations Can Expose Human Rights Violations' (*London School of Economics*, 2 February 2023) <https://blogs.lse.ac.uk/humanrights/2023/02/02/the-role-of-technology-in-the-exposition-of-war-crimes-in-ukraine-how-the-use-of-cutting-edge-technologies-and-open-sources-investigations-can-expose-human-rights-violations/>.

Cassese, Antonio. ‘Remarks on Scelle’s Theory of “Role Splitting” (*dédoublement fonctionnel*) in International Law’ (1990) 1 *European Journal of International Law* 210.
———. ‘Reflections on International Criminal Justice’ (1998) 61 *Modern Law Review* 1.
———. *International Law* (Oxford UP 2001).
———. ‘The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649.
——— and Paola Gaeta. *Cassese’s International Criminal Law* (3rd edn, Oxford UP 2019).
Choo, Andrew L.-T. ‘International Kidnapping, Disguised Extradition and Abuse of Process’ (1994) 57 *Modern Law Review* 626.
Cicero, Marcus Tullius. *Selected Works* (Michael Grant tr, Penguin 1984).
‘Civilian Harm in Ukraine’ (*Bellingcat*, last accessed 19 March 2023) <https://ukraine.bellingcat.com/>.
Clapham, Andrew and Paola Gaeta. ‘Torture by Private Actors and ‘Gold-Plating’ the Offence in National Law’ in Margaret M. de Guzman and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William Schabas* (Oxford UP 2018) 287.
Coke, Edward. *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton, not the Name of the Author Only, but of the Law It Selfe* (1628).
———. *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown* (1644).
Coleman, Flynn. ‘To Prosecute Putin for War Crimes, Safeguard the Digital Proof’ (*Foreign Policy*, 10 April 2022) <https://foreignpolicy.com/2022/04/10/prosecute-putin-war-crimes-evidence-bucha-safeguard-digital-proof/>.
Council of Europe. ‘Progress Report by the United Kingdom: Implementation of the ICC Statute’ (7 September 2001) Doc Consult/ICC (2001) 31.
Cowles, Willard B. ‘Universality of Jurisdiction over War Crimes’ (1945) 33 *California Law Review* 177.
Craven, Mathew. ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 *European Journal of International Law* 489.
Crawford, James. *Brownlie’s Principles of Public International Law* (8th edn, Oxford UP 2012).
Crawford, Julia and Franck Peti. ‘Insights on the Digital Revolution for War Crimes Probes in Ukraine’ (*Justice Info*, 31 May 2022) <https://www.justiceinfo.net/en/93111-insights-digital-revolution-war-crimes-probes-ukraine.html>.
Craze, Sarah. ‘Prosecuting privateers for piracy: How piracy law transitioned from treason to a crime against property’ (2016) 28 *International Journal of Maritime History* 654.
Crown Prosecution Service. *Annual Report and Accounts 2021–2022* (HC 2021–22, 487).
Davidović, Maja. ‘Reconciling Complexities of Time in Criminal Justice and Transitional Justice’ (2021) 21 *International Criminal Law Review* 935.
D’Alessandra, Federica and Kirsty Sutherland. ‘The Promise and Challenges of New Actors and New Technologies in International Justice’ (2021) 19 *Journal of International Criminal Justice* 9.

D'Amato, Anthony. 'It's a Bird, It's a Plane, It's *Jus Cogens*' (1990) 6 *Connecticut Journal of International Law* 2.

De Cock, Chris. 'Counter-Insurgency Operations in Afghanistan' (2010) 13 *Yearbook of International Humanitarian* Law 97.

de Vattel, Emmerich. *Le Droit des gens: Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (first published 1758, Charles G Fenwick tr, Carnegie Institution of Washington 1916).

de Wet, Erika. 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97.

———. 'The International Constitutional Order' (2006) 55 *International & Comparative Law Quarterly* 51.

de Guzman, Margaret M. 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265.

Del Ponte, Carla. 'Prosecuting the Individuals Bearing the Highest Level of Responsibility' (2004) 2 *Journal of International Criminal Justice* 516.

Demaria, Tiphaine. 'Obligations de comportement et obligations de résultat dans la jurisprudence de la Cour internationale de Justice' (2021) 58 *Annuaire Canadien de Droit International* 362.

Dinstein, Yoram. 'The Universality Principle and War Crimes' (1998) 71 *International Law Studies* 17.

———. *War, Aggression, and Self-Defense* (5th edn, Cambridge UP 2011).

Douglas, Lawrence. *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton UP 2016).

Doherty, Katherine L. and Timothy L.H. McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 *UC Davis Journal of International Law & Policy* 147.

Dörmann, Knut. 'Article 8: War Crimes – Analysis and Interpretation of Elements' in in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016).

———, Liesbeth Lijnzaad, Marco Sassòli, and Philip Spoerri (eds). *Commentary on the First Geneva Convention* (International Committee of the Red Cross/Cambridge UP 2016).

———, Liesbeth Lijnzaad, Marco Sassòli, and Philip Spoerri (eds). *Commentary on the Second Geneva Convention* (International Committee of the Red Cross/Cambridge UP 2017).

———, Cordula Droege, Helen Durham, Liesbeth Lijnzaad, Marco Sassòli, Philip Spoerri, and Kenneth Watkin (eds). *Commentary on the Third Geneva Convention* (International Committee of the Red Cross/Cambridge UP 2020).

Doswald-Beck, Louise. 'Implementation of International Humanitarian Law in Future Wars' (1999) 52 *Naval War College Review* 24.

Dupuy, Pierre-Marie. 'Unity in the Application of International Law at the Global Level and the Responsibility of Judges at the National Level: Reviewing Georges Scelle's "Role Splitting" Theory' in Marcelo Kohen and Laurence Boisson de Chazournes (eds), *International Law and the Quest for its Implementation: Liber Amicorum Vera Gowlland- Debbas* (Martinus Nijhoff 2010) 417.

Dutton, Yvonne M. 'Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?' (2023) 55 *Case Western Reserve Journal of International Law* 391.

El Zeidy, Mohamed M. 'The Principle of Complementarity' (2002) 23 *Michigan Journal of International Law* 870.

'Eyes on Russia Map' (*Center for Advanced Defense Studies*, last accessed 19 March 2023) <https://c4ads.org/multimedia/eyes-on-russia-map/>.

Falk, Richard A. *The Role of Domestic Courts in the International Legal Order* (Syracuse UP 1964).

Fawcett, James E.S. 'The Eichmann Case' (1962) 27 *British Yearbook of International Law* 181.

Ferdinandusse, Ward. 'The Prosecution of Grave Breaches in National Courts' (2009) 7 *Journal of International Criminal Justice* 723.

Fischer, Horst. 'Some Aspects of German State Practice Concerning IHL' (1998) 1 *Yearbook of International Humanitarian Law* 380.

Fortin, Katharine. *The Accountability of Armed Groups under Human Rights Law* (Oxford UP 2017).

Gaeta, Paola. 'When is the Involvement of State Officials a Requirement for the Crime of Torture?' (2008) 6 *Journal of International Criminal Justice* 183.

———. 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford UP 2012) 596.

Gardner, Maggie. 'Piracy Prosecutions in National Courts' (2010) 10 *Journal of International Criminal Justice* 797.

Garrod, Matthew. 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and 'Universal Jurisdiction' in the Light of the *Habré Case*' (2018) 59 *Harvard International Law Journal* 125.

Gattini, Andrea. 'Breach of International Obligations' in André Nollkaemper and Ilia Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (Cambridge UP 2014) 25.

Gillich, Ines. 'Illegally Evading Attribution: Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law' (2015) 48 *Vanderbilt Journal of Transnational Law* 1191.

Golder, Joseph. 'Pro-Russia Militia Says It's Taking Control of Ukrainian Trenches' (*Newsweek*, 23 June 2022) <https://www.newsweek.com/pro-russia-militia-says-its-taking-control-ukrainian-trenches-1718620>.

Goldstone, Richard J. 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277.

Goodwin, Joshua M. 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 973.

Green, Leslie C. *International Law: A Canadian Perspective* (Carswell 1984).

Greene, Jody. '*Hostis Humani Generis*' (2008) 34 *Critical Inquiry* 633.

Grotius, Hugo. *The Rights of War and Peace* (first published 1625, AC Campbell tr, M Walter Dune 1901).

———. *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (first published 1633, James B. Scott ed, Ralph van Deman Magoffin tr, Oxford UP 1916).

Hale, Matthew. *Historia Placitorum Coronæ*, vol 1 (1736).

Hall, Christopher K. and Carsten Stann. 'Article 7(1)(f): Torture' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 204.

———. 'Article 7(1)(k): Other Inhumane Acts' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 235.

Happold, Matthew. '*Bankovic v Belgium* and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77.

Harding, Christopher. '"*Hostis Humani Generis*"—The Pirate as Outlaw in the Early Modern Law of the Sea' in Claire Jowitt (ed), *Pirates? The Politics of Plunder, 1550-1650* (Palgrave Macmillan 2007) 20.

Hatchell, Michael P. 'Closing the Gaps in the United States Law and Implementing the Rome Statute: A Comparative Approach' (2005) 12 *ILSA Journal of International & Comparative Law* 183.

Hathaway, Oona A. 'International Law Goes to War in Ukraine: The Legal Pushback to Russia's Invasion' (*Foreign Affairs*, 15 March 2022) <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>.

———. 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine' (*Just Security*, 20 September 2022) <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>.

Hawkins, William. *A Treatise of Pleas of the Crown*, vol 1 (1716).

Heller, Kevin Jon. 'A Sentence-Based Theory of Complementarity' (2012) 53 *Harvard International Law Journal* 85.

Henckaerts, Jean-Marie and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol 1 (ICRC/Cambridge UP 2005).

Higgins, Rosalyn. *Problems and Process: International Law and How We Use It* (Oxford UP 1994).
Hirst, Michael. *Jurisdiction and the Ambit of the Criminal Law* (Oxford UP 2003).
Hitchens, Christopher. *Letters to a Young Contrarian* (Basic Books 2001).
Hodgkinson, Sandra L. 'The Governing International Law on Maritime Piracy' in Michael P. Scharf, Michael A. Newton, and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge UP 2015) 13.
Holmes, John T. 'Complementarity: National courts versus the ICC' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford UP 2002) 667.
ICRC Advisory Service on International Humanitarian Law, *Preventing and Repressing International Crimes*, vol 1 (2014).
ILA Committee on International Human Rights Law and Practice. *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000).
Independent International Commission of Inquiry on Ukraine. 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533.
———. 'Report of the Independent International Commission of Inquiry on Ukraine' (15 March 2023) UN Doc A/HRC/52/62.
International Criminal Court. *Elements of Crimes* (2013).
International Criminal Court Assembly of States Parties. 'Proposed Programme Budget for 2022 of the International Criminal Court' (16 August 2021) Doc ICC-ASP/20/10.
International Law Commission. 'Draft Code of Crimes Against the Peace and Security of Mankind with commentaries' [1996] 2(2) *Yearbook of the International Law Commission* 17, UN Doc A/CN.4/SER.A/1996/Add.l.
———. 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] 2(2) *Yearbook of the International Law Commission* 31 UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2).
———. 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682.
———. 'Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)": Study by the Secretariat' (18 June 2010) UN Doc A/CN.4/630.
———. 'Report of the International Law Commission on the Work of its Seventieth Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.
———. 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' in 'Report of the International Law Commission on the Work of its Seventy-third session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10.

Institut de Droit International, 16th Committee. 'Le Conflit des Lois pénales en matière de competence. Révision des Résolutions de Munioh' (1931) 36 *Annuaire de l'institut de Droit International* 87.

———, 17th Committee. 'La compétence universelle en matière pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre' (2005) 71 *Annuaire de l'Institut de Droit International* 296.

Ivanova, Polina. 'Russia turns to Donbas conscripts to fill front lines' (*Financial Times*, 11 June 2022) <https://www.ft.com/content/e5b88958-b6e4-4417-ba50-eb1916092acd>.

Jackson, Miles. 'Command Responsibility' in Jérôme de Hemptinne, Robert Roth, and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge UP 2019) 409.

Jescheck, Hans-Heinrich. 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 *Journal of International Criminal Justice* 38.

Joyner, Christopher C. 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law & Contemporary Problems* 153.

Katona, Nóra. 'Article 4: Obligation to Criminalize Torture' in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Commentary* (2nd edn, Oxford UP 2019) 176.

Kelsen, Hans. *General Theory of Law and State* (first published 1945, Transaction Publishers 2006).

Kissinger, Henry A. 'The Pitfalls of Universal Jurisdiction' (2001) 80 *Foreign Affairs* 86.

Kittichaisaree, Kriangsak. *International Criminal Law* (Oxford UP 2001).

Klamberg, Mark. 'Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden' (2020) 66 *Scandinavian Studies in Law* 367.

Kleffner, Jann K. *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford UP 2008).

Koenig, Alexa. 'From 'Capture to Courtroom' Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 *Journal of International Criminal Justice* 829.

Komarov, Alexander and Oona A. Hathaway. 'Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression' (*Just Security*, 5 April 2022) <https://www.justsecurity.or g/80958/ukraines-constitutional-constraints-how-to-achieveaccountability-for-the-crime-of-aggression/>.

Kontorovich, Eugene. 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal* 183.

Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge UP 2006).

——— and Päivi Leino. 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

Kreß, Claus. ‘Universal Jurisdiction over International Crimes and the *Institut de Droit international*’ (2006) 4 *Journal of International Criminal Justice* 561.

Kuibida, Roman, Liana Moroz, and Roman Smaliuk, ‘Justice in the East of Ukraine during the Ongoing Armed Conflict’ (2020) 11 *International Journal of Court Administration* 1.

Lauterpacht, Hersch. *The Function of Law in the International Community* (Martti Koskenniemi ed, first published 1933, Oxford UP 2011).

———. ‘Is International Law a Part of the Law of England?’ (1939) 25 *Transactions of the Grotius Society* 51.

———. *International Law: Collected Papers*, vol 3 (Elihu Lauterpacht ed, Cambridge UP 1970).

Lasok, Dominic. ‘The Eichmann Trial’ (1962) 11 *International & Comparative Law Quarterly* 355.

Liivoja, Rain. *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge UP 2017).

Mackinnon, Amy, Christina Lu, and Jack Detsch. ‘Putin Wanted by ICC Over Alleged War Crimes’ (*Foreign Policy*, 17 March 2023) <https://foreignpolicy.com/2023/03/17/putin-war-crimes-against-humanity-warrant-icc-ukraine-children-reeducation-transfer-territory-lvova-belova/>.

Mankoff, Jeffrey. *Russian Foreign Policy: The Return of Great Power Politics* (Rowman & Littlefield 2009).

Marchuk, Iryna. ‘Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine’ (2022) 20 *Journal of International Criminal Justice* 787.

McCoubrey, Hilaire and Nigel D. White, *International Law and Armed Conflict* (Aldershot 1992).

McCorquodale, Robert and Rebecca La Forgia, ‘Taking Off the Blindfolds: Torture by Non-State Actors’ (2001) 1 *Human Rights Law Review* 189.

Mearsheimer, John J. *The Tragedy of Great Power Politics* (W.W. Norton 2001).

Meron, Theodor. ‘The Geneva Conventions as Customary Law’ (1987) 81 *American Journal of International Law* 348.

———. *Human Rights and Humanitarian Norms as Customary Law* (Oxford UP 1989).

Meyer, William D. ‘Under Assault: A Status Report on the Ukrainian Justice System in Wartime’ (*International Legal Assistance Consortium*, 15 July 2022) <http://ilacnet.org/wp-content/uploads/2022/07/ILAC_-Ukraine-Status-Report-on-Justice-System-July-2022.pdf>.

Mitchell, Claire. *Aut Dedere, Aut Judicare: The Extradite Or Prosecute Clause in International Law* (IHEID Publications 2009).

Momtaz, Djamchid. ‘Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority’ in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford UP 2010) 237.

Moreno-Ocampo, Luis. 'International Criminal Justice: Learning From Reality' (2015) 16(2) *Georgetown Journal of International Affairs* 47.

Musmanno, Michael A. 'The Objections *in limine* to the Eichmann Trial' (1962) 35 *Temple Law Quarterly* 1.

Newton, Michael A. 'The Quest for Constructive Complementarity' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge UP 2011) 304.

Nowak, Manfred. 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' in Mark Ginbey and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 11.

Nsereko, Daniel T. Ntanda. 'The International Criminal Court: Jurisdictional and Related Issues (1999) 10 *Criminal Law Forum* 87.

Nussbaum, Arthur. 'Significance of Roman Law in the History of International Law' (1952) 100 *University of Pennsylvania Law Review* 678.

Öberg, Marko D. 'The Absorption of Grave Breaches Into War Crimes Law' (2009) 91 *International Review of the Red Cross* 163. \

Ogrenchuk, Anna. '12 friends against Russia: how universal jurisdiction allows punishment for crimes in Ukraine' (*European Pravda,* 6 June 2022) <https://www.eurointegration.com.ua/eng/news/2022/06/6/7140690/>.

O'Keefe, Roger. 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

———. 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 811.

Oppenheim, Lassa F.L. *International Law*, vol 1 (2nd edn, Longmans Green 1912).

Orentlicher, Diane F. 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

Peskin, Victor. 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 *Journal of Human Rights* 213.

Pictet Jean S. (ed). *Commentary on the Fourth Geneva Convention* (ICRC 1958).

Philippe, Xavier. 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?' (2006) 88 *International Review of the Red Cross* 375.

Pound, Roscoe. 'Hierarchy of Sources and Forms in Different Systems of Law' (1933) 7 *Tulane Law Review* 475.

Radin, Max. 'Fundamental Concepts of the Roman Law' (1924) 12 *California Law Review* 393.

Ragazzi, Maurizio. *The Concept of International Obligations* Erga Omnes (Oxford UP 1997).

Randall, Kenneth C. 'Universal Jurisdiction Under International Law' (1998) 66 *Texas Law Review* 785.

Raustiala, Kal. *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford UP 2009).

Reeves, Shane R. and David Wallace, 'The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict' (2015) 91 *International Law Studies* 361.
Reydams, Luc. *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford UP 2004).
Rodenhäuser, Tilman. *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford UP 2018).
Rojo, Enrique Carnero. 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?' (2005) 18 *Leiden Journal of International Law* 829.
Röling, Bert V.A. 'Aspects of the Criminal Responsibility for Violations of the Laws of War' in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica 1979) 211.
Roscini, Marco. 'Great Expectations: The Implementation of the Rome Statute in Italy' (2007) 6 *Journal of International Criminal Justice* 493.
Rubin, Alfred P. *The Law of Piracy* (2nd edn, Transnational Publishers 1997).
Ryngaert, Cedric. 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Participants in the International Legal System* (Routledge 2011) 284.
———. *Jurisdiction in International Law* (2nd edn, Oxford UP 2015).
Sadat, Leila N. 'Heads of State and Other Government Officials before the International Criminal Court: The Uneasy Revolution Continues' in Margaret M. de Guzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) 96.
Sandoz, Yves. 'The History of the Grave Breaches Regime' (2009) 7 *Journal of International Criminal Justice* 657.
———, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross/Martinus Nijhoff 1987).
Scelle, Georges. *Précis de Droit des Gens*, vol II (Sirey 1932).
———. 'Règles Généales du Droit de la Paix' (1933) 46 *Recueil des Cours de l'Académie de Droit International* 327.
———. 'Le phénomène juridique du dédoublement fonctionnel' in Walter Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem* (Vittorio Klostermann Verlag 1956) 324.
Schabas, William A. *An Introduction to the International Criminal Court* (Cambridge UP 2001).
———. 'Victor's Justice: Selecting Situations at the International Criminal Court' (2010) 43 *John Marshal Law Review* 535.
———. 'The Contribution of the Eichmann Trial to International Law' (2013) 26 *Leiden Journal of International Law* 667.

——— and Giulia Pecorella. ‘Article 12: Preconditions to the Exercise of Jurisdiction’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck/Hart/Nomos 2016) 672.

Scharf, Michael P. ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’ (1996) 31 *Texas International Law Journal* 1.

———, Paul R. Williams, Yvonne Dutton, and Milena Sterio, ‘High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine’ (*Opinio Juris*, 29 July 2022) <https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/>.

Schindler, Dietrich. ‘Significance of the Geneva Conventions for the contemporary world’ (1999) 81 *International Review of the Red* Cross 715.

Schmidt, Roland. ‘Article 5: Types of Jurisdiction over the Offence of Torture’ in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Commentary* (2nd edn, Oxford UP 2019) 194.

Schmitt, Michael N. ‘The Status of Opposition Fighters in a Non-International Armed Conflict’ (2012) 88 *International Law Studies* 119.

Schwarzenberger, Georg. ‘International *Jus Cogens*?’ (1965) 43 *Texas Law Review* 455.

Schwelb, Egon. ‘Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission’ (1967) 61 *American Journal of International Law* 946.

Shearer, Ivan. ‘Piracy’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 8 (Oxford UP 2012) 320.

Silving, Helen. ‘*In Re* Eichmann: A Dilemma of Law and Morality’ (1961) 55 *American Journal of International* Law 307.

Simma, Bruno. ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *European Journal of International Law* 265.

‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (*International Criminal Court*, 17 March 2033) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

Slaughter, Anne-Marie. ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191.

Smith, John and Brian Hogan. *Criminal Law* (David Ormerod ed, 10th edn, Oxford UP 2009).

Stahn, Carsten. ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Criminal Law Forum* 87.

Stanbrook, Ivor and Clive Stanbrook, *Extradition Law and Practice* (2nd edn, Oxford UP 2000).

Steven, Lee A. ‘Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations’ (1999) 39 *Virginia Journal of International Law* 425.

Talmon, Stefan. ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 *International & Comparative Law Quarterly* 493.

Townley, Stephen. ‘Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law’ (2021) 50 *Vanderbilt Journal of Transnational Law* 1223.

UK Foreign & Commonwealth Office. *Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level* (2019).

———. ‘UK joins core group dedicated to achieving accountability for Russia’s aggression against Ukraine’ (*HM Government*, 20 January 2023) <https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine>.

‘Ukraine: Political interference with judicial independence must end’ (*International Commission of Jurists*, 15 December 2021) <https://www.icj.org/ukraine-political-interference-with-judicial-independence-must-end/>.

‘Ukraine: Support to the implementation of the judicial reform’ (*Council of Europe*, last accessed 21 March 2023) <https://www.coe.int/en/web/cdcj/-support-to-the-judicial-reform-in-ukraine>.

UN Committee Against Torture. ‘Conclusions and recommendations of the Committee against Torture: Belgium’ (23 June 2003) UN Doc CAT/C/CR/30/6.

———. ‘General Comment No 2 on the Implementation of Article 2 by States Parties’ (2008) UN Doc CAT/C/GC/2.

———. ‘Concluding Observations: Bulgaria’ (2011) UN Doc CAT/C/BGR/CO/4-5.

———. ‘Concluding Observations: Djibouti’ (2012) UN Doc CAT/C/DJI/CO/1.

———. ‘Concluding Observations: Russian Federation’ (2012) UN Doc CAT/C/RUS/CO/5.

UN Office of the High Commissioner for Human Rights. ‘Accountability for killings in Ukraine from January 2014 to May 2016’ (14 July 2016) <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf>

———. ‘Report on the human rights situation in Ukraine: 16 November 2016 to 15 February 2017’ (2018) <https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UAReport17th_EN.pdf>.

———. ‘Ukraine / Russia: Prisoners of war’ (15 November 2022) <https://www.ohchr.org/en/press-briefing-notes/2022/11/ukraine-russia-prisoners-war>.

———. ‘Killings of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation’s Armed Attack Against Ukraine’ (8 December 2022) <https://www.ohchr.org/sites/default/files/2022-12/2022-12-07-OHCHR-Thematic-Report-Killings-EN.pdf>.

———. ‘Report on the Human Rights Situation in Ukraine: 1 August 2022–31 January 2023’ (24 March 2023) <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf>.

UN Secretary-General. ‘The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General’ (3 July 2018) UN Doc A/73/123.

UN War Crimes Commission. *The History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationary Office 1948).

van der Wilt, Harmen. 'Equal standards? On the dialectics between national jurisdictions and the International Criminal Court' (2008) 8 *International Criminal Law Review* 229.

Van Schaack, Beth. 'The Establishment of the Permanent International Criminal Court' (1999) 17 *Chinese (Taiwan) Yearbook of International Law* 1.

Verdross, Alfred. 'Forbidden Treaties in International Law' (1937) 31 *American Journal of International Law* 571.

———. '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 *American Journal of International Law* 55.

——— and Bruno Simma. *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984).

Vidmar, Jure. 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford UP 2012) 13.

Waldorf, Lars. 'A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal' (2010) 33 *Fordham International Law Journal* 1221.

Warbrick, Colin, Dominic McGoldrick, and Robert Cryer. 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51 *International & Comparative Law Quarterly* 733.

Weil, Prosper. 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413.

Werle, Gerhard and Florian Jessberger, *Principles of International Criminal Law* (4th edn, Oxford UP 2020).

Wheaton, Henry. *Elements of International Law* (Richard H Danna Jr ed., 8th edn, Little, Brown & Co 1866).

Wise, Edward M. 'Extradition: The Hypothesis of a Civitas Maxima and the Maxim *Aut Dedere Aut Judicare*' (1991) 62 *Revue Internationale de Droit Pénal* 109.

Woetzel, Robert K. 'The Eichmann Case in International Law' [1962] *Criminal Law Review* 671.

Wolff, Christian. *Jus Gentium Methodo Scientifica Pertractum* (first published 1764, Thomas Ahnert ed, Joseph H Drake tr, Liberty Fund 2017).

Wright, Lord. 'The Legal Basis of Courts Administering International Criminal Law' (1949) 15 *Law Reports of Trials of War Criminals* 23.

Yanev, Lachezar. 'Joint Criminal Enterprise' in Jérôme de Hemptinne, Robert Roth, and Elies van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge UP 2019) 121.

Zach, Gerrit. 'Article 1: Definition of Torture' in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Commentary* (2nd edn, Oxford UP 2019) 23.

Zhernakov, Mykhailo and Nestor Barchuk. 'Fresh challenges threaten to reverse Ukraine's judicial reform progress' (*Atlantic Council*, 12 December 2022) <https://www.atlanticcouncil.org/blogs/ukrainealert/fresh-challenges-threaten-to-reverse-ukraines-judicial-reform-progress/>.

NATIONAL CASES

R v Kidd (1701) 14 Howell State Trials 123 (England).
Le Louis (1817) 2 Dods 210, 165 ER 1464 (High Court of Admiralty) (England).
United States v Klintock, 18 US (5 Wheat) 144 (1820) (US).
United States v Smith, 18 US (5 Wheat) 153 (1820) (US).
Ex p Scott (1829) 9 B & C 446, 109 ER 166 (KB) (England).
Military Commissions, 11 Op AG 297 (AG 1865) (US).
R v Keyn (1876) 2 ExD 63 (England).
Ker v Illinois, 119 US 436 (1886) (US).
American Banana Co v United Fruit Co, 213 US 347 (1901) (US).
West Rand Central Gold Mining Co Ltd v The King [1905] 2 KB 391 (KB) (England).
Lennard's Carrying Co Ltd v Asiastic Petroleum Co Ltd [1915] 1 AC 705 (HL) (UK).
R v Casement [1917] 1 KB 98 (KB) (England).
R v Casement [1917] 1 KB 134 (CA) (England).
United States v Bowman, 260 US 94 (1922) (US).
Re Piracy Jure Gentium [1934] 1 AC 586 (PC) (UK).
Polites v Commonwealth [1945] HCA 3, (1945) CLR 60 (Australia).
Brend v Wood (1946) 175 LTR 306 (KB) (England).
Joyce v DPP [1946] 1 AC 347 (HL) (UK).
Chandler v United States, 171 F 2d 921 (1st Cir 1948), cert denied, 336 US 918 (1949).
Foley Brothers v Filardo, 336 US 281 (1949) (US).
Ex p Elliot [1949] 1 All ER 373 (KB) (England).
Nusselein v Belgian State (1950) 17 ILR 135 (Court of Cassation) (Belgium).
Re Rohrig (1950) 17 ILR 393 (Special Criminal Court of Amsterdam) (The Netherlands).
Public Prosecutor v L (1951) 18 ILR 206 (Supreme Court) (The Netherlands).
Frisbee v Collins, 342 US 519 (1952) (US).
Re Van den Plas (1955) 22 ILR 205 (Court of Cassation) (France).
Re Helbert Wagg & Co Ltd [1956] Ch 323 (Ch) (England).
The Universal Jurisdiction (Austria) Case (1958) 28 ILR 341 (Supreme Court) (Austria).
Cr.C. (Jerusalem) 40/61 *Attorney General v Eichmann* (1961) 45 PM 3, (1968) 36 ILR 5 (Israel).
Cr.A. 336/61 *Eichmann v Attorney General* (1962) 16 (3) PD 2033, (1968) 36 ILR 277 (Israel).
Re Argoud (1964) 45 ILR 90 (Court of Cassation) (France).
Salomon v Commissioners of Customs and Excise [1967] 2 QB 116 (CA) (England).
Daniels v White [1968] SCR 517 (Canada).

Post Office v Estuary Radio Ltd [1968] 2 QB 740 (CA) (England).
Treacy v DPP [1971] 1 AC 537 (HL) (UK).
United States v Cotten, 471 F 2d 744 (9th Cir 1973), cert denied, 411 US 936 (1973) (US).
Buttes Gas & Oil Co v Hammer (No 2) [1975] 1 QB 557 (CA) (England).
Oppenheimer v Cattermole [1976] 1 AC 249 (HL) (UK).
Ierardi v Gunter, 528 F 2d 929 (1st Cir 1976) (US).
Michigan v Doran, 439 US 282 (1978) (US).
Filártiga v Peña-Irala, 630 F 2d 876 (2nd Cir 1980) (US).
R v Secretary of State for the Home Dept, ex p Puttick [1981] QB 767 (QB) (England).
Buttes Gas & Oil Co v Hammer (No 3) [1982] 1 AC 888 (HL) (UK).
Garland v British Rail Engineering Ltd [1983] 2 AC 751 (HL) (UK).
Tel-Oren v Libyan Arab Republic, 726 F 2d 774 (DC Cir 1984), cert denied, 470 U.S. 1003 (1985) (US).
United States v Benitez, 741 F 2d 1312 (11th Cir 1984) (US).
Fédération Nationale de Déportés et Internés Résistants et Patriotes v Barbie (1985) 78 ILR 124 (Court of Cassation) (France).
Demjanjuk v Petrovsky, 776 F 2d 571 (6th Cir 1985), cert denied, 475 US 1016 (1986) (US).
R v Nedrick [1986] 1 WLR 1025 (CA) (England).
West v Atkins, 487 US 42 (1988) (US).
Cr.C. (Jerusalem) 373/86 *State of Israel v Demjanjuk* (1988) 5748 (c) PD 457 (Israel).
Committee of US Citizens in Nicaragua v Reagan, 859 F 2d 929 (DC Cir 1988) (US).
United States v Layton, 855 F 2d 1388 (9th Cir 1988), cert denied, 489 US 1046 (1989) (UK).
J.H. Rayner Ltd v Dept of Trade [1990] 2 AC 418 (HL) (UK).
EEOC v Arabian American Oil Co, 499 US 244 (1991) (US).
Somchai Liangsiriprasert v Government of the USA [1991] 1 AC 225 (PC) (UK).
State v Ebrahim 1991 (2) SA 553 (AD), (1992) 31 ILM 888 (South Africa).
Polyukhovich v Commonwealth [1991] HCA 32, (1991) 172 CLR 501 (Australia).
United States v Alvarez-Machain, 504 US 655 (1992) (US).
Siderman de Blake v Republic of Argentina, 965 F 2d 699 (9th Cir 1992), cert denied, 507 US 1017 (1993) (US).
Cr.A. 347/88 37 *Demjanjuk v State of Israel* (1993) 37 (4) PD 22 (Israel).
BGH 13 February 1994, 14 NStZ 232 (Germany).
R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42 (HL) (UK).
United States v Vasquez-Velasco, 15 F 3d 833 (9th Cir 1994) (US).
Princz v Federal Republic of Germany, 26 F 3d 1166 (DC Cir 1994), cert denied, 513 US 1121 (1995) (US).
Minister of State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20, (1995) 183 CLR 273 (Australia).
Kadic v Karadžić, 70 F 3d 232 (2nd Cir 1995), cert denied, 518 US 1005 (1996) (US).
UfR 1995.848 L (Denmark).

Prosecutor v Djajić (1997) 92 *American Journal of International Law Supplement* 78 (Military Tribunal at Lausanne (Switzerland).
BayObLG 23 May 1997, NJW 1998, 392 (Germany).
Re Surrender of Ntakirutimana, 988 F Supp 1038 (SD Tex 1997) (US).
OLG Düsseldorf 26 September 1997, 2 StE 8/96 (Germany).
HR 11 November 1997, NJ 1998, 463 (The Netherlands).
OLG Düsseldorf 26 September 1997, NJW-RR 1998, 490 (Germany).
R v Woollin [1999] 1 AC 82 (HL) (UK).
BGH 30 April 1999, NJW 2000, 2517 (Germany).
Higgs v Minister of National Security (Bahamas) [1999] UKPC 55, [2000] 2 AC 228 (UK).
Ntakirutimana v Reno, 184 F 3d 419 (5th Cir 1999), cert denied, 528 US 1135 (1999) (US).
R v Sawoniuk [2000] EWCA Crim 9, (2001) 2 Cr App R 220 (England).
United States v Bin Laden, 92 F Supp 2d 189 (SDNY 2000) (US).
Hof Amsterdam 20 November 2000, NJ 2001, 51 (The Netherlands).
BVerfG 12 December 2000, NJW 2001, 1848 (Germany).
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) [2000] 1 AC 147 (HL) (UK).
Hutchinson v Newbury Magistrates Court [2000] EWHC 61 (QB), (2000) 122 ILR 499 (England).
R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2712 (Admin), ILDC 662 (UK 2002) (England).
Matter of Y-L-, 23 I & N Dec 270 (AG 2002) (US).
R v Matthews [2003] EWCA Crim 192, [2003] 2 Cr App R 461 (England).
United States v Yousef, 327 F 3d 56 (2nd Cir 2003), cert denied, 540 US 933 (2003) (US).
Rb Rotterdam 7 April 2004, NL:RBROT:2004:AO7287 (The Netherlands).
R v Zardad, ILDC 95 (UK 2004) (Central Criminal Court, 7 April 2004) (England).
Kaunda v President of the Republic of South Africa [2004] ZACC 5 (South Africa).
Bouzari v Islamic Republic of Iran (2004) 71 OR (3d) 675 (CA) (Canada).
Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers 2004 SCC 45, [2004] 2 SCR 427 (Canada).
Sosa v Alvarez-Machain, 542 US 692 (2004) (US).
State v Basson 2005 (1) SA 171 (CC) (South Africa).
A v Secretary of State for the Home Dept (No 2) [2005] UKHL 71, [2006] 2 AC 221 (UK).
BGE 133 II 450 (Belgium).
R v Jones [2006] UKHL 16, [2007] 1 AC 136 (UK).
Jones v Minister of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC 270 (UK).
R (Al-Skeini) v Secretary of States for Defence [2007] UKHL 26, [2008] 1 AC 153 (UK).
Fang v Jiang [2007] NZAR 420 (SC) (New Zealand).

R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 (England).
Ramirez-Peyro v Holder, 574 F 3d 893 (8th Cir 2009) (US).
HR 1 December 2009, NJ 2010, 101 (The Netherlands).
Norris v Government of the USA [2008] UKHL 16, [2008] 1 AC 920 (UK).
Ugirashebuja v Government of the Republic of Rwanda [2009] EWHC 770 (Admin), (2011) 142 ILR 568 (England).
R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin), (2014) 154 ILR 423 (England).
United States v Belfast, 611 F 3d 783 (11th Cir 2010) (US).
Morrison v National Australian Bank Ltd, 561 US 247 (2010) (US).
Republic of Serbia v Ganić [2010] EW Misc 11, (2015) 160 ILR 651 (England).
Zhang v Zemin [2010] NSWCA 255 (Australia).
Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs [2012] UKSC 48, [2013] 1 AC 614 (UK).
R (Amirifard) v Secretary of State for the Home Dept [2013] EWHC 279 (Admin), [2013] CN 260 (England).
Richardson v DPP [2014] UKSC 8, [2014] 1 AC 635 (UK).
R (Khan) v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 24, [2014] 1 WLR 872 (England).
National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre [2014] ZACC 30 (South Africa).
Garcia v Holder, 756 F 3d 885 (5th Cir 2014) (US).
Cox v Ergo Versicherung AG [2014] UKSC 22, [2014] 1 AC 1379 (UK).
R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 1 WLR 1449 (UK).
R v Masih [2015] EWCA Crim 477 (England).
Government of the USA v Bowen [2015] EWHC 1873 (Admin), [2015] CN 1096 (England).
Government of the USA v Giese [2015] EWHC 2733 (Admin), [2015] CN 1572 (England).
Bilta (UK) Ltd v Nazir (No 2) [2015] UKSC 23, [2016] 1 AC 1 (UK).
Devani v Republic of Kenya [2015] EWHC 3535 (Admin) (England).
OLG Frankfurt 29 December 2015, 12 W 52/15 (Germany).
RJR Nabisco Inc v European Community, 579 US 325, 335–36 (2016) (US).
Belhaj v Straw [2017] UKSC 3, [2017] 1 AC 964 (UK).
Barajas-Romero v Lynch, 846 F 3d 351 (9th Cir 2017) (US).
Government of the Republic of Rwanda v Nteziryayo [2017] EWHC 1912 (Admin) (England).
R (Medical Justice) v Secretary of State for the Home Dept [2017] EWHC 2461 (Admin), [2017] 4 WLR 198 (England).
Alseran v Ministry of Defence [2017] EWHC 3289 (QB), [2019] 1 QB 1251 (England).
R v TRA (Redress Trust intervening) [2018] EWCA Crim 2843 (England).
R v Taylor [2019] UKSC 51, [2021] 1 AC 349 (UK).

Matter of O-F-A-S-, 28 I & N Dec 35, 40 (AG 2020) (US).
Mallya v Government of India [2020] EWHC 924 (Admin) (England).
R (KBR Inc) v Director of the Serious Fraud Office [2021] UKSC 2, [2022] 1 AC 519 (UK).
Modi v Government of India [2021] EWHC 2257 (Admin) (England).
OLG Frankfurt 30 November 2021, 5-3 StE 1/20-4-1/20 (Germany).
Roberts v Soldiers, Sailors, Airmen and Families Association [2022] UKSC 29, [2022] 3 WLR 1111 (UK).
HR 8 July 2022, NL:PHR:2008:BG1477 (The Netherlands).
OLG Hamburg 27 July 2022, 3 St 2/22 (Germany).
Rb The Hague 17 November 2022, ECLI: NL:RBDHA:2022:12218 (The Netherlands).

INTERNATIONAL CASES

Arrest and Return of Savarkar (France v Great Britain) (1911) 11 RIAA 243 (Permeant Court of Arbitration).
Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion) (1923) PCIJ Series B No 4.
German Settlers in Poland (Advisory Opinion) (1923) PCIJ Series B No 6.
SS Lotus (France v Turkey) (Merits) (1927) PCIJ Rep Series A No 10.
Stephens (United States) v United Mexican States (1927) 4 RIAA 265, 266–67 (Mexico-US General Claims Commission).
Nájera (France) v United Mexican States (1928) 5 RIAA 466, 470 (French-Mexican Claims Commission).
Panevezys-Saldutiskis Railway (Estonia v Lithuania) (Merits) (1938) PCIJ Rep Series A/B No 76.
France v Göring (1946) 22 Trial of the Major War Criminals before the International Military Tribunal 411.
United States v Ohlendorf (1948) 4 Trials of War Criminals before the Nuremberg Military Tribunals 411 (US Military Tribunal II).
Right of Passage Over Indian Territory (Portugal v India) (Merits) [1960] ICJ Rep 6.
Case 77/69 *Commission v Belgium* [1970] ECR 237.
Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3.
United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Jurisdiction) [1980] ICJ Rep 3.
López Burgos v Uruguay, Communication No R.12/52, UN Human Rights Committee (1981) UN Doc A/36/40.
Celiberti de Casariego v Uruguay, Communication No R.13/56, UN Human Rights Committee (1981) UN Doc A/36/40.

Estrella v Uruguay, Communication No 74/1980, UN Human Rights Committee (29 March 1983) UN Doc CCPR/C/18/D/74/1980.
William L. Pereira Associates, Iran v Islamic Republic of Iran (1984) 5 Iran-USCTR 198.
Tippetts, Abbet, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran (1984) 6 Iran-USCTR 219.
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14.
Phelps Dodge Corp v Islamic Republic Iran (1986) 10 Iran-USCTR 121.
Yeager v Islamic Republic of Iran (1987) 17 Iran-USCTR 92.
Arthur Young & Co v Islamic Republic of Iran (1987) 17 Iran-USCTR 245.
Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion) [1988] ICJ Rep 12.
OR, NM, MS v Argentina, Communication Nos 1/1988, 2/1988, and 3/1988, UN Committee Against Torture (23 November 1989) UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988.
García v Ecuador, Communication No 319/1988, UN Human Rights Committee (1991) UN Doc CCPR/C/43/D/319/1988.
Loizidou v Turkey (Preliminary Objections) (1995) 20 EHRR 99.
Prosecutor v Tadić (Decision on the Defence Motion on Jurisdiction) IT-94-1-T (10 August 1995).
Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).
Loizidou v Turkey (Merits) [1996] ECHR 70.
Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany and R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-01029.
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.
Prosecutor v Erdemović (Trial Judgment) IT-96-22-T (29 November 1996).
Prosecutor v Akayesu (Trial Judgment) ICTR-96-4-T (2 September 1998).
Prosecutor v Rajić (Review of the Indictment) IT-95-12-R61 (13 September 1996).
Prosecutor v Delalić (Trial Judgment) IT-96-21-T (16 November 1998).
Prosecutor v Furundžija (Trial Judgment) IT-95-17/1-T (10 December 1998).
Elmi v Australia, Communication No 120/1998, UN Committee Against Torture (25 May 1999) UN Doc CAT/C/22/D/120/1998.
Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62.
M/V 'SAIGA' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment of 1 July 1999) 1999 ITLOS Rep 10.
Cyprus v Turkey (1999) 2 DR 125.
Selmouni v France (1999) 29 EHRR 403.
Prosecutor v Tadić (Appeal Judgment) IT-94-1-A (15 July 1999).

United States–Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R) [1999] 7 DSR 2755.
Prosecutor v Jelisić (Trial Judgment) IT-95-10-T (14 December 1999).
Prosecutor v Blaškić (Trial Judgment) IT-95-14-T (3 March 2000).
Prosecutor v Furundžija (Appeal Judgment) IT-95-17/1-A (21 July 2000).
Cantoral-Benavides v Peru (Merits, Judgment) Inter-American Court of Human Rights Series C No 88 (18 August 2000).
Prosecutor v Delalić (Appeal Judgment) IT-96-21-A (20 February 2001).
Prosecutor v Kunarac (Trial Judgment) IT-96-23 & 23/1-T (22 February 2001).
Prosecutor v Kordić (Trial Judgment) IT-95-14/2-T (26 February 2001).
Prosecutor v Akayesu (Appeal Judgment) ICTR-96-4-A (1 June 2001).
Banković v Belgium [2001] ECHR 890.
Prosecutor v Kvočka (Trial Judgment) IT-98-30/1-T (2 November 2001).
Egmez v Cyprus (2002) 34 EHRR 2.
Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Jurisdiction) [2002] ICJ Rep 3.
MPS v Australia, Complaint No 138/1999, UN Committee Against Torture (30 April 2002) UN Doc CAT/C/28/D/138/1999.
Al-Adsani v UK (2002) 34 EHRR 273.
HMHI v Australia, Complaint No 177/2001, UN Committee Against Torture (1 May 2002) UN Doc CAT/C/28/D/177/2001.
Prosecutor v Kunarac (Appeal Judgment) IT-96-23 & 23/1-A (12 June 2002).
İlhan v Turkey (2002) 34 EHRR 869.
Domingues v United States (Case 12.285) Report No 62/02, Inter-American Commission on Human Rights (2002) OEA/Ser.L/V/II.117 doc. 7 rev.1.
Kalashnikov v Russia [2002] ECHR 596.
Cyprus v Turkey (2002) 35 EHRR 731.
Prosecutor v Kvoćka (Appeal Judgment) IT-98-30/1-A (7 February 2003).
Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.
Prisoners of War - Eritrea's Claim 17 (Eritrea/Ethiopia) (Partial Award) (2003) 26 RIAA 23 (Eritrea-Ethiopia Claims Commission).
Prisoners of War - Ethiopia's Claim 4 (Eritrea/Ethiopia) (Partial Award) (2003) 26 RIAA 73 (Eritrea-Ethiopia Claims Commission).
Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion OC-18/03) Inter-American Court of Human Rights Series A No 18 (17 September 2003).
Prosecutor v Vasiljević (Appeal Judgment) IT-98-32 (25 February 2004).
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
Prosecutor v Fofana (Appeals Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict) SCSL-2004-14-AR72(E) (25 May 2004).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
Prosecutor v Blaškić (Appeal Judgment) IT-95-14-A (29 July 2004).
Prosecutor v Brđanin (Trial Judgment) IT-99-36-T (1 September 2004).
Prosecutor v Kvočka (Appeal Judgement) IT-98-30/1-A (28 February 2005).
Prosecutor v Hadžihasanović (Appeals Decision on Motions for Acquittal) IT-01-47-AR73.3 (11 March 2005).
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits) [2005] ICJ Rep 168.
Prosecutor v Semanza (Appeals Judgment) ICTR-97-20-A (20 May 2005).
Case T-306/01 *Yusuf v Council and Commission* [2005] ECR II-3533.
Ilaşcu v Moldova and Russian Federation (2005) 40 EHRR 1030.
Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction) [2006] ICJ Rep 6.
Prosecutor v Stakić (Appeal Judgment) IT-97-24-A (22 March 2006).
Prosecutor v Karemera (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C) (16 June 2006).
Prosecutor v Šešelj (Reconsideration of Jurisdiction Decision) IT-03-67-AR72.1 (16 June 2006).
Prosecutor v Orić (Trial Judgement) IT-03-68-T (30 June 2006).
Telenor Mobile Communications AS v Republic of Hungary (Award) ICSID Case No ARB/04/15 (13 September 2006).
Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-00052.
Goiburú v Paraguay (Merits, Reparations and Costs, Judgment) Inter-American Court of Human Rights Series C No 153 (22 September 2006).
Prosecutor v Lubanga (Decision on the Confirmation of Charges) ICC-01/04-01/06-803 (29 January 2007).
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43.
Prosecutor v Brđanin (Appeal Judgement) IT-99-36-A (3 April 2007).
Prosecutor v Brima (Trial Judgement) SCSL-04-16-T (20 June 2007).
Jorgić v Germany [2007] ECHR 583.
Prosecutor v Karadžić (Decision on Hostage-Taking) IT-95-5/18-AR72.5 (9 July 2008).
Baykara v Turkey [2008] ECHR 1345.
Association of Victims of Post Electoral Violence v Cameroon (2009) AHRLR 9 (African Commission on Human and Peoples' Rights).
Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor) ICC-01/05-01/08-424 (15 June 2009).
Prosecutor v Karadžić (Decision on Hostage-Taking) IT-95-5/18-AR72.5 (9 July 2009).
Prosecutor v Ndindiliyimana (Trial Judgement) ICTR-00-56-T (17 May 2011).

Fleury v Haiti (Merits and Reparations, Judgment) Inter-American Court on Human Rights Series C No 236 (23 November 2011).
Prosecutor v Lubanga (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012).
Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (Merits, Judgment) [2012] ICJ Rep 99.
Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits) [2012] ICJ Rep 422.
Artavia Murillo v Costa Rica (Preliminary Objections, Merits, Reparations, and Costs, Judgment) Inter-American Court of Human Rights Series C No 257 (28 November 2012).
Prosecutor v Katanga (Trial Judgment) ICC-01/04-01/07-3436 (7 March 2014).
M/V 'Virginia G' (Panama v Guinea-Bissau) (Judgment of 14 April 2014) 2014 ITLOS Rep 4.
Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion of 2 April 2015) 2015 ITLOS Rep 4.
Chagos Marine Protected Area (Mauritius v UK) (Award) (2015) 31 RIAA 359 (Permanent Court of Arbitration).
Tomlinson v State of Belize and State of Trinidad and Tobago [2016] CCJ 1 (OJ).
Prosecutor v Stanišić (Appeal Judgment) IT-08-91-A (30 June 2016).
Eli Lilly & Co v Government of Canada (Final Award) ICSID Case No UNCT/14/2 (16 March 2017).
Marfin Investment Group Holdings SA v Republic of Cyprus (Award) ICSID Case No ARB/13/27 (26 July 2018).
Chevron Corp and Texaco Petroleum Co v Republic of Ecuador (Second Partial Award on Track II) PCA Case No 2009-23 (30 August 2018).
Request under Regulation 46(3) of the Regulations of the Court (Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute") ICC-RoC46(3)-01/18-37 (6 September 2018).
Prosecutor v Ntaganda (Trial Judgment) ICC-01/04-02/06-2359 (8 July 2019).
Khater v Moroco, Communication No 782/2016, UN Committee Against Torture (26 December 2019) UN Doc CAT/C/68/D/782/2016.
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures) [2020] ICJ Rep 3.
Ameziane v United States (Case 12.865) Report No 29/20, Inter-American Commission on Human Rights (2020) OEA/Ser.L/V/II doc 39.
Prosecutor v Ongwen (Trial Judgment) ICC-02/04-01/15-1762 (4 February 2021).
Situation in the State of Palestine (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine') ICC-01/18-143 (5 February 2021).
Ukraine v Russian Federation (Re Crimea) App Nos 20958/14 and 38334/18 (ECtHR, 16 December 2021).

Situation in Ukraine (Decision assigning the situation in Ukraine to Pre-Trial Chamber II) ICC-01/22-1 (2 March 2022).
Situation in Ukraine (Notification on Receipt of Referrals and on Initiation of Investigation) ICC-01/22-2 (7 March 2022).
Situation in Ukraine (Further Notification on Receipt of Referrals and of Article 18 Letters) ICC-01/22-7 (18 March 2022).
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections) 2022 <https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>.
Ukraine & The Netherlands v Russian Federation App Nos 8019/16, 43800/14, and 28525/20 (ECtHR, 25 January 2023).
Situation in Ukraine (Notification of the election of the Presiding Judge) ICC-01/22-15 (23 February 2023).
Mamasakhlisi v Georgia and Russian Federation App Nos 29999/04 and 41424/04 (ECtHR, 7 March 2023).

NATIONAL LAWS

Treason Act 1351 (25 Edw 3, c 2) (UK).
Treason Act 1543 (35 Hen 8, c 2) (UK).
Offences at Sea Act 1536 (28 Hen 8 c 15) (UK).
Slave Trade Act 1824 (5 Geo 4, c 113) (UK).
Offences Against the Person Act 1861 (24 & 25 Vict c 100) (UK).
Foreign Enlistment Act 1870 (33 & 34 Vict c 90) (UK).
Official Secrets Act 1911 (UK).
Nazis and Nazi Collaborators (Punishment) Law (5710-11) (1950–51) 4 LSI 154 (Israel).
Geneva Conventions Act 1957 (UK).
Internally Protected Persons Act 1978 (UK).
Aviation Security Act 1982 (UK).
War Crimes Act 1991 (UK).
Merchant Shipping Act 1995 (UK).
Sex Offenders Act 1997 (UK).
International Criminal Court Act 2001 (UK).
Anti-terrorism, Crime and Security Act 2001 (UK).
Strafgesetzbuch [Criminal Code] (Germany).

INTERNATIONAL INSTRUMENTS

Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907) 205 CTS 277.

UNGA Res 96 (I) (11 December 1946).
Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.
Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949) 75 UNTS 31.
Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (adopted 12 August 1949) 75 UNTS 85.
Geneva Convention relative to the treatment of prisoners of war (adopted 12 August 1949) 75 UNTS 135.
Geneva Convention relative to the protection of civilian persons in time of war (adopted 12 August 1949) 75 UNTS 287.
UNSC Res 138 (23 June 1960).
Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963) 704 UNTS 219.
Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3.
Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 609.
Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331.
Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970) 860 UNTS 105.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 23 September 1971) 974 UNTS 177.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973) 1035 UNTS 167.
International Convention Against the Taking of Hostages (adopted 17 December 1979) 1316 UNTS 205.
United Nations Convention on the Law of the Sea (adopted 10 December 1982) 1833 UNTS 3.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988) 1678 UNTS 201.
Statute of the International Tribunal for Rwanda (adopted 8 November 1994) UNSC Res 955, (1994) 33 ILM 1598.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997) 2056 UNTS 211.
International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997) 2149 UNTS 256.
Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3.

International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999) 2178 UNTS 197.
Agreement on the Establishment of a Special Court for Sierra Leone, Statute of the Special Court for Sierra Leone (UN–Sierra Leone) (adopted 16 January 2002) 2178 UNTS 137, 145.
UNSC Presidential Statement 2002/22 (23 July 2002) UN Doc S/PRST/2002/22.
UNSC Res 2127 (5 December 2013).
Council Decision 2014/486/CFSP of 22 July 2014 on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) [2014] OJ L217/42.
UNGA Res ES-11/1 (2 March 2022).
UNHRC Res 49/1 (7 March 2022) UN Doc A/HRC/RES/49/1.
Council Decision (CFSP) 2022/638 of 13 April 2022 amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) [2022] OJ L117/38.
UNHRC Res S-34/1 (16 May 2022) UN Doc A/HRC/RES/S-34/1.
European Parliament and Council Regulation (EU) 2022/838 of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences [2022] OJ L148/1.
UNGA Res ES-11/4 (12 October 2022).
UNGA Res ES-11/L.7 (23 February 2023).