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Hostis Humani Generis: Universal Jurisdiction in English Criminal Law and Grave Breaches of the Geneva Conventions in Ukraine

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 robust, yet in many respects inadequate, incorporation of universal jurisdiction over certain violations of international humanitarian law within English criminal law is worth examination. This article provides a theoretical, doctrinal, and statutory overview of universal jurisdiction over grave breaches of the Geneva Conventions in English law, reviewing its origin in *egra omnes* obligations and analysing 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 Federation appear *prima facie* liable for gross transgressions of international humanitarian law justiciable before English courts. English criminal law is well suited for the prosecutions of such perpetrators, with the universality principle promising to play a cardinal role in post-conflict transitional justice in Ukraine. This article illustrates how the United Kingdom's professed commitment to justice and accountability in Ukraine can manifest itself in tangible commitments to effective prosecution under the principle of universal jurisdiction, when prosecutions before the International Criminal Court and Ukrainian domestic courts may face challenges which will undoubtedly result in accountability gaps.

Keywords: international humanitarian law, grave breaches, universal jurisdiction, war crimes, Russia, Ukraine

* Keck Fellow, University of California, Los Angeles (UCLA); Research Fellow, Promise Institute for Human Rights, UCLA School of Law; Researcher, Center for Truth and Justice. An earlier version of this article was awarded the UCLA Library Research Prize in the Humanities, Arts, and Social Sciences. I wish to thank Dr Anne Gilliland for her support throughout the production of this article. All views and errors remain my own.

'This new type of criminal, who is in actual fact *hostis generis humani*...' [1]
Hannah Arendt, *Eichmann in Jerusalem*

I. INTRODUCTION

The 1961 trial of Adolf Eichmann before the District Court of Jerusalem for (among others) genocide and crimes against humanity during the Holocaust represented a watershed moment for international criminal law.[2] The crimes for which the notorious Nazi functionary was convicted did not exist *malum prohibitum* at the time of their commission, 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, *Eichmann* has attained a central place in international criminal law,[4] and is recognised 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 universal jurisdiction, 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 it—in prosecuting their perpetrators, irrespective of traditional notions of *locus delicti* and territoriality.[7] As the German Federal Constitutional Court stated in the famous *Jorgić* case, universal jurisdiction applies 'only to specific crimes which are viewed as threats to the legal interests of the international community of states' and is 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

[1] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1964) 263.
[2] Criminal Case No 40/61 *AG v Eichmann* (1961) 45 PM 3, (1968) 36 ILR 5 (District Court of Jerusalem).
[3] See eg Helen Silving, 'In Re Eichmann: A Dilemma of Law and Morality' (1961) 55 American Journal of International Law 307; James ES Fawcett, 'The *Eichmann* Case' (1962) 38 British Yearbook of International Law 181.
[4] See eg *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) ('*Tadić* Appeal Decision') [55], [57]; *Prosecutor v Erdemović* (Trial Judgment) IT-96-22-T (29 November 1996) [62]; *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) ('*Furundžija* Trial Judgment') [156]; *Prosecutor v Jelisić* (Trial Judgment) IT-95-10-T (14 December 1999) ('*Jelisić* Trial Judgment') [68].
[5] Michael A Musmanno, 'The Objections *in limine* to the Eichmann Trial' (1962) 35 Temple Law Quarterly 1, 20.
[6] Criminal Appeal 336/61 *Eichmann v AG* (1962) 16(3) PD 2033, (1968) 36 ILR 277 (Supreme Court of Israel) [10].
[7] See *Demjanjuk v Petrovsky*, 776 F2d 571, 582 (6th Cir 1985), cert denied, 475 US 1016 (1965); Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1998) 66 Texas Law Review 785; Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge University Press 2017) 39.

for extradition'.[8] The essential premise of universal jurisdiction is now almost universally accepted,[9] though its scope remains subject to debate.[10]

While recently, universal jurisdiction has primarily been applied in the prosecution of members of the so-called 'Islamic State' and former Syrian government officials for crimes against humanity in continental jurisdictions,[11] with Russia's invasion of Ukraine and emerging evidence of widespread atrocity crimes perpetrated by Russian and Russian-aligned forces, universal jurisdiction has come into a renewed spotlight. President of the Association of Lawyers of Ukraine, Anna Ogrenchuk, remarked that universal jurisdiction 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,[12] which is presently flooded with a volume of cases it is woefully ill-prepared to handle.[13] From the few cases it has already dealt with, it is also evident that the Ukrainian criminal justice system's treatment of international crimes currently falls short of international standards.[14]

[8] Bundesverfassungsgericht (BVerfG), 12 December 2000, NJW 2001, 1848, para 13(a). See also Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735, 745.

[9] See eg Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 303–14; Antonio Cassese and others (eds), *International Criminal Law* (3rd edn, Oxford University Press 2013) 278–81; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 451.

[10] Vaughn Lowe, *International Law* (Oxford University Press 2007) 178.

[11] See eg Oberlandesgericht (OLG) Frankfurt, 30 November 2021, 5-3 StE 1/20-4-1/20 (Germany); OLG Hamburg, 27 July 2022, 3 St 2/22 (Germany); Assemblée pléniere, 12 May 2023, appeals n º 22-80.057 et 22-84.468 (France).

[12] Anna Ogrenchuk, '12 Friends against Russia: How Universal Jurisdiction Allows Punishment for Crimes in Ukraine' *European Pravda* (Kyiv, 6 June 2022) <www.eurointegration.com.ua/articles/2022/06/6/7140673/> accessed 16 September 2023.

[13] 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, 395–96; Alexander Komarov and Oona A Hathaway, 'Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression' (*Just Security*, 5 April 2022) <www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieveaccountability-for-the-crime-of-aggression/> accessed 11 September 2023.

[14] For instance, national courts have imposed life sentences on low-level Russian soldiers for war crimes which would not attract such a harsh sentence under international criminal law. Courts have also considered the fact that crimes were committed as part of an aggressive war as an aggravating factor for individual criminal responsibility, an approach which lacks grounding in law. Courts have also failed to establish contextual elements of war crimes, such as the existence of an international armed conflict. In certain cases, Ukrainian courts have also miscategorised defendants' conduct under international humanitarian law, applied erroneous *mens rea* standards, and wrongfully classified Russian 'Grad' multiple launch rocket systems as prohibited means of warfare when prosecuting the indiscriminate use of such systems. On these cases, 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, 794–801. The ability of Ukrainian judges to apply international law properly is further called into question by the 2018 conviction of two low-ranking Russian military intelligence officers in Ukraine for the crime of aggression. This offence can only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a State' under the Rome Statute of the

The list of Western countries expressing interest in prosecutions of international crimes committed in Ukraine under the premise of universal jurisdiction is growing, and now includes Germany, Estonia, Lithuania, Spain, Poland, Slovakia, Latvia, Sweden, Norway, France, and Switzerland.[15] Even the United States (US), traditionally a sceptic of universal jurisdiction over international crimes,[16] has recently amended its 1996 War Crimes Act to endow its courts with universal criminal jurisdiction over certain violations of international humanitarian law (IHL), spurred by reports of atrocity crimes in Ukraine.[17] While the US has yet to open a formal investigation, it has signed a memorandum of understanding with the Eurojust-led Joint Investigation Team investigating core international crimes committed in Ukraine.[18] The United Kingdom (UK), however, is absent from this list, despite its professed support for international justice mechanisms such as the International Criminal Court (ICC) in Ukraine[19] and a proposed 'hybrid' tribunal for aggressions against Ukraine.[20] It is yet to be seen whether the Universal Jurisdiction (Extension) Bill, introduced in Parliament in April 2023,[21] which would give English courts universal jurisdiction over genocide, crimes against humanity, and war crimes,[22] will signal a shift in political sentiment. The UK Government has thus far not initiated an investigation under the principle of universal jurisdiction relating to alleged international crimes 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 universal jurisdiction, to 'ensure that Ukraine's "subsequent

International Criminal Court (adopted 17 July 1998) 2187 UNTS 3 (Rome Statute) art 8 *bis* (1), rendering the conviction of such 'low-level' perpetrators a clear misapplication of the elements of the crime aggression in international criminal law. On this case, see Sergey Sayapin, 'A Curious Aggression Trial in Ukraine: Some Reflections on the *Alexandrov and Yerofeyev* Case' (2018) 16 Journal of International Criminal Justice 1093.

[15] See Dutton (n 13) 392–93.

[16] See eg Julian Simcock, 'Statement at the 75th UN General Assembly Sixth Committee on Agenda Item Number 87: Scope and Application of the Principle of Universal Jurisdiction' (New York, 3 November 2020) <https://usun.usmission.gov/statement-at-the-75th-un-general-assembly-sixth-committee-on-agenda-item-number-87-scope-and-application-of-the-principle-of-universal-jurisdiction/> accessed 11 September 2023.

[17] See Justice for Victims of War Crimes Act, Public Law No 117-351, 136 Stat 6265 (codified at 18 USC § 2441).

[18] Eurojust, 'National Authorities of the Ukraine Joint Investigation Team Sign Memorandum of Understanding with the United States Department of Justice' (*Eurojust*, 4 March 2023) <www.eurojust.europa.eu/news/national-authorities-ukraine-joint-investigation-team-sign-memorandum-understanding-usa> accessed 11 September 2023.

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

[20] See HM Government, 'UK Joins Core Group Dedicated to Achieving Accountability for Russia's Aggression Against Ukraine' (*HM Government*, 20 January 2023) <www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine> accessed 11 September 2023.

[21] Universal Jurisdiction (Extension) HC Bill (2022–23) [296].

[22] Currently, under the International Criminal Court Act 2001, s 51(2)(b), English extraterritorial jurisdiction over these offences is restricted to British nationals or persons subject to UK service jurisdiction.

Nuremberg" offenders face justice without impunity'.[23] This article outlines how English law can be employed to accomplish this objective, outlining how universal jurisdiction can serve as a basis for prosecuting atrocity crimes in Ukraine within English domestic courts. Section II.A explores the theoretical foundations of universal jurisdiction in relation to *jus cogens*, with Section II.B turning to the construction of extraterritorial criminal jurisdiction in international and English law. Section III then proceeds to lay out violations of IHL which could be justiciable before English courts, exploring potential perpetrator groups and offences in the context of the Ukraine conflict that may be subject to universal jurisdiction in England.

II. Theoretical Roots of Universal Jurisdiction

A. Normative hierarchy in international law

The notion that some crimes furnish the jurisdiction of states over acts that would ordinarily be out of reach of their domestic legal systems—the basic premise of universal jurisdiction—implies some hierarchy of criminal conduct in international law. 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',[24] a law that was not *jus dispositivum*, modifiable by agreements between states, as the broader law of nations was at the time. The earliest offence rooted in such law was piracy,[25] with Cicero having referred to the pirate as '*communis hostis omnium*', meaning common enemy to all mankind, as early as 44 BCE.[26] In English law, piracy has been regarded as a form of high treason since the sixteenth century,[27] with Edward Coke branding pirates '*hostis humani generis*', enemies of all mankind,[28] a characterisation later reflected in jurisprudence.[29] Similarly, early US Supreme Court jurisprudence regarded piracy as an offence 'committed against all nations' and thus pirates as the 'proper subjects for the penal code of all nations'.[30] In 1934, in an influential case before the Privy Council, Viscount Sankey LC affirmed the inapplicability of traditional restrictions

[23] HL Deb 18 May 2022, vol 822, col 483.
[24] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractum* (first published 1764, Joseph H Drake tr, Clarendon Press 1934) 10.
[25] Alfred P Rubin, *The Law of Piracy* (2nd edn, Martinus Nijhoff 1998) 17.
[26] Marcus Tullius Cicero, *De Officiis* (first published 44 BCE, Walter Miller tr, Harvard University Press 1913) 385.
[27] See Offences at Sea Act 1536 (28 Hen 8 c 15).
[28] 3 Co Inst 113. See also Co Litt 391; 1 Hale PC 665; 1 Hawkins PC 254; 4 Bl Comm 71.
[29] See cases cited in *Halsbury's Laws of England*, vol 4 (2nd edn, 1933) para 637.
[30] *US v Klintock*, 18 US (5 Wheat) 144, 152 (1820) (Marshall CJ). See also *US v Smith*, 18 US (5 Wheat) 153, 161 (1820) (Story J).

on territorial jurisdiction in cases of piracy, invoking the notion of *hostis humani generis* in finding that the pirate is 'justiciable by any State anywhere'.[31]

The universalisation of criminal jurisdiction over piracy greatly influenced the development of modern universal jurisdiction.[32] Early universal jurisdiction over piracy soon expanded to recognise that '[t]he judicial power of every independent state... extends… to the punishment of piracy *and other offences against the law of nations* by whomsoever and wheresoever committed'.[33] The *Institut de Droit International* endorsed this extension of universal jurisdiction to violations of international law at its 1931 conference.[34] In its present formulation, the exercise of universal jurisdiction is tantamount to the right or 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 cogens*,[35] which hold peremptory character in the international legal system, absolutely binding all states with no other norm being able to prevail over them.[36] Having been referenced in arbitral jurisprudence as early as 1928,[37] the development of *jus cogens* is indicative of the evolution of an international *ordre public* based on a priority of values, with *jus cogens* representing a value-based Kantian imperative.[38] Ultimately, *jus cogens* represents a compromise between naturalism and positivism as both doctrines endeavour to adapt to the shifting moral and political values of international society.[39]

Offences involving the violation of *jus cogens* are accordingly considered to impute *obligatio erga omnes*,[40] that is, rights which 'all States can be held to have a

[31] *Re Piracy Jure Gentium* [1934] AC 586 (PC) 589 (Viscount Sankey LC).

[32] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Jurisdiction) [2002] ICJ Rep 3 ('*Arrest Warrant*') 35 [6] (Separate Opinion of President Guillaume), 63 [60]-[61] (Separate Opinion of Judges Higgins, Koojimans and Buergenthal); Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 126; Crawford (n 9) 286.

[33] Henry Wheaton, *Elements of International Law* (Richard H Danna Jr ed, 8th edn, Little, Brown & Co 1866) 179 (emphasis added).

[34] Institut de Droit International, 'Le Conflit des Lois pénales en matière de competence. Révision des Résolutions de Muznioh' (1931) 36 Annuaire de l'institut de Droit International 87, 93.

[35] 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, 801–809.

[36] *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) [155]; *Jelisić* Trial Judgment (n 4) [60]; *Jones v Minister of the Interior of the Kingdom of Saudi Arabia* (*Jones v Saudi Arabia*) [2006] UKHL 26, [2007] AC 270 [42] (Lord Hoffman); *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits) [2012] ICJ Rep 99 [92].

[37] See *Nájera (France) v United Mexican States* (1928) 5 RIAA 466, 470, 472.

[38] Erika de Wet, 'The International Constitutional Order' (2006) 55 International and Comparative Law Quarterly 51, 58–59.

[39] See Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2006) 324–25; Antônio A Cançado Trindade, 'Construction of the International Law for Humankind' (2005) 316 Recueil des Cours de l'Academie de Droit International 335, 434.

[40] M Cherif Bassiouni, 'International Crimes: "*Jus Cogens*" and "*Obligatio Erga Omnes*"' (1996) 59 Law and Contemporary Problems 63, 65–66; Malcom N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 92–94.

legal interest in… protect[ing]'.[41] In other words, *erga omnes* obligations carry an 'imperative character'[42] that furnishes the interest of all states in combating violations of certain offences that violate *jus cogens*.[43] Thus, the French *Cour de Cassation* found in its case concerning notorious Nazi fugitive Klaus Barbie that violations of such norms 'are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign'.[44] Presently, the prohibitions against (among others) genocide, crimes against humanity, war crimes, and aggression are recognised as having attained the status of *erga omnes* obligations.[45]

The underlying policy basis for universal jurisdiction over such crimes logically flows from the internationalisation of their prohibition,[46] while its *raison d'être* lies in combating impunity for such heinous crimes.[47] Yet the fact that certain offences can be prosecuted extraterritorially as a matter of international law does not furnish national criminal jurisdiction over them. Although the traditional stringent rules of territoriality remain foreign to international crimes, their prosecution before English courts is dependent on the statutory construction of English criminal law itself.

B. Extraterritorial ambit of criminal law

(i) Universality in National Criminal Jurisdictions

The extraterritorial ambit of domestic law is commonly constructed under the 'effects doctrine', which posits that states may assert jurisdiction over extraterritorial acts so long as they have sufficient links *ratione materiae* (with the subject matter of the act) or *ratione personae* (with the actors involved).[48] On the other hand,

[41] *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 [33].
[42] *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Jurisdiction) [1980] ICJ Rep 3 [62], [88].
[43] See *Furundžija* Trial Judgment (n 4) [156]; *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)* (Preliminary Objections) 22 July 2022 <www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf> [107]–[108].
[44] *Fédération Nationale de Déportés et Internés Résistants et Patriotes v Barbie* (1985) 78 ILR 124, 130.
[45] See ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' (2022) UN Doc A/77/10, 85, para 3 (commentary on Conclusion 22).
[46] See *Arrest Warrant* (n 32) 137 [46] (Dissenting Opinion of Judge ad hoc Van den Wyngaert); *Obligation to Prosecute or Extradite* (n 43) [68]; Terje Einarsen, *The Concept of Universal Crimes in International Law* (Torkel Opsahl 2012) 139; Kai Ambos, *Treatise on International Criminal Law*, vol II (2nd edn, Oxford University Press 2022) 261–63.
[47] *Tadić* Appeal Decision (n 4) [58]; *Arrest Warrant* (n 32) 63 [51] (Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal); 137 [46] (Dissenting Opinion of Judge ad hoc Van den Wyngaert); *Obligation to Prosecute or Extradite* (n 43) 487 [123] (Separate Opinion of Judge Cançado Trindade).
[48] See Hersch Lauterpacht, *Collected Papers*, vol III (Elihu Lauterpacht ed, Cambridge University Press 1970) 237–41; Robert Y Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol I (9th edn,

universal jurisdiction is premised *in abstracto* on the absence of any required nexus between the offence or offender and the forum state.[49] In the seventeenth century, Hugo Grotius wrote as follows:

> [States] have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nations, done to other states and subjects… [While] it has been a settled rule, to leave offenses of individuals, which affect their own community, to those states themselves… to pardon or punish at their discretion… they have not the same plenary authority, or discretion, respecting offences which affect society at large.[50]

Grotius concluded that a state 'should upon the complaint of the aggrieved party, either punish him itself, or deliver him up to the discretion of that party'.[51] This is the one of the earliest articulations of the *aut dedere aut judicare* principle, the obligation to extradite or prosecute,[52] which now appears in over 70 international instruments.[53] Eminent Swiss jurist Emmerich de Vattel went on to write that offenders whose crimes 'violate all public security, and declare themselves the 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'.[54] The universality principle finds its roots in these classical writings—violations of *jus cogens* 'offend all States… enabling any State to vindicate rights common to all'.[55] In the 1948 *Einsatzgruppen* case, a US Military Tribunal at Nuremberg asserted that '[t]here is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law'.[56] Lord Wright, Chairman of the UN War Crimes Commission, later wrote that 'every Independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the

Longman 1992) 474–75; Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford University Press 2009) 107–10. For discussions of passive and active nationality principles see Cassese and others (n 9) 276–77; Liivoja (n 7) 68–69; Ryngaert (n 32) 110–13.

[49] *Demjanjuk* (n 7) 582–83; Ryngaert (n 32) 126.

[50] Hugo Grotius, *Rights of War and Peace* (first published 1625, AC Campbell tr, M Walter Dune 1901) 247, 258.

[51] ibid 258

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

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

[54] Emmerich de Vattel, *The Law of Nations*, vol III (first published 1758, Charles G Fenwick tr, Carnegie Institution of Washington 1916) 93.

[55] Randall (n 7) 831. See also Ryngaert (n 32) 126–27.

[56] *US v Ohlendorf* (1948) 4 TWC 411, 460.

victims or the place where the offence was committed'.[57] This notion was affirmed by the Dutch Special Criminal Court of Amsterdam soon afterwards:

> 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.[58]

The common law was initially hesitant towards extraterritorial application of penal law, with Mathew Hale observing that 'if a man had been stricken in one country and died in another, it was doubtful whether he was indictable or triable in either'.[59] Yet the common law tradition evolved to adopt a presumption against extraterritoriality rather than a unilateral rejection of it.[60] English extraterritorial jurisdiction has accordingly expanded to cover myriad offences from crimes against merchant ships to those against aircraft.[61] Insofar as statute is concerned, Parliament's supremacy furnishes it with the ability to enact legislation with an extraterritorial ambit if it specifically prescribes so.[62] According to Lord Lloyd-Jones, an intention to do so may be express or implied from 'the scheme, context and subject matter of the legislation'.[63] Parliament has prescribed extraterritorial criminal jurisdiction since at least the Treason Act 1351,[64] which extended jurisdiction over high treason extraterritorially.[65] Murder committed extraterritorially has also been justiciable before English courts in certain circumstances since 1541.[66]

[57] Lord Wright, 'The Legal Basis of Courts Administering International Criminal Law' (1949) 15 Law Reports of the Trials of War Criminals 23, 26.
[58] *Re Rohrig* (1950) 17 ILR 393, 397.
[59] 1 Hale PC 426.
[60] See *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519 [21]–[22] (Lord Lloyd-Jones), citing *R (Al-Skeini) v Secretary of States for Defence* [2007] UKHL 26, [2008] AC 153 [11] (Lord Bingham), [45] (Lord Rodger). See also William S Dodge, 'The New Presumption Against Extraterritoriality' (2020) 133 Harvard Law Review 1582, 1589–603.
[61] Geoff Gilbert, 'Crimes Sans Frontiéres: Jurisdictional Problems in English Law' (1992) 63 British Yearbook of International Law 415, 426–30.
[62] See *Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61 (CA) 64 (Cozens-Hardy MR); *Treacy v DPP* [1971] AC 537 (HL) 551 (Lord Reid); *Al-Skeini* (n 60) [13] (Lord Bingham).
[63] *KBR Inc* (n 60) [29]–[31] (Lord Lloyd-Jones), citing *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1 [212]–[213] (Lord Toulson and Lord Hodge). See also *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43, [2010] AC 90 [22] (Lord Mance); *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379 [29] (Lord Sumption).
[64] Treason Act 1351 (25 Edw 3 Stat 5 c 2).
[65] See *Joyce v DPP* [1946] AC 347 (HL) 367–68 (Lord Jowitt LC).
[66] See Criminal Law Act 1541 (33 Hen 8 c 23); *R v Page* [1954] 1 QB 170 (CA) 175 (Lord Goddard CJ).

(ii) Criminal Jurisdiction in International Law

While the Russian Federation has vehemently objected to the jurisdictional competence of the ICC, national penal jurisdiction operates far differently from that of international criminal tribunals. It has long been held, as Grotius wrote, that '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'.[67] This doctrine follows from states' possession of inherent *jus puniendi*, or power to punish.[68] In the famous *SS Lotus* case, the Permanent Court of International Justice (PCIJ) affirmed this power of states, finding that:

> [f]ar 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.[69]

The PCIJ summarised its findings as follows:

> [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.[70]

The *Lotus* principle has been met with much criticism in contemporary scholarship.[71] Yet the notion that 'everything which is not prohibited is permitted'[72] appears an overly simplified reading of the PCIJ's judgment. The core proposition of the majority opinion in *Lotus* is that the equality and co-existence of states demands a balance of states' inherent sovereign authority to prescribe the ambit of their criminal jurisdiction with states' right against undue interferences with

[67] Grotius (n 50) 226–27.

[68] Anthony Sammons, 'The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 Berkeley Journal of International Law 111, 128. See Kai Ambos, *Treatise on International Criminal Law*, vol I (2nd edn, Oxford University Press 2021) ('Ambos, *Treatise I*') 99.

[69] *The Case of the SS Lotus (France v Turkey)* (Merits) [1927] PCIJ Rep Ser A No 10, 19.

[70] ibid.

[71] See eg FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours 1, 35; Vaughan Lowe, 'Blocking Extraterritorial Jurisdiction: the British Protection of Trading Interests Act, 1980' (1981) 75 American Journal of International Law 257, 263; Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Oxford University Press 1994) 76–77; Alain Pellet, 'L'Adaptation du Droit International aux Besoins Changeants de la Société Internationale' (2007) 329 Recueil des Cours 1, 27. For criticisms in jurisprudence, see eg *Nuclear Weapons* Advisory Opinion (n 36) 268 [12]–[15] (Declaration of President Bedjaoui); 495 (Dissenting Opinion of Judge Weeramantry)*; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2008] ICJ Rep 403, 478 [2]–[8] (Declaration of Judge Simma).

[72] *Lotus* (n 69) 34 (Dissenting Opinion of Judge Loder).

their sovereignty.[73] This contrasts with the current understanding of the *Lotus* principle. Nonetheless, Judge Shahabuddeen synthesised this modern reading of *Lotus* in *Nuclear Weapons* as a principle to the effect that '[t]he existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist'.[74] It is on this basis that Judge Fitzmaurice had previously observed that an understanding of *Lotus* within the modern world order of states requires jurisdiction to be constructed so as to 'avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'.[75] Thus, the *Lotus* case must be read against the backdrop of state sovereignty; it does not endorse 'total judicial chaos',[76] but rather a framework of jurisdiction in which one state's authority to prescribe jurisdiction is limited by another's inherent sovereignty.

In the context of international crimes, there exists a third interest which must be balanced, namely the interest of the international community in punishing crimes which victimise humankind as a whole through the transgression of norms that 'protect universal values'.[77] The crimes alleged to have been committed in Ukraine, as violations of *jus cogens*, are directed against the international community itself. With the post-Second World War order no longer conceiving of sovereignty as absolute,[78] the interest in prosecuting such crimes 'pierce[s] the veil of state sovereignty'.[79] The international criminalisation of certain conduct thus defines a boundary where a state's interest in maintaining sovereignty is outweighed by the collective interest of other states in punishing crimes which victimise them collectively.[80] As the *jus puniendi* of the international community is derived from

[73] See An Hertogen, 'Letting *Lotus* Bloom' (2016) 26 European Journal of International Law 901, 913.
[74] *Nuclear Weapons* Advisory Opinion (n 36) 393 (Dissenting Opinion of Judge Shahabuddeen).
[75] *Barcelona Traction* (n 41) 64 [70] (Separate Opinion of Judge Fitzmaurice). See similarly *Arrest Warrant* (n 32) 63 [54] (Separate Opinion of Judges Higgins, Koojimans and Buergenthal); Institut de Droit International, '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).
[76] *Arrest Warrant* (n 32) 35 [15] (Separate Opinion of President Guillaume).
[77] *Prosecutor v Milutinović et al* (Decision on Motion Challenging Jurisdiction) IT-99-37-PT (6 May 2003) [7] (Separate Opinion of Judge Robinson). See also David Luban, 'The Enemy of All Humanity' (2018) 47 Netherlands Journal of Legal Philosophy 112, 125–26.
[78] See Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 Journal of International Criminal Justice 830, 837–38.
[79] Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020) para 107, citing Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Röhrscheid 1952) 11; M Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Lal Chand Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 65.
[80] For an illustration of this principle in operation in the context of torture, see Sammons (n 68) 129–30.

the collectivised *jus puniendi* of individual states,[81] all states hold a legitimate interest in exercising jurisdiction over international crimes.[82]

The *laissez-faire* approach so often assigned to *Lotus* is thus tempered, in the context of national jurisdiction over international crimes, by the tripartite balancing of: (a) states' sovereign authority to prescribe their criminal jurisdiction; (b) the legitimate interests of states to be free from arbitrary encroachments upon their sovereignty; and (c) the collective interest of states, as members of the international community, in ensuring that international crimes do not remain unpunished. A state's authority to enact statutes with extraterritorial ambit is materially distinct from its authority to enforce those laws on the territory of other states. The former is concerned with a state's legislative competence to endow its courts with adjudicative authority over acts occurring outside of that state, while the latter involves the executive imposition of one state onto the sovereignty of another.[83]

As Roger O'Keefe argues in his salient critique of the mainstream understanding of universal jurisdiction, while a state generally enjoys broad discretion to prescribe its courts' jurisdiction over crimes occurring extraterritorially, the balancing interest of other states' sovereignty prohibits the enforcement of its laws extraterritorially without the consent of the other state concerned.[84] In English law, this distinction is maintained through the refusal of criminal prosecutions where a defendant was brought into the jurisdiction *ratione loci* of the UK against their will, absent due process.[85] Such action on the part of the state 'will offend "the court's sense of justice and propriety"'.[86]

It follows that, although the courts of the state in which an international crime occurs (the *locus delicti*) and the state of which alleged perpetrators are nationals remain the optimal venues for prosecuting such offences, when a state

[81] See Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limit' (2003) 1 Journal of International Criminal Justice 618, 621–34; Kai Ambos, 'Punishment Without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293.

[82] Werle and Jeßberger (n 79) para 259; Otto Triffterer, Morten Bergsmo, and Kai Ambos, 'Preamble' in Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (4th edn, CH Beck / Hart / Nomos 2022) ('Ambos, *Commentary*') 1, para 21. See also Albin Eser, 'National Jurisdiction over Extraterritorial Crimes within the Framework of International Complementarity' in Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 279.

[83] This distinction between 'legislative jurisdiction' and 'enforcement jurisdiction' is widely accepted. See eg Hans Kelsen, *Principles of International Law* (2nd edn, Richard W Tucker tr, Rinehart 1966) 307–10; Patrick Daillier, Mathias Forteau, and Alain Pellet, *Droit international public* (8th edn, LGDJ 2009) paras 334–36; Vaughn Lowe, 'Jurisdiction' in Malcolm D Evans (eds), *International Law* (Oxford University Press 2010) 329, 332–33; Jean Combacau and Serge Sur, *Droit international public* (10th edn, Montchrestien 2012) 357; Raphaële Rivier, *Droit international public* (LGDJ 2012) 351, 364; Crawford (n 9) 460–64.

[84] See O'Keefe (n 8) 738–40. See also *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] AC 147 (HL) 273 (Lord Millet); Brownlie (n 9) 309; Ryngaert (n 32) 134; Crawford (n 9) 464–66.

[85] See *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (HL) 62–64 (Lord Griffiths).

[86] *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1387 [13] (Lord Dyson), quoting *Bennett* (n 85) 74 (Lord Lowry).

chronically fails in its obligation to prosecute, the exercise of universal jurisdiction by other states becomes appropriate to ensure such crimes that violate *jus cogens* do not remain unpunished.[87] The balancing of sovereignty-related interests with the interests of preventing impunity for international crimes is a core component of what Máximo Langer identifies as a shift from 'global enforcer' to 'no safe haven' universal jurisdiction.[88] Theodor Meron characterised this qualified approach to universal jurisdiction as a key to closing the 'accountability gap' for international crimes.[89]

Russian officials have persistently denied any accusations of violating IHL and other internationally wrongful acts. They have made it clear that no effective investigation of such allegations will be conducted by organs of the Russian state, ostensibly because preliminary evidence indicates that officials at the highest levels of the Russian government bear individual criminal responsibility for such acts and conduct.[90] There is nothing to suggest that this climate of impunity will subside in the near future. This makes it all the more proper for third states to exercise universal jurisdiction over alleged international crimes committed by Russian actors in the ongoing conflict in Ukraine. This is especially so in the light of Ukrainian requests for assistance in prosecuting the sheer volume of alleged atrocity crimes that have occurred in its territory, and the limited capacity of Ukraine's national judicial institutions.

III. Universal Jurisdiction over Grave Breaches

International law alone cannot expand domestic law absent an Act of Parliament to such an effect;[91] this has explicitly been emphasised in the context of criminal statutes.[92] Similarly, the International Court of Justice (ICJ) has held that violations of *jus cogens* are not sufficient in themselves to establish jurisdiction,[93] a notion

[87] *Obligation to Prosecute or Extradite* (n 43) [120]; Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale Law Journal 2537, 2561–62; Bassiouni and Wise (n 53) 49–50; Werle and Jeßberger (n 79) para 260.

[88] See Máximo Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13 Journal of International Criminal Justice 245, 249–52.

[89] Theodor Meron, 'Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes' (2018) 112 American Journal of International Law 433, 437–38.

[90] See Karim AA Khan, 'Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova' (*ICC*, 17 March 2023) <www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> accessed 11 September 2023. See also n 144 and accompanying text.

[91] *JH 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).

[92] See eg *Pinochet* (n 84) 235–36 (Lord Hope); *R v Jones* [2006] UKHL 16, [2007] AC 136 [23], [28] (Lord Bingham).

[93] *Jurisdictional Immunities of the State* (n 36) [95]. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction) [2006] ICJ Rep 6 [64].

affirmed by the House of Lords in *Jones v Saudi Arabia*.[94] Yet, as Lord Griffiths emphasised, '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'.[95] International and domestic law must thus grapple with offences *erga omnes* and perpetrators who are *hostis humani generis*.[96] While universal jurisdiction is often criticised as 'a body of judge-made law'[97] in the UK, as with most jurisdictions,[98] it is statutorily prescribed within the confines of international instruments specifically requiring it.[99] With discussion of universal jurisdiction over atrocity crimes in Ukraine dominated by the crime of aggression,[100] the issue of war crimes has been largely sidelined. While several statutes conferring universal jurisdiction may be relevant to international crimes in Ukraine,[101] this article shall focus solely on the most promising of them, the Geneva Conventions Act 1957 (GCA 1957).

A. 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'.[102] The offenders referred to by Attorney General Speed have evolved into the modern notion of war criminals.[103] The GCA 1957 was transposed into the UK's domestic legal regime in order for the UK to fulfil its international obligations under the 1949 Geneva Convention,[104] which was adopted internationally

[94] *Jones v Saudi Arabia* (n 36) [24] (Lord Bingham). See also *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (CA) [87]–[90] (Goudge JA) (Canada); *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).

[95] *Somchai Liangsiriprasert v Government of the USA* [1991] 1 AC 225 (PC) 251 (Lord Griffiths).

[96] Georges Abi-Saab, 'The Concept of "International Crimes" and its Place in Contemporary International Law' in Joseph HH Weiler, Antonio Cassese, and Marina Spinedi (eds), *International Crimes of State* (De Gruyter 1989) 147.

[97] *Sosa v Alvarez-Machain* 542 US 692, 715 (2004).

[98] See the UN Secretary-General's study on universal jurisdiction, the findings of which are reported in UN Docs A/65/181, A/66/93, A/67/116, A/68/113, A/69/174, A/70/125, A/71/111, A/72/112, and A/73/123.

[99] See Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press 2003) 236–47.

[100] See eg Tom Dannenbaum, 'A Special Tribunal for the Crime of Aggression?' (2022) 20 Journal of International Criminal Justice 859, 862; Carrie McDougall, 'The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine' (2023) 28 Journal of Conflict and Security Law 203, 214–17; Kevin Jon Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2022) Journal of Genocide Research (forthcoming 2023) 22–23.

[101] eg Taking of Hostages Act 1982, s 1(1) (hostage-taking); Criminal Justice Act 1988, s 134 (torture).

[102] *Military Commissions*, 11 Opinions of the Attorney General 297, 307 (AG 1865) (US).

[103] Willard B Cowles, 'Universality of Jurisdiction over War Crimes' (1945) 33 California Law Review 177, 202; Christopher C Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 Law and Contemporary Problems 153, 166–67. See ILC, 'Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries' [1996] II(II) Yearbook of the ILC 15 ('Draft Code of Crimes') 53–56 (commentary to Draft Article 20).

[104] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('GC I'); Geneva

after the Second Would War owing to the widespread atrocities that occurred.[105] With an increasingly standardised framework of individual liability for war crimes having emerged since the ratification of the Geneva Conventions,[106] the present value of the grave breaches regime is not its normative value to IHL but rather its procedural and jurisdictional significance.[107] In particular, the grave breaches regime furnishes liability for grave breaches outside of the ICC's jurisdiction and creates a customary *aut dedere aut judicare* obligation in relation to grave breaches.[108]

The scope of the Geneva Conventions, with the exception of Common Article 3, is limited to conflicts of an international character.[109] The UK, Russia, and Ukraine are all Contracting Parties to the Geneva Conventions and Additional Protocol I of 1977 (AP I) relating to international armed conflict. The core principles of IHL, embodied principally within these instruments,[110] have been considered by the ICJ to be 'so fundamental to the respect of the human person and elementary considerations of humanity' as to 'constitute intransgressible principles of international customary law'.[111] This has been affirmed in subsequent jurisprudence[112] and has been interpreted as conveying the *erga omnes* nature of core IHL

Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('GC II'); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('GC III'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('GC IV'). When referring to one of the common articles to all four conventions, this article shall refer to 'GC'.

[105] Dietrich Schindler, 'Significance of the Geneva Conventions for the Contemporary World' (1999) 81 International Review of the Red Cross 715, 724; Richard van Elst, 'Implementing Universal Jurisdiction Over Grave Breaches of the Geneva Conventions' (2000) 13 Leiden Journal of International Law 815, 824–25.

[106] See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2005) 25–26.

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

[108] On the *aut dedere aut judicare* principle in customary law, see Bassiouni and Wise (n 53) 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.

[109] GC common art 2.

[110] 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, entered into force 7 December 1978) 1125 UNTS 3 ('AP I').

[111] *Nuclear Weapons* Advisory Opinion (n 36) [79] (internal citation omitted). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 ('*Nicaragua* Judgment') [218].

[112] See eg *Tadić* Appeal Decision (n 4) paras 79–85; *Prosecutor v Delalić et al* (Appeal Judgment) 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]; *Prisoners of War – Ethiopia's Claim 4 (Eritrea/Ethiopia)* (Partial Award) (2003) 26 RIAA 73 [30].

principles.[113] The Geneva Conventions prescribe some of the cardinal *jus cogens* norms,[114] with the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) recognising the prohibition against serious violations of IHL as being 'universal in nature' and 'transcending the interest of any one State'.[115] Despite this, universal jurisdiction prosecutions for grave breaches of the Geneva Conventions have been relatively few in number, only having begun in earnest in the late 1990s.[116]

B. Incorporation into English law

The GCA 1957 incorporates only certain parts of the original four conventions of 1949—excluding Common Article 3 and Additional Protocol II, both of which apply to non-international armed conflict—into English criminal law.[117] While Common Article 3 is still regarded as the minimum standard of conduct in armed conflict,[118] the Geneva Conventions are less explicit with regard to the *aut dedere aut judicare* obligations of states in the context of violations which do not amount to grave breaches, requiring merely that states 'take measures necessary for the suppression' of such acts.[119] States thus have the *right* rather than the *obligation* to prosecute such offences,[120] a right of which Parliament has not availed itself.[121]

All four Geneva Conventions provide 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'.[122] The ICTY,[123]

[113] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [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].

[114] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press 1989) 9; M Cherif Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers 1997) 341–46; Schindler (n 105) 723.

[115] *Tadić* Appeal Decision (n 4) [141].

[116] See Antonio Cassese, 'Reflections on International Criminal Justice' (1998) 61 Modern Law Review 1, 6; Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 Journal of International Criminal Justice 723, 724–25.

[117] Geneva Conventions Act 1957 ('GCA 1957') s 1(1). See GC common art 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, entered into force 7 December 1978) 1125 UNTS 609, art 1(1).

[118] *Nicaragua* Judgment (n 111) [218]; *Prosecutor v Akayesu* (Appeal Judgment) ICTR-96-4-A (1 June 2001) [443]; *Čelebići* Appeal Judgment (n 112) [150]; *Prosecutor v Karadžić* (Decision on Hostage-Taking) IT-95-5/18-AR72.5 (9 July 2009) [26].

[119] GC I art 49(3); GC II art 50(3); GC III art 129(3); GC IV art 146(3).

[120] Hoge Raad, 24 October 2008, ECLI:NL:HR:2008:BG1476, paras 5.2.3, 10.2; Theodor Meron, 'Criminalization of Violations of International Humanitarian Law' (2003) 301 Recueil des Cours 112, 149.

[121] cf HL Deb 15 January 2001, vol 620, col 929 ('It is our policy to assume universal jurisdiction only where an international agreement expressly requires it').

[122] GC I art 49(2); GC II art 50(2); GC III art 129(2); GC IV art 146(2).

[123] See eg *Tadić* Appeal Decision (n 4) [79]; *Jelisić* Trial Judgment (n 4) [200].

ICRC,[124] and scholars[125] have recognised this provision as obliging states to establish universal jurisdiction over *and prosecute* grave breaches. GCA 1957, s 1(1) makes it a criminal offence for '[a]ny person, whatever his nationality… whether in or outside the United Kingdom' to commit a 'grave breach' of the Geneva Conventions or AP I, as defined with recourse to the relevant provisions of those instruments.[126] A complete enumeration of acts constituting grave breaches under these provisions would be unnecessary for the purposes of this article, but generally, grave breaches are those acts universally considered to be impermissible during international armed conflict. The provisions furthermore set out offences which, owing to their nexus with an armed conflict, cease to be purely domestic crimes.[127] Although this is not explicitly stated in the GCA 1957, grave breaches form the core of the international offence of war crimes.[128] Article 8(2)(a) of the Rome Statute criminalises grave breaches as war crimes.[129] It should also be noted that not all violations of IHL constitute grave breaches, nor do grave breaches represent a complete enumeration of acts considered to be war crimes.[130]

C. Prerequisites for Exercise of Jurisdiction

The GCA 1957 confers broad universal jurisdiction over grave breaches no matter their *loci delicti* or the nationality of the perpetrator, subject to the prosecutorial approval of the Attorney General.[131] Although political considerations will undoubtedly come into play, if the UK were to request the extradition of a person accused of grave breaches, it must establish a *prima facie* case against them in the

[124] See eg Yves Sandoz and others (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; Knut Dörmann and others (eds), *Commentary on the First Geneva Convention* (ICRC/Cambridge University Press 2016) ('GC I Commentary') para 2863; Knut Dörmann and others (eds), *Commentary on the Third Geneva Convention* (ICRC/Cambridge University Press 2020) ('GC III Commentary') para 5129; Jean S Pictet (ed), *Commentary on the Fourth Geneva Convention* (ICRC 1958) ('GC IV Commentary') 587.

[125] See eg van Elst (n 105) 821–25 M Cherif Bassiouni, 'Universal Jurisdiction for International War Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Virginia Journal of International Law 81, 116; Reydams (n 52) 54–55; Mettraux (n 106) 55; Yves Sandoz, 'Penal Aspects of International Humanitarian Law' in M Cherif Bassiouni (ed), *International Criminal Law*, vol I (3rd edn, Martinus Nijhoff 2008) 293, 319–20.

[126] GCA 1957, s 1(1A). See GC I art 50; GC II art 51; GC III art 130; GC IV art 147; AP I arts 11(4), 85(2), (3), (4).

[127] Knut Dörman, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2009) 19. See also *Prosecutor v Tadić* (Trial Judgment) IT-94-1-T (7 May 1997) [573]; *Prosecutor v Kunarac et al* (Trial Judgment) IT-96-23-T (22 February 2001) [568].

[128] AP I art 85(5); Draft Code of Crimes (n 103) 54, para 10 (commentary to Draft Article 20); AP Commentary (n 124) para 3408.

[129] Rome Statute art 8(2)(a). See generally Dörman (n 127) 17–127.

[130] See Sandoz (n 125) 304; Öberg (n 107) 165. The grave breaches regime has proved useful in delaminating those violations of IHL serious enough to impute individual criminal responsibility as war crimes, see Bert VA Röling, 'The Law of War and the National Jurisdiction Since 1945' (1960) 100 Recueil des Cours 325, 345–46.

[131] GCA 1957, s 3(a).

extraditing country.[132] The *prima facie* standard is satisfied when the inculpatory evidence against a defendant, unless sufficiently contradicted by the defendant, would warrant their conviction for the stated charge or charges.[133] Essentially, this is a determination of 'whether a reasonable jury could draw the inference of guilt'.[134] The standard differs significantly from the standard applicable to conviction at trial, which demands the exclusion of 'all realistic possibilities consistent with the defendant's innocence'.[135] The *prima facie* threshold has thus been recognised as a low one,[136] though the House of Lords has found that the potential unavailability of 'significant relevant witnesses or documents' resulting from the passage of time may preclude the existence of a *prima facie* case.[137]

English courts have dealt with a number of cases applying the *prima facie* standard, including in the context of extraditions.[138] The standard has been directly considered in relation to grave breaches in two extradition cases, albeit in both instances extradition was ultimately denied on unrelated grounds.[139] The shift of international evidence-gathering practice towards digital techniques in the last decade will undoubtedly make the *prima facie* test a rather simple standard to satisfy in the context of the GCA 1957.[140] With access to Russian primary documents being limited absent regime change, digital evidence will likely play a key role in the building of *prima facie* cases against perpetrators.[141]

[132] See GC I Commentary (n 124) paras 2881–82; GC III Commentary (n 124) paras 5147–48; GC IV Commentary (n 124) 593.

[133] *R v Governor of Pentonville Prison, ex p Osman* [1990] 1 WLR 277 (QB) 299 (Lloyd LJ). See also *R v Galbraith* [1981] 1 WLR 1039 (CA) 1042 (Lord Lane CJ); Barbara J Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press 1991) 93–95.

[134] *Mallya v Government of India* [2020] EWHC 924 (Admin) [33] (Irwin LJ and Laing J).

[135] *R v Masih* [2015] EWCA Crim 477 [3] (Pitchford LJ). See also *R v Jabber* [2006] EWCA Crim 2964 [19] (Moses LJ); *R v Goddard* [2012] EWCA Crim 1756 [36] (Aikens LJ).

[136] *Modi v Government of India* [2021] EWHC 2257 (Admin) [47] (Chamberlain J).

[137] *Norris v Government of the USA* [2008] UKHL 16, [2008] 1 AC 920 [106].

[138] See eg *Ugirashebuja v Republic of Rwanda* [2009] EWHC 770 (Admin), (2011) 142 ILR 568 [18], [58] (Laws LJ); *R (Hamza) v Secretary of State for the Home Dept* [2012] EWHC 2736 (Admin) [78]–[94] (Sir John Thomas P); *Devani v Republic of Kenya* [2015] EWHC 3535 (Admin) [49] (Sir Richard Aikens); *Republic of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin) [411]–[420] (Irwin LJ and Foskett J).

[139] See *Ugirashebuja* (n 138) [18] (Laws LJ); *Republic of Serbia v Ganić* (2015) 160 ILR 651 [40] (Workman J).

[140] 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.

[141] 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/> accessed 11 September 2023. On the success of digital evidence use in universal jurisdiction prosecutions in European jurisdictions, see Mark Klamberg, 'Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden' (2020) 66 Scandinavian Studies in Law 367, 376–79; Karolina Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions' (2021) 19 Journal of International Criminal Justice 189, 198–208.

D. English jurisdiction over crimes in ukraine

English provisions for universal jurisdiction over grave breaches of the Geneva Conventions provide an optimal framework for the prosecution of atrocity crimes in Ukraine, many of which fall into the *ratione materiae* of the grave breaches regime, as discussed in the following section. The modern construction of universal jurisdiction under international law, having evolved since the time of *Lotus*, would empower English courts to exercise universal jurisdiction over offences committed on the territory of Ukraine by Russian and Ukrainian nationals, given the compelling interests both of Parliament to prescribe extraterritorial criminal jurisdiction within the bounds of its sovereign authority and of the UK, as a member of the international community, to punish heinous crimes that have punctuated the brutal conflict in Ukraine, primarily committed by Russian armed forces.[142] The crimes alleged to have been committed in Ukraine moreover appear contrary to *jus cogens* prohibiting certain serious violations of IHL, furnishing the UK's interest in their repression, even when committed in Ukraine, far from the shores of the British Isles.

In the light of the *prima facie* standard necessary for launching prosecutions under the GCA 1957, evidence of the commission of acts *prima facie* amounting to grave breaches documented by international investigators, as discussed in more detail in the following section, will greatly support English efforts at universal jurisdiction prosecutions. Having established the conceptual and jurisdictional framework as to how English prosecutions of atrocity crimes in Ukraine would operate under both public international law and English criminal law, this article now turns to the specific acts and conduct perpetrated by various actors in the Russia-Ukraine conflict that would be justiciable under the GCA 1957 and whose prosecution by English courts would substantially contribute towards combating impunity and pursuing accountability for international crimes.

IV. Prosecuting Grave Breaches Committed in Ukraine

A. Role of domestic prosecutions

On 7 March 2023, an ICC Pre-Trial Chamber issued a sealed warrant for the arrest of Russian President Vladimir Putin and Maria Lvova-Belova, Russian Commissioner for Children's Rights, for the war crime of forcibly deporting civilians, specifically Ukrainian children, from occupied territories.[143] The significance of this

[142] See Section IV.B.

[143] ICC, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (*ICC*, 17 March 2033) <www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 11 September 2023.

move—which has been described as 'Putin's Nuremberg moment'[144]—in the history of international criminal justice cannot be overstated. However, although 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. While the focus on prosecuting individuals 'most responsible' for international crimes may not be a normative constraint on the ICC as it was for the *ad hoc* tribunals,[145] it nevertheless remains a practical constraint. Despite the Rome Statute's explicit verbiage that the ICC shall aim to prosecute all perpetrators 'without any distinction based on official capacity',[146] institutional and budgetary constraints will make it impossible for the Court to prosecute more than a handful of cases likely involving the highest-ranking Russian officials. The arrest warrant issued against Putin and Lvova-Belova serves to further confirm this. Universal jurisdiction stands to help fill this accountability gap by leveraging better-funded and higher-bandwidth domestic prosecutorial apparatus and judiciaries to prosecute perpetrators who may otherwise evade accountability before international fora.

One must bear in mind that a state 'has no mind of its own any more than it has a body of its own'.[147] The 'macro-crimes' of the Russian Federation, to borrow from Herbert Jäger,[148] are ultimately the result of acts of individuals,[149] not only those of President Putin and his inner circle but of mid-level military commanders who personally oversaw the commission of acts on the ground. While efforts to build competency and capacity to prosecute such perpetrators are vital in the long term, it is imperative that justice is not excessively delayed, with the passage of time imperilling the availability of evidence and the reliability of testimonies.[150] Universal jurisdiction prosecutions in countries such as England with well-developed, robust justice systems and judges with relatively high competency in international law will allow for perpetrators to be investigated, prosecuted, and tried fairly and impartially.

[144] See Reed Brody, 'Putin's Nuremberg Moment' (*The Nation*, 28 March 2023) <www.thenation.com/article/world/putin-russia-ukraine-war/> accessed 11 September 2023.

[145] See *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58') ICC-01/04-169 (13 July 2006) [73]–[79]. cf UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534, para 5.

[146] Rome Statute art 27(1).

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

[148] See Herbert Jäger, 'Makrokriminalität' in Daniela Klimke and Aldo Legnaro (eds), *Kriminologische Grundlagentexte* (Springer 2016) 309.

[149] cf *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [62]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [213].

[150] See generally Maja Davidović, 'Reconciling Complexities of Time in Criminal Justice and Transitional Justice' (2021) 21 International Criminal Law Review 935.

B. Breaches by members of the Russian armed forces

(i) Material Elements

In its first report, delivered to the UN General Assembly in October 2022,[151] the Independent International Commission of Inquiry on Ukraine (COI), established by the UN Human Rights Council earlier that year,[152] laid out a number of internationally wrongful acts alleged to have been committed by members of the Russian armed forces in Ukraine that would fall under the universal jurisdiction of English courts. The COI greatly expanded on these findings in its second report to the Human Rights Council, also finding 'reasonable grounds to conclude' that the Russian armed forces' invasion of Ukraine qualifies as aggression under *jus ad bellum*, that is, international law on the use of force.[153] The conclusions contained in both of the COI's first two reports are bolstered by the findings of the Office of the UN High Commissioner for Human Rights (OHCHR), which are based on the fact-finding operations of the UN Human Rights Monitoring Mission in Ukraine (HRMMU), which was dispatched in 2014 and has since then amassed an impressive evidentiary record of human rights violations in occupied Donbas. The OHCHR's March 2023 report supports many of the conclusions of the COI.[154]

A comprehensive survey of all international crimes for which Russian nationals may be charged under the GCA 1957 is beyond the scope of this article and would be impossible without more complete information on individual perpetrators. Nevertheless, the table below synthesises some of the most serious grave breaches that *prima facie* appear to have been committed, based on the reports of the COI and OHCHR published thus far. More evidence for the listed grave breaches and evidence of further grave breaches will likely emerge as international and national investigations progress.

Table IV.1

Potential Grave Breaches Committed by the Russian Armed Forces

Grave Breach	Applicable Provision	Sources
Indiscriminate attacks	AP I, art 81(3)(b)	COI; OHCHR[155]

[151] UNGA, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533 ('COI Report I').

[152] 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).

[153] UNHRC, 'Report of the Independent International Commission of Inquiry on Ukraine' (15 March 2023) UN Doc A/HRC/52/62 ('COI Report II') para 3, citing UNGA Res 3314 (XXIX) (14 December 1974) UN Doc 3314(XXIX).

[154] UN OHCHR, 'Report on the Human Rights Situation in Ukraine: 1 August 2022–31 January 2023' (24 March 2023) ('OHCHR 35th Report') <www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf> accessed 11 September 2023.

[155] COI Report I (n 151) paras 44–51; COI Report II (n 153) paras 23; OHCHR 35th Report (n 155) paras 30–32.

Disproportionate attacks	AP I, art 81(3)(c)	COI[156]
Attacks against civilians	GC IV, art 147; AP I, art 85(3)(a)	COI; OHCHR[157]
Unlawful confinement of civilians	GC IV, art 147	COI; OHCHR[158]
Attacks against civilian property	GC IV, art 147	COI; OHCHR[159]
Attacks against medical facilities	GC I, art 50	OHCHR[160]
Torture and extrajudicial killing of individuals *hors de combat*	GC I, art 50; AP I, art 3(e)	COI[161]
Torture and extrajudicial killing of prisoners of war	GC III, art 130	COI; OHCHR[162]
Torture and extrajudicial killing of civilians	GC IV, art 147	COI; OHCHR[163]
Rape or other sexual violence against civilians	GC IV, art 147; AP I, art 85(4)(c)[164]	COI; OHCHR[165]
Deportation of civilians from occupied territories	GC IV, art 147; AP I, art 85(4)(a)	COI; OHCHR[166]
Forcible conscription of civilians in occupied territories	GC IV, art 147	OHCHR[167]

[156] COI Report II (n 153) paras 23–24, 40–43.
[157] COI Report I (n 151) paras 56–59; COI Report II (n 153) paras 57–59; OHCHR 35th Report (n 154) paras 44–47.
[158] COI Report I (n 151) paras 75–80; COI Report II (n 153) paras 60–67; OHCHR 35th Report (n 154) paras 48–50.
[159] COI Report I (n 151) paras 56–59; COI Report II (n 153) paras 40–43; OHCHR 35th Report (n 154) paras 39–40.
[160] OHCHR 35th Report (n 154) paras 35–38.
[161] COI Report I (n 151) paras 82–85; COI Report II (n 153) paras 53–56.
[162] COI Report II (n 153) paras 71–77; OHCHR 35th Report (n 154) para 62.
[163] COI Report II (n 153) paras 71–77; OHCHR 35th Report (n 154) paras 44–47.
[164] On the evolution of IHL recognising sexual crimes as grave breaches *vis-à-vis* inhumane acts causing great suffering, see Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff 2012) 145–58; Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96 International Review of the Red Cross 503, 526–30.
[165] COI Report I (n 151) paras 88–98; COI Report II (n 153) paras 78–85; OHCHR 35th Report (n 154) paras 56–61.
[166] COI Report II (n 153) paras 68–70, 95–102; OHCHR 35th Report (n 154) paras 63–70.
[167] OHCHR 35th Report (n 154) paras 71–72. See also Polina Ivanova, 'Russia Turns to Donbas Conscripts to Fill Front Lines' *Financial Times* (London, 11 June 2022) <www.ft.com/content/e5b88958-b6e4-4417-ba50-eb1916092acd> accessed 11 September 2023; Ihor Burdyga and Regina Gimalova, 'Ukraine Separatists Draft Anyone They Can' *Deutsche Welle* (Kyiv, 27 April 2022) <www.dw.com/en/how-ukraine-separatists-are-mass-conscripting-anyone-of-fighting-age/a-61608760> accessed 11 September 2023.

A potential grave breach that is justiciable under the GCA 1957, though not listed above, is the intentional direction of attacks towards protected cultural property, a grave breach of AP I.[168] While neither the COI nor the OHCHR has examined attacks against Ukrainian cultural property, UNESCO and civil society groups have documented widespread attacks on Ukrainian cultural sites.[169] An extensive and in-depth examination of the constituent elements of each grave breach mentioned in Table IV.1, 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.

For the purposes of English universal jurisdiction, linking an individual to any of the above listed grave breaches, contingent on their liability being *prima facie* established, would satisfy the requirement of a *prima facie* case against them. In this regard, international investigations such as those of the COI and OHCHR are vital tools to support universal jurisdiction prosecutions, as national investigative authorities will not be as hard-pressed to extensively examine the context of actions constituting grave breaches themselves. Rather, they will be tasked principally with establishing the liability of individual suspects for crimes for which international investigators have already amassed evidentiary records.

(ii) Mental Elements

It is well-established that a court 'should not find a man guilty of an offence against the criminal law unless he has a guilty mind';[170] however, the Geneva Conventions do not prescribe a *mens rea* for grave breaches.[171] In this regard, English courts will enjoy relatively broad authority to interpret the requisite intent.[172] Indeed, the ICRC *Commentary* states, with regard to grave breaches, that '[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',[173] and thus '[d]epending on the legal system to which they belong,

[168] AP I art 85(4)(d). See generally Stefan Wehrenberg, 'Art 8' in Ambos, *Commentary* (n 82) 317, paras 399–418. cf Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 23 March 1999, entered into force 9 March 2004) 2253 UNTS 172, art 15.

[169] See eg UNESCO, 'Damaged Cultural Sites in Ukraine Verified by UNESCO' (last updated 7 September 2023) <www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco> accessed 11 September 2023; Hayden F Basset and others, 'Potential Damage to Ukrainian Cultural Heritage Sites' (*Cultural Heritage Monitoring Lab*, 2023) <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/56776560f5a94c1c88d361e3dd1aef59/data> accessed 11 September 2023.

[170] *Brend v Wood* (1946) 175 LT 306 (KB) 307 (Lord Goddard CJ). cf Werle and Jeßberger (n 80) para 460.

[171] GC I Commentary (n 124) para 2932.

[172] cf *Jorgić v Germany* (2007) 47 EHRR 6 [114].

[173] GC I Commentary (n 124) para 2849.

domestic courts [may] place their own interpretation on notions such as intent'.[174] Accordingly, for grave breaches involving killing, courts may turn to the *mens rea* of the common law crime of murder.[175] GCA 1957, s 1A(5) states that an offence involving murder under the Act shall be punished as such, lending some merit to this proposition.

Alternatively, English courts may instead refer to the jurisprudence of the *ad hoc* tribunals, which established mental elements of war crimes on a case-by-case basis,[176] although Guénaël Mettraux suggests that the *mens rea* of 'wilfully' is generally applicable to all grave breaches.[177] They may also extrapolate Article 30 of the Rome Statute,[178] which prescribes a uniform *mens rea* for crimes under the Statute—including grave breaches in relation to war crimes under Article 8(2)(a)[179]—to the GCA 1957. The specific *mens rea* to be applied in prosecutions of grave breaches is outside the scope of this article and must be assessed in the context of individual perpetrators.[180] This subsection applies to the *mens rea* of grave breaches as discussed in Sections IV.C and IV.D.

C. Breaches by members of Russia-aligned groups

Members of certain Russia-aligned groups in Donbas who are not members of formal armed forces would also be subject to the universal jurisdiction of English courts. The use of universal jurisdiction to prosecute crimes committed by Russia-aligned separatists is of exceptional importance given a nearly eight-year-long absence of the rule of law in the occupied Donbas.[181] As Christopher Joyner remarked, '[w]ar crimes flourish in direct proportion to the dearth of political order'.[182] Two primary Russia-aligned groups exist in Ukraine, the Donetsk People's Militia and the Luhansk People's Militia, which are the armed groups of the Russian-recognised Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) respectively. These separatist militias have mobilised in support of

[174] GC III Commentary (n 124) para 5197. But cf Cassese and others (n 9) 39–40; Ambos, *Treatise I* (n 68) 402–04.

[175] See *R v Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App R 461 [46]–[47] (Rix LJ); John Smith and Brian Hogan, *Criminal Law* (David Ormerod ed, 10th edn, Oxford University Press 2009) 70–72.

[176] Werle and Jeßberger (n 79) para 462; GC III Commentary (n 124) para 5202. See Mohamed Elewa Badar, 'Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 International Criminal Law Review 313, 320–22, 334–40, 343–46.

[177] Mettraux (n 106) 72, citing AP Commentary (n 124) para 3474. The words 'intentionally', 'wantonly', and 'wilfully' appear to be used interchangeably in regard to grave breaches, see Ambos, *Treatise I* (n 68) 402.

[178] Rome Statute art 30(2).

[179] cf Draft Code of Crimes (n 103) 54, para 10 (commentary to Draft Article 20); Öberg (n 107) 169.

[180] See eg the *mens rea* of attacks against civilians, *Prosecutor v Galić* (Appeal Judgment) IT-98-29-A (30 November 2006) paras 132–40; *Prosecutor v Strugar* (Appeal Judgment) IT-01-42-A (17 July 20008) para 270–75.

[181] See UN OHCHR, 'Accountability for Killings in Ukraine from January 2014 to May 2016' (14 July 2016) para 9 <www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf> accessed 11 September 2023.

[182] Joyner (n 103) 162.

the Russian armed forces, particularly as part of the fighting in Donbas. Given their extensive participation in recent Russian hostilities, it is highly likely that separatist militia members are responsible for material acts amounting to grave breaches.

(i) Application of International Humanitarian Law

While *jus in bello* was originally designed to apply to conflicts between conventional national armies (the style of warfare that had dominated the European continent since the Napoleonic Wars), modern IHL has come to bind non-state actors in armed conflicts.[183] There is no requirement that grave breaches be perpetrated by members of formal armed forces.[184] For an act to amount to a grave breach, it must be committed in 'furtherance of or under the guise of the armed conflict';[185] however, the GCA 1957 furnishes universal jurisdiction only for grave breaches committed during *international* armed conflict.[186] Thus, the prosecution of DPR and LPR militia members hinges on the classification of their combatancy as part of an international armed conflict between Ukraine and Russia rather than an independent non-international armed conflict between Ukraine and the separatists.

Firstly, the DPR and LPR militias are heavily equipped with Russian weaponry, structured into formal military-like units, and fight in a coordinated manner, and therefore qualify as organised armed groups.[187] Prior to Russia's invasion of Ukraine, these armed groups could reasonably be considered part of a non-international armed conflict.[188] However, a non-international conflict in which an internal armed group is opposing the state becomes internationalised when another state intervenes in that conflict directly through the deployment of military forces or when some participants in the internal armed conflict act on behalf of another state.[189] In determining whether the latter avenue of internationalisation is satisfied, it is necessary to examine the degree of control exercised by another state over internal armed groups.[190]

[183] See generally Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press 2018) 19–114.
[184] Dörman (n 127) 34–37. See also *US v Flick et al* (1947) 6 TWC 1187, 1191–92; *US v Krupp et al* (1948) 9 TWC 1327, 1375.
[185] *Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) [58].
[186] GCA 1957, s 1(1). See GC common art 2; AP I arts 1(3), 3(a).
[187] See AP I art 49; Michael N Schmitt, 'The Status of Opposition Fighters in a Non-International Armed Conflict' (2012) 88 International Law Studies 119, 135; Rodenhäuser (n 183) 63–69.
[188] 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.
[189] Mettraux (n 106) 56, citing *Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999) ('*Tadić* Appeal Judgment') [84]; *Prosecutor v Rajić* (Review of the Indictment) IT-95-12-R61 (13 September 1996) ('*Rajić* Rule 61 Decision') [13]–[32].
[190] See Schmitt (n 187) 121; Reeves and Wallace (n 188) 399–400; Rodenhäuser (n 183) 81–82.

International criminal tribunals have adopted the 'overall control' test to determine this influence by another state.[191] However, the ICJ has twice endorsed the alternative and more demanding 'effective control' test,[192] causing some confusion as to which test is the most appropriate in different contexts. The differing tests can, however, be explained by the respective ambits of these institutions. International criminal tribunals prosecute individuals, and any determination made by such tribunals on states' control over armed groups is merely for the purpose of establishing jurisdiction *ratione materiae* over violations of the Geneva Conventions.[193] Such determinations are not made for the purpose of determining states' 'operational control' over such groups and thus responsibility for their acts under general international law.[194] 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 extends over persons only'.[195]

The overall control test was not intended to replace the effective control test so much as it put forward a more fit-for-purpose test for the 'imputation of the acts of unorganised individuals to a state [as opposed to] the imputation of those of an organised military group'.[196] It is difficult to impeach the methodological soundness of different tribunals holding *kompetenz-kompetenz* to determine the respective appropriate standard necessary to determine its competency or jurisdiction over a certain matter.[197] In the case of international criminal law, the less rigorous overall control test is more appropriate in achieving the goal of IHL, namely the 'protection of civilians to the maximum extent possible'.[198] English courts can thus be expected to turn to the overall control test as their international counterparts have.

As of the date of writing, Russia's control over the DPR and LPR militias has been examined twice, both in cases concerning the 2014 downing of Malaysian Airlines Flight 17 (MH17) over Eastern Ukraine. In the first case, a Dutch court sitting at The Hague considered an *in absentia* criminal case against three DPR militants charged with 298 counts of murder in relation to the MH17 attack. The District Court of The Hague found that, at the time of the incident, 'an

[191] *Tadić* Appeal Judgment (n 189) [137]; *Prosecutor v Aleksovski* (Appeal Judgment) IT-95-14/1-A (24 March 2000) ('*Aleksovski* Appeal Judgment') [145]; *Čelebići* Appeal Judgment (n 112) [42]; *Prosecutor v Lubanga* (Trial Judgment) ICC-01/04-01/06-2842 (14 March 2012) [541]; *Prosecutor v Katanga* (Trial Judgment) ICC-01/04-01/07-3436 (7 March 2014) [1178]; *Prosecutor v Ntaganda* (Trial Judgment) ICC-01/04-02/06-2359 (8 July 2019) [727]; *Prosecutor v Ongwen* (Trial Judgment) ICC-02/04-01/15-1762 (4 February 2021) [2687].

[192] See *Nicaragua* Judgment (n 111) [115]; *Bosnian Genocide* Judgment (n 113) [402]–[407].

[193] *Rajić* Rule 61 Decision (n 189) [25].

[194] cf *Nicaragua* Judgment (n 111) [115].

[195] *Bosnian Genocide* Judgment (n 113) [403].

[196] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553, 565. See also Rodenhäuser (n 183) 83–84.

[197] 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.

[198] *Aleksovski* Appeal Judgment (n 191) para 146, quoting *Tadić* Appeal Judgment (n 189) para 168. cf *Jelisić* Trial Judgment (n 4) para 200; Ambos, *Treatise I* (n 68) 106–15.

international armed conflict took place on the territory of Ukraine between Ukraine and the DPR, which was under the *overall control* of the Russian Federation'.[199] The factors considered by the court in its analysis[200] conformed to the requirements set in international criminal jurisprudence.[201]

The second case concerns the case of *Ukraine and the Netherlands v Russia* before the Grand Chamber of the European Court of Human Rights (ECtHR). Here the Grand Chamber applied the ECtHR's 'effective overall control' test, which represents an even less stringent version of the overall control test.[202] This test simply demands that a non-state group with a territorial presence acts as a *de facto* 'subordinate local administration' of the controlling state[203] and survives 'by virtue of the military, economic, financial and political support given to it' by the state.[204] In its decision on admissibility in the MH17 case, the Grand Chamber analysed Russia's control of the DPR, detailing (among others) direct military support, political and economic support, and the actual presence of Russian troops in the DPR.[205] Based on these findings, the Grand Chamber concluded that 'the Russian Federation had effective control over the relevant parts of Donbas controlled by the subordinate separatist administrations or separatist armed groups'.[206] Should the approaches of the District Court of the Hague and the ECtHR be replicated in English courts in future cases concerning the situation on the ground post-February 2022, it is likely that there would be similar determinations of Russia's overall control of the DPR and LPR militias for the purpose of establishing jurisdiction under the GCA 1957 over members of such groups.

(ii) Material Elements

The taxonomy used by the COI and the HRMMU to refer to combatants in the conflict complicates the attribution of certain internationally wrongful acts constituting grave breaches to Russia-aligned separatist groups.[207] There have, however, been several acts constituting grave breaches specifically attributed to Russia-aligned militias in the reports of the COI and OHCHR. For instance, the

[199] Rechtbank The Hague, 17 November 2022, ECLI:NL:RBDHA:2022:12218, 19 (emphasis in original).
[200] ibid 15–18.
[201] cf *Tadić* Appeal Judgment (n 189) [137].
[202] Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 International and Comparative Law Quarterly 493, 511. See generally *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99 [62]; *Loizidou v Turkey* (Merits) (1996) 23 EHRR 513 [52]; *Ilaşcu v Moldova and Russian Federation* (2005) 40 EHRR 1030 [314].
[203] *Cyprus v Turkey* (1999) 2 DR 125 [102]. See also *Cyprus v Turkey* (2002) 35 EHRR 731 (*'Cyprus v Turkey II'*) [74].
[204] *Ilaşcu* (n 202) [392]. See also *Cyprus v Turkey II* (n 203) [77].
[205] *Ukraine and the Netherlands v Russian Federation* App Nos 8019/16, 43800/14, and 28525/20 (ECtHR, 25 January 2023) paras 588–611, 618–21, 628–39, 643–44, 649–54, 659–62, 670–75, 684–89.
[206] ibid, para 697.
[207] Both use classifications that make it difficult to disaggregate offences committed by Russian armed forces from those committed by the DPR and LPR militias: see COI Report I (n 151) para 24, fn 6; COI Report II (n 153) para 3, fn 2; OHCHR 35th Report (n 154) para 5, fn 2.

HRMMU spoke with 11 Ukrainian prisoners of war (POWs) who were subject to torture and ill-treatment 'during their interrogations by so-called "prosecutors" of Russian-affiliated armed groups'.[208] The COI furthermore directly implicated agents of the DPR and LPR 'in the commission of unlawful confinement, torture, and sexual and gender-based violence'.[209] 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.[210] 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.[211] Media reports also suggest that DPR and LPR authorities have organised forced conscription efforts in occupied Donbas,[212] which would amount to a grave breach of the Fourth Geneva Convention.[213]

D. Breaches by 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 Hersch Lauterpacht wrote, '[t]here is not the slightest relation between the content of the right to self-defence and the claim that it is above the law and not amenable to evaluation by law'.[214] Although politically unsavoury, 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. Although it is thus far evident that the vast majority of grave breaches committed during the present conflict have been at the hands of Russia-aligned forces,[215] evading calls of victors' justice will be vital to ensuring the integrity of post-conflict justice in Ukraine, no matter the forum.[216]

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*,[217] a grave breach of the First Geneva Convention and

[208] OHCHR 35th Report (n 154) para 84.
[209] COI Report II (n 153) para 52.
[210] OHCHR 35th Report (n 154) para 85.
[211] See GC III art 130; AP I art 85(4)(e).
[212] See eg Peter Beaumont and Artem Mazhulin, '"They Hunt Us Like Stray Cats": Pro-Russia Separatists Step Up Forced Conscription As Losses Mount' *The Guardian* (Kyiv, 20 July 2022) <www.theguardian.com/world/2022/jul/20/pro-russian-separatists-step-up-forced-conscription-as-losses-mount> accessed 11 September 2023. See also n 167.
[213] GC IV art 147.
[214] Hersch Lauterpacht, *The Function of Law in the International Community* (Martti Koskenniemi ed, first published 1933, Oxford University Press 2011) 188, cited in *Nuclear Weapons* Advisory Opinion (n 36) 322–23 (Dissenting Opinion of Vice-President Schwebel).
[215] See COI Report I (n 151) para 109; COI Report II (n 153) para 23.
[216] cf Gary J Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002) 8–16.
[217] COI Report II (n 153) para 61.

AP I.[218] 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,[219] which can amount to an indiscriminate or disproportionate attack,[220] a lack of separation between Ukrainian armed forces and civilians which placed civilians at risk,[221] torture of captured Russian combatants,[222] and alleged ill-treatment of individuals suspected of being Russian collaborators.[223]

The alleged torture of Russian POWs constitutes the clearest internationally wrongful act by Ukrainian armed forces detailed in the COI's second report, with torture, inhuman treatment, and wilfully causing great suffering or serious injury to body or health all constituting grave breaches of the Third Geneva Convention.[224] In the case 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'.[225] 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.[226] While Russia-aligned forces appear responsible for the greatest volume and gravity of crimes committed during the conflict, 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 purely because of the political or national affiliation of their perpetrators.

V. Conclusion

Following his visit to Sarajevo in 1992, the late Christopher Hitchens 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'.[227] Two decades later, Judge Cançado Trindade of the ICJ declared that,

[218] See GC I art 50; AP I art 85(3)(e).
[219] COI Report II (n 153) para 36. The COI noted that, unlike Russia, Ukraine is party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.
[220] See GC IV art 147; AP I art 85(3)(b) and (c); OHCHR 35th Report (n 154) para 36. See also 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, 1226–1227.
[221] COI Report II (n 153) para 46.
[222] ibid para 86.
[223] 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' at para 89.
[224] See GC III art 130.
[225] COI Report II (n 153) para 88.
[226] See GC IV art 147; AP I art 85(4)(e).
[227] Christopher Hitchens, *Letters to a Young Contrarian* (Basic Books 2001) 136.

'[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'.[228] Nevertheless, the commitments of governments to accountability for atrocities in Ukraine largely have yet to result in concrete actions. Real measures of investigation and prosecution are necessary to combat impunity in a conflict landscape awash with flagrant disregard for the laws of armed conflict. In this regard, one can never too quickly recall the words 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.'[229]

As a leading actor in the global movement to support Ukraine's war effort through military and financial aid to Ukraine and sanctions on Russian state-aligned entities, the UK is well positioned to make a significant impact in ensuring that perpetrators of atrocity crimes in the conflict do not remain unpunished. 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 and has instead unified much of the world in defence of a rules-based international order. The war in Ukraine demands of world leaders a display of courage, equipped with the tool of universal jurisdiction. The UK faces a choice that will determine if history, when judging its actions, will merely 'look and pass'.

[228] *Obligation to Prosecute or Extradite* (n 43) 487 [177] (Separate Opinion of Judge Cançado Trindade).
[229] Dante Alighieri, 'Inferno III' in *The Divine Comedy*, vol I (Courtney Langdon tr, Harvard University Press 1918) 26, 31.