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EDITORIAL

It is with great pleasure that we present the Autumn Issue of Volume 8 of the *Cambridge Law Review*. As ever, we have received numerous submissions from around the world. It is gratifying to see that authors of all backgrounds continue to view this journal as a platform on which they can share their scholarship.

This Issue comprises three articles: two on contemporary issues in international law, and one on English law. In '*Hostis Humani Generis*: Universal Jurisdiction in English Criminal Law', Mischa Gureghian Hall explores the development of the international law principle of universal jurisdiction (which permits states to assert extraterritorial criminal jurisdiction in certain circumstances), how the principle is reflected in English law, and its potential application in relation to the Russo-Ukrainian war. In 'Sinking States, Sunken Statehood? The Recognition of Submerged States under International Law', Sarah Lok discusses how island states at risk of submergence because of climate change can, and should, continue to be recognised under the Montevideo Convention and the framework of state responsibility. Continued recognition, she argues, is a feasible remedy in response to the internationally wrongful conduct of states in neglecting their legally binding climate-related obligations. Lastly, in 'The Supreme Court in *Guest v Guest*: Remedial Mysteries in Proprietary Estoppel', Raiff Kai Andrews comments on the recent Supreme Court judgment of *Guest v Guest*, and argues that the majority is right to use the promisee's expectations as a starting point when assessing the appropriate remedy for a claim in proprietary estoppel.

We are grateful to all contributors for their thoughtful submissions and for bringing a diverse range of views and opinions to the table. We hope that the articles published in this Issue will provide food for thought and will serve as a springboard for future scholarship.

September 2023

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Hostis Humani Generis: Universal Jurisdiction in English Criminal Law

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 *erga 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

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'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.

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Sinking States, Sunken Statehood? The Recognition of Submerged States under International Law

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ABSTRACT

Several low-lying Small Island Developing States (SIDS) worldwide are finding themselves imminently submerged because of climate change-induced sea level rise. This raises questions about whether they can, and should, have their statehood continually recognised under international law. This article first outlines a typology of territorial submergence for submerging SIDS, encompassing the dual phases of 'quasi-submerged' and 'submerged'. It argues that the criteria for statehood under the Montevideo Convention ('Montevideo') are relevant to both the creation and extinction of states as the criteria fulfil restrictive, reflective, representative, and responsive functions in the international legal order. It subsequently argues that, notwithstanding Montevideo's theoretical flexibility, its practical application indicates that submerging SIDS likely cannot be recognised under its framework, though the Montevideo analysis suggests that these SIDS should nevertheless continue to be recognised as continued recognition will prevent statelessness from occurring. Lastly, this article examines the principles surrounding state responsibility, which reveal that submerging SIDS can, and should, have their statehood continually recognised under international law. This is because state liability for climate change can potentially be found and recognition constitutes a possible and desirable reparatory option that can be used to mitigate issues arising from loss and damage negotiations.

Keywords: Small Island Developing States, Montevideo Convention, climate change, statehood

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I. Introduction

What is to happen to submerged states? The mythology of historical lost cities is well-established: these submerged island subcontinents, such as Plato's Atlantis or Pytheas' Thule, exist solely within the pages of the ancient Greek oeuvre. Yet, a not-so-lost island nation situated in today's Pacific Ocean shows that the prospect of territorial submergence is not solely found in fiction.

At the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP27), Tuvalu announced plans to build a digital version of itself in the metaverse given rising sea levels.[1] As only seven governments have agreed to continual recognition of Tuvalu, the Minister for Justice, Communication and Foreign Affairs of Tuvalu, Simon Kofe, acknowledged that the country must 'look at alternative solutions for [its] survival'.[2] This bleakly indicates that international law, despite comprising a whole gamut of legal principles and actors, may not enable the continuous recognition of Tuvalu's statehood as it undergoes an inevitable process of territorial submergence. However, Tuvalu is not alone in having its continued recognition as a state under international law questioned. Beyond Tuvalu, there are numerous low-lying—and thus submerging—Small Island Developing States (SIDS) worldwide, such as Kiribati, the Maldives, and the Marshall Islands. Indeed, these islands currently find themselves precariously above present sea levels: Tuvalu has a landmass that rarely exceeds five metres above sea level, with the average height of its islands being less than two metres above sea level; Kiribati has few points that measure over two metres above sea level;[3] and the Maldives has a maximum height of around three metres above sea level.[4] The imminent submergence of these states thus invites the question of whether quasi-submerged and submerged SIDS can, and should, have their statehood continually recognised under international law.

To answer this question, this article will proceed as follows. It will first outline a typology of territorial submergence—encompassing the dual phases of 'quasi-submerged' and 'submerged'—tailored to the context of SIDS composed entirely of archipelagos of low-lying coral atolls. An interdisciplinary doctrinal ap-

[1] Aimée McLaughlin, 'How Tuvalu Could Become the First Country to Exist Solely in the Metaverse' (*Creative Review*, 22 November 2022) <www.creativereview.co.uk/tuvalu-metaverse-cop27/> accessed 30 November 2022.

[2] Lucy Craymer, 'Tuvalu Turns to the Metaverse as Rising Seas Threaten Existence' *Reuters* (Wellington, 15 November 2022) <www.reuters.com/business/cop/tuvalu-turns-metaverse-rising-seas-threaten-existence-2022-11-15/> accessed 30 November 2022.

[3] Justin T Locke, 'Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments' (2009) 175 The Geographical Journal 171; Tauisi Taupo, Harold Cuffe, and Ilan Noy, 'Household Vulnerability on the Frontline of Climate Change: The Pacific Atoll Nation of Tuvalu' (2018) 20 Environmental Economics and Policy Studies 705, 707.

[4] Fathimath Ghina, 'Sustainable Development in Small Island Developing States' (2003) 5 Environment, Development and Sustainability 139, 146.

proach utilising existing legal and geographical concepts will be deployed. Subsequently, this article will seek to explore two potential argumentative routes that can be used to justify the continued recognition of SIDS' statehood under international law: (a) the Montevideo Convention on the Rights and Duties of States 1933 ('Montevideo'); and (b) state responsibility. It will establish the relevance of Article 1 of Montevideo—which holds that states should have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states[5]—for both the creation and extinction of states so as to ground the later analysis. This article will then question whether quasi-submerged and submerged SIDS can, and should, be recognised under international law through examining: (a) the theory and practice relating to Montevideo; and (b) state responsibility under the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Ultimately, this article finds that quasi-submerged and submerged SIDS can, and should, have their statehood continually recognised under international law.

This article seeks to fill three existing gaps in the literature on statehood and state recognition. Firstly, there is insufficient literature incorporating theoretical analysis of this problem through a historical lens, specifically in relation to Westphalian sovereignty and its relationship with territory and statehood. Although works focusing on the possibility of 'climate deterritorialised nations' question the concept of territory itself,[6] they do not closely interrogate the relationship between territory and Westphalian sovereignty. Secondly, there is a lack of normative argumentation on whether Montevideo should (not) be relevant for not just the creation, but also the extinction, of states. A significant number of writers operate under the assumption that Montevideo is relevant to the extinction of states;[7] few examine countervailing arguments.[8] Lastly, the question of whether

[5] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 ('Montevideo') art 1.

[6] Catherine Blanchard, 'Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise' (2016) 53 The Canadian Yearbook of International Law 66; Davorin Lapaš, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2022) 59 The Canadian Yearbook of International Law 1; Fiona McConnell, 'Governments-in-Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty' (2009) 3 Geography Compass 1902

[7] See eg James Ker-Lindsay, 'Climate Change and State Death' (2016) 58(4) Survival 73 and Łukasz Kułaga, 'The Impact of Climate Change on States: The Territorial Aspect' (2021) 23 International Community Law Review 115.

[8] Abhimanyu G Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Statehood' (*EJIL: Talk!*, 8 November 2013) <www.ejiltalk.org/the-21st-century-atlantis-the-international-law-of-statehood-and-climate-change-induced-loss-of-statehood/#more-9752> accessed 1 November 2022 ('Jain, 'Climate Change-Induced Loss of Statehood''); Abhimanyu G Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 Stanford Journal of International Law 1.

submerged states should continue to be recognised under international law is underexplored. Existing arguments in this regard are mostly limited to issues of sovereign equality and morality,[9] and it is necessary for international legal scholarship to question whether the current legal and political landscape is well-suited to meet the exigencies of the climate crisis.

This article first establishes that the criteria for statehood under Montevideo are relevant to the question of statehood for quasi-submerged and submerged SIDS (as defined in Section II.B) in fulfilling restrictive, reflective, representative, and responsive functions in the international legal order (Section III.A). It subsequently argues that, notwithstanding Montevideo's theoretical flexibility, its practical application suggests that it cannot provide a sound framework for continued recognition of quasi-submerged and submerged SIDS (Section III.B). Nevertheless, the Montevideo analysis reveals an argument that can be made to justify that these SIDS should be continually recognised under international law (Section III.B). Lastly, this article examines the principles surrounding state responsibility, which reveal that it is not only potentially arguable under ARSIWA that these SIDS can be continually recognised (Sections IV.A and IV.B), but also that they should (Section IV.B).

II. A Typology of Territorial Submergence

This section seeks to outline a typology of territorial submergence for submerging SIDS to ground the analysis in the subsequent sections. It will first outline the relevant concepts (that is, low tide elevations, habitability, low-elevation coastal zone, and extreme sea level rise) for the sake of clarity before introducing the typology itself.

The Intergovernmental Panel on Climate Change (IPCC) has argued that SIDS, especially the atoll nations of the Pacific and Indian Oceans, are amongst the most vulnerable to climate change and rising sea levels.[10] It is important to note here that SIDS are not homogenous in their geographical composition. Although some SIDS are composed of single islands (for example, Barbados and Sri Lanka), others are archipelagos of several (for example, Tuvalu), hundreds (for example, Tonga), or thousands of islands (for example, the Maldives).[11] Furthermore, although some islands or groups of islands can be mountainous (for example, Dominica), others, for which sea level rise is especially threatening, consist

[9] Jenny G Stoutenberg, 'When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialised" Island States' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 59, 85; Blanchard (n 6) 72, 107.

[10] Leonard A Nurse and others, 'Small Islands' in Vicente R Barros and others (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 1613.

[11] James Lewis, 'The Vulnerability of Small Island States to Sea Level Rise: The Need for Holistic Strategies' (1990) 14 Disasters 241.

entirely of atolls and reef islands (for example, Kiribati).[12] As exposure to climatic hazards is ultimately contingent on structural characteristics—such as geographical and population size, remoteness, and low elevation—that increase susceptibility to flooding and coastal inundation,[13] this heterogeneity in SIDS' geographical composition translates into heterogeneity in their vulnerability to sea level rise. Therefore, this analysis and its associated framework will be focused on the SIDS composed entirely of archipelagos of low-lying coral atolls that are most vulnerable to climate change-induced sea level rise, namely Tuvalu, Kiribati, the Maldives, and the Marshall Islands. These SIDS will be collectively referred to as 'submerging SIDS' (when referring to their present state) and 'quasi-submerged and submerged SIDS' (when referring to their potential future state) in this article. The concepts of 'quasi-submerged' and 'submerged' will be defined later in Section II.B.

A. Legal and geographical concepts

One relevant overarching legal concept, along with one implied legal concept, can be distilled from the United Nations Convention on the Law of the Sea (UNCLOS) and the jurisprudence of the International Court of Justice (ICJ) pertaining to archipelagos, namely: (a) low tide elevations; and (b) habitability. Article 13(1) of UNCLOS provides that a low-tide elevation is 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'.[14] It is clear from this definition that low-tide elevations have reduced habitability in terms of human habitation and economic life when compared to landmasses that are not submerged at both high and low tide. Furthermore, as the ICJ noted in *Maritime Delimitation (Qatar/Bahrain)*, low-tide elevations are not territory 'in the same sense as islands' or other land territory.[15] Taken together, the legal authorities on low-tide elevation further imply that territories need to possess a certain level of habitability.[16]

There are also relevant concepts in the sphere of coastal geography that can be utilised to craft this typology. Firstly, the low-elevation coastal zone (LECZ) refers to the contiguous area along the coast that is less than ten metres above sea

[12] ibid.

[13] Karen E McNamara and others, 'What is Shaping Vulnerability to Climate Change? The Case of Laamu Atoll, Maldives' (2019) 14(1) Island Studies Journal 81, 83.

[14] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 ('UNCLOS') art 13(1).

[15] *Maritime Delimitation and Territorial Questions (Qatar/Bahrain)* (Merits) [2001] ICJ Rep 40, 206.

[16] As UNCLOS art 121 provides guidance on individual islands and not archipelagic states that are 'constituted wholly by one or more archipelagos' as per UNCLOS art 46(a), art 121 does not apply to archipelagos and thus cannot be used for this article's analysis. See Myron H Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol III (Martinus Nijhoff 1995) 326.

level.[17] This area sees increased flood risk, particularly when high tides combine with storm surges or high river flows; if floods occur, environmental damage may occur.[18] Furthermore, coastal geography identifies two challenges faced by submerging SIDS, namely an increased frequency of flooding and an increased vulnerability to extreme sea level rise (ESLR). On the former, the frequency of extreme water-level events in SIDS is projected to double by 2050;[19] on the latter, extreme sea levels that are historically rare will become more common under all projections of global warming, with SIDS expected to experience such events annually by 2050.[20] IPCC reports—which contain national and global assessments of projected coastal flooding given ESLR—corroborate the relevance of these challenges.[21]

B. TYPOLOGY OF TERRITORIAL SUBMERGENCE

A dual-phase typology of territorial submergence can be derived from the abovementioned legal and geographical concepts. For the sake of simplicity, the term 'land mass' will be used as a general term to refer to all the islands as part of archipelagos and atolls that comprise the state's territory.[22]

The first phase in this typology comprises the 'quasi-submerged' state, which sees significant submergence of at least a majority of its total land mass at high tide, though some islands may still be restrictively habitable. Here, the land mass will adhere to the definition of low-tide elevation provided in UNCLOS Article 13(1), which therefore means that it will cease to carry the same legal implications as land territory on the basis of *Qatar/Bahrain*. The land mass will be at the LECZ and will see significant submergence at high tide because of ESLR, as well as a significant increase in coastal flooding. Human habitation and economic life, especially along the coasts, may thus be adversely affected and restricted. As a result, the capacity of communities to continue living in certain areas is likely to be

[17] Gordon McGranahan, Deborah Balk, and Bridget Anderson, 'The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones' (2007) 19 Environment and Urbanisation 17; Stewart Angus and James D Hansom, 'Enhancing the Resilience of High-Vulnerability, Low-Elevation Coastal Zones' (2021) 200 Ocean and Coastal Management 105414.

[18] Molly E Keogh and Torbjörn E Törnqvist, 'Measuring Rates of Present-Day Relative Sea-Level Rise in Low-Elevation Coastal Zones: A Critical Evaluation' (2019) 15 Ocean Science 61, 67.

[19] Adelle Thomas and others, 'Climate Change and Small Island Developing States' (2020) 45 Annual Review of Environment and Resources 1, 8.

[20] Ebru Kirezci and others, 'Projections of Global-Scale Extreme Sea Levels and Resulting Episodic Coastal Flooding Over the 21st Century' (2020) 10 Scientific Reports 11629.

[21] IPCC, 'Intergovernmental Panel on Climate Change. 2019. Summary for policymakers' in Hans-Otto Pörtner and others (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*.

[22] This is a generally accepted term. See McNamara and others (n 13) 83.

reduced.[23] Given the projected increased frequency of flooding and ESLR, this is the phase that SIDS will likely find themselves in by 2050.[24]

The second phase in this typology comprises the 'submerged' state, which sees almost complete or complete submergence of at least a majority of the total land mass at high tide, with very few or no islands left that are (restrictively) habitable. The land mass here, like that of the quasi-submerged state, does not carry the same legal implications as land territory on the basis of *Qatar/Bahrain*. However, unlike with the quasi-submerged state, the land mass will no longer be at the LECZ: it will be largely or wholly submerged at high tide (and possibly even low tide), thereby rendering it unable to sustain human habitation and economic life. As future ESLR is projected to reach 1.5 to 2.5 metres in the Pacific Ocean region—which is where Kiribati and Tuvalu are situated—based on a 100-year return period,[25] both SIDS—having most of their islands lying less than two metres above sea level—are likely to reach this phase within a century.

III. State Recognition under Montevideo

This section explores the viability of arguing for the continued recognition of quasi-submerged and submerged SIDS' statehood under Montevideo. It will first establish Montevideo's relevance for the recognition of quasi-submerged and submerged SIDS before analysing whether they can be recognised under Montevideo and whether they should, more generally, continue to be recognised. Although international law lacks an authoritative legal definition of a state, Montevideo is used in this analysis as it is the most cited definition[26] and is considered customary international law.[27]

A. Montevideo in the International Legal Order

The Montevideo Convention holds that states should have: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.[28] As mentioned in Section I, a significant majority

[23] Ann Powers and Christopher Stucko, 'Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 133; Clive Shofield and David Freestone, 'Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 146.

[24] Kirezci and others (n 20).

[25] ibid.

[26] Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press 2015) 95.

[27] Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14(2) Melbourne Journal of International Law 346.

[28] Montevideo art 1.

of the literature thus far operates under the assumption that Montevideo is relevant to both the creation and extinction of statehood, without providing the necessary justifications for such relevance. There is, however, a stream of legal scholarship that denies the relevance of Montevideo to questions of state recognition in the context of state extinction, and posits that Montevideo only pertains to the creation of states.[29] Another stream of legal scholarship that may deny the relevance of the Montevideo criteria to state extinction asserts that the recognition of statehood is fundamentally a political exercise.[30] Nevertheless, this section argues that Montevideo serves four functions in the international legal order.

Firstly, Montevideo serves a restrictive function: by having a territory requirement as one of its constituent elements, it prevents a potentially indeterminate number of non-territorial entities (that were never considered states under Montevideo) from asserting statehood because they will be unable to fulfil this requirement.[31] Indeed, if this criterion serves as a precondition for the creation of states, but not necessarily for their continued existence, then random non-territorial entities can assert that they constitute states on the basis that certain new or existing states do not fulfil, or have not already fulfilled, the territory requirement. This would risk undermining Montevideo's restrictive function. Therefore, contrary to the argument that this function does not explain the continued relevance of the territory requirement once a state has come into existence,[32] the territory requirement is relevant for both the creation and continuity of statehood.

Furthermore, Montevideo serves a reflective function: it not only comprises legal criteria deployed by the UN to determine questions of statehood,[33] but also functions as a framework that reflects political reality. In other words, the language of Montevideo is not solely limited to the legal ambit of statehood—it is instead also deployed by SIDS in the diplomatic sphere. Even if some posit that the text of Montevideo itself contains no consideration of continuity,[34] arguments made by states pertaining to their continued recognition implicitly reference the criteria under Montevideo itself. These arguments constitute state practice, thereby contributing to the creation of a customary international law notion that the criteria in Montevideo are relevant to the continuity of statehood.[35] When indicating that they considered extinction of statehood to be a consequence of ESLR, the Maldives

[29] See eg Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[30] See eg Milena Sterio, 'Power Politics and State Recognition' in Gëzim Visoka, John Doyle, and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2019) 82.

[31] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[32] ibid.

[33] Kawser Ahmed, 'Will the ICJ Objectively Assess the Statehood of Palestine? A Brief Reflection' (2023) 22 The Law and Practice of International Courts and Tribunals 119

[34] ibid.

[35] State practice (eg diplomatic acts and correspondence) is relevant in the international legal sphere as it can contribute to customary international law. See Statute of the International Court of Justice, art38(1)(b).

referred to the 'extinction of their State', while Nauru highlighted that submergence rendered states 'in danger of losing their populations and their land as a whole'.[36] This evinces state invocation of the Montevideo criteria—population and territory—when discussing their potential extinction. The argument that the territory requirement does not explain Montevideo's continued relevance to state extinction thus fails to recognise adequately the reality of state practice in international law. It also follows that the argument cannot be made that, as statehood is linked to power politics,[37] Montevideo is irrelevant. Indeed, the problem with this argument is its attempt to divorce law from politics: it solely understands Montevideo as constitutive of legal criteria, without also recognising that the Montevideo lexicon is used in state actions in the political sphere.

Montevideo also serves a representative function, featuring elements that are important to states—especially SIDS—and statehood in the context of the international legal order. This is true for the requirements of government and the capacity to enter legal relations with other states, as they respectively enable internal and external management of the state. The representative function of Montevideo is also reflected in the population requirement because states are (plainly) ultimately composed of people. Further, this representative function holds especially true for the territory requirement, given the link that the notion of Westphalian sovereignty draws between territory and sovereignty and the importance of territory to SIDS' identity.

An argument against this proposition is to the effect that, because technological developments have greatly decreased the functional utility of territory, Montevideo's territory requirement for the continued existence of states can be dispensed with.[38] Yet, this is a *non sequitur*, for it conflates a diminished functional utility with the absence of functional utility. It also overstates the influence of technological developments: although technological and legal developments, such as the expansion of international trade and the exercise of extraterritorial jurisdiction, may make states less reliant on their delineated territory, this does not necessarily mean that these states no longer require a territorial basis. Indeed, territory serves a crucial historical function as a basis for state sovereignty in the international legal order today.[39] Therefore, even if technology can enable the digitisation of a state's presence (for example, Tuvalu's proposal to build a 'digital twin' in the metaverse), it is no perfect substitute for actual, physical territory, be it land or maritime territory.[40] Furthermore, even if it is accepted that technological developments have greatly decreased the functional utility of territory, it does not mean that the territory requirement can be dispensed with, for it is still important in other aspects. Although some have rather quickly dismissed the cultural

[36] Wong (n 27).
[37] Sterio (n 30) 82.
[38] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).
[39] McConnell (n 6) 1903.
[40] This more expansive definition of territory will be elaborated on further in Section III.B.

function of territory in describing it as the 'least tangible and immediately critical purpose that territory serves',[41] this cannot hold true in the cultural context of citizens in SIDS. Sociological studies suggest that Tuvaluan and Kiribatian identities are strongly related to their land territory,[42] and therefore it cannot be argued that a community's cultural ties—and, by extension, cultural fabric—are only partially premised on territory. In short, digital territory is an imperfect replacement for physical territory.

More broadly, Montevideo's importance to statehood is underscored both by the need to ensure Montevideo's substantive coherence and by the law on state continuity. It has been argued that the limited functional utility of territory for statehood is underscored by the absence of a minimum threshold for the satisfaction of the territory requirement.[43] However, this argument is not viable when taken to its logical conclusion: given that there is likewise no minimum threshold for the population requirement under Montevideo, this argument necessarily entails that multiple components of the Montevideo criteria can be done away with. It has also been suggested that the law on state continuity cannot supersede the Montevideo criteria that apply to the creation of statehood.[44] This thus implies that if one were to determine the extinction of a state, one would have to first ascertain if the state existed—and was thus created—under Montevideo in the first place, thereby justifying the importance of the Montevideo criteria.

Lastly, Montevideo serves a responsive function: given its existing prevalence as an analytical rubric for questions pertaining to statehood, it is a framework that enables international law to respond to novel legal problems (in this case, the unprecedented question of continued recognition of sinking states). This is especially because the concept of the state has been largely construed with reference to Montevideo.[45] Although a line of argument posits that statehood continues 'so long as an identified polity exists with respect to a significant part of a given territory and people',[46] how far this presumption of continuity of states—where the same state can still be deemed to exist despite drastic changes in its ability to fulfil the Montevideo criteria—will extend to quasi-submerged and submerged states in the future is unclear. Although it is accepted that the non-fulfilment of one or more of the elements of statehood will not affect state continuity, it is also unclear where

[41] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[42] Carol Farbotko, Elaine Stratford, and Heather Lazrus, 'Climate Migrants and New Identities? The Geopolitics of Embracing or Rejecting Mobility' (2016) 17 Social and Cultural Geography 533, 534; Candice E Steiner, 'A Sea of Warriors: Performing an Identity of Resilience and Empowerment in the Face of Climate Change in the Pacific' (2015) 27 The Contemporary Pacific 147, 149.

[43] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[44] Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States' (2021) 22(2) Melbourne Journal of International Law 357, 377.

[45] Ryan Mitra and Sanskriti Sanghi, 'The Small Island States in the Indo-Pacific: Sovereignty Lost?' (2023) 31 Asia Pacific Law Review 428, 436.

[46] James Crawford, *The Creation of States in International Law* (Oxford University Press 2007) 715.

the limits of such non-fulfilment of individual or multiple elements lie.[47] Taken together, all of this means that the challenges that the presumption of continuity itself cannot resolve necessitate reliance on Montevideo, for these challenges require continuous examination of the very boundaries of Montevideo's individual criteria. Therefore, contrary to what some assert, it is not viable to look to historical precedent to justify that loss of territory does not imply loss of statehood.[48] Although historical practice undoubtedly shows that international law does not hold that loss of territory implies loss of statehood,[49] the current situation in which SIDS find themselves lacks precedent[50] and thus raises the possibility that loss of territory could imply loss of statehood.

In summary, Montevideo is relevant for both the creation and extinction of states as it stops non-territorial entities from claiming statehood, reflects the political reality pertaining to continued statehood, features elements important to states and statehood, and functions as a reference point to navigate novel questions pertaining to statehood. It is, then, a *non sequitur* to argue that the failure of the international community to apply Montevideo rigorously to make determinations about statehood entails that Montevideo is irrelevant to questions relating to the continued statehood of quasi-submerged and submerged states.[51] Indeed, the Montevideo criteria are relevant to the question of recognition in the context of state extinction, for they provide international law with a framework through which legal questions related to, as well as the politics of, state recognition can be understood.

B. State recognition

Having established Montevideo's relevance to state extinction, this article will proceed to analyse whether quasi-submerged and submerged SIDS can be continually recognised under Montevideo and whether they should be continually recognised more generally. This section seeks to argue that although quasi-submerged and submerged SIDS likely cannot be continually recognised under Montevideo, analysis arising from this examination nevertheless points towards an argument justifying that these submerging SIDS should be continually recognised.

Some writers deem it impossible for quasi-submerged and submerged states to retain their statehood, for they believe that Montevideo clearly articulates that a state should possess land territory.[52] Proponents of such an approach fail to recognise that Montevideo lacks self-defining criteria, in that international law

[47] Wong (n 27).

[48] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[49] Jenny G Stoutenberg, *Disappearing Island States in International Law* (Brill Nijhoff 2015) 264.

[50] ibid.

[51] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2012) 236.

[52] Crawford (n 46) 31–32; Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty' (2010) 53 Ocean and Coastal Management 1.

lacks a singular authoritative exposition on what the various elements of statehood precisely entail.[53] Accordingly, the conceptual indeterminacy surrounding territory reveals that the notion may accommodate definitions extending beyond that of simply the presence of physical land, thereby enabling these states to be continually recognised under Montevideo. Indeed, even though physical territory serves as a basis for state sovereignty in the international legal order today,[54] conceptual and practical advances in international law promote a broader understanding of territory.

In the first place, definitions of territory can encompass both land and maritime territory. Although existing jurisprudence under the law of the sea deems maritime territory to be contingent on the presence of land territory,[55] conceptual developments posit that territory (and maritime territory) can exist if the population thereon so requires for their own identity or existence,[56] which can include citizenship and its associated bundle of rights. Such a broader understanding of territory in the context of these SIDS is supported by the fact that international law presently recognises, albeit to a limited extent, the notion of non-territorial sovereignty in the political sphere, as in the context of diasporic communities (because of invasion or colonisation) or the Sovereign Order of Malta.[57] Given that a state's sovereignty also applies to its entire territory, including its uninhabitable terrain,[58] this implies that a government will still be deemed sovereign over its land, regardless of the form taken—habitable or non-habitable—by such land.

Indeed, to ensure that existing jurisprudence under the law of the sea exists in coherence with conceptual developments in international law, there is a need to maintain exceptionally—at least to a certain extent—present maritime baselines possessed by submerging SIDs to prevent changes to their maritime territory from occurring as their land territory gradually sinks into the sea. This exception to the rule of ambulatory baselines in UNCLOS has been construed as acceptable within a broader interpretation of rules under the law of the sea,[59] thereby enabling UNCLOS to adapt to current challenges arising from climate change and, by extension, ensuring that submerging SIDS continue to possess some maritime territory.

[53] Stoutenberg (n 49) 249.

[54] McConnell (n 6) 1903; Cynthia Weber, 'Reconsidering Statehood: Examining the Sovereignty/Intervention Boundary' (1992) 18 Review of International Studies 199, 211.

[55] *North Sea Continental Shelf (Germany/Denmark, Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [96]; UNCLOS art 2(1). This is also reflected in the principle that 'the land dominates the sea', according to which the terrestrial territorial situation is the starting point for the determination of the maritime rights of coastal states (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep 659 [113]).

[56] McConnell (n 6) 1915–1916; Weber (n 54) 215.

[57] Jörgen Ödalen, 'Underwater Self-determination: Sea-level Rise and Deterritorialised Small Island States' (2014) 17 Ethics, Policy & Environment 225, 228.

[58] Mitra and Sanghi (n 45) 435.

[59] Signe Veierud Busch, 'Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation' in Elise Johansen, Signe Veierud

Moreover, states wield the power to interpret—however broadly or narrowly—whether other states meet Montevideo's criteria.[60] By applying the presumption of continuity, which holds that a state can continue to exist despite drastic changes to its fulfilment of Montevideo,[61] it can broadly be argued that submerging SIDS can be recognised even when submerged because they either fulfilled the Montevideo criteria previously or possess maritime territory. All of the above suggest that, notwithstanding the existing jurisprudence under the law of the sea, theoretical and practical developments indicate that sovereignty may not be solely contingent on land territory, thereby enabling the potential recognition of quasi-submerged and submerged SIDS.

The necessity of this more expansive interpretation is underscored by the undesirability of measures that submerging SIDS have taken or might take to ensure their continual recognition under Montevideo, should a narrow conception of territory as purely encompassing land territory be adopted. Although the phase of the 'submerged' state entails an absence of physical territory, the lack of a baseline territory requirement will mean that these states can simply construct a 'sovereignty marker' that safeguards minimum adherence to Montevideo's territory requirement, such as a lighthouse.[62] Yet, this may cause further practical issues: it is uncertain as to what size such a placeholder must be to ensure 'minimum adherence' and what sorts of constructions can constitute acceptable 'sovereignty markers'. Additionally, the Maldives has been constructing artificial islands within their territorial waters to maintain their statehood.[63] Although this solution is theoretically compliant with the idea of physical territory, this is not only environmentally destructive,[64] but also potentially non-constitutive of territory given international law's unwillingness to open the floodgates regarding the existence of states based on artificial islands.[65] This is especially because no conceptual distinction between the notions of 'claiming new land' and 'reclaiming or maintaining a State's current borders' appears to exist: so long as the new acquired territory was

Busch, and Ingvild Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change* (Cambridge University Press 2020) 334–335.

[60] Stoutenberg (n 49) 252, 269.

[61] Crawford (n 46) 715.

[62] Jessica Drew, 'The Statehood of Disappearing Island States and International Law' (*International Law Blog*, 12 July 2023) <https://internationallaw.blog/2023/07/12/the-statehood-of-disappearing-island-states-and-international-law/#_ftnref20> accessed 12 August 2023.

[63] ibid.

[64] Emma Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' [2018] Brill Open Law <https://brill.com/view/journals/bol/aop/article-10.1163-23527072-00101008/article-10.1163-23527072-00101008/article-10.1163-23527072-00101008.xml?ebody=pdf-67975> 5–6.

[65] ibid 6–7.

terra nullius, the acquisition would be an act *à titre de souverain*;[66] and the ICJ has also held that reclamation plans are similarly understood.[67]

The ability of submerging SIDS to compel other states to undertake this more expansive interpretation of territory under Montevideo is shown through how SIDS more generally—including states beyond Tuvalu, Kiribati, the Maldives, and the Marshall Islands—have been carving out a legally and politically favourable space for themselves within the international sphere. This is despite arguments to the contrary positing that international environmental law (IEL) has often been utilised contrary to SIDS' interests.[68]

Firstly, SIDS have established their vulnerability in multilateral negotiation spaces, as evinced through their work as part of the Alliance of Small Island States (AOSIS) in advancing clear diplomatic objectives and actively participating in COP negotiations, thereby securing international visibility as vulnerable countries.[69] Such visibility has translated into influence: their vulnerability narrative and use of moral leadership strategies have provided them with leverage in negotiations, enabling them to secure at least some parts of their agenda and interests in international agreements.[70] This, then, has the effect of enabling them to be taken seriously by other countries in both the Global South and Global North, with the international media, policy, and scientific communities placing significant focus on SIDS and recognising them as hotspots of global climate change and paradigm examples of island vulnerability.[71] Furthermore, significant work has been done by SIDS to bring attention to environmental threats and thereby ensure their own survival on the legal front. Vanuatu's request for an advisory opinion from the ICJ pertaining to the international legal obligations of states in relation to climate change has been adopted by the UN General Assembly and accepted by the ICJ;[72] and Antigua and Barbuda and Tuvalu have established a Commission of Small

[66] Sookyeon Huh, 'Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)' (2015) 26 The European Journal of International Law 709, 715.

[67] *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 [274].

[68] Mitra and Sanghi (n 45) 439.

[69] Aaron Atteridge, Cleo Verkuijl, and Adis Dzebo, 'Nationally Determined Contributions (NDCs) As Instruments for Promoting National Development Agendas? An Analysis of Small Island Developing States (SIDS)' (2020) 20 Climate Policy 485, 486; Timothée Ourbak and Alexandre K Magnan, 'The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players' (2018) 18 Regional Environmental Change 2201.

[70] Inés de Águeda Corneloup and Arthur P J Mol, 'Small Island Developing States and International Climate Change Negotiations: The Power of Moral "Leadership"' (2014) 14 International Environmental Agreements: Politics, Law and Economics 281, 292.

[71] Carola Klöck and Patrick D Nunn, 'Adaptation to Climate Change in Small Island Developing States: A Systematic Literature Review of Academic Research' (2019) 28 The Journal of Environment & Development 196, 197; Jan Petzold and Alexandre K Magnan, 'Climate Change: Thinking Small Islands Beyond Small Island Developing States (SIDS)' (2019) 152 Climatic Change 145.

[72] Vanuatu ICJ Initiative, 'Statement ICJ Core Group' (*Vanuatu ICJ Initiative*, 27 October 2022) <www.vanuatuicj.com/statement-icj-core-group> accessed 21 January 2023.

Island States on Climate Change and International Law (COSIS) with express authority to (among other things) request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on matters pertaining to climate change, with proceedings now underway.[73] Although advisory opinions are not legally binding, they have served as authoritative pronouncements of law.[74] Taken together, all of this implies that SIDS are not just securing diplomatic influence, but also buttressing it with legal influence, thereby working towards shaping the international agenda in their favour. It therefore follows that submerging SIDS, in utilising Montevideo's reflective function, could be deemed sufficiently influential to sway other states into adopting a broader understanding of territory that works to their benefit.

Nevertheless, the force of this argument should not be overstated: even as these submerging SIDS are securing and reinforcing their legal and political influence internationally, the actual exercise of Montevideo's theoretical flexibility is still contingent on the continued benevolence of other political actors within the international legal order. This is especially because states are legally entitled to withdraw recognition of another state—and thereby deny that state's statehood—whenever they wish.[75] At most, SIDS might practically influence the international interpretation of the territory requirement under Montevideo, but this is not guaranteed.

Moreover, notwithstanding the broader definition of 'territory' that could be used, Montevideo's historical practical application appears to place stronger practical significance on the criteria of territory and—more importantly for the purposes of this argument—permanent population. An argument can be made that (non-)recognition under Montevideo occurs regardless of whether the entity in question meets all or only some of its criteria:[76] there are some states that fulfil the Montevideo criteria but are not fully recognised by the international community (for example, Kosovo);[77] there are also states that do not fulfil the Montevideo criteria but are recognised by the international community (for example, Somalia).[78] Furthermore, states suffer constant transformations in their constitutive elements that do not affect their statehood, given that a strong presumption applies

[73] Donald R Rothwell, 'The Acid Test: Legal Moves to Force Action on Climate Change' (*Reliefweb*, 19 January 2023) <https://reliefweb.int/report/antigua-and-barbuda/acid-test-legal-moves-force-action-climate-change> accessed 21 January 2023.

[74] Margaretha Wewerinke-Singh, 'Climate Change in an Unequal World: Do International Courts and Tribunals Matter?' (*National University of Singapore Centre for International Law*, 15 September 2022) <https://cil.nus.edu.sg/blogs/climate-change-in-an-unequal-world-do-international-courts-and-tribunals-matter/> accessed 21 January 2023.

[75] Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53 Yale Law Journal 385, 389.

[76] Mitra and Sanghi (n 45) 434.

[77] AJLabs, 'Which Countries Recognise Kosovo's Statehood?' *Al Jazeera* (Doha, 17 February 2023) <www.aljazeera.com/news/2023/2/17/mapping-the-countries-that-recognise-kosovo-as-a-state-2> accessed 27 August 2023.

[78] Ken Menkhaus, 'State Collapse in Somalia: Second Thoughts' (2003) 30 Review of African Political Economy 405.

to the continuity of a state once it has been created and,[79] therefore, against its extinction. For example, 'failed' states that lose an effective government do not fulfil Montevideo's third criterion (that is, government), and, by extension, potentially its fourth criterion as they may lack the institutional capacity and authority to conduct international relations. However, these 'failed' states are still the main claimants to a demarcated territory in which a core population remains (even if a population exodus has occurred) and are still recognised as states by the international community. This suggests that the criteria of territory and permanent population are more crucial to determining statehood as compared to the third and fourth criteria. By contrast, in the case of quasi-submerged and submerged SIDS, a complete departure of the population base will likely occur. This means that even if other states may be swayed by SIDS into adopting a broader interpretation of territory, it will be challenging to assert that submerging SIDS have a permanent population in their 'quasi-submerged' and 'submerged' stages. Habitability will already be severely limited and significant migration would likely have occurred (or be underway) at the phase of the quasi-submerged state. At the phase of the submerged state, there may be little to no population at all. Therefore, given the greater importance that has been implicitly accorded to both territory and a permanent population in the recognition of statehood under Montevideo thus far, it cannot be said that recognition under Montevideo can take place regardless of requirements left unfulfilled by the state in question. It is therefore difficult to conclude that quasi-submerged and submerged SIDS can have their statehood continually recognised under Montevideo.

Nevertheless, the above analysis relating to the broader conception of territory can be utilised to argue that submerged SIDS should be continually recognised, even as they move along the typology of territorial submergence. The point that territory can exist if the population requires it for their own identity or existence works in favour of these SIDS: if SIDS at the phase of the 'submerged' state are deemed to lack territory (as discussed in Section II.B) and thus no longer exist as states, then their citizens have no right under international law to acquire a new nationality from another state.[80] It follows that, at present, non-submerging states do not have any concomitant obligations to grant citizens of submerged SIDS citizenship of their state when submerging SIDS no longer exist as states. Construing these submerged SIDS as having territory (albeit in the maritime sphere) thereby protects their citizens' citizenship status, even as these populations may have to migrate to another non-submerged state; this is especially because the non-submerged state may not grant them citizenship in the short-term. Therefore, contrary to a line of argument holding that maintaining submerging SIDS' statehood

[79] Rouleau-Dick (n 44) 359–360.

[80] Melissa Stewart, 'Cascading Consequences of Sinking States' (2023) 59 Stanford Journal of International Law (forthcoming).

is a legal fiction bereft of practical utility,[81] a wider understanding of Montevideo's territory requirement will ensure practical benefits in terms of continued citizenship, at least until citizens of submerging SIDS are able to acquire citizenship under a new state, thereby ensuring that these citizens will at no point find themselves stateless. Indeed, recognising the continuation of these states does not merely yield temporary benefits, for it is impossible to predict with certainty the amount of time it would take for all the citizens of these SIDS to acquire citizenship under a new state. Furthermore, as the notion of 'statelessness' presumes that the origin state possesses neither the capacity nor intention to represent them,[82] rendering the citizens of these SIDS stateless would be to misrepresent at least the intentions of submerging SIDS in continuing to fight for their continued physical and political existence.

Overall, Montevideo is sufficiently conceptually flexible to accommodate an expansive interpretation of the concept of territory that includes both land and maritime territory. Nevertheless, even as SIDS potentially possess the political leverage to compel states to adopt this broader interpretation of territory, the practical application of Montevideo thus far—in terms of its general use by states and, more significantly, the relatively heavier weight accorded to the criteria of territory and permanent population—suggests that submerging SIDS likely cannot be recognised within the international legal framework directly pertaining to statehood, regardless of whether they are quasi-submerged or submerged. Montevideo's responsive function thereby raises the possibility that loss of territory could (indirectly) imply loss of statehood through quasi-submerged and submerged SIDS' inevitable non-fulfilment of the criterion of a permanent population. Nevertheless, this examination of statehood recognition under Montevideo allows an argument to be made that submerging SIDS should continue to be recognised, on the basis that recognition prevents statelessness from occurring.

IV. State Recognition through State Responsibility

This section aims to explore the viability of arguing for the continued recognition of submerging SIDS under the alternative route of state responsibility, rather than through the direct route of Montevideo (as seen earlier in Section III). It will do so by addressing the questions of whether quasi-submerged and submerged SIDS can, and should, be continually recognised through the lens of state responsibility. Although a stream of literature posits that this line of argument is conceptually uncertain as well as institutionally and politically challenging to adopt in practice,[83]

[81] Ori Sharon, 'To Be or not to Be: State Extinction through Climate Change' (2021) 51 Environmental Law 1041, 1044–1045.

[82] Mitra and Sanghi (n 45) 447.

[83] See eg Benoît Mayer, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 Asian Journal of International Law 185, 187–188 and Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1, 20–22.

this section will seek to address these points in turn while showing that state responsibility can be used to make arguments in favour of continued recognition of submerging SIDS.

A. ESTABLISHING STATE RESPONSIBILITY

To argue in favour of the continued recognition of submerging SIDS through the framework of state responsibility, potential state responsibility for inadequate climate action that has contributed to ESLR must first be established, after which the various remedies in response to such liability—including continued recognition—can be evaluated. State liability can be established under ARSIWA through IEL and international human rights law (IHRL), with this liability arising from a breach of international obligations necessitating a duty to make reparations.[84] Under ARSIWA, it can be argued that because states have failed to exert sufficient regulatory control over carbon emission activities within their jurisdiction that have contributed to ESLR,[85] they have therefore failed to meet their international obligations.

ARSIWA Article 2 holds that to establish an internationally wrongful act of a state, the act must: (a) be attributable to the state; and (b) constitute a breach of an international obligation owed by that state. Under (a), scientific developments facilitate the establishment of causal links between state emissions and environmental outcomes,[86] thereby enabling attribution; this is notwithstanding arguments positing that establishing causation is complex given the temporally and spatially extensive nature of climate change.[87] Furthermore, although international courts and tribunals have been critiqued for taking inconsistent approaches to causation,[88] this does not necessarily preclude findings of causation.

However, establishing a breach of international obligations under (b) is more complex. At this juncture, it is useful to outline some potential arguments countering the proposition that states are bound by (or have breached) interna-

[84] Articles on Responsibility of States for Internationally Wrongful Acts (2001) Un Doc A/RES/56/83 ('ARSIWA') art 1.

[85] The link between emissions and ESLR is scientifically established: see Jennifer Chu, 'Short-Lived Greenhouse Gases Cause Centuries of Sea-Level Rise' (*NASA: Global Climate Change, Vital Signs of the Planet*, 12 January 2017) <https://climate.nasa.gov/news/2533/short-lived-greenhouse-gases-cause-centuries-of-sea-level-rise/> accessed 5 August 2023.

[86] *Sacchi v Argentina* Communication No 104/2019, UN Doc CRC/C/88/D/104/2019 (CRC, Decision of 22 September 2021) [10.11]; Zia Akhtar, 'Greenhouse Gas Emissions, "Event Attribution" and *Locus Standi* in Foreign Courts' (2021) 50 Environmental Policy and Law 309, 317–320.

[87] Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Alexander Zahar and Benoît Mayer (eds), *Debating Climate Law* (Cambridge University Press 2021) 185–186.

[88] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 European Journal of International Law 471, 479–492; Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' (2022) 90 British Yearbook of International Law 1, 44–78.

tional obligations relating to their emissions activities. Firstly, notwithstanding extensive state participation in the Paris Agreement, the presence of capacious and undefined concepts such as 'highest possible ambition' and 'common but differentiated responsibility' in the Paris Agreement means that states have some—albeit not unlimited—potential argumentative room to evade responsibility for their actions,[89] with there being significant confusion as to what these concepts entail.[90] Furthermore, the potential for inadequate state accountability is exacerbated by the lack of direct enforcement under the Paris Agreement's mitigation mechanism.[91] Lastly, not all provisions in the Paris Agreement are legally binding; at any rate, their status is unclear. It is true that the Agreement contains some legally binding provisions.[92] However, Article 4(3) holds that State Parties' subsequent Nationally Determined Contributions (NDC) (that is, national climate pledges) 'will'—rather than 'shall'—represent a 'progression beyond the Party's then current [NDC] and reflect its highest possible ambition'.[93] It does not create legally binding obligations as to a particular result. Given that there has also been some uncertainty as to the legal bindingness—and thus obligatory nature—of NDCs,[94] particularly because numerous states have refrained from establishing judiciable targets in their NDCs,[95] a state's failure to meet the substantive content of its NDC does not mean that a legal obligation has been breached. These counterarguments, taken together, therefore suggest that states can potentially evade legal liability under ARSIWA Article 2.

While these arguments are theoretically viable within the context of the Paris Agreement, they fail to note that states have broader and more specific duties within IEL. These duties suggest that states are internationally obliged to reduce emissions to prevent harming SIDS through ESLR and can be held liable for their breach. Indeed, the ICJ has repeatedly held that states have substantive obligations

[89] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 237, 239–243; Sanita van Wyk, 'Climate Change Law and Policy in South Africa and Mauritius: Adaptation and Mitigation Strategies in Terms of the Paris Agreement' (2022) 30 African Journal of International and Comparative Law 1; Benoît Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13 Chinese Journal of International Law 539, 545–547, 571–574.

[90] Andreas Buser, 'National Climate Litigation and the International Rule of Law' (2023) 36 Leiden Journal of International Law 593, 602.

[91] Vegard H Tørstad, 'Participation, Ambition and Compliance: Can the Paris Agreement Solve the Effectiveness Trilemma?' (2020) 29 Environmental Politics 761.

[92] See eg Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 ('Paris Agreement') arts 4(2), 4(8), and 6(2).

[93] Paris Agreement art 4(3).

[94] Some characterise NDCs as being legally binding and/or obligatory (eg Mayer (n 83) 251, Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33 Journal of Environmental Law 1, 5), while others deem it as merely an 'expectation' (eg Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 Transnational Environmental Law 17).

[95] Buser (n 90) 603.

not to utilise their territory to cause transboundary harm under customary international law.[96] This obligation involves a due diligence standard that is assessed against the standard of reasonableness,[97] which is a variable concept involving the interplay of multiple context-dependent considerations.[98] International courts and tribunals can therefore find state liability notwithstanding that the standard of reasonableness allows for a broad scope of state discretion. Moreover, because norms of international climate law increasingly encompass precise obligations,[99] states' argumentative room to evade responsibility for their emissions is gradually reducing. States that fail to reduce emissions that pose a significant risk to the climate system could thus be found to have committed a breach of an international obligation.

Furthermore, notwithstanding the unclear legal nature of the Paris Agreement and its lack of enforcement, there are still ways in which states can be held to account under the Agreement within the domestic, regional, and international legal spheres. Firstly, the surge of climate litigation actions taken worldwide with long-term strategic ambitions,[100] where claimants sometimes make arguments based on their nation's obligations under the Paris Agreement,[101] suggests that there are domestic judicial avenues through which states can be held accountable for their international legal obligations in substance. At the very least, such domestic enforcement mechanisms may nudge states into thinking again about (more closely) adhering to their international legal obligations. Although the Agreement has not yet been used by regional and international courts,[102] these judicial bodies nonetheless provide a potential alternative avenue for litigants to file claims after having exhausted domestic-level remedies, especially as domestic judiciaries may opt to defer to domestic governments for relatively more 'political' questions.[103] These legal institutions could function as a check on states' discretion to self-define the capacious and undefined concepts in the Paris Agreement, thereby filling in

[96] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)* (Merits) 1 December 2022 <www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf> accessed 25 July 2023 [99].

[97] Voigt (n 89) 246.

[98] *Responsibilities and Obligations of States with respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Reports 10 [117]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [223].

[99] Maciej Nyka, 'State Responsibility for Climate Change Damages' (2021) 45 Review of European and Comparative Law 131, 141.

[100] Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Litigation' in César Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilisation Can Bolster Climate Action* (Cambridge University Press 2023) 97.

[101] See eg *Tristan Runge v State of Saxony* [2022] ECLI:DE:BVerfG:2022:rk20220118.1bvr156521 and *Future Generations v Ministry of the Environment* ('*Demanda Generaciones Futuras v Minambiente*') [2018] STC4360-2018, nº 11001-22-03-000-2018-00319-01.

[102] Voigt (n 89) 244.

[103] Benoît Mayer and Harro van Asselt, 'The Rise of International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 175, 176, 180–183.

the gap left by the Agreement's lack of direct enforcement. Additionally, even if the obligatory nature of NDCs in international law is disputed, many NDCs may still be binding under national legislation.[104] Therefore, states can potentially be held liable under ARSIWA Article 2 for breaches of IEL through domestic, regional, and international courts as well as domestic legislation.

Additional international obligations have also been explicitly imposed on states in the realm of IHRL by international legal mechanisms. In *Sacchi v Argentina*, the United Nations Committee on the Rights of the Child held that countries had extraterritorial responsibilities related to carbon pollution in view of the urgency of the climate crisis and their human rights obligations, and established a test for causation that required the harm resulting from carbon pollution to be 'reasonably foreseeable' and 'significant'.[105] Thus, a breach may be found under ARSIWA Article 2 so long as emissions are attributable to a particular state and that state has failed to fulfil its extraterritorial responsibilities related to carbon pollution. Likewise, in *Torres Strait Islanders*, the United Nations Human Rights Committee held that the Australian Government had violated its human rights obligations to the Torres Strait Islanders—such as its obligations to ensure the right to life and culture—because of its greenhouse gas emissions and climate change inaction.[106] Accordingly, even though the Paris Agreement has not been directly used by regional and international courts, state responsibility for emissions can be established through states' international human rights obligations.

Admittedly, this area is marked by some uncertainty as state responsibility has not been widely litigated in the context of environmental responsibility.[107] It is not a foregone conclusion that states will be found to be in breach of their international obligations and, by extension, be found to have committed an internationally wrongful act under ARSIWA Article 2. In view of the foregoing, however, it is at least arguable that state responsibility can be established for breaches of treaty obligations undertaken under IEL or international legal obligations under IHRL.

B. Reparations

If state responsibility can be established, it can additionally be used to argue that quasi-submerged and submerged SIDS can have their statehood continually recognised under international law as such continued recognition constitutes a viable reparatory option under ARSIWA. It is also a desirable reparatory option that can be used to mitigate the practical problems associated with loss and damage.

[104] David Hunter, Wenhui Ji, and Jenna Ruddock, 'The Paris Agreement and Global Climate Litigation after the Trump Withdrawal' (2019) 34 Maryland Journal of International Law 224, 248; Preston (n 94) 6–14.

[105] *Sacchi* (n 86) [10.7], [10.12].

[106] *Daniel Billy v Australia (Torres Strait Islanders Petition)* Communication No 3624/2019, UN Doc CCPR/C/135/D/3624/2019 (HRC, Decision of 22 September 2022).

[107] Voigt (n 83) 21.

ARSIWA establishes three potential forms of reparation—restitution, compensation, and satisfaction—that flow in a hierarchy.[108] Firstly, restitution is unavailable. ARSIWA Article 35 provides that states are only obliged to make restitution insofar as it is not materially impossible; however, reversing ESLR caused by global warming has been scientifically proven to be materially impossible.[109] Secondly, compensation is practically challenging given the limited guidance on compensation of purely ecological harm, the numerous state contributors to such harm,[110] and the potential inadequacy of reparations.[111] These challenges are likely exacerbated by historical practical problems associated with loss and damage, including the potential unwillingness of states to come to a compromise on the actual implementation of a redistributive mechanism.

The only possible and desirable remedy, then, is satisfaction under ARSIWA Article 37, with recognition of submerging SIDS serving as an 'appropriate modality'[112] that can fall under the Article's remit. This remedy is not disproportionate to the injury suffered by these SIDS.[113] The requirement of proportionality is based on the dual rationales of the equality of states and the avoidance of punitive measures; an act of recognition fulfils both, and indeed facilitates the former.[114] Continued recognition also remedies the shortcomings associated with other potential solutions in this sphere.

One such solution is the concept of 'deterritorialised' island states, where citizens of quasi-submerged and submerged SIDS can continue to exercise sovereign control over their uninhabitable territory.[115] This status is justified on the basis that the 'deterritorialised' state is not a new concept in international law, with its most famous example being the Sovereign Order of Malta.[116] However, to draw an analogy with the Sovereign Order of Malta would be to gloss over the fundamental problems arising in relation to the demarcation of territory, for the Sovereign Order of Malta is not a submerging state. More crucially, this solution may inadvertently undermine the equality of states in the international legal order. It is uncertain if this 'deterritorialised' statehood would be equivalent to the statehood these SIDS currently possess. If not, a hierarchy of states might potentially be created, with submerging SIDS positioned on a lower echelon. This runs coun-

[108] ARSIWA arts 35–37.

[109] Louise Boyle, 'Continued Sea Level Rise "Irreversible" For Centuries, Says Landmark UN Climate Report' *The Independent* (New York, 9 August 2021) <www.independent.co.uk/climate-change/news/sea-level-rise-ipcc-report-2021-b1899177.html> accessed 7 December 2022.

[110] Voigt (n 83) 20.

[111] Mayer (n 83) 216.

[112] ARSIWA art 37(2).

[113] ARSIWA art 37(3).

[114] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 107.

[115] Lapaš (n 6) 1–2; Ödalen (n 57) 225; Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41 Environmental Policy and Law 281.

[116] Ödalen (n 57) 227.

ter to the presumption of continuity, which is rooted in a nation-state-centred conception of international law,[117] for these SIDS will no longer see the continuation of their existing statehood, but will rather have a new, subordinate status imposed on them.

Another solution proffered in this sphere is the concept of the nation *ex situ*, which refers to a status that allows for the continued, perpetual existence of a submerged SIDS, thereby protecting citizens of SIDS through providing them with a link to their state by way of citizenship.[118] The necessity of this solution nevertheless appears unclear, given that continued recognition of submerging SIDS—and, by extension, the maintenance of the status quo—can achieve the same outcome in practice. It is also unclear how this concept can be operationalised in the international arena.

Ultimately, because present legal solutions overcomplicate the matter, the solution lies in convincing other states to continue recognising quasi-submerged and submerged SIDS as states, such that they can maintain their present statehood status. This may either be implicitly through legal avenues like court proceedings or explicitly through political avenues. Such avenues are already present within the international legal sphere: the former can be achieved through ICJ and ITLOS advisory proceedings, while the latter can be achieved through submerging SIDS continuously leveraging their existing diplomatic influence (as highlighted in Section III.B). Therefore, contrary to what some argue, the 'justice paradox' in the current international legal regime does not arise out of the lack of viable legal theories to provide viable remedies for submerging SIDS,[119] for the creation of additional legal theories is unnecessary.

Furthermore, addressing the issue of continued recognition through advisory proceedings is desirable. The injured SIDS need not overcome a heavy burden of proof to establish a breach of international due diligence obligations (as explored in Section IV.A). Further, as advisory proceedings are not fundamentally adversarial,[120] the ICJ and ITLOS can make arguments for recognition that are strongly persuasive on all states without generating inequity between the legally responsible states and the injured states. Lastly, even as some believe that compliance with advisory opinions may be non-existent absent diplomatic power and an ability to impose countermeasures on recalcitrant states,[121] the expanding international influence of SIDS (as expanded on in Section III.B) and ever-increasing international mobilisation to combat the ramifications of the climate crisis suggest

[117] Rouleau-Dick (n 44) 365.

[118] Maxine Burkett, 'The Nation Ex-Situ' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013).

[119] Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 University of Hawai'i Law Review 633, 634–635.

[120] Mason-Case and Dehm (n 87) 183–184; Voigt (n 83) 20–21; Medes Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law' (2021) 68 Netherlands International Law Review 121, 129–130, 142–143.

[121] Mayer (n 83) 188.

that compliance may occur. Therefore, under ARSIWA's reparatory framework, quasi-submerged and submerged SIDS can and should be continually recognised under international law.

Continuous recognition of quasi-submerged and submerged SIDS could additionally help mitigate an issue international law currently faces within the climate change sphere: the practical problems associated with loss and damage. Conceptually, loss and damage involve (among other things) permanent harm or irrecoverable loss, such as ESLR-induced loss of landmass.[122] Although COP27 has been touted as a breakthrough for loss and damage insofar as states have formally agreed to establish a loss and damage fund after decades of negotiations, the decision text does not indicate which states are to contribute to this fund.[123] This uncertainty is exacerbated by the Warsaw International Mechanism for Loss and Damage, which lacks mechanisms regarding compensation liability.[124] Furthermore, although states have agreed to operationalise the COP27 agreement text in COP28,[125] the slow pace at which loss and damage discussions have historically taken place, as well as the historically underdeveloped and unspecific nature of loss and damage policy innovations that impede implementation in submerging SIDS,[126] together suggest that COP28 is unlikely to generate an outcome that clearly indicates (among other things) which states should contribute to this fund, the amount of funding they should contribute, and how this funding is to be distributed to submerging SIDS. Lastly, even if COP28 can create such an outcome, these state contributors may either not actually contribute to this fund, given the inability of international institutions to enforce compliance,[127] or take decades to pay out these funds.[128] If there has been such marked hesitance in the political sphere to reach and implement desirable outcomes pertaining to questions with

[122] Meinhard Doelle and Sara Seck, 'Loss and Damage from Climate Change: From Concept to Remedy?' (2020) 20 Climate Policy 669.

[123] UNFCCC, 'Sharm el Sheikh Implementation Plan' (*United Nations Climate Change*, 20 November 2022) <https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf> accessed 11 September 2023.

[124] Nyka (n 99) 150.

[125] Adeline Stuart-Watt, 'What Will It Take to Deliver Substantive Progress on Loss and Damage at COP27?' (*LSE Grantham Research Institute on Climate Change and the Environment*, 31 October 2022) <www.lse.ac.uk/granthaminstitute/news/what-will-it-take-to-deliver-substantive-progress-on-loss-and-damage-at-cop27/> accessed 13 August 2023.

[126] Elisa Calliari and Lisa Vanhala, 'The 'National Turn' in Climate Change Loss and Damage Governance Research: Constructing the L&D Policy Landscape in Tuvalu' (2022) 22 Climate Policy 184; Reinhard Mechler and others, 'Loss and Damage and Limits to Adaptation: Recent IPCC Insights and Implications for Climate Science and Policy' (2020) 15 Sustainability Science 1245, 1249.

[127] Craig A Johnson, 'Holding Polluting Countries to Account for Climate Change: Is "Loss and Damage" Up to the Task?' (2017) 34(1) Review of Policy Research 50, 63.

[128] Elisabeth Mahase, 'Climate Change: "Loss and Damage" Fund Payouts Could Take Decades, Scientists Warn' (2022) 379 British Medical Journal 3050.

allocative and distributive consequences, then recognition—which does not require any redistribution of finances—is an alternative avenue for states to pursue in resolving this intractable issue of providing reparations for submerging SIDS.

Overall, state liability for ESLR is capable of being established under ARSIWA through the domestic implementation and enforcement of IEL and the additional obligations imposed on states under IHRL. Satisfaction in the form of continued recognition is not only a possible remedy under ARSIWA's reparatory framework, but also the most theoretically desirable and practically feasible form of reparation in comparison to present solutions. Quasi-submerged and submerged SIDS therefore can and should be continually recognised under international law. Furthermore, recognition serves as a (partial) solution to issues faced by international law today; in particular, it can ameliorate loss and damage-related problems as it does not involve any redistribution of finances (and, by extension, accompanying implementation issues).

V. Conclusion

In sum, climate change-induced ESLR will cause submerging SIDS to move along a spectrum of territorial submergence, with these states first finding themselves quasi-submerged before becoming submerged. The restrictive, reflective, representative, and responsive functions of the Montevideo criteria collectively ensure Montevideo's relevance for both the creation and extinction of states. Although quasi-submerged and submerged SIDS cannot be continually recognised under Montevideo given their inevitable non-fulfilment of the permanent population criterion, the analysis nevertheless suggests that these SIDS should be continually recognised as recognition will prevent statelessness from occurring. Yet, the principles of state responsibility can potentially justify the continued recognition of submerging SIDS. State liability under ARSIWA can arguably be established, with recognition constituting a possible remedy under ARSIWA's reparatory framework. The desirability of continued recognition as a remedy is further underscored through comparison with other proposed solutions and its ability to mitigate problems relating to loss and damage.

This analysis also highlights the shortcomings of existing solutions in the literature pertaining to the continuous recognition of submerging SIDS. Further research will be required to refine existing solutions and create additional ones so as to ensure state equality—and therefore centrality—in the international legal order. More broadly, this analysis calls into question the desirability of the continued application of existing international law frameworks in the light of the exigencies and implications of the climate crisis.

So, what is to happen to submerged states? The answer fundamentally lies in the hands of the international community, who possesses the power to ensure that sinking states do not see their statehood—and its concomitant issues—become sunken.

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The Supreme Court in *Guest v Guest*: Remedial Mysteries in Proprietary Estoppel

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ABSTRACT

In the light of the Supreme Court's recent decision in *Guest v Guest* [2022] UKSC 27, this article critically examines the equitable doctrine of proprietary estoppel with a focus on the question of how the court should approach the quantification of the form and extent of the remedy that is awarded. Firstly, this article examines the majority and minority judgments of the Supreme Court in *Guest* and explores the respective advantages and disadvantages of the expectation-based and detriment-based approaches. Secondly, this article evaluates the role of proportionality in determining the appropriate remedy in the light of the Supreme Court's judgment in *Guest*. Thirdly, this article explores the intrinsic value to both the judiciary and the layperson in ensuring that a clear framework of principles is developed. Finally, this article argues that the Supreme Court in *Guest* is correct to champion the expectation-based approach when deciding the form and extent of the remedy, as it provides a more determinative framework on which the court can ground its judicial discretion.

Keywords: proprietary estoppel, equity, unconscionability, remedies, expectation

I. INTRODUCTION

Proprietary estoppel is a doctrine that marks the intersection between the comparatively rigid laws governing the transfer of land and more malleable principles of equity. It allows equity to act as a counterweight to the unconscionability that arises where B has relied, to their detriment, on A's promise to utilise a legal power. It is A's subsequent refusal to exercise this legal power, whether intentionally or not, that is usually the unconscionable conduct. The assurance, reliance, detriment, and unconscionability to which the circumstances

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give rise can come in varying degrees and forms.[1] The appropriate remedy in any particular case varies in turn. For example, property rights (such as the freehold title to a property) or private rights (such as damages or a licence) may be the most appropriate method of satisfying the equity that has arisen in the circumstances.[2]

Two broad competing approaches have emerged in relation to the remedial issue of how the court should exercise its discretion when quantifying the remedy in cases of proprietary estoppel.[3] On the first approach, the court starts with an assumption that B's expectations will be protected unless it is disproportionate to do so.[4] On the second approach, the court will look to do no more than remedy the detriment that B has suffered as a result of A reneging on their promise.[5] This is, as Lewison LJ remarked, a 'lively controversy about the essential aim of the exercise of this broad judgmental discretion'.[6]

When faced with the difficult task of formulating the remedy in instances of proprietary estoppel, the court must exercise, to a greater or lesser degree, judicial discretion. In the development of the case law, there has been a lack of clarity as to what the remedial objective of the doctrine of proprietary estoppel is, and this has resulted in a lack of certainty as to how judges might quantify the form and extent of a remedy.[7] The recent uptake of cases of proprietary estoppel concerning family farms has served to accentuate the need for a clear framework in order to bring about a concrete foundation on which the court can base its judicial discretion. These cases typically involve a family dispute over their agricultural businesses whereby B will have worked on the farm with the expectation that they will one day inherit it, but instead they are denied their expected inheritance. This is usually as a result of the breakdown of the family relationship.[8] At the heart of this debate have been Court of Appeal cases such as *Davies v Davies*[9] and *Guest v Guest*.[10] Until the recent Supreme Court judgment in *Guest v Guest* [2022] UKSC 27, the question of whether the doctrine of proprietary estoppel is concerned with rectifying unconscionability as a result of denied expectations or as a result of detrimental reliance had been left open.[11] It is this fundamental question of how the form and extent of the remedy should be

[1] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29].
[2] In *Jennings v Rice* [2002] EWCA 159, [2003] 1 P & CR 8, the Court of Appeal made a monetary award. By contrast, in *Voyce v Voyce* (1991) 62 P & CR 290 (CA), a freehold title was awarded.
[3] Ben McFarlane, 'Estoppel' in John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020) para 12-049.
[4] ibid.
[5] ibid.
[6] *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10 [39].
[7] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel — Again' (2006) 122 Law Quarterly Review 492, 499.
[8] *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [236]; *Habberfield v Habberfield* [2019] EWCA Civ 890, [2019] 2 P & CR DG13 [82].
[9] *Davies* (n 6).
[10] [2020] EWCA Civ 387, [2020] 1 WLR 3480.
[11] *Guest* (n 8).

quantified that the Supreme Court in *Guest* was asked to address.[12] The Supreme Court focused their analysis on instances of a promise of a future interest in property, rather than on circumstances in which there is a mistaken belief that such an interest has already been acquired.[13]

II. The Background to the Supreme Court Case of *Guest v Guest*

There has been a great deal of contemporary debate regarding the question of whether proprietary estoppel seeks to remedy the detriment suffered by B, or whether it seeks to uphold B's expectations. As hinted above, at the forefront of this debate have been *Davies*[14] and *Guest*.[15]

Davies and *Guest* have broadly similar fact patterns, with both involving B's expected inheritance of the family farm and the subsequent breakdown of family relations. In *Davies*, B (A's daughter) worked on the farm for many years and received low pay.[16] B had expected to receive a share in the farm business based on various assurances made by A.[17] However, owing to various disagreements, A reneged on their assurances that B would inherit his promised share.[18]

Guest concerned Tump Farm, which had mostly been a dairy farm consisting of 197 acres with a farmhouse and a semi-detached cottage on its grounds.[19] It had been farmed by the Guest family since 1938.[20] B (A's son) had worked on Tump Farm full-time for 32 years with the expectation that he would one day inherit the farm.[21] A breakdown in the family relationship occurred and B was written out of A's will. As a result, B brought a claim in proprietary estoppel.[22]

It is clear that both *Davies* and *Guest* considered the prevention of an unconscionable result to be the doctrinal purpose of proprietary estoppel.[23] Until the judgment of the Supreme Court in *Guest*, however, recent cases were indecisive in relation to the approach that should be employed when deciding the form and extent of a remedy in proprietary estoppel.[24]

In *Davies*, the High Court awarded B a total of £1.3 million, as the trial judge concluded that this fairly reflected both B's expectations as well as the

[12] ibid [7].
[13] ibid [4].
[14] *Davies* (n 6).
[15] *Guest* (n 8).
[16] *Davies* (n 6) [4]–[6].
[17] ibid [21].
[18] ibid.
[19] *Guest* (n 8) [113].
[20] ibid.
[21] ibid [116].
[22] ibid [123].
[23] *Davies* (n 6) [38]; *Guest* (n 8) [160].
[24] *Guest* (n 8) [7].

detriment that B had suffered.[25] However, the Court of Appeal drew a different conclusion and reduced the remedy to £500,000.[26] Lewison LJ recognised that the need for proportionality between the remedy and the detriment meant that B's expectations should be fulfilled 'in a more limited way' in circumstances where the expectation was disproportionate to the detriment.[27] He also approved of the suggestion that there might be 'a sliding scale' that considered the expectation, the detriment, and the length of time that the expectation was reasonably held.[28] Lewison LJ's approach marks an erosion of the significance of the role of B's expectations, in that B's expectations are unlikely to be fulfilled under this approach (although they would not be ignored).

In contrast to the Court of Appeal in *Davies*, the High Court in *Guest* fashioned the remedy around B's expectations.[29] B was granted a lump sum payment reflecting (among other things) 50 per cent after tax of the market value of the farming business along with 40 per cent after tax of the value of the farm itself.[30] A appealed against this remedy. A argued (among other things) that rather than seeking to enforce B's expectations, the court should instead make a detriment-based assessment of B's loss of opportunity to pursue other work or look to compensate B for any increase in the value of the farm as a result of B's contributions.[31]

The Court of Appeal rejected the argument that the court should seek to compensate for B's loss of opportunity to work elsewhere, highlighting that in 'a case where the claimant has largely performed his side of the bargain, it is fair to take what the claimant was promised as a rough proxy for what he has lost'.[32] The argument that the remedy should be based on the increase in the value of the property was also rejected, as it was an approach that did not properly reflect the assurances given.[33]

Both *Davies* and *Guest* reaffirm unconscionability as the doctrinal purpose of proprietary estoppel.[34] They differ, however, in their respective approaches: *Davies* gives greater weight to B's detriment, and vice versa.[35] In contrast with *Davies*, the majority judgment of the Supreme Court in *Guest* firmly establishes that the court should formulate the form and extent of the remedy through the lens of B's expectations.[36]

[25] *Davies v Davies* [2015] EWHC 015 (Ch) [56] (Judge Milwyn Jarman QC).
[26] *Davies* (n 6) [69].
[27] ibid [38].
[28] ibid [41].
[29] *Guest v Guest* [2019] EWHC 869 (Ch).
[30] ibid [288] (Judge Jonathan Russen QC).
[31] *Guest* (n 10) [65].
[32] ibid [82] (Floyd LJ).
[33] ibid [85].
[34] *Davies* (n 6) [38]; *Guest* (n 8) [47].
[35] *Davies* (n 6) [38].
[36] *Guest* (n 8) [75].

III. The Contrasting Approaches of the Majority and Minority in the Supreme Court

The majority ruling of the Supreme Court in *Guest* was given by Lord Briggs (with whom Lady Arden and Lady Rose agreed), with Lord Leggatt and Lord Stephens dissenting.[37]

Both Lord Briggs and Lord Leggatt agreed that the concept of unconscionability remains at the foundation of proprietary estoppel both when assessing whether or not the circumstances give rise to an equity, as well as when assessing the form and extent of the remedy.[38] There is, however, a clear dividing line between the prevailing judgment of Lord Briggs and the dissenting judgment of Lord Leggatt. Lord Briggs affirmed that the essential aim of proprietary estoppel is to rectify the unconscionability that results from A repudiating their promise to B and that the starting assumption is to enforce B's expectations.[39] As stated by Lord Briggs, 'it is the repudiation of the promised expectation' that constitutes the unconscionable conduct.[40] In contrast, Lord Leggatt argued that the essential aim of the doctrine of proprietary estoppel is to remedy the detriment that B has suffered as a result of their reliance on a promise by A that A has subsequently reneged on.[41] He viewed the nature of the harm that is being remedied as being A's failure to take responsibility for not upholding their assurances, rather than A's failure to uphold their assurances.[42] Consequently, despite Lord Briggs's and Lord Leggatt's agreement that unconscionability remains at the foundation of proprietary estoppel, they differed as to how this unconscionability should be remedied.

Lord Briggs agreed with Scarman LJ in *Crabb v Arun District Council* that the court must achieve the 'minimum equity to do justice'[43] and placed an emphasis on the 'to do justice' element of this judicial endeavour.[44] Lord Briggs highlighted that the requirement 'to do justice' entailed that the essential aim is to remedy the unconscionability that has arisen.[45] He stated that the court should apply a two-stage analysis in this regard.[46]

At the first stage, the court must assess whether or not A's conduct in repudiating their promise to B was unconscionable.[47] At the second stage, the court should start with an assumption that it is B's expectations that should be

[37] ibid.
[38] *Guest* (n 8) [13] (Lord Briggs), [160] (Lord Leggatt).
[39] ibid [53], [75].
[40] ibid [53].
[41] ibid [195]–[196].
[42] Lorren Eldridge, 'Looking a Guest Horse in the Mouth: Proprietary Estoppel in English Law' [2023] Conveyancer and Property Lawyer 101, 106.
[43] [1976] Ch 179 (CA) 198.
[44] *Guest* (n 8) [13].
[45] ibid [13].
[46] ibid [74]–[75].
[47] ibid.

enforced.[48] In this regard, the court will typically 'start with the assumption (not presumption) that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise'.[49] But if it is shown that the specific enforcement of the promise is 'out of all proportion to the cost of the detriment' suffered by B, then the court has discretion to limit the remedy so as to do justice between the parties.[50] On this point, Lord Briggs stated that the 'court may have to listen to many other reasons from the promisor… why something less than full performance will negate the unconscionability and therefore satisfy the equity'.[51]

In contrast to Lord Briggs, Lord Leggatt argued that the 'basal purpose' of proprietary estoppel is to remedy the detriment suffered by B and that the expectation-based approach and the detriment-based approach are both methods of achieving this purpose.[52] Therefore, Lord Leggatt highlighted a key distinction between two scenarios: firstly, where performance of the promise remains contingent on a future event (for example, the death of A); and secondly, where a promise has fallen due for performance.[53]

Where the first scenario arises (namely where performance is conditional on a future event but A has resiled from their promise), Lord Leggatt stated that consideration should be given to whether A has offered to compensate B for their reliance loss. Following this, where there is no offer of compensation, the court will have to decide between '(1) awarding a remedy assessed by reference to the prospect of a future gift and (2) awarding compensation for B's reliance loss'.[54]

Where the second scenario occurs (namely where the promise has fallen due), Lord Leggatt argued that, even where B's reliance loss is difficult to quantify but the value of the interest in the property is disproportionate to B's detriment, then the court should aim to quantify the loss in monetary terms, rather than start with the assumption that the promise should be enforced.[55] It may be appropriate, however, to design a remedy that gives effect to the promise where the reliance loss is difficult to quantify in monetary terms and the value of the interest in property is not clearly disproportionate to B's reliance loss so as to fulfil the equity in the circumstances.[56] Lord Leggatt further argued that the purpose of the court's discretion to fashion an appropriate remedy to achieve justice in the circumstances is to prevent B from suffering a detriment, highlighting that:

[48] ibid.
[49] ibid [75].
[50] ibid [76].
[51] ibid [75].
[52] ibid [196], drawing upon the dictum of Dixon J in the High Court of Australia in *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674–675.
[53] *Guest* (n 8) [257]–[259].
[54] ibid [260].
[55] ibid [258].
[56] ibid.

> …in exercising this discretion, the aim is to award a remedy which does all that is necessary, but no more than is necessary, to prevent B from suffering detriment as a result of having relied on a promise of a gift of property which A no longer intends to make.[57]

At the heart of Lord Briggs's majority judgment is the championing of proprietary estoppel as an equitable remedy. Both the majority and the minority judgments agreed that the appropriate remedy can take the form of either specific performance or damages.[58] Although Lord Leggatt recognised that the court 'has a flexible discretion to fashion a remedy which does justice in the circumstances', Lord Leggatt's focus on remedying the detriment with a view to quantifying the loss into a monetary sum greatly limits the scope of the court's discretion when compared to Lord Briggs's expectation approach.[59]

Lord Leggatt did find support for this detriment-focused approach. For example, *Jennings v Rice* stands in contrast to the expectation-based trend that had emerged in previous case law throughout the twentieth century.[60] On appeal, the argument that the court should employ an expectation-based remedy was rejected in favour of the argument that there needed to be proportionality between the remedy and the detriment. However, Walker LJ also rejected the argument that the correct approach was to remedy the detriment that B had suffered.[61] He reasoned that the court should not solely look to remedy the detriment because in some circumstances such a quantification cannot be done with reasonable accuracy.[62] Further, Walker LJ highlighted that the application of proportionality takes into account any other benefits that B may have received (like free accommodation) which might not be considered if the court were solely to apply either the expectation-based approach or the detriment-based approach.[63]

Another point in support of the detriment-focused approach can be found in Australian case law. In *Grundt v Great Boulder Pty Gold Mines Ltd*, Dixon J (of the High Court of Australia) noted that 'it is often said simply that the party asserting the estoppel must have been induced to act to his detriment'.[64] Therefore, the unconscionable conduct would not be A's failure to keep their promise but rather A's failure to prevent B from suffering a detriment as a result of their reasonable reliance on the promise.[65]

It could also be argued that one of the primary advantages of Lord Leggatt's approach is that if it is possible to quantify accurately the detriment suffered by B, then the remedy will accurately reflect B's detriment-based loss.

[57] ibid [261].
[58] ibid [53] (Lord Briggs), [192] (Lord Leggatt).
[59] ibid [261].
[60] *Jennings* (n 2).
[61] ibid [51].
[62] ibid.
[63] ibid.
[64] *Grundt* (n 52).
[65] *Guest* (n 8) [191] (Lord Leggatt).

Lord Leggatt was not suggesting that the damages must be capable of 'arithmetical computation' for the court to grant them.[66] Rather, as with cases of personal injury, damages represent the most appropriate remedy to reflect the degree of harm done to the claimant.[67]

Another argument in favour of the detriment-based approach is that it safeguards the traditional requirements for the formation of a legally binding obligation.[68] On an expectation-based claim, detrimental reliance can be viewed as an alternative to the requirement of consideration, which would serve to make the assurances made by A legally binding.[69] Through this framework, a claim for the enforcement of A's promise would arise merely from A's failure to make a gratuitous transfer after B has relied on A's promise to their detriment.[70] However, even if detrimental reliance is an appropriate substitute for consideration, it cannot supersede the other requirements necessary to create a legal obligation, such as the intention to create a legally binding obligation and the need for certain terms under the agreement.[71]

Indeed, as Lord Leggatt highlights, under the expectation approach, 'there is no requirement that the promise must be an utterance which would reasonably be understood as intended to create a legal obligation'.[72] This is reflected in *Thorner v Major*, where the House of Lords held that a promise need not be express to give rise to a claim in proprietary estoppel.[73] In *Thorner*, B had been working on the family farm for almost 30 years and, because of various assurances from A (although none of these assurances were express), was expecting to inherit upon A's death in 2005.[74] A had made a will to this effect, but it was subsequently destroyed with the result that A disinherited B.[75] B brought a claim in proprietary estoppel which ultimately succeeded. However, as Lord Leggatt summarised in *Guest*, the doctrine 'does not and could not sensibly have as its aim the enforcement of promises which do not satisfy the requirements for the creation of legal obligations. A property expectation claim is not a form of contract lite.'[76] From this perspective, the detriment-based approach prevents proprietary estoppel from threatening the erosion of the conventional principles governing the formation of a contract by preventing detrimental reliance from substituting in for the role of consideration.

Nevertheless, there are various advantages to the adoption of Lord Briggs's expectation-based remedial approach for the development of future case law

[66] ibid [199].
[67] ibid.
[68] Eldridge (n 42) 104.
[69] *Guest* (n 8) [174].
[70] ibid.
[71] ibid [175].
[72] ibid [176].
[73] *Thorner* (n 1) [55]–[56] (Lord Walker).
[74] ibid.
[75] ibid [44].
[76] *Guest* (n 8) [183].

compared to Lord Leggatt's detriment-based approach.[77]

Firstly, to start with an assumption that the expectation, rather than the detriment, should be met to remedy the unconscionability in the circumstances is a more determinative approach. This is because it provides a clear starting point for the court when considering the form and extent of the remedy and, in so doing, it promotes a greater degree of doctrinal certainty. In particular, it circumvents the difficulties involved in calculating the detriment. In *Guest*, Lord Leggatt highlighted the difficulties of quantifying B's detrimental reliance, stating that:

> In some cases there is no difficulty in quantifying the claimant's reliance loss, where for example it consists in spending money on improving property. Often, however, the detriment to the claimant does not consist in, or is not limited to, the expenditure of money or other financial damage.[78]

Lord Leggatt further noted a wide array of non-pecuniary examples of detrimental reliance, including 'loss of educational or career opportunities and other non-pecuniary detriment of a kind which it is intrinsically difficult, and in one sense impossible, to value in terms of money'.[79] Although Lord Briggs concedes that the court's inability to place a value on the detriment is not in itself a sound reason to prefer an expectation-based remedy,[80] in acknowledging this difficulty, Lord Leggatt rightly admitted that 'where there is a choice between two possible remedies one of which is an award of money that would be difficult to quantify, such difficulty of quantification may be a good reason to prefer the other remedy'.[81] He further commented that the difficulties involved in 'quantifying the reliance loss may be a good reason to prefer the remedy of compelling the defendant to grant the property right which the claimant was promised'.[82]

Thorner v Major supports this argument. The trial judge in that case commented that to place a monetary value on B's lifelong contribution to the farm was a 'virtually impossible task'.[83] By contrast, the expectation-based approach did not pose such a difficulty in *Thorner*.[84] Walker LJ in *Jennings* also recognised this difficulty, stating that 'in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations'.[85] Therefore, starting with an assumption that the expectation should be met is an approach that avoids the risk of uncertainty and undercompensating B.

[77] ibid.
[78] ibid [198].
[79] ibid.
[80] ibid [12].
[81] ibid [200].
[82] ibid [202].
[83] *Thorner v Major* [2007] EWHC 2422 (Ch), [2008] WTLR 155 [139]–[142]; *Guest* (n 8) [203] (Lord Leggatt).
[84] *Thorner* (n 83).
[85] *Jennings* (n 2) [51].

Further, under Lord Briggs's approach, the fact that the court starts with the assumption that the expectation should be enforced does not mean that 'real-life difficulties'[86] will be unaccounted for, such as the need for a clean break or to account for disproportionality between the remedy and the detriment.[87] Harry Sanderson highlights that such remedial flexibility is 'familiar to equity'.[88] The emphasis on the flexibility of the court's discretion is shown in *Guest* by the focus that Lord Briggs placed on remedying unconscionability, rather than on seeking to enforce a *prima facie* entitlement to B's expectations.[89] This highlights that Lord Briggs's approach is sensitive to the varying fact patterns in proprietary estoppel cases.[90]

Secondly, starting with an assumption that B's expectations are to be enforced saves parties both time and costs. B's expectations are often clearer than B's detriment. As demonstrated in *Guest*, accurately quantifying the detriment can be a difficult, if not impossible, task for the court. One judge's opinion on how to quantify the detriment arising from a particular set of facts may also be different from another's. Where the detriment suffered is non-pecuniary (as it so often is in cases concerning proprietary estoppel), this expectation-based starting assumption circumvents unnecessary attempts at quantifying and distilling the detriment suffered into a specific monetary sum.

Thirdly, the benefit of the courts cementing the expectation-based approach extends into instances where the doctrine of proprietary estoppel interacts with a potential contract. It could be argued that championing an expectation-based remedy will only serve to promote uncertainty in commercial transactions as expectations may contravene the terms of the potential contract. This is a scenario that Lord Walker in *Cobbe v Yeoman's Row Management Ltd* was keen to avert.[91] From this perspective, Lord Leggatt's approach would largely circumvent this issue. These concerns, however, are overstated. As Martin Dixon highlights, the distinction between commercial and non-commercial contexts in instances of proprietary estoppel is an artificial one.[92] He further points out that the doctrine of proprietary estoppel cannot successfully operate in contract-type scenarios as the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 have not been met.[93] Nor can proprietary estoppel by invoked by parties to a contract to override it. In *Gordon v Havener*, it was noted that 'proprietary estoppel cannot, as a matter of principle, be invoked by a contract-

[86] *Guest* (n 8) [7].
[87] ibid [13], [16].
[88] Harry Sanderson, 'Proprietary Estoppel in *Guest v Guest*: Equity at Its Most Flexible?' (2023) 139 Law Quarterly Review 187, 191.
[89] ibid 190.
[90] *Guest* (n 8) [65].
[91] [2008] UKHL 55, [2008] 1 WLR 1752 [81].
[92] Martin Dixon, 'Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?' [2022] Conveyancer and Property Lawyer 30, 37–38.
[93] ibid 36.

breaker where the relevant promise is contained in the contract…'.[94] Conversely, Dixon comments that this also makes clear that proprietary estoppel cannot operate as a remedy for breach of contract as 'the estoppel is not seeking to enforce the contract, it is remedying the unconscionability of the defendant'.[95]

Simply put, the 'heart of the doctrine' remains that of rectifying the unconscionability suffered by B rather than attempting to enforce a contract.[96] The presence of a potential contact does not change the fact that proprietary estoppel is a mechanism of equity and is therefore separate from a contractual claim.[97] Accordingly, the courts should be under no compulsion to depart from the expectation-based assumption as affirmed in *Guest* in instances where the doctrine of proprietary estoppel interacts with a potential contract.[98] It is true that commercial formalities and conventions will often mean that the full enforcement of B's expectations will not be necessary to prevent B from suffering an unconscionable result. Equally, the presence of a potential contract does not disbar the application of equity. In these circumstances, the court must exercise judicial discretion in its application of proportionality.

IV. Proportionality

Lord Briggs addressed the role of proportionality in claims of proprietary estoppel, arguing that it should not be viewed as the essential aim of the doctrine or be used as a basis for the remedy.[99] This is in contrast to recent case law, in which proportionality has been said to be 'at the heart' of the doctrine of proprietary estoppel.[100] In *Crabb*, Scarman LJ highlighted that it is an essential requirement that there must be proportionality between the expectation and the detriment, and that the court should seek 'the minimum equity to do justice to' the claimant.[101] In *Guest* itself, Lord Leggatt argued that the correct interpretation of Scarman LJ's dictum is that the court should not grant a remedy that reflects B's expectations when this would be disproportionate to the detriment that B has suffered.[102]

However, Lord Briggs is correct to conclude that, as the detriment suffered by B usually cannot be easily quantified, an accurate assessment of proportionality cannot be undertaken in most cases.[103] Placing the proportionality test as the aim of the doctrine therefore does not provide adequate guidance as to the form and extent of the relief. *Davies* is an example of an instance where the court had

[94] [2021] UKPC 26 [15].
[95] Dixon (n 92) 36.
[96] ibid.
[97] ibid.
[98] *Guest* (n 8).
[99] ibid [72].
[100] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 [65].
[101] *Crabb* (n 43) 198.
[102] *Guest* (n 8) [197].
[103] ibid [72].

difficulty in quantifying the extent of the detriment compared to the remedy.[104] The trial judge commented that the 'proportionate remedy is to award… a lump sum in the amount of £1.3 million', this being about a third of the net value of the family farm.[105] On appeal, Lewison LJ commented that the trial judge provided 'no further explanation of how he reached his ultimate conclusion', and the £1.3 million awarded at trial was reduced to £500,000, as noted above.[106] In this instance, the court quantified the remedy but was unable to elucidate on the specifics of the approach involved in arriving at a remedy that it deemed to be proportionate. This is far from the first time that the court has faced difficulty in quantifying the detriment and assessing proportionality.[107]

Habberfield v Habberfield also illustrates how proportionality is not a suitable framework for the court to ground its judicial discretion when deciding on the form and extent of the remedy.[108] In the Court of Appeal, Lewison LJ upheld the expectation-based approach of Birss J, who had awarded a monetary sum as a proxy for the promised inheritance of part of the contested farmland. Lewison LJ agreed that decades of B's life in contributing to the farm were not 'susceptible of quantification'.[109] As it was not possible to value the detriment accurately, it would not be possible to show that B's expectation was out of proportion to the detriment suffered.[110] From this perspective, the issue of proportionality between the remedy and the detriment occupies a more limited role as a result of *Guest* and its championing of the expectation-based approach.[111] As is often the case, the detriment is very difficult or impossible to quantify accurately and the application of proportionality is accordingly made redundant.[112]

Nevertheless, proportionality still has a role to play. The application of proportionality goes beyond the examination of the relationship between the expectation and the detriment. The enforcement of the expectation, or a monetary equivalent, may be proportionate as a consequence of B upholding their side of the bargain: where B does so, it is proportionate to require A to fulfil their part of the agreement.[113] That said, in a situation where A can show that the enforcement of B's expectation (whether by *in specie* enforcement or a monetary equivalent) would be disproportionate to the remedy given, the court has the power to exercise discretion and amend the form and extent of the remedy so that it remedies the equity in the circumstances. An example is *Guest* itself, in which the acceleration of the promised benefit (in this case, caused by the acceleration of intestacy) and the need for a clean break made a discount for accelerated receipt

[104] *Davies* (n 6).
[105] *Davies* (n 25) [56].
[106] *Davies* (n 6) [37], [69].
[107] *Jennings* (n 2) [43].
[108] *Habberfield* (n 8).
[109] ibid [60].
[110] *Guest* (n 8) [55].
[111] ibid.
[112] ibid [72].
[113] ibid [73].

appropriate.[114] This is because the accelerated receipt of inheritance was an additional benefit that also had the effect of depriving the current proprietors of a proportion of their assets for the remainder of their lifetime.

As a consequence of *Guest,* it is clear that proportionality serves as a barometer for the court to apply in the circumstances to assess whether or not the enforcement of B's expectations is necessary to prevent an unconscionable result, rather than being the essential aim of proprietary estoppel.[115] The principle allows the court to assess whether a lower remedy is required to prevent B from being awarded more than what is necessary to satisfy the equity in the circumstances.[116] The application of proportionality in this manner will assist the court in averting the possibility of overcompensating B that might result from the initial assumption that the court should enforce B's expectations.

V. The Intrinsic Value of the Expectation-Based Framework

As Lord Briggs points out, the 'traditional English approach' is, on the face of it, to 'hold the promisor to his promise'.[117] In referencing *Dillwyn v Llewelyn*[118] as 'an early precursor of proprietary estoppel,' Lord Briggs argued that throughout the development of the doctrine there has been a 'single-minded' aim of remedying the expectation.[119] The majority judgment went on to state that remedying the expectation is the 'simplest way to prevent the unconscionability inherent in repudiating it', albeit that this has always been tempered by discretion.[120] Although detrimental reliance forms a large part of the 'moral justification' for equitable relief,[121] and is a required condition to give rise to it, judges had not been focused on protecting B from the detriment they had suffered until *Jennings* introduced the principle of proportionality.[122] Indeed, to focus on the detriment would 'replace what is meant to be a flexible conscience-based discretion aimed at producing justice with the mechanical task of monetarising the detriment and the expectation'.[123] In considering the nature of equity more broadly, Lord Sales (writing extrajudicially) highlights that equity 'overlays the common law, mitigating the harshness that would ensue were strict legal rules to be applied without any exception'.[124] Therefore, an approach in which the court starts with

[114] ibid.
[115] ibid [65].
[116] ibid [104]–[105].
[117] ibid [53].
[118] (1862) 4 De GF & J 517, 45 ER 1285.
[119] *Guest* (n 8) [20].
[120] ibid [61].
[121] ibid [53].
[122] *Jennings* (n 2).
[123] *Guest* (n 8) [53].
[124] Lord Sales JSC, 'Proprietary Estoppel: Great Expectations and Detrimental Reliance' in Natalie Mrockova, Aruna Nair, and Luke Rostill (eds), *Modern Studies in Property Law*, vol 12 (Hart Publishing 2023)

the assumption that the expectation interest is to be satisfied, but remains capable of modifying the remedy, represents an accurate reflection of the development of proprietary estoppel and its inherent flexibility as an equitable doctrine.

Furthermore, the doctrine of proprietary estoppel should always aspire to be capable of providing normative guidance, as this will promote certainty in the lives of citizens.[125] However, to prevent unfettered indeterminacy in the exercise of judicial discretion, the expectation-based framework must be developed and implemented in future case law. The Supreme Court's decision in *Guest* will assist judges in future cases in fixing their discretion within the law itself and therefore facilitate their role as agents of the law,[126] as it reaffirms B's expectations as the court's starting point when quantifying the form and extent of the remedy.[127] Lord Briggs's expectation-based framework, in counteracting legal indeterminacy, will also help those who are affected by a claim in proprietary estoppel, whether they be a legal practitioner or a layperson, to plan for the future more reliably.[128] Therefore, his approach directly promotes the rule of law.[129]

VI. Conclusion

It is clear that the Supreme Court in *Guest* held aspirations of promoting doctrinal certainty when reaffirming the expectation-based approach to remedying claims in proprietary estoppel.[130] Lord Briggs sets out a clear two-stage test which provides a framework that the court can use to assess the merits of future claims. This is an intuitive approach that is capable of accommodating the broad spectrum of scenarios that can arise in cases of proprietary estoppel. In clarifying the focus of the doctrine, the Supreme Court has provided a focal point for judicial discretion, which will prevent those tasked with fashioning the appropriate remedy under a claim for proprietary estoppel from straying into the shade of the 'portable palm tree' once again.[131]

Nevertheless, some questions remain unanswered. Although the role of proportionality in the assessment of the appropriate remedy has been substantially clarified by the majority judgment in *Guest*, its continued application will inevitably lead to future debate regarding the relationship between B's expectations and the detriment that they have suffered.

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[125] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 228.

[126] Gardner (n 7) 505.

[127] *Guest* (n 8) [75].

[128] ibid.

[129] See Raz (n 125).

[130] ibid 222.

[131] *Taylor v Dickens* [1998] 1 FLR 806, 820.