

INTERNATIONAL CRIMINAL LAW IN THE CONTEXT OF THE RUSSO-UKRAINIAN WAR: COMMAND RESPONSIBILITY & UNIVERSAL JURISDICTION

Miron Sergeev

I. INTRODUCTION

Galvanized by the Russian Federation's full-scale invasion of Ukraine in February 2022, several cases against the Russian high command call upon the international criminal law regime to resolve responsibility for war crimes.¹ During the Russo-Ukrainian War, the International Criminal Court (ICC) issued arrest warrants against key suspects among the Russian high command for the war crimes of directing attacks at civilian objects and causing excessive incidental harm to civilians.² Key suspects included the Minister of Defense, Sergei Shoigu; the Chief of the General Staff of the Armed Forces, Valery Gerasimov; the Commander of the Long-Range Aviation of the Aerospace Force, Sergei Kobylash; and the Naval Admiral, Viktor Sokolov.³ The ICC also issued arrest warrants against the Commissioner for Children's Rights in the Office of the President of the Russian Federation, Maria Lvova-Belova, and President Vladimir Putin, for the unlawful deportation of Ukrainian children, which is a war crime.⁴ The doctrines of universal jurisdiction and command responsibility furnish legal mechanisms for ensuring the rule of law through criminal accountability in the cases against Russian high government officials.⁵

Between two different factual circumstances—attacks that cause excessive collateral damage and the deportation of children—the arrest warrants allege that there is enough evidence against the accused officials for committing war crimes

1. Int'l Crim. Ct. (ICC), Situation in Ukraine, <https://www.icc-cpi.int/situations/ukraine> (last visited Feb. 24, 2026).

2. Press Release, ICC, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov* (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and>.

3. Press Release, ICC, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov* (Mar. 5, 2024), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and>.

4. Press Release, ICC, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

5. Nicholas J. Nizinski, *Command Responsibility and the War in Ukraine: Can Customary International Law Hold Russian Commanders Accountable for War Crimes?*, 129 DICK. L. REV. 313, 323–25, 328 (2024).

against Ukraine's civilian population to take these officials into custody.⁶ To hold these individuals accountable, member states of the United Nations (U.N.) should execute the arrest warrants and exercise universal jurisdiction to facilitate adjudication by national courts. Universal jurisdiction informs global adjudicative authority when national courts resolve cases through trials on behalf of the international community, and it allows states to play a significant role in the development and legitimization of the international criminal law regime.⁷ Universal jurisdiction is the most remote form of extraterritorial jurisdiction.⁸ State courts may exercise jurisdiction over serious crimes of international law without a legal nexus to the location of the offense, nationalities of the perpetrator or victim, or a state's vital security interests.⁹ Every court in the world has the right to punish "crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole."¹⁰

Crimes are of exceptional gravity and considered serious when they shock the conscience of humanity, which is marked by a repugnance at the heinousness or atrociousness of the act.¹¹ Universal jurisdiction involves domestic trials that complement the work of international criminal tribunals.¹² States exercise universal jurisdiction to prosecute suspects based on the heinous nature of the international crimes they are accused of.¹³ The absence or uncertainty of a jurisdiction capable of addressing the crimes in question also justifies exercising universal jurisdiction since it plays an important "gap-filling" role in cases where impunity persists because local legal remedies cannot be exhausted.¹⁴

The Russian high command is subject to universal jurisdiction because the crimes that the officials stand accused of are heinous violations of international law.¹⁵ War crimes and crimes against humanity shock the conscience of all nations

6. Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 2.

7. See MARGARET DEGUZMAN, SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW, 68–73, 116–17 (Oxford Univ. Press 2020) (discussing how the gravity of certain crimes makes it incumbent on the international law community to adjudicate such crimes with state help).

8. PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, PROGRAM IN LAW AND PUBLIC AFFAIRS & WOODROW WILSON SCHOOL OF PUB. & INT'L Affs. 28–29 (Princeton Univ. 2001).

9. *Id.* at 23.

10. *Id.*

11. See Noah Feldman, *Cosmopolitan Law?* 116 YALE L.J. 1022, 1063 (2007) (discussing how the heinousness of certain crimes must not be allowed to go unpunished because a national rather than a nonnational committed the crime).

12. AISLING O'SULLIVAN, UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW: THE DEBATE AND THE BATTLE FOR HEGEMONY, 89, 207 (Routledge 2017).

13. See MARK CHADWICK, PIRACY AND THE ORIGINS OF UNIVERSAL JURISDICTION: ON STRANGER TIDES?, 34 QUEEN MARY STUD. INT'L L. 15 (2019) (discussing how arguments that favor the exercise of universal jurisdiction focus on the "heinous nature of the core international crimes[.]").

14. *Id.*

15. Vlasta Kovbasa, *A Pursuit of Justice: Applying Universal Jurisdiction to Hold Russian War Criminals Accountable*, TRANSATLANTIC DIALOGUE CTR. (July 25, 2024), <https://tdcenter.org/2024/07/25/a-pursuit-of-justice-applying-universal-jurisdiction-to-hold-russian-war-criminals-accountable/>.

and affect the whole of humankind.¹⁶ Whereas the four military officials (Kobylash, Sokolov, Shoigu, and Gerasimov) are suspected of committing crimes against humanity by systematically directing intentional attacks at civilians,¹⁷ Lvova-Belova and Putin are suspected of war crimes against Ukraine's children.¹⁸ Universal jurisdiction is appropriate over the alleged subject matter because the acts constitute core international crimes that any state has the right, if not the obligation, to punish.¹⁹ The exercise of universal jurisdiction is justified by the seriousness of the crimes alleged, the intentional manner of their commission by state actors, and the victimization of vulnerable aspects of the civilian population.

The warrants and factual circumstances of the 2022 invasion also implicate issues of command responsibility. Command responsibility serves as an especially effective doctrine of liability for prosecuting Russian military commanders for war crimes and crimes against humanity perpetrated by their subordinates.²⁰ If Russian leaders failed to take all necessary and reasonable measures within their power to prevent or punish the criminal conduct of inferior officers, then they as their superiors are responsible for the officers' conduct.²¹ The cases bear a striking resemblance to the Nuremberg Trials²² and the Tokyo War Crimes Tribunal,²³ based on the failures of the head of state and military leaders to prevent atrocities committed under their respective authority.²⁴ More recent convictions of senior

16. Mark Ellis & Yannic Körtgen, *Accountability and Justice: The Application of the Principle of Universal Jurisdiction to Russia's Invasion of Ukraine*, 56 CORNELL INT'L L.J. 445, 445–47, 451 (Sep. 6, 2025), <https://publications.lawschool.cornell.edu/cilj/wp-content/uploads/sites/7/2025/09/Ellis-Kortgen-final.pdf>.

17. Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 2 (finding reasonable grounds to believe alleged airstrikes were being directed at civilian objects).

18. Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

19. See Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996) (explaining how legal literature considers genocide and war crimes as violations of international law).

20. See Ellis & Körtgen, *supra* note 16, at 447 (discussing that under the Rome Statute the ICC has the power to hold commanders responsible for subordinate actions); see also Nicholas Nizinski, *Command Responsibility and the War in Ukraine: Can Customary International Law Hold Russian Commanders Accountable for War Crimes?*, 129 DICK. L. REV. 313, 349 (Oct. 25, 2024) (explaining command responsibility is an internationally approved mode of criminal liability for both military and civilian superiors).

21. Int'l Comm. of the Red Cross, *Command Responsibility and Failure to Act* (June 2009), https://www.icrc.org/sites/default/files/document/file_list/command-responsibility-icrc-eng.pdf.

22. See Office of Military Gov't for Ger. (U.S.), *Indictments from the Nuremberg Trials*, 75 (1946), <https://www.loc.gov/item/2011525463/> (charging German political leaders for planning, preparing, initiating, and waging wars of aggression and invasions of other countries).

23. See Charter of the International Military Tribunal for the Far East, U.N. Doc. 3, in *Atrocity Crimes collection*, United Nations (U.N.), at art. 5 (Jan. 19, 1946, amended Apr. 26, 1946), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (discussing how article 5 of the charter allows the International Military Tribunal to exercise jurisdiction over war criminals who acted individually or as members of organizations).

24. Press Release, Office of the High Commissioner for Human Rights, *UN Report Details Summary Executions of Civilians by Russian Troops in Northern Ukraine* (Dec. 7, 2022), <https://www.ohchr.org/en/press-releases/2022/12/un-report-details-summary-executions->

political leaders for serious international crimes demonstrate that command responsibility remains an effective doctrine of liability.²⁵ In 2022, the European Court of Human Rights upheld the conviction of Vladimir Milanković for ordering attacks against the civilian population in Croatia and failing to prevent inferior officers from committing war crimes.²⁶ As the commander of the police units which had committed those crimes Vladimir Milanković was under a duty to stop them.²⁷ Similarly, Putin and the four military officials are accused of perpetrating crimes through others and of failing to exercise proper control over civilian and military subordinates who committed the acts under their effective authority.²⁸

Beyond the allegations in the arrest warrants, these members of the Russian high command may be responsible for unindicted crimes, namely the crime of aggression.²⁹ Every commander who prosecutes war must answer for the planning, preparation, initiation, or execution of an armed attack that in its character, gravity, and scale, constitutes a manifest violation of the U.N. Charter.³⁰ The Russo-Ukrainian war involves official troops from Russia, Ukraine, and North Korea, constantly risking escalation on the European continent.³¹ Tens of thousands of troops amass along national borders and cross territorial boundaries to engage in interstate armed conflict.³² As of February 2026, Ukraine suffered approximately 600,000 casualties, 140,000 of whom were killed in action,³³ whereas Russia lost

civilians-russian-troops-northern.

25. See *Prosecutor v. Taylor*, No. SCSL-03-1-T, Trial Chamber II, Special Court for Sierra Leone, Judgment ¶6972 (May 18, 2012), <https://www.refworld.org/jurisprudence/caselaw/scsl/2012/en/92206> (finding former Liberian President Charles Taylor guilty of aiding and abetting atrocities committed during civil war); see also Human Rights Watch [HRW], *ICTY/Bosnia: Karadžić Convicted for Srebrenica Genocide*, HRW (Mar. 24, 2016), <https://www.hrw.org/news/2016/03/24/icty/bosnia-karadzic-convictedsrebrenica-genocide> (recounting how International Criminal Tribunal for the former Yugoslavia convicted former Republika Srpska President Radovan Kradžić on several counts of genocide across Bosnia and Herzegovina).

26. *Milanković v. Croatia*, App. No. 33351/20, Judgment ¶¶ 8–10 (Eur. Ct. H.R. First Section Jan. 20, 2022), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-215180%22%7D>.

27. *Id.*

28. Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 2.

29. Coal. for the Int'l Crim. Ct., *The Crime of Aggression*, <https://coalitionfortheicc.org/crime-aggression-July-2025> (last visited Feb. 24, 2026) (defining the crime of aggression under Article 8 bis of the Rome Statute as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”).

30. Rome Statute of the International Criminal Court, at art. 8 bis, 2187 U.N.T.S. 90, July 17, 1998 [hereinafter “Rome Statute”].

31. Marko Milanovich, *North Korea's Troop Deployment in the Russian War of Aggression against Ukraine: The DPRK as a Principal or as an Accomplice?*, EJIL: Talk! (Nov. 4, 2024), <https://www.ejiltalk.org/north-koreas-troop-deployment-in-the-russian-war-of-aggression-against-ukraine-the-dprk-as-a-principal-or-as-an-accomplice/>.

32. *Id.*

33. John Psaropoulos, *The Ukraine War in Numbers: People, Territory, Money*, AL JAZEERA (Feb. 23, 2026), <https://www.aljazeera.com/news/2026/2/23/the-ukraine-war-in-numbers-people-territory-money>.

325,000 soldiers and more than 1.25 million were wounded.³⁴ By February 24, 2026—the fourth anniversary of Russia’s full-scale invasion of Ukraine—the overall casualties between both Russian and Ukrainian troops totaled at almost 2 million.³⁵ Airstrikes and combat operations inflicted 56,000 civilian casualties, leaving many dead or severely wounded.³⁶ Waging an offensive war or “special military operation” that the International Court of Justice (I.C.J.) orders the initiating state to suspended immediately is a threat to international peace and security which no court in the world should ignore.³⁷ The recrudescence of an international armed conflict calls for states to arrest the wanted members of the Russian high command responsible for starting the warfare. If the ICC does not explicitly hold the officials responsible for ordering acts of aggression and the invasion of another country, then domestic criminal tribunals should take the reins and facilitate prosecutions based not only on the allegations of superior responsibility justifying the arrest warrants, but also formal charges of aggression.

States should exercise universal jurisdiction to adjudicate the allegations of war crimes, crimes against humanity, and crimes of aggression that members of the Russian high command stand accused of.³⁸ To bring the defendants to justice, the courts of all U.N. states should strive to hold full and fair trials, which would require domestic law enforcement to conduct arrests like in the case of General Augusto Pinochet, who was taken into custody by the British government for the murder of citizens in Chile.³⁹ Pinochet was not prosecuted.⁴⁰ However, his successful arrest highlights the ability of any state to exercise universal jurisdiction over international crimes that form a part of *jus cogens* (peremptory, non-derogable, fundamental norms), which give rise to obligations *erga omnes* (towards all) with respect to prevention and punishment.⁴¹

In accord with the ancient maxim *crimen grave non potest non esse punibile* (a serious crime cannot be unpunishable), every state has the right to exercise universal

34. Seth Jones & Riley McCabe, *Russia’s Grinding War in Ukraine: Massive Losses and Tiny Gains for a Declining Power*, Ctr. for Strategic & Int’l Stud. (Jan. 27, 2026), <https://www.csis.org/analysis/russias-grinding-war-ukraine>.

35. Psaropoulos, *supra* note 33.

36. See Ctr. for Preventive Action, *War in Ukraine*, COUNCIL ON FOREIGN REL. (updated Feb. 24, 2026), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine> (estimating civilian casualties due to armed conflict); see also U.N. Off. of the High Comm’r for Hum. Rts., *Protection of Civilians in Armed Conflict: December 2025 Update*, 4 (Jan. 12, 2026), <https://ukraine.ohchr.org/en/Protection-of-Civilians-in-Armed-Conflict-December%202025> (select “in English” to navigate to the official PDF) (showing statistics of 40,601 civilians injured and 14,999 civilians killed due to warfare).

37. See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukr. v. Russ.*), Order, ¶ 81 I.C.J. 229 (March 16, 2022), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf>.

38. See Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 2.

39. Amnesty Int’l., *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, EUR 45/21/98, at 1 (Oct. 1998), <https://www.amnesty.org/en/wp-content/uploads/2021/06/eur450211998en.pdf>.

40. *Id.*

41. *Id.* at 7.

jurisdiction to adjudicate all plausible allegations of serious international crimes committed by Russian high command throughout the war in Ukraine.⁴² The legality and legitimacy of exercising universal jurisdiction depends on whether the court adequately addresses issues of impartiality that may arise due to national bias and guarantees fairness through procedural safeguards.⁴³ This Comment assesses the strengths and weaknesses of exercising universal jurisdiction through *in absentia* criminal proceedings to hear all the evidence and adjudicate the alleged atrocities.⁴⁴ Section II analyzes how the exercise of universal jurisdiction by national courts complements the efforts of the ICC to hold Russian high government officials accountable and considers popular challenges or criticisms of exercising universal jurisdiction, including issues of judicial impartiality. Section III demonstrates the existence of sufficient evidence to take the suspects into custody and initiate domestic prosecutions that adjudicate the allegations of war crimes and crimes against humanity. Section IV maps out how the doctrine of command responsibility interacts with universal jurisdiction over the crime of aggression. Special tribunals and states whose courts can legally and legitimately exercise universal jurisdiction should complement the work of the ICC by either taking the Russian officials into custody or launching *in absentia* prosecutions.

II. THE EXERCISE OF UNIVERSAL JURISDICTION BY NATIONAL COURTS COMPLEMENTS THE EFFORTS OF THE INTERNATIONAL CRIMINAL COURT

Between an arrest for prosecution at the Hague and the exercise of universal jurisdiction by a national court, states should take both pathways to the adjudication of the allegations against the Russian high command. Although the ICC is heavily criticized for its inconsistent jurisprudence on requests for cooperation and the politicization of the judicial process, the ICC presents procedural and substantive advantages to adjudication in the cases against the Russian leadership, especially in terms of jurisdiction.⁴⁵ Nonetheless, a major disadvantage of leaving prosecution completely to the purview of the ICC lies in its limited enforcement powers and frequent non-compliance by States Parties with regard to international cooperation and judicial assistance.⁴⁶

42. See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. 20, §§ VII–VIII (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625) (arguing punishment for the good of all humankind may be exacted by any one at all according to the law of nature).

43. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 10 (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (declaring everyone is entitled to a full and fair public hearing).

44. Ryan Rabinovitch, *Universal Jurisdiction in Absentia*, 28 *FORDHAM INT'L L.J.* 500, 526–29 (2005), <https://ir.lawnet.fordham.edu/ilj/vol28/iss2/8>.

45. See Olivia Flasch, *The Interplay Between Articles 27 and 98 of the Rome Statute: A Familiar Friend Makes a New Appearance in the Arrest Warrants Against Netanyahu and Gallant*, *EJIL: Talk!* (Jan. 15, 2025), <https://www.ejiltalk.org/the-interplay-between-articles-27-and-98-of-the-rome-statute-a-familiar-friend-makes-a-new-appearance-in-the-arrest-warrants-against-netanyahu-and-gallant/> (drawing similarities between arrest warrants for Putin and sitting Prime Minister of Israel Benjamin Netanyahu).

46. See *Prosecutor v. Putin*, ICC-01/22-90, Pre-Trial Chamber II, *Finding under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request to Cooperate in*

Universal jurisdiction thus plays an important gap-filling role by allowing states to leverage international criminal law doctrines for the sake of resolving the allegations in the ICC arrest warrants with meaningful enforcement powers.⁴⁷ The history of universal jurisdiction has outgrown its roots in natural law traditions and the criminalization of piracy around the world.⁴⁸ It now encompasses a great scope of offenses, focusing primarily on “atrocities” or “core” international crimes: war crimes, crimes against humanity, genocide, and aggression.⁴⁹ Universal jurisdiction still presents its own challenges since it may not be legal to conduct a national prosecution against an official who enjoys personal immunity under the prosecuting state’s laws, whereas such arguments are not opposable in proceedings by an international or special tribunal.⁵⁰ Universal jurisdiction may also involve risks, including: (i) a greater concern about impartiality due to the influence of bias whenever allies or fellow nationals are involved in the process; and (ii) serious threats to the legitimacy of the international criminal law regime based on perceptions of political abuse in violation of sovereignty among the international community.⁵¹ To overcome these challenges and remain legitimate, national courts exercising universal jurisdiction should facilitate a full and fair trial that thoroughly investigates the reasonable grounds and evidence justifying the arrest warrants, assessing all plausible allegations of serious international crimes.⁵²

A. The ICC Presents Procedural & Substantive Advantages to Adjudication Yet Remains Unable to Secure Sufficient International Cooperation & Judicial Assistance

The ICC serves as an appropriate tribunal to resolve the allegations against the Russian high command for core international crimes perpetrated in a territory belonging to a state which consents to jurisdiction. Two principles inform the ICC’s jurisdiction: territoriality and complementarity.⁵³ First, the ICC has adjudicative authority limited to crimes committed on the territories of States Parties to the Rome

the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties, ¶ 33 (Oct. 24, 2024), <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1809d1971.pdf> (discussing the tension between State Parties’ obligations under the Rome Statute and their obligations to other State Parties when asked to comply with the Courts’ request for help in apprehending fugitives).

47. CHADWICK, *supra* note 13, at 15.

48. DEGUZMAN, *supra* note 7, at 35.

49. *Id.* at 36.

50. Chile Eboe-Osuji, *Personal Immunity in National Prosecutions of International Crimes*, LAWFARE (Aug. 12, 2025), <https://www.lawfaremedia.org/article/personal-immunity-in-national-prosecutions-of-international-crimes>.

51. DEGUZMAN, *supra* note 7, at 116, 140.

52. See Universal Declaration of Human Rights, *supra* note 37, at art. 10 (affirming everyone’s right to a fair and public hearing following a criminal charge).

53. See Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 NOTRE DAME L. REV. 549, 552, 571, 596 (2023), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=5103&context=ndlr> (discussing ICC jurisdictional preconditions).

Statute or by their nationals.⁵⁴ States may confer jurisdiction over crimes committed on their territory to the ICC, thereby extending its adjudicative authority over the nationals of non-States Parties, as Russia's invasion of Ukraine demonstrates.⁵⁵ Second, the ICC is not intended to entirely replace national criminal systems but only prosecute cases when states are unwilling or unable to do so genuinely. For example, complementarity requires the Court to relinquish its jurisdiction if a state—even a non-State Party—is investigating or prosecuting the case in question.⁵⁶

The ICC uses the “same person/same conduct” test to assess complementarity which requires looking at whether a state is investigating the specific suspect named in an arrest warrant. Even if the state investigates the same suspect, the domestic investigation must sufficiently mirror the Office of the Prosecutor's investigation before the ICC will defer to the national criminal procedure.⁵⁷ If a state conducts an investigation, the Court may still find the state unwilling to proceed meaningfully because the state conducted the investigation as a national decision to shield the accused from criminal responsibility or because the state conducted an investigation inconsistent with an intent to bring the person concerned to justice.⁵⁸ The state must genuinely wish to place the investigated suspect on trial, as the goal of the unwillingness criterion is “to preclude the possibility of sham trials aimed at shielding perpetrators” from conviction by halting the ICC process on a technicality.⁵⁹

The ICC presents one pathway to the adjudication of serious international crimes by the accused Russian officials and represents the most legitimate venue for prosecution based on both procedural and substantive grounds. Since Ukraine exercised its prerogative to consent to jurisdiction under Article 12(3) of the Rome Statute, the crimes occurring in Ukraine's territory expose the accused to the investigative and prosecutorial processes of the ICC.⁶⁰ Ukraine acceded as the 125th State Party to the Rome Statute, though it was not a full member when the arrest warrants were issued.⁶¹ While Russia is not a State Party, the ICC may hear prosecutions of high-ranking Russian officials who committed crimes on Ukrainian territory if they are made suspects, arrested, and transported for trial.⁶² In the absence of an enforcement mechanism, the Rome Statute anticipates the arrest and transfer of a suspect by a State Party as a form of international cooperation and judicial assistance, so adjudication by the ICC depends on obtaining custody given a trial

54. *Id.* at 571.

55. *Id.* at 588–91, 608.

56. *Id.* at 571.

57. Kevin Jon Heller, *An Overview of the Principle of Complementarity*, OPINIO JURIS (May 24, 2024), <https://opiniojuris.org/2024/05/24/an-overview-of-the-principle-of-complementarity/>.

58. *Id.*

59. *Id.*

60. ICC, Situation in Ukraine, *supra* note 1.

61. Coal. for the Int'l Crim. Ct., *Ukraine Becomes the 125th State Party to the ICC Rome Statute* (Jan. 22, 2025), <https://www.coalitionfortheicc.org/ukraine-becomes-125th-ICC-state-party>.

62. Rome Statute, *supra* note 30, at arts. 12(3), 54.

must happen in the presence of the accused, not *in absentia*.⁶³

Certain pre-trial hearings, however, particularly confirmation of charges proceedings, may be done *in absentia* whenever the person charged cannot be found even though all reasonable steps were taken to secure his appearance before the Court and inform him of the charges and hearing.⁶⁴ It is well-settled in ICC jurisprudence that a suspect who happens to be a head of state cannot claim the defense of sovereign immunity, which is not opposable in proceedings before the permanent international penal body.⁶⁵ The Rome Statute explicitly provides that procedural defenses, such as “immunities . . . which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”⁶⁶ Several international law commentators consider prosecution in contravention of personal immunity controversial because it risks the erosion of the Court’s authority and legitimacy, especially with respect to the heads of non-States Parties.⁶⁷ However, the Nuremberg and Tokyo tribunals set an age-old precedent that the senior officials of non-consenting states may nevertheless be tried and punished once in custody for serious international crimes.⁶⁸

Substantively, the Rome Statute grants the ICC jurisdiction in cases of war crimes and crimes against humanity.⁶⁹ War crimes, such as intentionally directing attacks against civilian populations or non-combatants, are serious breaches of international humanitarian law or the rules of armed conflict.⁷⁰ Civilian objects and populations, especially children, are given special protection under international law,⁷¹ which shields them from intentional attacks.⁷² Crimes against humanity are acts that are committed as part of a widespread or systematic attack directed against any civilian population, such as extermination.⁷³ In pursuit of individual accountability, the ICC arrest warrants strive to end impunity for the gravest crimes, especially those committed by or at the behest of political leaders.⁷⁴ Given the serious nature of the crimes involved in the 2022 invasion, the special class of victims targeted, and the collective method of perpetration by means of state action, States Parties by their consent to the Rome Statute must arrest and transfer the

63. *Id.* arts. 63, 89(1).

64. *Id.* art. 61(2)(a).

65. *Prosecutor v. Putin*, *supra* note 46, at ¶33.

66. Rome Statute, *supra* note 30, at art. 27(2).

67. *Id.*

68. Chile Eboe-Osuji, *There Is No Immunity for the International Criminal Court to Respect*, JUST SECURITY (Apr. 11, 2025), <https://www.justsecurity.org/110266/no-immunity-icc-respect/>.

69. Rome Statute, *supra* note 30, at arts. 6(a), 7(1), 8(2)(a)–(b).

70. *Id.* arts. 8(2)(b)(i), 6(a), 7(1), 8(2)(a)–(b).

71. Int’l Comm. of the Red Cross (ICRC), *Legal Protection of Children in Armed Conflict*, 1–2 (Feb. 2, 2003) https://www.icrc.org/sites/default/files/document/file_list/children-legal-protection-factsheet.pdf.

72. Rome Statute, *supra* note 22, at arts. 8(2)(b)(i), 6(a), 7(1), 8(2)(a)–(b).

73. *Id.* art. 7(1)(b).

74. ICC, Situation in Ukraine, *supra* note 2.

suspects to the Court for adjudication.⁷⁵

The most glaring problem with pursuing adjudication at the ICC pertains to the Court's lack of enforcement capacity and the consequent need to rely on international cooperation for judicial assistance, which risks the stagnation of a case due to non-compliance by States Parties. In Putin's case, Mongolia's non-compliance despite the Court's request to execute his arrest warrant reveals a disturbing reality of impunity for heads of state based on some states' preference of horizontal or bilateral relations over their vertical obligations to the Court.⁷⁶ The pattern of non-compliance in similar cases, such as that of the former President of Sudan, Omar Al-Bashir, shows how international prosecution grows stagnant when States Parties fail to arrest and transfer suspects upon request.⁷⁷ Al-Bashir was wanted for alleged war crimes, crimes against humanity, and genocide during the conflict in the Darfur region, yet four states—Malawi,⁷⁸ Congo,⁷⁹ Jordan,⁸⁰ and South Africa⁸¹—refused to comply with the Court's request to execute his arrest warrant.

Insufficient international cooperation suggests that reliance on States Parties alone to execute arrest warrants is futile.⁸² Although the ICC may meaningfully facilitate the trial process, non-compliance is a major obstacle in the way of adjudication, so until methods of international cooperation and judicial assistance other than dependence on unreliable States Parties present themselves, the cases against Russian officials risk remaining in limbo.

This history of inadequate judicial assistance does not mean there has never been international cooperation on arresting and transporting fugitives to international criminal tribunals. The case of Slobodan Milošević serves as an example of a successful arrest and transfer by a state to an *ad hoc* criminal tribunal,

75. Rome Statute, *supra* note 30, at arts. 59(2), 59(7).

76. *Prosecutor v. Putin*, *supra* note 46, at ¶¶33–34.

77. *See generally Prosecutor v. Al-Bashir*, Pre-Trial Chamber I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir Case No. ICC-02/05-01/09, (Dec. 12, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_21722.PDF.

78. *Id.*

79. *See generally Prosecutor v. Al-Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (Apr. 9, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_03452.PDF.

80. *See generally Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09 (Pre-Trial Chamber II, Int'l Crim. Ct., Dec. 11, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF.

81. *See generally Prosecutor v. Al-Bashir*, Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09 (Pre-Trial Chamber II, Int'l Crim. Ct., July 6, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF.

82. Amnesty Int'l, *Mongolia: Putin Must Be Arrested and Surrendered to the International Criminal Court* (Sept. 2, 2024), <https://www.amnesty.org/en/latest/news/2024/09/mongolia-putin-must-be-arrested-and-surrendered-to-the-international-criminal-court/>.

the International Criminal Tribunal for Yugoslavia (ICTY).⁸³ After mass protests and an election that led to his ouster from government office, Milošević was imprisoned and charged with abuse of power.⁸⁴ When the ICTY President and Prosecutor insisted that the Federal Republic of Yugoslavia had an international obligation to transfer Milošević to the Hague so that he could stand trial, the Yugoslav government complied and transferred custody due to political pressure associated with joining the European Union (EU).⁸⁵ Milošević unfortunately died in the U.N. Detention Unit at the Hague due to health complications before his case could be adjudicated, showing the need to safeguard human dignity and the right to life during pre-trial detention.⁸⁶ States Parties must arrest and arrange similar custody transfers with the ICC upon the execution of the warrants against the Russian suspects to facilitate adjudication.⁸⁷

B. History of Crimes Under the Law of Nations & Prospects of Universal Jurisdiction: From Pursuing Pirates to Prosecuting Military Commanders & Mercenaries

Theories of universal jurisdiction over atrocities, such as the crime of aggression, justify prosecution in a national court, whereas more states must enact implementing legislation to facilitate the arrest and prosecution of the fugitives before the ICC.⁸⁸ Ambassador Beth Van Schaack explains that the ICC exercises a form of “internationalized or pooled universal jurisdiction” based on customary international law and/or treaty law, with the possible exception of the crime of aggression.⁸⁹ Under this theory, “ . . . the normative justification of punishment is independent of the will of the respective sovereign,” yet it assumes the validity of “supra-national enforcement by the ICC” because “the entire international community agrees on the criminality of certain conduct.”⁹⁰ The prosecution of the crime of aggression at the ICC faces significant procedural challenges, stemming from the 2010 Kampala Review Conference’s amendments.⁹¹ These challenges include a jurisdictional opt-out provision, which allows States Parties to exclude themselves from the Court’s jurisdiction over this crime, thereby preventing the

83. Int’l Crim. Trib. for the Former Yugoslavia (ICTY), *Arrest and Transfer*, available at <https://www.icty.org/en/content/arrest-and-transfer> (last visited Feb. 26, 2026).

84. *Id.*

85. *Id.*

86. ICTY, *Slobodan Milošević Found Dead in His Cell in the Detention Unit*, (Mar. 11, 2006), <https://www.icty.org/en/press/slobodan-milosevic-found-dead-his-cell-detention-unit>.

87. Rome Statute, *supra* note 30, at arts. 59, 86, 89.

88. ICC, *Arresting ICC Suspects at Large: Why It Matters, What the Court Does, What States Can Do* (Jan. 2019), <https://www.icc-cpi.int/sites/default/files/bookletArrestsENG.pdf>.

89. Beth Van Schaack, *Can the Int’l Criminal Court Try US Officials? – The Theory of “Delegated Jurisdiction” and Its Discontents (Part II)*, JUST SECURITY (Apr. 9, 2018), <https://www.justsecurity.org/54620/intl-criminal-court-officials-the-theory-delegated-jurisdiction-discontents-part-ii/>.

90. *Id.*

91. Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 505–6, 519 (2011), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1413&context=facpubs>.

prosecution of their nationals for aggression.⁹² Despite several such procedural impediments that make it impractical for the ICC to prosecute aggression, the Kampala amendments to the Rome Statute leave room for all states to enact implementing legislation that gives their domestic courts universal jurisdiction over the crime.⁹³

Accordingly, universal jurisdiction may be more feasible compared to ICC proceedings alone for national courts to adjudicate the allegations against the Russian officers. Universal jurisdiction is founded on the authority of the *forum deprehensionis* (place of apprehension) or the court of the state where the accused is held in custody without regard for the place where the crimes were committed.⁹⁴ Given its broader scope, universal jurisdiction is an effective way to bring all the accused to justice and prosecute unindicted crimes of aggression or acts of genocide.⁹⁵ While the arrest warrants allege war crimes and crimes against humanity, the Rome Statute provides for the crime of aggression and genocide. Universal jurisdiction may bridge this gap and allow a state or special tribunal to investigate all plausible allegations of these core international crimes in the absence of any hearings by the Court on additional charges.⁹⁶

In filling this gap, special tribunals and national courts that exercise universal jurisdiction should reasonably conclude that “Nuremberg and its progeny provide a customary international law basis for prosecuting the crime of aggression” and “take full advantage of the complementarity principle” to adjudicate allegations of aggression, genocide, and other atrocities not expressly suspected or charged by the ICC.⁹⁷ Exercising universal jurisdiction over international crimes presents far greater prospects than overcoming procedural hurdles at the ICC. Accused nationals of Non-States Parties often evade arrest, while an increasing number of states enact implementing statutes and crystalize the practice of prosecuting atrocities domestically.⁹⁸

1. History of Crimes Under the Law of Nations & Universal Jurisdiction

Universal jurisdiction developed as a unique judicial doctrine to prosecute a crime that may not directly concern the punishing authority.⁹⁹ Historically, universal jurisdiction developed to address issues of piracy, including crimes by state-sponsored privateers who were granted letters of marque and reprisal to plunder by

92. *Id.*

93. Michael Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L. J. 357, 359 & 379 (2012), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1745&context=faculty_publications.

94. *Id.* at 379.

95. O'SULLIVAN, *supra* note 12, at 89, 207.

96. Rome Statute, *supra* note 30, at art. 5.

97. Scharf, *supra* note 93, at 379, 388.

98. *Id.* at 388.

99. Chile Eboe-Osuji, *End of Immunity: Holding World Leaders Accountable for Aggression, Genocide, War Crimes, and Crimes against Humanity*, 254 (Rowman & Littlefield 2024).

proxy on the high seas.¹⁰⁰ Universal jurisdiction has since been extended to address grave violations of international law, such as war crimes, crimes against humanity, and genocide.¹⁰¹ The “piracy analogy” was invoked by the District Court of Jerusalem in *Israel v. Eichmann* to reinforce the universal jurisdiction doctrine and to affirm that certain grave crimes are offenses against humankind because they shock the conscience of all nations as to be *delicta juris gentium* (against the law of nations itself).¹⁰² Misuse of the piracy analogy risks revisionism given states historically pursued pirates for committing maritime robbery in international waters, not because of the heinousness of the crime.¹⁰³ Nevertheless, analogies to piracy retain enduring value by extending universal jurisdiction to certain modern offenses with similar characteristics.¹⁰⁴

The focus of universal jurisdiction remains broadly on “atrocities” or “core” international crimes.¹⁰⁵ The nature and character of these crimes is so heinous that it offends “the interest of all humanity” and threatens to “imperil civilization itself.”¹⁰⁶ Universal jurisdiction generally extends over individuals who are responsible for the violations of “ageless principles” of “decency, honor, fair play, and humanity” that inform civilization.¹⁰⁷

2. Prospects of Universal Jurisdiction to Prosecute the Russian High Command

The piracy analogy aptly applies to the crime of aggression by the Russian high command, as ordering or effectively controlling mercenaries of the Wagner Group to assist with the illegal annexation of Crimea in 2014 and participate in armed conflict against Ukraine since 2022 looks awfully similar to the actions of state-sponsored privateers on the high seas.¹⁰⁸ Just as leaving pirates unchecked permits a dangerous culture of impunity to take root, so too does a government that skirts responsibility by dispatching mercenaries to occupy lands, annex territories, and fight in an interstate war.¹⁰⁹ Statutes enabling universal jurisdiction over all atrocities and waiving any personal immunity defenses allow national prosecutions of the

100. O’SULLIVAN, *supra* note 12, at 42.

101. *Id.* at 64.

102. *Israel v. Eichmann*, Criminal Case No. 40/61, Judgment, ¶12 (Dist. Ct. of Jerusalem, Dec. 11, 1961), https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf.

103. DEGUZMAN, *supra* note 7, at 35.

104. *Id.*

105. *Id.* at 36.

106. Leila Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 975 (2006); *see also* Noah Feldman, *Cosmopolitan Law?* 116 YALE L.J. 1022, 1063 (2007).

107. *See* GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY*, 4 (Oxford Univ. Press 2009) (arguing that participants of war who violate certain moral principles must be punished and failure to punish wrongdoers would make a mockery of civilization).

108. Andrew S. Bowen, *Russia’s Wagner Private Military Company (PMC)*, Cong. Res. Serv. IF12344, at 1 (Aug. 1, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12344>; *see also* CHADWICK, *supra* note 11, at 30, 55, 171.

109. *Id.*

suspected Russian military commanders for heinous crimes committed either by them or through others, including mercenaries who essentially perpetuate a global cartel of impunity that the international criminal law regime must correct.¹¹⁰

Crimes of aggression should logically be included in discussions of universal jurisdiction asserted over atrocities during international armed conflicts.¹¹¹ As the centerpiece of the Nuremberg progeny, allegations of aggression in modern international criminal law trace their roots back to the judgment of the International Military Tribunal (IMT) that held the Nazi leadership accountable for crimes against peace committed throughout World War II.¹¹² Crucially, the IMT found that war crimes and crimes against humanity were committed as an integral part of crimes against peace.¹¹³ The officials who were responsible for crimes against peace were charged with “participating in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation, and waging wars of aggression, and wars in violation of international treaties, agreements, and assurances.”¹¹⁴ The Rome Statute defines crimes of aggression in similar terms with a focus on a “manifest violation” of the U.N. Charter.¹¹⁵

In its broadest formulation, the crime of aggression encompasses any illegal armed conflict directed by government, as the heart of the crime is the conviction that leaders bring their populations to war, not the reverse, making leaders the most responsible.¹¹⁶ For decades since the IMT’s judgment, laws that proscribe the crime of aggression permeated domestic institutions and practices governing war, aiming to restrain leaders from territorial conquest and the illegitimate deployment of armed forces.¹¹⁷

Beyond the piracy analogy, the history of universal jurisdiction reaffirms the right of every state to punish serious crimes based on consent and international treaty law. Universal jurisdiction has outgrown its roots in natural law theory and the fight against pirates now that positivist outlooks on international law advance treaty interpretation that finds the obligation to punish in pre-existing agreements between states.¹¹⁸ For example, a way to justify war crimes trials based on universal jurisdiction is to interpret state consent to extraterritorial jurisdiction as arising from the Geneva Conventions obligations.¹¹⁹ Irrespective of nationality and place of commission, the Geneva Conventions imply consent to extraterritorial jurisdiction if a government official of a breaching state commits war crimes.¹²⁰

110. *Id.*

111. O’SULLIVAN, *supra* note 12, at 91–2.

112. *Indictments from the Nuremberg Trials*, *supra* note 22, at 5.

113. *Id.* at 53.

114. *Id.*

115. Rome Statute, *supra* note 30, at art. 8 *bis*.

116. NOAH WEISBORD, *THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS*, 44 (Princeton Univ. Press 2019).

117. *Id.*

118. *Id.* at 35–37.

119. O’SULLIVAN, *supra* note 12, at 91.

120. *Id.*

In the 1950s and 1960s, states agreed to trials based on grave breaches in international armed conflicts. The capital punishment of Adolf Eichmann for his crimes against humanity targeting Jewish populations was partly based on his failure to protect civilians in time of war, showcasing the effectiveness of universal jurisdiction grounded in violations of the rules of armed conflict.¹²¹ The *Eichmann* judgment also compares the promises given to protect civilians in times of war under the Geneva Conventions with war crimes and crimes against humanity, such as forcible deportations and mass murders, which demand the exercise of universal jurisdiction by the state that takes the accused into custody.¹²² Pre-existing treaties, such as the Geneva Conventions and the Genocide Convention, thus provide a positivist justification for universal jurisdiction based on obligations arising from state consent to prevent and punish certain crimes.¹²³

The factual circumstances underlying the claims of aggression, war crimes, and crimes against humanity that the Russian high command stands accused of indicate grave breaches of the Geneva Conventions in an international armed conflict.¹²⁴ Subordinates attacking civilians either on orders from superiors or without their intervention demonstrates plausible violations of the Geneva Conventions.¹²⁵

Beside treaty obligations, customary international law, as assessed by analyzing state practice in accord with *opinio juris* (legal obligation) of some duration, generality, and uniformity, broadens the scope of offenses that a national court may try in exercising universal jurisdiction.¹²⁶ Since the successful arrest of General Pinochet, several states implemented legislation to provide for the arrest and prosecution of wanted war criminals, perpetrators of crimes against humanity, and enablers of systematic torture.¹²⁷ The Pinochet case crucially establishes that sovereign immunity is not opposable as a procedural defense against a national court that exercises universal jurisdiction over crimes against humanity and torture.¹²⁸

In 2011, an Amnesty International survey found that the laws of 145 U.N. member states provide for universal jurisdiction over one or more of the following offenses: war crimes, crimes against humanity, genocide, and torture.¹²⁹ The EU

121. *Id.* at 67–69.

122. *Israel v. Eichmann*, *supra* note 102, at ¶¶ 13, 23, 35, 75.

123. Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 78 U.N.T.S. 277.

124. Gavin Logan & Kevin Coble, *Ukraine Symposium - Terrorizing Civilians and the Law of Armed Conflict*, LIEBER INSTIT. WEST POINT (Mar. 4, 2025), <https://lieber.westpoint.edu/terrorizing-civilians-law-armed-conflict/>.

125. *Id.*

126. Duncan Hollis et al., *International Law*, 136–42, 614–20 (8th ed. 2023).

127. Amnesty Int'l., *supra* note 39, at 1, 8.

128. *Id.* at 14.

129. See Amnesty Int'l., *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/2011, 1 (Oct. 2011), <https://www.amnesty.org/en/documents/ior53/004/2011/en> (showing 145 out of 193 U.N. member states, approximately 75%, have provided for universal jurisdiction over core international crimes); see also DEGUZMAN, *supra* note 7, at 117 (explaining Sweden's expansive universal jurisdiction statute in which national courts may prosecute any crime, wherever committed, that is punishable by more than four years' imprisonment under domestic law); see also TRIAL Int'l, *Universal*

plays a pivotal role in the development of universal jurisdiction prosecutions, justifying them on the basis of victims' rights.¹³⁰ Several U.N. member states, including Chile, Kenya, Egypt, and Greece, describe universal jurisdiction as an institution of international law that is of exceptional character in the fight against impunity for war crimes and crimes against humanity.¹³¹ Germany launched preliminary universal jurisdiction investigations into Russian war crimes as early as March 2022, whereas the US passed the Justice for Victims of War Crimes Act in 2023, establishing a universal jurisdiction statute that enables the prosecution of alleged war crimes committed by foreign nationals overseas if they are found on U.S. territory.¹³²

These developments lay the groundwork for bringing those who committed war crimes against Ukraine's people to justice.¹³³ Given that the ICC found reasonable grounds to issue the arrest warrants, there is a compelling cause to take the suspects into custody and adjudicate their cases in any state around the world, for the character of the war crimes and inhumane acts alleged is akin to historical atrocities that justify universal jurisdiction, such as Eichmann's orders to systematically mass murder civilians.¹³⁴ The crimes alleged are subjects of universal jurisdiction under customary international law and their adjudication by national courts or special tribunals has crystalized as an enduring state practice since at least 1945 as the progeny of Nuremberg.¹³⁵ The impressive number of states whose legislation provides for universal jurisdiction over atrocity crimes represents at least 75% of U.N. member states—a significant bloc of countries that gradually reforms international customary law on adjudicative authority.¹³⁶ The exercise of universal

Jurisdiction: Law and Practice in the United States, 11 (May 2022), <https://trialinternational.org/wp-content/uploads/2022/05/UJ-USA-1.pdf> (explaining early U.S. universal jurisdiction statutes, including the War Crimes Act of 1996 which references breaches of the Geneva Conventions, violations of customs of war, and willful killings of civilians in breach of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices).

130. Directorate-Gen. for External Policies, European Parliament, *Study: The Role of the European Union in Promoting Universal Jurisdiction*, PE 754.442, 13–4 (2024), [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/754442/EXPO_STU\(2024\)754442_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/754442/EXPO_STU(2024)754442_EN.pdf).

131. Press Release, General Assembly, *General Assembly Adopts Resolution Affirming Accountability for War Crimes, Crimes against Humanity*, GA/L/3415 (Apr. 11, 2011), <https://press.un.org/en/2011/gal3415.doc.htm>.

132. Vlasta Kovbasa, *A Pursuit of Justice: Applying Universal Jurisdiction to Hold Russian War Criminals Accountable*, Transnat'l Dialogue Ctr., 5, 7 (July 25, 2024), <https://tdcenter.org/2024/07/25/a-pursuit-of-justice-applying-universal-jurisdiction-to-hold-russian-war-criminals-accountable/>.

133. *Id.* at 7.

134. *Israel v. Eichmann*, *supra* note 102, at ¶¶69, 120, 148.

135. Scharf, *supra* note 84, at 379, 388; *see also* Hayley Evans, *A Survey of Recent Developments and Trends in Universal Jurisdiction*, Lawfare (Feb. 9, 2022), <https://www.lawfaremedia.org/article/survey-recent-developments-and-trends-universal-jurisdiction>.

136. Amnesty Int'l., *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/2011, 1 (Oct. 2011), <https://www.amnesty.org/en/documents/ior53/004/2011/en>.

jurisdiction over genocide and war crimes is generally accepted as a uniform practice of some duration on the basis of *opinio juris*, marking the gradual crystallization of the doctrine as a cornerstone of the international criminal law regime and promoting individual accountability for atrocities everywhere in the world.¹³⁷

Multiple efforts are underway in the Baltic States, Netherlands, Poland,¹³⁸ and the United Kingdom to establish a special military tribunal for the crime of aggression that would hold Russian war criminals accountable based on universal jurisdiction, which may be exercised by any third party state.¹³⁹ On June 25, 2025, Ukraine signed an agreement with the Council of Europe to establish a special tribunal that “will give Ukraine a path to justice for the top-level decision to invade its territory,” reaffirming “the fundamental principle that war must not be waged as a tool of state policy” and upholding “the global international law-based order” to “deter future acts of aggression by state leaders and strengthen mechanisms for accountability and the peaceful resolution of disputes.”¹⁴⁰ The special tribunal on the crime of aggression by the Russian high command against Ukraine “is an investment in global peace, justice and the credibility of international law.”¹⁴¹

International law advocates also argue that forcibly deporting Ukrainian children to Russia satisfies the *prima facie* elements of the crime of genocide.¹⁴² The Rome Statute defines genocide as a set of voluntary acts (*actus reus*)—such as forcibly transferring children of a group to another group—that are committed with the intent (*mens rea*) to destroy, in whole or in part, a national, ethnic, racial, or religious group.¹⁴³ The forcible transfers from one ethnolinguistic group (Ukrainian) to another (Russian), coupled with statements on state media that suggest the intent to destroy Ukrainians as a national group as well as members of the Ukrainian Orthodox Church as a religious group, are indicative of genocide.¹⁴⁴ Whether the forcible deportation of children is a war crime or outright genocide, Russia’s policies of transfers and adoptions indicate the perpetration of a heinous act that victimizes a vulnerable segment of the Ukrainian population and thereby aggravates the terrible conduct.¹⁴⁵

137. *Id.*

138. Dapo Akande & Antonios Tzanakopoulos, *Making Counter-Hegemonic International Law: Should a Special Tribunal for Aggression Be International or Hybrid?*, Just Security (Oct. 31, 2023), <https://www.justsecurity.org/88373/making-counter-hegemonic-international-law-should-a-special-tribunal-for-aggression-be-international-or-hybrid/>.

139. Patrick Butchard, *Conflict in Ukraine: A Special Tribunal on the Crime of Aggression*, No. 9968, HOUSE COMMONS LIBR. (2024), <https://researchbriefings.files.parliament.uk/documents/CBP-9968/CBP-9968.pdf>.

140. Council of Europe, *Frequently Asked Questions – Special Tribunal for the Crime of Aggression Against Ukraine*, <https://www.coe.int/en/web/portal/frequently-asked-questions> (last visited Feb. 24, 2026).

141. *Id.*

142. Yulia Ioffe, *Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?*, 25 J. GENOCIDE RES. 315, 316–317, 324 (2023), <https://doi.org/10.1080/14623528.2023.2228085>.

143. Rome Statute, *supra* note 22, at art. 6(e).

144. Ioffe, *supra* note 141, at 316–317, 324.

145. *Id.* at 350.

Scrubbing out the nationalities of nearly 20,000 Ukrainian children in favor of Russian citizenship and mass adoptions shocks the conscience of humanity enough to warrant the exercise of universal jurisdiction in the cases of Putin and Lvova-Belova, as their policymaking inflicts harm upon a special class of victims.¹⁴⁶ Both genocide and war crimes against children are egregious acts that warrant arrest and prosecution. National courts should complement the work of the ICC by exercising universal jurisdiction over all plausible atrocities based on the failure of the accused to return allegedly abducted Ukrainian children.¹⁴⁷ Whenever and wherever any sovereign commits war crimes against children or genocide, they should be deemed no longer a national, but *hostis humani generis* (an enemy of humankind), and as such rendered justiciable by any state anywhere.¹⁴⁸

States should implement universal jurisdiction statutes that permit prosecutions of foreign government officials before their national courts based on allegations of genocide, war crimes, crimes against humanity, or crimes against peace. Universal jurisdiction statutes should reflect the IMT's broad definition of crimes against peace to account for various acts of aggression and allow national courts to adjudicate all plausible allegations of these core international crimes.¹⁴⁹ National courts that exercise universal jurisdiction over the Russian high command should adjudicate not only the allegations in the warrants issued by the ICC, but also determine whether the accused are responsible for the crime of aggression by ordering a series of armed attacks against another member state's territorial integrity, which is a manifest violation of international law and an affront to world peace and global security.¹⁵⁰ If the Russian high command never authorized its so-called "special military operation," then an international armed conflict during which atrocities foreseeably and unsurprisingly occurred may have been avoided.¹⁵¹ Insofar as the officials ordered 190,000 troops to mobilize and cross the borders of two countries (Russia and Belarus), only to wage an offensive war, they may be responsible for the crime of aggression by directing an invasion of another country, which is a serious international crime against peace.¹⁵² Ultimately, universal jurisdiction over crimes against peace, at the core of which lies aggression, is justified by both treaty

146. See Alison Bisset, *The UN Committee on the Rights of the Child and Russia's Deportation of Children from Ukraine*, OPINIO JURIS (Apr. 12, 2024), <https://opiniojuris.org/2024/04/12/the-un-committee-on-the-rights-of-the-child-and-russias-deportation-of-children-from-ukraine/> (discussing the ICC's recognition of war crimes committed by Russia and the mass deportation of children).

147. Resolution on Return of Ukrainian Children Forcibly Transferred and Deported by Russia, PARL. EU. DOC. 2025/2691(RSP) (May 8, 2025), https://www.europarl.europa.eu/doceo/document/TA-10-2025-0096_EN.pdf.

148. *Israel v. Eichmann*, *supra* note 102, at ¶13.

149. *Indictments from the Nuremberg Trials*, *supra* note 22, at 5.

150. U.N. Charter art. 1(1), 2(4), 1945, 1 U.N.T.S. XVI.

151. Press Release, *Russian Federation Announces 'Special Military Operation' in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict*, U.N. Press Release SC/14803 (Feb. 23, 2022), <https://press.un.org/en/2022/sc14803.doc.htm>.

152. Andrew Bowen, *Russia's War in Ukraine: Military and Intelligence Aspects*, Cong. Res. Serv. R47068, 1 (2023), <https://crsreports.congress.gov/product/pdf/R/R47068/7>.

obligations and customary international law formed since World War II.¹⁵³

C. Risks & Challenges of Universal Jurisdiction: Adjudication of Foreign Government Officials by National Courts & Special Tribunals

Universal jurisdiction is not without critiques and challenges. Major criticisms of universal jurisdiction include: (i) the opposability of personal immunity in national prosecutions, (ii) concerns about extraterritorial law enforcement by means of forcible capture or abduction, (iii) how bias and partiality influence the perception of unfair trials, and (iv) the hegemonic or domineering legacy of colonialism that informs views on the doctrine's abuse. To ensure the legitimacy of the international criminal law regime, trials must be conducted in accord with strict evidentiary rules and respect the "global interests" of "crime prevention through norm expression and deterrence."¹⁵⁴ To guarantee the legitimate exercise of universal jurisdiction, global interests must be adequately balanced against and outweigh national interests in employing alternative justice mechanisms, amnesty, or other means of peaceful settlement to resolve the alleged crimes.¹⁵⁵

Unlike adjudication by the ICC, the exercise of universal jurisdiction may be impossible due to the procedural defense of personal immunity at the national level.¹⁵⁶ The doctrine of *ratione materiae* refers to the immunity of a head of state or government official performing acts abroad on behalf of his state in that official capacity, whereas the doctrine of *ratione personae* traditionally functions to immunize a limited number of officials, such as heads of state, ministers of foreign affairs, and diplomats from prosecution in national courts based on official status alone.¹⁵⁷ The International Court of Justice (I.C.J.) holds that these personal "immunities under customary international law . . . remain opposable before the courts of a foreign State, even where these courts exercise [universal] jurisdiction."¹⁵⁸ Yet the "inviolability" attaches to official status or official acts, not conduct which is universally condemned as criminal under international law—"immunity does not mean impunity." "[J]urisdictional immunity" is "procedural in nature" while "criminal responsibility is a question of substantive law," and no jurisdictional immunity may "exonerate the person to whom it applies from all criminal responsibility."¹⁵⁹ The I.C.J. recognizes that immunity is not opposable before international criminal courts but may serve as a procedural roadblock for national prosecutions.¹⁶⁰ The failure of both Mongolia and Tajikistan to take Putin into custody during his diplomatic visits demonstrate the states' deference to the Russian President's personal immunity over their obligations to cooperate with the

153. Scharf, *supra* note 84, at 379, 388.

154. DEGUZMAN, *supra* note 7, at 116.

155. *Id.* at 140.

156. Eboe-Osuji, *supra* note 99, at 233–39, 254.

157. *Id.* at 149.

158. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, Feb. 14, 2002, I.C.J. Rep. 25, 20.

159. *Id.* at 21, 26, 30.

160. *Id.* at 26.

ICC or their rights to adjudicate allegations of atrocities in their national courts.¹⁶¹

Vast differences in the exercise of universal jurisdiction by national courts trigger concerns about procedural fairness based on the presence of the accused. For example, Eichmann's capture and extradition to Israel highlights concerns about how states should properly take suspected war criminals into custody.¹⁶² Israeli courts have identified instances of war crimes by the Nazi leader to warrant overriding customary international law on sovereign immunity in favor of universal jurisdiction facilitated by abduction.¹⁶³ To avoid conflicts arising out of extraterritorial law enforcement, some legal scholars argue universal jurisdiction should be rooted in the territoriality of the apprehending state.¹⁶⁴ A national court presiding over a defendant whose presence is secured through an abduction by the state's special forces on another state's territory puts the legality and legitimacy of the proceeding into question due to clashing interests between concurrent jurisdictions.¹⁶⁵ Extraterritorial law enforcement that captures and transports foreign government officials to satisfy the presence requirements of universal jurisdiction through "forcible rendition" to the prosecuting state presents a serious threat to the legitimacy of the doctrine.¹⁶⁶ However, states successfully prosecute acts of terrorism, war crimes, and similar international offenses even if they are committed in other states, and some states hold whole trials on such charges *in absentia* when they are unable to get the accused into custody despite making all reasonable attempts.¹⁶⁷ Admittedly, trials *in absentia* may be seen as unfair and illegitimate because they cast doubt on the credibility of the process by failing to afford the defendant meaningful opportunities to be heard, confront the witnesses against him, and cross examine the evidence.¹⁶⁸ Hence, procedural safeguards built into the exercise of universal jurisdiction *in absentia* should serve as a baseline of fairness

161. Coal. for the Int'l Crim. Ct., *Tajikistan's Failure to Arrest Vladimir Putin Undermines the Fight Against Impunity* (Oct. 16, 2025), <https://www.coalitionfortheicc.org/news/tajikistans-failure-arrest-vladimir-putin-undermines-fight-against-impunity>.

162. O'SULLIVAN, *supra* note 12, at 69.

163. *Id.*

164. Hollis et al., *supra* note 126, at 614–23, 646–49.

165. *Id.* at 614–23, 646–49.

166. U.S. Dep't of Just., Criminal Resource Manual § 1617, Extraterritorial Criminal Jurisdiction—18 U.S.C. §§ 112, 878, 970, 1116, 1117 & 1201, <https://www.justice.gov/archives/jm/criminal-resource-manual-1617-extraterritorial-criminal-jurisdiction-18-usc-112-878-970-1116>.

167. Mike Corder, *Dutch Court Convicts Pro-Syrian Government Militia Member of Illegally Detaining, Torturing Civilian*, AP NEWS (Dec. 8, 2023), <https://apnews.com/article/netherlands-syria-war-crimes-torture-conviction-court-cf58e317a8c1b13999c46afc31d3b0e5>; see also Kim Willsher, *French Court Finds Three Syrian Officials Guilty of Crimes Against Humanity*, THE GUARDIAN (May 24, 2024), <https://www.theguardian.com/world/article/2024/may/24/french-court-finds-three-syrian-officials-guilty-of-crimes-against-humanity>.

168. Human Rights Watch, *Letter to the Secretariat of the Rules and Procedure Committee of the ECCC on Trials in Absentia* (Nov. 17, 2006), https://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf; see also International Covenant on Civil and Political Rights [ICCPR] art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

for the defendant while allowing cases to move along when the accused fail to appear and avoid accountability.¹⁶⁹ The development of thorough records and the accrual of evidence adduced through *in absentia* prosecutions based on universal jurisdiction over core international crimes presents a pathway to the adjudication of the cases against the Russian high command that avoids issues of states overreaching by attempting abductions of the wanted government officials.¹⁷⁰

Evidentiary issues and considerations of fairness for the defendant also arise out of fear that universal jurisdiction will be decided based on undue prejudice or otherwise abused for political ends.¹⁷¹ Bias presents a significant risk when a national court whose state was most affected by the crime also presides over the prosecution of that crime and reviews the evidence.¹⁷² Judges on special tribunals who preside over cases involving fellow nationals or parties associated with closely allied states may find it more difficult to be impartial and independent, as intertwined national interests or desires of vengeance may predominate over global interests of crime prevention through norm expression and deterrence.¹⁷³ The unique nature of the crime of aggression, however, means that states at the receiving end of an armed attack are in the best position to demonstrate their need to use the inherent right of self-defense to repel the invasion.¹⁷⁴ The exercise of universal jurisdiction by the national courts of an attacked or victim state like Ukraine, therefore, should be considered more legitimate than adjudication by the courts of a would-be conqueror.

Moreover, no court in the world consists of a flawless arbiter or perfect panel of totally unbiased decision-makers, so as long as the prosecution is conducted in the “general interests of the international community” and the judge(s) remain “strictly impartial,” the exercise of universal jurisdiction may be just as legitimate as adjudication by the ICC.¹⁷⁵ To impartially adjudicate a case before her, the judge must reach a decision through a critical analysis that adopts “the better legal argument when a passable alternative presents itself” and overcome “national allegiance” to render the decision on the facts and merits of the case rather than

169. See Rabinovitch, *supra* note 44, at 526 (describing trials *in absentia* by special criminal tribunals and national courts under certain procedural rules); see also Second Additional Protocol to the European Convention on Extradition art. 3, Mar. 17, 1978, C.E.T.S. No. 98, <https://rm.coe.int/1680077974> (affirming right to retrial as a procedural safeguard).

170. Hollis et al., *supra* note 126, at 646–49.

171. DEGUZMAN, *supra* note 7, at 117.

172. Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337–38 (2000), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1846&context=faculty_scholarship.

173. Milan Marković, *International Criminal Trials and the Disqualification of Judges on the Basis of Nationality*, 13 WASH. U. GLOBAL STUD. L. REV. 1, 7, 14, 20 (2014), https://openscholarship.wustl.edu/law_globalstudies/vol13/iss1/5; see also Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed*, 45 CORNELL INT'L L.J. 78, 106–7, 123 (2012), <https://scholarship.law.cornell.edu/cilj/vol45/iss1/3>.

174. U.N. Charter, *supra* note 150, at arts. 1(1), 2(4), 51.

175. *Prosecutor v. Putin*, *supra* note 46, at ¶30.

personal passions and interests.¹⁷⁶ Although the exercise of universal jurisdiction over Russian government officials by the courts of Ukraine may raise challenges of fairness, these *in absentia* prosecutions present a pathway to the adjudication of atrocities, especially the crime of aggression, which the defending state is well-positioned to assess.¹⁷⁷ Insofar as Ukraine is fighting a war of self-defense, it has the right to defeat its belligerent adversary and assert dominion over Russia's leadership, much as the Allies did over Nazi Germany in Nuremberg.¹⁷⁸ On the other hand, the courts of Ukraine, the Russian Federation, and the People's Republic of China are all ill-equipped to handle the cases because the judges of these states are unlikely to overcome national allegiance or close association as allies,¹⁷⁹ tainting any prosecution with bias that shatters impartiality and is inconsistent with an intent to bring the persons concerned to justice.¹⁸⁰

A more serious challenge posed against universal jurisdiction criticizes the diplomatic hypocrisy of Western states that wish to avoid the extraterritorial reach of international criminal law while subjecting foreign nationals of lesser developed countries to their own criminal justice systems.¹⁸¹ For instance, vocal protests of the African Union against Western hegemony and neo-imperialism pressured the United Kingdom to move successful criminal proceedings against General Pinochet, which had overcome objections based on sovereign immunity, into retreat.¹⁸² Scholarship exploring Third World Approaches to International Law (TWAIL) generally unpacks the statist and imperialist biases behind the hegemonic logic of universal jurisdiction, driving home the point that such claims to universality may be better replaced with an acceptance of legal and normative pluralism.¹⁸³ TWAIL reveal that jurisprudence on crimes against humanity develops through piecemeal additions to customary international law and differs drastically depending on the tribunal

176. Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed*, 45 CORNELL INT'L L.J. 78, 128 (2012), <https://scholarship.law.cornell.edu/cilj/vol45/iss1/3>.

177. Maya Nicholson, *Ukraine's Precarious Pursuit of Justice Through In Absentia Trials*, Lawfare (June 18, 2025), <https://www.lawfaremedia.org/article/ukraine-s-precarious-pursuit-of-justice-through-in-absentia-trials>.

178. Eboe-Osuji, *supra* note 99, at 20, 22.

179. See Int'l Comm'n of Jurists, *Appointing the Judges: Procedures for Selection of Judges in the Russian Federation*, 58 (Int'l Comm'n of Jurists 2014), <https://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf> (concluding structural deficiencies undermine judicial independence in Russia); see also Cong.-Exec. Comm'n on China, *Judicial Independence in the PRC*, <https://www.cecc.gov/judicial-independence-in-the-prc> (showing how centralizing control over court finances, government staff salaries, and appointments of judges impede the impartiality of the Chinese judiciary); see also U.S. Dep't of State, *2020 Country Reports on Human Rights Practices: Ukraine* (2020), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/ukraine> (emphasizing high-level corruption and problems with judicial independence in Ukraine).

180. Rome Statute, *supra* note 30, at art. 17(2).

181. O'SULLIVAN, *supra* note 12, at 187.

182. *Id.*

183. NERGIS CANEFE, *CRIMES AGAINST HUMANITY: THE LIMITS OF UNIVERSAL JURISDICTION IN THE GLOBAL SOUTH*, 37, 67 (Univ. of Wales Press 2021).

applying it.¹⁸⁴ Universal jurisdiction thus risks devolving into imperialism by states that use the long arm of their criminal codes to subject foreign government officials to extraterritorial law enforcement and their own justice systems while disregarding international criminal tribunals.

The exercise of universal jurisdiction requires the application of a careful balancing test by the adjudicating court between the global interests of crime prevention through norm expression and deterrence on one hand, and national interests in alternative means of settlement or resolution on the other—whichever set of interests outweighs the other ultimately wins in the analysis and determines whether the court may legitimately hold a trial.¹⁸⁵ Among the core principles of the U.N. Charter is the obligation of member states to “settle their international disputes by peaceful means,” such as negotiation, mediation, arbitration, conciliation, or judicial settlement.¹⁸⁶ Striving to secure a lasting “ceasefire” and “peace deal,” the Trump administration’s first Special Envoy for Ukraine, Keith Kellogg, notes that President Volodymyr Zelenskyy’s “call for . . . a special tribunal to prosecute Russian war crimes” is “ambitious and just.”¹⁸⁷ Ukraine’s and America’s interests are therefore aligned with respect to seeking a resolution to the crimes, as they commend and aspire toward the adjudication of serious international crimes.¹⁸⁸ The interests of the national community most affected by the crimes align with the global interests of peaceful resolution, favoring judicial settlement or prosecution.¹⁸⁹

Although Russia’s interest may naturally lie in amnesty or alternative means of resolution, such an outcome would result in impunity, which is what international criminal law fundamentally seeks to eradicate.¹⁹⁰ In the interest of prevention, the message that the adjudication of the defendants on behalf of the global community sends to every member of humankind is that powerful political leaders are not above the law.¹⁹¹ This expression of a valuable legal norm promotes deterrence by putting all sovereigns on notice that the commission of serious international crimes will be prosecuted.¹⁹² This norm expression extends beyond utilitarian goals and values in cases of crimes of aggression, as “retributive justice” is invaluable for not only “dispensing just deserts and vindicating the suffering victims,” but also exerting “a deterrent effect on political and military leaders” who are forced to “change the rules of international relations.”¹⁹³ Arrest warrants, criminal allegations, and “accusations can seriously undermine the political ambitions of existing or aspiring leaders.”¹⁹⁴

184. *Id.* at 83.

185. DEGUZMAN, *supra* note 7, at 140.

186. Hollis et al., *supra* note 126, at 345.

187. Keith Kellogg & Fred Fleitz, *America First, Russia, & Ukraine*, AM. FIRST POL’Y INST. (Apr. 11, 2024), <https://americafirstpolicy.com/issues/america-first-russia-ukraine>.

188. *Id.*

189. DEGUZMAN, *supra* note 7, at 140.

190. *Id.* at 109.

191. A.B.A., *What Is the Rule of Law?*, <https://www.americanbar.org/advocacy/global-programs/who-we-are/rule-law-initiative/what-is-rule-of-law>.

192. *Id.* at 4, 36.

193. WEISBORD, *supra* note 116, at 3.

194. *Id.* at 4.

The global interests in restraining political leaders through trials that prevent and punish illegal armed conflict ultimately outweigh any national interests against the exercise of universal jurisdiction over international crimes committed throughout the Russo-Ukrainian War.

III. REASONABLE GROUNDS FOR THE EXERCISE OF UNIVERSAL JURISDICTION: PLAUSIBLE ALLEGATIONS OF CORE INTERNATIONAL CRIMES & SUFFICIENT EVIDENCE FOR PROSECUTION

Given the foregoing justifications for universal jurisdiction, all plausible allegations of core international crimes perpetrated by Russian officials should be investigated and prosecuted by states. Besides the procedural and substantive strengths and weaknesses of universal jurisdiction, a closer assessment of the evidence and reasonable grounds that the accused committed atrocities justifies the exercise of universal jurisdiction over them. The *mens rea* and *actus reus* of the alleged crimes—directing armed attacks against civilian infrastructure and the deportation of children—constitute heinous behavior with a criminal state of mind that shocks the conscience of humanity.¹⁹⁵ Just as the inspiration, motive, or intention of genocide evokes repugnance, so too does the criminal state of mind required to commit crimes against humanity and war crimes targeting children, acts which are characterized by their degree of horror and barbarity.¹⁹⁶ To wit, the evidence justifying the arrest warrants must show beyond a reasonable doubt that Kobylash, Sokolov, Shoigu, and Gerasimov (the four military officials) bear responsibility for missile strikes against Ukrainian electric power plants and substations from October 2022 to March 2023.¹⁹⁷ In the cases of Lvova-Belova and Putin, the evidence must persuade the judge(s) that the political leaders unlawfully transferred Ukraine's children to Russia.¹⁹⁸ The following analysis considers each atrocity crime alleged in the ICC arrest warrants to demonstrate why there are reasonable grounds and sufficient evidence to exercise universal jurisdiction over the wanted members of the Russian leadership for exceptionally grave offenses.

A. Widespread & Systematic Attacks Against Civilians: Crimes Against Humanity & War Crimes of Exceptional Gravity Are Subject to Universal Jurisdiction

The four military officials are accused of war crimes, namely intentionally directing attacks at civilian objects¹⁹⁹ and knowingly causing excessive incidental harm to civilians or damage to civilian objects.²⁰⁰ To prove the *mens rea* and *actus*

195. Rome Statute, *supra* note 30, at arts. 6(a), 7(1), 8(2)(a)–(b).

196. See International Law Committee [ILC], Report on the Work of Its Thirty-Sixth Session', U.N. Doc. A/39/10, ¶34 (May 7–July 27, 1984), https://legal.un.org/ilc/documentation/english/reports/a_39_10.pdf. (identifying offenses against the peace and security of mankind based on the status of the victim of the criminal act).

197. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 3.

198. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

199. Rome Statute, *supra* note 30, at art. 8(2)(b)(ii).

200. *Id.* art. 8(2)(b)(iv).

reus of intentionally directing attacks against civilian objects, the prosecution must demonstrate that the commanders intended to direct the attacks and knowingly issued orders in the context of an international armed conflict that foreseeably resulted in the destruction of non-military infrastructure and the deaths of non-combatants.²⁰¹ To prove the elements of attacking or bombarding towns, villages, dwellings, or buildings, the prosecution must demonstrate that the commanders intentionally attacked or bombarded a civilian object knowing it was undefended and a non-military objective in the context of an international armed conflict.²⁰² Excessive incidental harm to civilians who are not a part of hostilities goes beyond collateral damage and implicates individual accountability under international criminal law.²⁰³

In addition to grave war crimes, the four military officials are accused of crimes against humanity.²⁰⁴ The arrest warrants allege “other inhumane acts,” namely “‘intentionally causing great suffering, or serious injury to body or to mental or physical health’, as per article 7(1)(k) of the Rome Statute.”²⁰⁵ The *mens rea* of the inhumane act requires the prosecution to prove that the perpetrator either knew or intended the conduct to be a part of a widespread or systematic attack directed against the civilian population.²⁰⁶ An element of this particular charge is that the act is comparable to another crime against humanity under Article 7, such as that of murder or extermination.²⁰⁷ If the character of the inhumane act was similar to any other crime against humanity listed under Article 7, and the commanders issuing the orders to attack were aware of the factual circumstances that established the character of that act, then the criminal state of mind holds.²⁰⁸

Reports of Russian units launching waves of Shahed-136 suicide drones—lethal autonomous weapon systems that fly circuitous rounds and patrol in swarms—to destroy power plants indicate that the *actus reus* of a systematic attack is essentially satisfied.²⁰⁹ Beside launching machines of death or killer robots, Russian aerial attacks against Ukraine’s critical infrastructure, specially protected objects, and civilian population indicate the widespread reach of the destructive activity.²¹⁰

201. ICC, Elements of Crimes, ICC-PIOS-LT-03-002/15_Eng, 1, 12-13 (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

202. *Id.* at 12–13.

203. Human Rights Watch, *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*, 50 (2004), <https://www.hrw.org/reports/2004/ij/digest.pdf>.

204. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 3.

205. *Id.*

206. ICC, Elements of Crimes, *supra* note 201, at 4.

207. *Id.* at 4, 8.

208. *Id.* at 9.

209. Sam Cranny-Evan, *Bracing for the Hardest Winter: Protecting Ukraine’s Energy Infrastructure*, RUSI (Oct. 5, 2023), <https://www.rusi.org/explore-our-research/publications/commentary/bracing-hardest-winter-protecting-ukraines-energy-infrastructure>. (showing patterns of Russian troops targeting Ukrainian energy infrastructure and exploiting winter vulnerabilities to exert pressure on the civilian population).

210. International Partnership for Human Rights & International Human Rights Clinic of

Mens rea is much harder to prove given the physical distance that drones, missiles, and artillery place between their operators and victims, but notwithstanding modern military technology's tendency to obfuscate responsibility, the requisite intent to commit the systematic attacks can be inferred from robust evidence.²¹¹ Namely, statements from high-level Russian officials regarding specific strikes and Russia's war effort generally; patterns of attacks consistently repeated year after year; and the specifications, designs, and technical characteristics of precision warfare or remote combat weapons used by Russia, resulting in devastating civilian impacts that cannot be chalked up to collateral damage.²¹² Overall, the four military officials are accused of grave war crimes and crimes against humanity, and the evidence justifying the arrest warrants presumably meets the rigorous burden of persuasion required to prove each element of the alleged offenses. The exercise of universal jurisdiction over the alleged war crimes and inhumane acts should thus be permitted by national courts and special tribunals based on the heinous character of these offenses and the abundance of robust evidence to prove both the requisite destruction and the criminal intent to direct the attack as part of a general scheme against civilians.²¹³ Letting these attacks against non-combatants go unpunished diminishes confidence in the international criminal law regime and perpetuates a dangerous culture of impunity among sovereigns who try to avoid responsibility by using advanced weapons and sophisticated military systems.²¹⁴

B. Unlawful Deportation of Ukraine's Children: Group Victimization of a Vulnerable Segment of the Civilian Population & War Crimes Under Aggravated Circumstances

The case of Lvova-Belova and Putin differs slightly from that of the four military officials insofar as the arrest warrants against the head of state and his commissioner allege crimes targeting a special class of victims, namely children, which only reinforces the need to exercise universal jurisdiction to protect a vulnerable population.²¹⁵ The two officials are accused of unlawfully deporting and transferring children from occupied areas of Ukraine to the Russian Federation. These are war crimes of immense gravity.²¹⁶ They stand accused of crimes allegedly committed on occupied territories of Ukraine from February 24, 2022, the beginning of the full-scale Russian invasion against its neighbor.²¹⁷ The elements of the charge under Article 8(2)(b)(viii) include showing knowledge of the attendant circumstance of an international armed conflict, whereas the *actus reus* entails deporting or

Harvard Law School *Airstrikes and Atrocities: A Legal Assessment of Russia's Aerial Campaign in Ukraine*, i–ii (Apr. 2025), <https://humanrightsclinic.law.harvard.edu/wp-content/uploads/2025/05/Airstrikes-and-Atrocities-April-2025-1.pdf>.

211. *Id.* at ii–iii.

212. *Id.* at iii.

213. Feldman, *supra* note 11, at 1063.

214. *Airstrikes and Atrocities: A Legal Assessment of Russia's Aerial Campaign in Ukraine*, *supra* note 203, at iii.

215. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

216. *Id.*

217. *Id.*

transferring parts of the population out of the occupied territory.²¹⁸ Under Article 8(2)(a)(vii), moreover, the prosecution must demonstrate the suspects' awareness of the factual circumstances that established the protected status of children under the Geneva Conventions of 1949.²¹⁹

The deportation and indoctrination of children is disturbingly reminiscent of the re-education, brainwashing, and mistreatment that ethnolinguistically Ukrainian people suffered during the reign of the Russian Empire.²²⁰ Reports indicate that at least 20,000 children were removed from their homes, thrust into another country, forced to take on a new citizenship, and raised to be assimilated into a different ethnolinguistic group.²²¹ The sheer number of children kidnapped under the policies permitted by Putin and Lvova-Belova make the alleged war crimes particularly heinous.²²² In addition, it is highly likely that they knew such a massive deportation and adoption scheme was in violation of Russia's obligations to protect a vulnerable segment of the civilian population.²²³

Putin and Lvova-Belova were also aware of the protected status of children because both Ukraine and Russia are parties to the Geneva Conventions and its first additional Protocol of 1977,²²⁴ which acknowledges the particular vulnerability of children and sets down rules according them special protection during the conduct of hostilities, especially in cases of detention and internment.²²⁵ Given Russia's succession to the USSR's treaty obligations, Lvova-Belova, Putin, and all Russian government officials should be aware of their inherited agreements on the rules of armed conflict.²²⁶ Targeting children as inviolable targets for deportation schemes amounts to breaking an inviolable agreement.²²⁷ The Russian officials knew or should have known about the special protections accorded to children.²²⁸ Universal jurisdiction over the Russian leaders is thus justified under *erga omnes* obligations arising from treaties, such as the Geneva Conventions and other legal authorities of

218. ICC, Elements of Crimes, *supra* note 201, at 15.

219. *Id.* at 11.

220. Sasha Vakulina, *Detained, Deported, and Brainwashed: How Moscow 'Russifies' Ukrainian Children*, Euronews (Dec. 5, 2024), <https://www.euronews.com/my-europe/2024/12/05/detained-deported-and-brainwashed-how-moscow-russifies-ukrainian-children>.

221. Bisset, *supra* note 146.

222. Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

223. Malcolm Langford & Geir Ulfstein, *Russia Has Violated the Fundamental Rules of International Law. What Are the Consequences?*, THE PEACE RESEARCH INSTITUTE OSLO, (Mar. 2, 2022), <https://www.prio.org/comments/704>.

224. Human Rights Watch (HRW), *Russia/Ukraine: International Law, Occupation, Armed Conflict, and Human Rights* (Feb. 23, 2022), <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights>.

225. ICRC, *Legal Protection of Children in Armed Conflict*, *supra* note 71, at 1–2.

226. ICRC, *Russian Federation, Succession to International Humanitarian Law Treaties*, ICRC Casebook, available at <https://casebook.icrc.org/case-study/russian-federation-succession-international-humanitarian-law-treaties> (last visited Feb. 26, 2026).

227. *Id.*

228. *Id.*

international humanitarian law.²²⁹ These form a part of the *jus cogens* and rules on the protection of children and other civilians, which legitimize adjudication aimed at preventing and punishing serious war crimes and grave breaches of international law during an international armed conflict.²³⁰

Universal jurisdiction over the alleged war crime is justified because targeting a vulnerable class of victims who receive special protection under international law offends all humankind.²³¹ Letting leaders launch special military operations that involve child kidnapping undermines the rationale upon which the modern international criminal law regime is founded—a deep concern for how “millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”²³² In the best interests of a specially protected, vulnerable part of the civilian population, states should exercise universal jurisdiction to hear all the evidence and confirm whether Putin and Lvova-Belova committed war crimes against Ukrainian children.²³³

IV. COMMAND RESPONSIBILITY & UNIVERSAL JURISDICTION OVER CRIMES OF AGGRESSION: WHY WAR MUST BE REPLACED BY LAW

The Honorable Benjamin Ferencz famously said that the primary purpose and ideal of the ICC was to replace the rule of force with the rule of law.²³⁴ Indeed, replacing war with law is a natural consequence of effective crime prevention and consistent adjudication of every act of aggression.²³⁵ Ferencz’s vision of a world entirely governed by the international criminal law regime focuses on individual accountability for conduct that deserves punishment, allowing the threat of judicial retribution to function as a deterrent to political leaders who act against the interests of peaceful coexistence and civilized relations among all states.²³⁶ In the same vein as the requirement that a crime of aggression must be committed by a state’s political leadership,²³⁷ command responsibility is a doctrine that is concerned solely with the criminal accountability of superiors.²³⁸ Superior responsibility is necessary for “the good functioning of any chain of command,” as a “guarantee that standards of humanitarian law” are respected within said chain, as “a form of criminal liability,” and as “a way to prevent the commission of crimes” by all individuals who constitute the structure.²³⁹

229. ERIKA DE WET, *Jus Cogens* and Obligations *Erga Omnes*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, ch. 4, § 4.1 (Dinah Shelton, ed., 2013).

230. *Id.*

231. *Universal jurisdiction over war crimes – Factsheet*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (May 21, 2021), <https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet>.

232. Rome Statute, *supra* note 30, Preamble.

233. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

234. WEISBORD, *supra* note 116, at 53.

235. DEGUZMAN, *supra* note 7, at 116–17.

236. WEISBORD, *supra* note 116, at 53, 58.

237. *Id.* at 3.

238. METTRAUX, *supra* note 107, at 18.

239. *Id.*

First articulated during the Nuremberg Trials, the doctrine of command responsibility elucidates the IMT's approach to the acts included in the broad scope of crimes against peace.²⁴⁰ Superior responsibility is ultimately premised on the understanding that the punishment of high-ranking officials serves the global interests of crime prevention better than the prosecution of lower-ranking individuals.²⁴¹ The exercise of universal jurisdiction over the wanted Russian officials is justified based on command responsibility for crimes of aggression, war crimes, and crimes against humanity, especially as seen in their manipulation of the machinery of the state and failure to investigate or punish inferior officers.²⁴² Both universal jurisdiction over aggression and command responsibility for any atrocity committed through inferior officers serve to protect the peace, security, and well-being of the world.²⁴³ Political leaders who use military power to wreak havoc, only to go unpunished, threaten to spread the injustice that the international criminal law regime exists to eliminate.²⁴⁴

A. Command Responsibility for War Crimes & Crimes Against Humanity: Internationally Unlawful Policy & the Failure to Prevent or Punish Inferior Officers

The doctrine of command responsibility maps onto the military operations ordered by the Russian high command against Ukraine.²⁴⁵ Command responsibility applies to the conduct of the four military officials if: (i) they acted jointly or through others; (ii) issued orders to commit the crimes; or (iii) failed to exercise proper control over the forces under their command.²⁴⁶ In the first scenario, the four military officials may have acted either jointly, by taking steps to direct aerial and naval machinery and attack the civilian population together, or through other persons, including individual soldiers, who may not be criminally responsible themselves.²⁴⁷ The second scenario assumes that the four military officials outright ordered or otherwise induced the commission of offenses, issuing commands that foreseeably caused war crimes and inhumane acts.²⁴⁸ The third scenario applies command responsibility to the four military officials even if they were ignorant but should have known that forces were about to commit such crimes, holding them accountable for failure to exercise effective command and control properly.²⁴⁹ Even if any of the four

240. *Indictments from the Nuremberg Trials*, *supra* note 22, at 5, 53.

241. METTRAUX, *supra* note 107, at 15.

242. Nizinski, *supra* note 25, at 349.

243. Rome Statute, *supra* note 30, at Preamble.

244. *Id.*

245. ICC, Situation in Ukraine, *supra* note 1.

246. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 2; *see also* ICRC, *Customary International Humanitarian Law: Rule 152 – Command Responsibility for Orders to Commit War Crimes*, <https://ihl-databases.icrc.org/ru/customary-ihl/v2/rule152>.

247. Rome Statute, *supra* note 30, at art. 25(3)(a).

248. *Id.* at art. 25(3)(b).

249. Rome Statute, *supra* note 30, at art. 28(1)(a); *see also* Charter of the International Military Tribunal for the Far East, *supra* note 23, at art. 5 (depicting winning arguments of the Tokyo War Crimes tribunal regarding command responsibility of Japanese political leaders for

military officials can plausibly deny having effective control, command responsibility nevertheless applies if these superiors failed to take all necessary and reasonable measures within their powers to prevent or repress the commission of the crimes.²⁵⁰ In the third scenario, moreover, the four military officials' failure to submit the matter to the competent authorities for investigation and prosecution supports the finding of command responsibility.²⁵¹

In terms of command responsibility, Putin in particular is accused of either failing to properly exercise control over civilian and military subordinates who committed the acts, or allowing for the commission of the war crimes by persons under his effective authority.²⁵² There are also reasonable grounds to believe that Lvova-Belova bears individual criminal responsibility for the aforementioned crimes, as the forcible transfer and deportation of Ukrainian children from territories occupied by Russian troops falls under the prerogative of her office as Commissioner for Children's Rights.²⁵³ Lvova-Belova is accused of committing the war crimes directly, jointly with others, or through others, suggesting more proximate participation in the deportation scheme.²⁵⁴ Putin's failure to take all necessary and reasonable measures within his power to prevent or repress the commission of the forcible deportations, or at least submit the matter to the competent judicial authorities for investigation and prosecution, indicates command responsibility for the war crimes.²⁵⁵ If Putin knew, should have known, or otherwise consciously disregarded information which clearly indicated that his forces were deporting Ukrainian children in droves at the behest of Lvova-Belova, then he may be criminally responsible as her superior and commander-in-chief.²⁵⁶

In the absence of sufficient international cooperation to arrest and transfer the suspects for prosecution at the ICC, universal jurisdiction should be exercised over all plausible allegations that implicate command responsibility and crimes of aggression because such state action threatens international peace, global security, and territorial integrity.²⁵⁷ The most responsible actors are those military and political leaders responsible for the tragedies that resulted from the Russo-Ukrainian War. This demands adjudication anywhere in the world precisely because these leaders were in the best position to avoid international warfare, prevent illegal armed

failing to investigate or punish atrocities committed by troops).

250. Rome Statute, *supra* note 30, 28(2)(c); *see also* Int'l Crim. Just. Initiative, *Introduction to IHL: Command Responsibility*, GEORGETOWN L. (Feb. 4, 2026), <https://www.law.georgetown.edu/icji/blog/introduction-to-ihl-command-responsibility/>.

251. ICRC, *Customary International Humanitarian Law: Rule 153 – Command Responsibility for Failure to Prevent, Repress or Report War Crimes*, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule153>.

252. ICC, Situation in Ukraine: ICC Judges Issue Arrest Warrants, *supra* note 4.

253. *Id.*

254. Rome Statute, *supra* note 30, at art. 25(3)(a).

255. *Id.* at arts. 28(1)(b), 28(2)(c).

256. *Id.* at art. 28(1)(a) & 28(2)(a)–(b).

257. *See* Carrie McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, 28 J. OF CONFLICT & SEC. L. 203, 214–15 (2001) (discussing how crimes against peace attract universal jurisdiction); *see also* U.N. Charter, *supra* note 150, at arts. 1(1), 2(4).

conflict, and restrain the conduct of inferior officers.²⁵⁸ To avoid a dangerous culture of impunity, no government official or head of state should be allowed to invade another country, wage a war of aggression, or occupy foreign territory, for such acts offend all humankind by posing a clear and present danger to the well-being of the world.²⁵⁹ To replace the rule of force with the rule of law globally, the scope of universal jurisdiction must extend over crimes of aggression and all state-sponsored atrocities. National courts may adjudicate the cases of the accused based on universal jurisdiction.

V. CONCLUSION

The exercise of universal jurisdiction by a national court or special tribunal complements the efforts of the ICC to bring Russian military and political leaders to justice. Adjudication by the Court has many advantages, including firmer procedural grounds to establish territorial jurisdiction over serious international crimes and extensive jurisprudence on the automatic waiver of sovereign immunity.²⁶⁰ However, given the Court's inability to secure sufficient international cooperation and judicial assistance from States Parties, arrest and transfer remains highly unlikely.²⁶¹

Instead, states should allow their courts to exercise universal jurisdiction over atrocities or core international crimes—war crimes, crimes against humanity, genocide, and aggression—which every government has the right, if not the obligation, to prevent and punish.²⁶² States should take the wanted officials into custody for prosecution or conduct *in absentia* trials that develop comprehensive evidentiary records even if the accused fail to appear before a national court.²⁶³ Additional plausible allegations of atrocities committed by the wanted officials involve claims of command responsibility, which is a mode of vicarious liability for offenses perpetrated through any inferior officer.²⁶⁴ There is sufficient evidence to justify the issuance of the arrest warrants, and calls for states and special tribunals to prosecute the suspects based on the principle of universal jurisdiction over atrocities.²⁶⁵ The challenges and risks of exercising universal jurisdiction call on states who apply the doctrine to (1) comply with the principle of legality based on implementing legislation that expressly carries on the progeny of Nuremberg; and (2) remain legitimate by advancing global interests of crime prevention through norm expression and deterrence, instead of primarily serving national interests or permitting a biased and unfair process to judge the accused.²⁶⁶ Implementing

258. WEISBORD, *supra* note 116, at 3.

259. *Israel v. Eichmann*, *supra* note 102, at ¶¶ 16, 75.

260. *Prosecutor v. Putin*, *supra* note 46, at ¶¶ 24, 35; *see also* Rome Statute, *supra* note 30, at arts. 12(3), 27(2).

261. *Prosecutor v. Putin*, *supra* note 46, at ¶ 33.

262. Bassiouni, *supra* note 19, at 68.

263. Rabinovitch, *supra* note 44, at 526–29.

264. METTRAUX, *supra* note 107, at 15.

265. *Airstrikes and Atrocities: A Legal Assessment of Russia's Aerial Campaign in Ukraine*, *supra* note 203, at iii.

266. DEGUZMAN, *supra* note 7, at 140; *see also* Scharf, *supra* note 84, at 379, 388.

legislation should thus reflect a broad grant of authority for national courts to proceed to trial on plausible allegations of war crimes, crimes against humanity, and crimes against peace, including claims of liability under theories of command responsibility for generally waging a war of aggression.²⁶⁷ Universal jurisdiction statutes that provide for the prosecution of atrocities advance the rule of law by expressing the norm that no sovereign who commits a serious international crime can get away with impunity, and successful trials based on universal jurisdiction deter the recrudescence of heinous offenses and military operations that result in terrible consequences. Overall, national courts exercising universal jurisdiction to prosecute the wanted officials of the Russian high command on behalf of the global community is a much-needed step to end impunity for war criminals who hide behind the veil of sovereignty.²⁶⁸ Immunity, after all, does not mean impunity, and no one is above the law.²⁶⁹

267. Amnesty Int'l., *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AI Index IOR 53/004/2011, 1 (Oct. 2011), <https://www.amnesty.org/en/documents/ior53/004/2011/en>.

268. Eboe-Osuji, *supra* note 99, at 233–39, 254.

269. Hollis et al., *supra* note 126, at 368, 654, 727, 1182, 1211, 1235; *see also* ICJ, *Arrest Warrant*, *supra* note 147, at 21, 26, 30.

THE NEW INTERPRETATION OF CONSENT: HOW INDIA COULD IMPLEMENT AN EFFECTIVE AFFIRMATIVE CONSENT STANDARD

Muskan Malhotra

I. INTRODUCTION

“Rape is one of the most egregious violations of human dignity and bodily autonomy, standing at the intersection of violence, power, and the oppression of individual liberty.”

— Anushri Joshi, *Rape Laws in India: A Detailed Analysis under Section 375 IPC and Section 63 of the Bharatiya Nyaya Sanhita*¹

According to India’s National Bureau of Crime’s most recent report in 2022, women across India reported 63,498 cases of rape and 6,735 cases of attempt to rape.² Of the reported cases, only 27.4% went to trial and ended in conviction.³ Despite public outcry and the high prevalence of rape,⁴ the conviction rate for rape remains lower than that for murder, kidnapping, and other violent crimes.⁵ 35% of women in India between the ages of fifteen and forty-nine suffer sexual or physical violence by a husband or partner, which is 8% higher than the world average for intimate partner violence.⁶ Despite the high prevalence of intimate partner violence,

1. Anushri Joshi, *Rape Laws in India: A Detailed Analysis under Section 375 IPC and Section 63 of the Bharatiya Nyaya Sanhita*, 2023, LEGAL SERV. INDIA, <https://www.legalserviceindia.com/legal/article-18509-rape-laws-in-india-a-detailed-analysis-under-section-375-ipc-and-section-63-of-the-bharatiya-nyaya-sanhita-2023.html> (last visited Nov. 14, 2025).

2. NAT’L CRIME REC. BUREAU, *IPC Crimes against Women (Crime Head-wise & State/UT-wise)* 2022, <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701935180TABLE3A2.pdf> (last visited Jan. 24, 2025). Cf. Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKLEY J. GENDER L. & JUST. 29, 54, 58–59 (2019) (explaining rape is a difficult crime to report and that some incidents of rape, especially those in which the victims know the perpetrator, remain severely underreported).

3. Nikita Jain, *In India’s Rape Culture No Woman is Safe*, THE CITIZEN (Aug. 22, 2024, 23:15 ET), <https://www.thecitizen.in/in-depth/in-indias-rape-culture-no-woman-is-safe-1061189>.

4. See FP EXPLAINERS, *A Rape Every 16 Minutes: The Shocking Numbers on Crimes Against Women in India*, FIRSTPOST (Aug. 14, 2024, 12:14 PM IST), <https://www.firstpost.com/explainers/a-rape-every-16-minutes-the-shocking-numbers-on-crimes-against-women-in-india-13804414.html> (reporting 51 rape cases occur in India per hour); Saikat Kumar Bose, *Why Kolkata Doctor’s Rape-Murder Case Went to CBI: Court’s Tough Remarks*, NDTV (Aug. 14, 2024, 2:47 PM IST) (documenting the nationwide protests over the rape and murder of a 31-year-old doctor at a state-run hospital).

5. Jain, *supra* note 3.

6. India, WORLD BANK GRP., <https://genderdata.worldbank.org/en/economies/india> (last visited Jan. 24, 2025).