

# Courtroom as War Crime: Ukraine's Military Justice Struggle

RACHEL E. VANLANDINGHAM\*

*This essay explores the risk of courtroom war crimes occurring during the Russia v. Ukraine armed conflict: war crimes committed by failing to provide fair trials. While Russia's battlefield atrocities have received great attention—as has the use of international criminal tribunals in response—what hasn't received sufficient regard is the nascent Ukrainian quest for accountability for Russian war crimes within Ukraine's domestic criminal courts. This essay sets the scene for such discussion by contextualizing it within international humanitarian law, specifically the Geneva Conventions' procedural war crime of unfair trial, the Conventions' assimilation doctrine, and their presumption of military courts.*

*Punishing Russian soldiers in Ukrainian custody for war crimes considered grave breaches is a treaty obligation that brings with it specific fair trial requirements; failure to meet such standards is itself a war crime. That is, the prosecution of Russian soldiers for war crimes in legally deficient Ukrainian proceedings would constitute grave breaches of the Geneva Conventions. Such war crimes would trigger allies' own accountability treaty obligations as well as undermine Ukraine's strategic legitimacy. Related, the prosecution of Russian prisoners in proceedings different than those used to prosecute Ukrainian soldiers also is violative of international humanitarian law, implicating allies' "ensure respect" treaty duty. Finally, Ukraine's failure to ensure prosecution of its service members' own war crimes would likewise constitute a war crime.*

*The danger of flawed Ukrainian domestic judicial proceedings or potential impunity for its own soldiers' battlefield crimes is minor compared to Russia's massive illegality in pursuit of this conflict. Yet what happens (or doesn't) in Ukrainian courtrooms is worthy of attention. While substantially descriptive, this essay is the first to directly connect domestic criminal justice systems to the efficacy of international humanitarian law with a critical eye towards military justice. It outlines the normative argument that robust and fair civilian*

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\* Rachel E. VanLandingham, Lt Col, USAF (ret.) is Irwin R. Buchalter Professor of Law, Southwestern Law School, Los Angeles, California; Visiting Professor of Law at the UCLA School of Law; and President, National Institute of Military Justice. She thanks the *Ohio State Law Journal* for the honor of participating in their February 2023 symposium, *The Ukraine War and Its Legal Ramifications*; this article benefited from discussions during that event. The author also thanks Brittany-Mawuena O. Teiko and Christopher Hanson, Southwestern Law School Class of 2024, for their excellent research and citation support.

*criminal justice systems, as opposed to military justice, better support the aims of international humanitarian law. Applied to Ukraine, just and transparent Ukrainian civilian judicial proceedings for both Russian and Ukrainian war crimes will best reinforce Ukraine's position as a prominent guardian of the rule of law. Allied support and resources for such accountability measures should be considered normative and practical necessities.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	1298
II. GENEVA CONVENTIONS' ACCOUNTABILITY FRAMEWORK.....	1306
A. <i>The Enforcement Trifecta's Central Feature: The Duty to Prosecute</i> .....	1309
1. <i>Prosecutorial Mandate</i> .....	1309
2. <i>Enabling Legislation and Prosecute or Extradite</i> .....	1312
3. <i>Fair Trial Guarantees</i> .....	1314
4. <i>Other (non-grave breach) Violations</i> .....	1316
B. <i>Grave Breaches</i> .....	1317
1. <i>Special List of War Crimes</i> .....	1317
2. <i>Courtroom War Crime</i> .....	1318
III. MILITARY JUSTICE & PROSECUTION OF WAR CRIMES .....	1322
A. <i>The Geneva Conventions' Military Courts Preference</i> .....	1322
B. <i>Modern Military Justice in Context</i> .....	1326
C. <i>Ukraine</i> .....	1330
IV. CONCLUSION.....	1333

## I. INTRODUCTION

The scope of war crimes committed by Russia over the course of its ongoing war against Ukraine is shockingly broad in number and barbarity. Such crimes include intentional as well as indiscriminate targeting of civilians and civilian property; torture and executions of Ukrainian prisoners; the forcible transfer of civilians; and the systematic rape and executions of civilians, with the latter doubling as crimes against humanity.<sup>1</sup> The breadth and depth of serious

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<sup>1</sup> See Press Release, United Nations Off. of the High Comm'r Hum. Rts., War Crimes, Indiscriminate Attacks on Infrastructure, Systematic and Widespread Torture Show Disregard for Civilians, Says UN Commission of Inquiry on Ukraine (Mar. 16, 2023), <https://www.ohchr.org/en/press-releases/2023/03/war-crimes-indiscriminate-attacks-infrastructure-systematic-and-widespread> [<https://perma.cc/5GX9-FKVT>] (detailing types and numbers of alleged war crimes by Russian forces fighting in Ukraine); see also Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on Ukraine, at 5–13, U.N. Doc. A/HRC/52/62 (2023).

violations of the laws and customs of war<sup>2</sup> by Russian armed forces in Ukraine since February 2022 continue to place great strain on the post-World War II international legal regime designed to regulate armed conflict and prevent such atrocities.<sup>3</sup>

This strain is felt around the world given that the 1949 Geneva Conventions—which form the centerpiece of international humanitarian law—place a legal duty on *all* State Parties not only to prevent and then suppress such crimes when they do occur, but to punish those involved in their commission.<sup>4</sup> Cognizant of the grave harm to the international rule of law that Russian war crimes of this scale pose, and in fulfillment of their duty to punish perpetrators, the western international community’s primary focus regarding Russian war crimes to date has been on international accountability mechanisms<sup>5</sup> plus evidence collection and preservation.<sup>6</sup> The western world’s discussion of which

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<sup>2</sup>The international legal paradigm regulating the conduct of hostilities and the treatment of war victims during armed conflict bears several labels. These include international humanitarian law (IHL), the law of armed conflict (LOAC), and the law of war (LOW). See *What Is IHL?*, INT’L COMM. OF THE RED CROSS (Sept. 18, 2015), <https://www.icrc.org/en/document/what-ihl> [<https://perma.cc/6B66-K3RN>].

<sup>3</sup>There have been sustained public calls for Russian war crimes accountability. See, e.g., *Hold Russia Accountable for Its War Crimes*, WASH. POST (July 2, 2023), <https://www.washingtonpost.com/opinions/2023/07/02/russia-war-crimes-ukraine/> [<https://perma.cc/8VY9-FMY6>].

<sup>4</sup>See *infra* Part II.A (explaining that this punishment also extends to those who order as well as fail to prevent such crimes).

<sup>5</sup>See, e.g., Carrie McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine*, 28 J. CONFLICT & SEC. L. 203, 211 (2023) (proposing the establishment of an ad hoc international tribunal to prosecute crimes of aggression committed against Ukraine); see also Robbie Gramer,  *Holding Russia Accountable for War Crimes Is Harder Than It Looks* (May 19, 2023), <https://foreignpolicy.com/2023/05/19/ukraine-russia-war-crimes-icc-putin-justice-atrocities-tribunal/> [<https://perma.cc/UVE6-9DZ7>] (noting that “every Western leader has broadly agreed that they must find a way to hold Russia accountable”); *Ukraine: International Centre for the Prosecution of Russia’s Crime of Aggression Against Ukraine Starts Operations Today*, EUR. COMM’N (July 3, 2023), [https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-international-centre-prosecution-russias-crime-aggression-against-ukraine-starts-operations-2023-07-03\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-international-centre-prosecution-russias-crime-aggression-against-ukraine-starts-operations-2023-07-03_en) [<https://perma.cc/M4D4-D95X>] (announcing the commencement of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA)); *Hold Russia Accountable for Its War Crimes*, *supra* note 3; IRYNA MARCHUK & ALOKA WANIGASURIYA, AM. SOC’Y OF INT’L L., THE ICC AND THE RUSSIA-UKRAINE WAR 3–4 (July 2022), [https://www.asil.org/sites/default/files/ASIL\\_Insights\\_2022\\_V26\\_I4.pdf](https://www.asil.org/sites/default/files/ASIL_Insights_2022_V26_I4.pdf) [<https://perma.cc/5PUV-2PED>] (highlighting the ICC’s investigation into the situation in Ukraine).

<sup>6</sup>See, e.g., *Ukraine: Preserving Evidence of War Crimes as Ukraine Retakes Its Territory Key for Victims of War Crimes*, AMNESTY INT’L (Nov. 11, 2022), <https://www.amnesty.org/en/latest/news/2022/11/ukraine-preserving-evidence-of-war-crimes-as-ukraine-retakes-its-territory-key-for-victims-of-war-crimes/> [<https://perma.cc/HDQ6-CV2T>] (“[P]reserving evidence of war crimes must be a priority. This is essential to ensure comprehensive accountability and enable the ongoing International Criminal Court

judicial forums—such as the International Criminal Court (ICC) whose prosecutor is already investigating Russian conduct in Ukraine<sup>7</sup>—are best suited for eventually administering justice for Russian war crimes and for prosecuting corollary Russian atrocity crimes such as the crime of aggression,<sup>8</sup> is important and necessary.

However, insufficient public attention has been paid to domestic Ukrainian prosecutions of war crimes, both of their own service members and of Russian soldiers in detention as prisoners of war in Ukraine.<sup>9</sup> While the commission of

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investigation and other national and international justice mechanisms to prosecute perpetrators of the most serious crimes under international law committed on Ukrainian soil.”); *see also* Press Release, U.S. Dep’t of State, Supporting Justice and Accountability in Ukraine (Feb. 18, 2023), <https://www.state.gov/supporting-justice-and-accountability-in-ukraine/> [<https://perma.cc/9DRC-9UE7>] (emphasizing the importance of preserving evidence of war crimes).

<sup>7</sup> *See* Karim A.A. Khan, Prosecutor, Int’l Crim. Ct., Statement on the Situation in Ukraine (Feb. 28, 2023) (transcript available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> [<https://perma.cc/V8PJ-4VXL>]) (“I am satisfied that there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine.”); *see also* Aubrey Allegretti, *ICC Launches War Crimes Investigation Over Russian Invasion of Ukraine*, *GUARDIAN* (Mar. 3, 2022), <https://www.theguardian.com/world/2022/mar/03/icc-launches-war-crimes-investigation-russia-invasion-ukraine> [<https://perma.cc/56UW-5MKG>] (“Karim Khan, the chief prosecutor for the international criminal court (ICC), said he would begin work ‘as rapidly as possible’ to look for possible crimes against humanity or genocide committed in Ukraine.”); Karim A.A. Khan, Prosecutor, Int’l Crim. Ct., Statement on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms. Maria Lvova-Belova (Mar. 17, 2023) (transcript available at <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> [<https://perma.cc/8Y6C-8W2A>]) (“[T]he Pre-Trial Chamber has confirmed that there are reasonable grounds to believe that President Putin and Ms Lvova-Belova bear criminal responsibility for the unlawful deportation and transfer of Ukrainian children.”).

<sup>8</sup> *See generally* Oona A. Hathaway, Maggie Mills & Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, *JUST SEC.* (May 5, 2023), <https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/> [<https://perma.cc/3WST-HF4R>] (detailing the legal pathways to creating a special tribunal to try the crime of aggression).

<sup>9</sup> *See* Chris Jenks, *Ukraine Symposium—The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 1*, *LIEBER INST.: ARTICLES OF WAR* (June 22, 2022), <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-1/> [<https://perma.cc/585R-2L2W>] (noting the apparent lack of due process guarantees in several Ukrainian domestic war crimes prosecutions of Russian prisoners of war; his two short blog pieces seemingly are the exception to lack of public attention that proves the rule). *But see* Chris Jenks, *Ukraine Symposium—The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWs—Part 2*, *LIEBER INST.: ARTICLES OF WAR* (June 24, 2022) [hereinafter Jenks, *Ukraine Symposium Part 2*], <https://lieber.westpoint.edu/atrocity-crimes-advisory-group-ukrainian-prosecutions-russian-pows-part-2/> [<https://perma.cc/3KGA-U7T2>]; Masha Gessen, *The Prosecution of Russian*

publicly reported war crimes by members of the Ukrainian armed forces is incomparably small in contrast to the vast number allegedly committed by the Russian military—to date, reportedly only a handful of alleged incidents versus thousands—the issue of Ukrainian criminal justice nonetheless is deeply important.<sup>10</sup> Ukrainian accountability mechanisms regarding both 1) its own service members’ criminality, particularly their war crimes; and 2) war crimes by Russian prisoners committed prior to their Ukrainian detention, as well as offenses committed during detention, deserve sustained international attention and support. Such processes will have effects on strategic legitimacy and are connected to the efficacy of international humanitarian law.

Regarding such effects, first, Ukraine’s fierce defense against unlawful Russian aggression is not only a war of physical destruction. It is also a struggle over the international rule of law. Russia blatantly disregarded the United Nations Charter’s legal prohibition against the use of force for territorial gain in its large-scale invasion of its neighbor in February 2022.<sup>11</sup> This first-order violation has since been followed by Russia’s illegal conduct of the war itself, consisting of systematic and widespread violations of the most fundamental precepts of international humanitarian law,<sup>12</sup> rules specifically refined and strengthened in the aftermath of the second World War to prevent such large-

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*War Crimes in Ukraine*, NEW YORKER (Aug. 1, 2022), <https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine> [<https://perma.cc/7WDP-HPVJ>] (detailing Ukrainian domestic prosecutorial efforts regarding Russian atrocity crimes committed in Ukraine).

<sup>10</sup> See Amanda Macias, *Russia Has Committed More Than 65,000 War Crimes in Ukraine*, *Prosecutor General Says*, CNBC (Feb. 1, 2023), <https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html> [<https://perma.cc/BT2P-PAVE>] (noting that Russia has committed over 65,000 war crimes in Ukraine as of early 2023); see also Mark Kersten, *Opinion, Ukraine Must Investigate Alleged War Crimes by Its Forces*, AL JAZEERA (Dec. 16, 2022), <https://www.aljazeera.com/opinions/2022/12/16/ukraine-must-investigate-alleged-war-crimes-by-its-forces> [<https://perma.cc/4TPJ-9FV2>] (outlining allegations of war crimes by Ukrainian armed forces against Russian prisoners of war).

<sup>11</sup> Beth Van Schaack, *Ambassador-at-Large, Off. of Glob. Crim. Just., Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression* (Mar. 27, 2023) (transcript available at <https://www.state.gov/ambassador-van-schaacks-remarks/> [<https://perma.cc/5WZM-3MTR>]) (“There is no question that Russia’s aggression against Ukraine is a manifest violation of the UN Charter.”); see also Oleksandra Drik, *New Tribunal Announced to Prosecute Russian Crime of Aggression in Ukraine*, VISEGRAD INSIGHT (Mar. 8, 2023), <https://visegradinsight.eu/new-tribunal-announced-to-prosecute-russian-crime-of-aggression-in-ukraine/> [<https://perma.cc/NZ29-WBN9>] (“Although self-evident and undeniable, the crime of aggression Russia has committed against Ukraine currently cannot be prosecuted and adjudicated—no institution in the world can do that.”); *A New Court to Prosecute Russia’s Illegal War?*, INT’L CRISIS GRP. (Mar. 29, 2023), <https://www.crisisgroup.org/global-ukraine/new-court-prosecute-russias-illegal-war> [<https://perma.cc/2J8N-L8AV>] (outlining the benefits and procedures needed to create a new tribunal to prosecute Russia for its crime of aggression).

<sup>12</sup> See Hum. Rts. Council, *supra* note 1, at 4–15.

scale, avoidable suffering in war.<sup>13</sup> Such gross disregard for the law governing the resort to force on the international stage, coupled with that regulating the conduct of war and treatment of its victims, poses a serious challenge to the viability of the entire post-war international legal architecture that has thus far helped prevent World War III.<sup>14</sup>

Because Ukraine's defensive war against Russia is a war of ideas as well as of physical violence—ideas largely concerning the utility of law on the global stage—Ukraine's adherence to the rules it is fighting to protect is of paramount importance. Ukraine receives massive international support largely because it represents the side fighting not only for itself but also for preservation of the international rule of law, including the law of war.<sup>15</sup> The North Atlantic Treaty Organization (NATO) member states, led by the United States, are pouring billions of dollars into Ukraine's defense, in part because they recognize the war is one for both Ukrainian sovereignty and for the greater international legal order.<sup>16</sup> Russia is also aware of this strategic legal context and is fighting its armed conflict against Ukraine in the information space as well as on the physical battlefield; it produces misinformation and propaganda to delegitimize Ukraine by portraying it as the law-breaker, and Russia as the law's valiant protector.<sup>17</sup>

While always important, Ukraine's adherence to international humanitarian law (the law of war) is therefore even more critical. Violations will not only be exploited by Russia in the cognitive battle space. Serious violations of the law

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<sup>13</sup> See *infra* Part II.

<sup>14</sup> See Oona A. Hathaway, *How Russia's Invasion of Ukraine Tested the International Legal Order*, BROOKINGS (Apr. 3, 2023), <https://www.brookings.edu/articles/how-russias-invasion-of-ukraine-tested-the-international-legal-order/> [<https://perma.cc/T3BB-32YJ>]; see also Rachel E. VanLandingham, *Captured in the News: Prisoners' Words and Images as Lawful Weapons of War*, 73 SYRACUSE L. REV. 551, 552 (2023) (highlighting that the Russian aggression against Ukraine is “not simply a war of survival as a nation-state for Ukraine. It is also a frontal assault against the rules- based international legal order”).

<sup>15</sup> See, e.g., Martin Armstrong, *The Countries Sending the Most Military Aid to Ukraine*, STATISTA (Feb. 24, 2023), <https://www.statista.com/chart/27278/military-aid-to-ukraine-by-country/> [<https://perma.cc/DPP2-VV5L>] (indicating that 40 countries have pledged military support to Ukraine); see also CHRISTINA L. ARABIA, ANDREW S. BOWEN & CORY WELT, CONG. RSCH. SERV., IF12040, U.S. SECURITY ASSISTANCE TO UKRAINE (2023) (“The Biden Administration has committed more than \$40 billion in security assistance since the start of the 2022 war.”).

<sup>16</sup> See Armstrong, *supra* note 15; ARABIA, BOWEN & WELT, *supra* note 15.

<sup>17</sup> Vera Bergengruen, *Inside the Kremlin's Year of Ukraine Propaganda*, TIME (Feb. 22, 2023), <https://time.com/6257372/russia-ukraine-war-disinformation/> [<https://perma.cc/K9VG-AX65>] (discussing how Russia has used the media to spread disinformation about Ukraine); see also *Russia's War on Ukraine: Six Months of Lies, Implemented*, U.S. DEP'T OF STATE (Aug. 24, 2022), <https://www.state.gov/disarming-disinformation/russias-war-on-ukraine-six-months-of-lies-implemented/> [<https://perma.cc/HDJ6-7ZT5>] (“Over the past six months, Russia's disinformation and propaganda machine has used Putin's false claims as a blueprint for campaigns aiming to deny Ukraine its right to independence and even existence.”).

of war could undermine Ukraine's legitimacy as the party representing the rule of law, degrading international support as well as potentially jeopardizing Ukraine's future NATO membership.<sup>18</sup> However, it is not the sporadic commission of Ukrainian war crimes that would have the most deleterious effects, assuming such offenses remain quite isolated.

Rather, it is *how* the government of Ukraine handles the inevitable war crimes committed by its own forces that will either enhance its power or undermine Ukrainian legitimacy if poorly managed. This is also true regarding how Ukraine handles internal criminal prosecutions of Russians; indeed, this dynamic is even stronger regarding the domestic proceedings and supporting mechanisms Ukraine used and will use to prosecute Russian war crimes. Flawed domestic legal proceedings against Russian prisoners—those failing to provide the specific fair trial guarantees as mandated by the Geneva Conventions, a war crime itself—will erode Ukraine's actual and perceived commitment to the rule of law.<sup>19</sup> Such degradation could chip away at international support.

Second, international humanitarian law, as reflected in the Geneva Conventions, their Protocols, and customary international law, recognizes that war crimes are not completely preventable and that accountability for such violations is integral to the paradigm's efficacy.<sup>20</sup> Hence it is a state's fulfillment of its treaty duty to punish those serious violations of international humanitarian law labeled grave breaches—and punish fairly, according to fundamental fair trial and due process principles—that most tangibly symbolizes commitment to the rule of law and the international order the rule of law supports.<sup>21</sup> Simply put, domestic accountability for war crimes through fair judicial proceedings is a structural linchpin of the Geneva Conventions' protections and of the entire body of international humanitarian law, the legal paradigm dedicated to reducing suffering in war.

Part II of this essay overviews the Conventions' accountability framework, focusing on the Conventions' grave breaches' prevention, suppression, and punishment obligations. It emphasizes the legal duty to prosecute grave breaches, noting that *domestic* prosecutions of grave breaches committed by a

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<sup>18</sup> See generally Jim Garamone, *Leaders Agree to Expedite Ukraine's NATO Membership*, U.S. DEP'T OF DEF. (July 11, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3455199/leaders-agree-to-expedite-ukraines-nato-membership/> [<https://perma.cc/72Q8-WJ66>] (discussing the plan that will ultimately bring Ukraine closer to NATO).

<sup>19</sup> U.S. failures in this arena—from its flawed Guantanamo Bay military commissions, to President Trump's pardoning war criminals, to the failure to hold government torturers to account, to the lack of accountability for civilian casualties—have degraded the appearance of U.S. commitment to the rule of law and hence U.S. legitimacy in this sphere. Ukraine cannot afford the same moral failings. See generally Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309 (2020) (describing U.S. loss of legitimacy in accountability for war crimes).

<sup>20</sup> See *infra* Part II.B.1.

<sup>21</sup> See *infra* Part II.A.3.

state's armed forces or its civilians is the paradigmatic norm with universal jurisdiction functioning as a fallback. It highlights the fair trial and fundamental due process guarantees required in prosecutions of grave breaches.<sup>22</sup> Part II also explains how failure to provide such guarantees is itself considered a grave breach, a specialized type of war crime that triggers the trifecta of repression obligations.

Part III details how the Geneva Conventions regulate their envisioned paradigmatic domestic prosecutions of war crimes. It explains how the Conventions favor military courts for prosecution of enemy prisoners' war crimes per the assimilation principle.<sup>23</sup> Civilian courts can be used for such prosecution only if domestic law creates jurisdiction for prosecution of the detaining power's own service members in those courts and seemingly only if such jurisdiction is actually utilized.<sup>24</sup> Part III unpacks the related requirement that whatever criminal proceedings are used to prosecute a State's own personnel for war crimes, the *same system* must be used to prosecute enemy prisoners for their war crimes, at least in an international armed conflict.<sup>25</sup> Equal justice is required regarding grave breaches for enemy and citizen alike.<sup>26</sup>

Part III briefly places these Convention obligations into context with regard to military justice systems, highlighting the modern trend away from such courts (a trend fueled by recognition of their structural deficiencies such as their lack of independence and impartiality). It notes the increasing turn to civilian

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<sup>22</sup> See *infra* Part II. So do relevant human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and, relevant for Ukraine, the European Convention on Human Rights, though judicial guarantees in both are subject to derogation in time of war. See *infra* Part III; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 14 (Dec. 16, 1966); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 243.

<sup>23</sup> See *infra* Part III.A.3 (noting that military courts are required for trying civilian internees during occupation).

<sup>24</sup> See *infra* Part III.A.3.

<sup>25</sup> The U.S. military commissions at Guantanamo Bay are seemingly violative of this requirement, though whether the assimilative principle has reached customary international law status and is thus applicable to non-international armed conflicts is unclear. See generally David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903 (2014) (outlining the many flaws associated with the military commissions). Instead of respecting the protective value animating this requirement, the United States' use of exceptional and substandard military commission judicial proceedings to exclusively prosecute its global war on terror enemies undermines international humanitarian law while failing to meet human rights obligations. See *id.*

<sup>26</sup> See Elizabeth Santalla Vargas, *Military or Civilian Jurisdiction for International Crimes? An Approach from Self-Interest in Accountability of Armed Forces in International Law*, in *MILITARY SELF-INTEREST IN ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES* 401, 411 (Morten Bergsmo & Song Tianying eds., 2015), <http://www.legal-tools.org/doc/d1e368/pdf/> [<https://perma.cc/H3JT-DHUK>] (noting that Article 84 of the Third Geneva Convention is designed to "ensure that prisoners of war are tried by the same jurisdiction that is also competent with respect to members of the armed forces of the detaining power").



criminal justice systems for disposition of criminal misconduct by those in uniform, including for their war crimes.<sup>27</sup> Numerous states, including Ukraine, dismantled their military justice systems over the last few decades.<sup>28</sup> Such states instead often rely exclusively on their civilian criminal justice systems to dispose of criminal misconduct by service members, even when such criminal misconduct constitutes a war crime.<sup>29</sup>

Before concluding, this essay touches on a related issue facing Ukraine: whether to re-establish military courts to more effectively maintain good order and discipline in a military that has ballooned in size since the initial Russian aggression.<sup>30</sup> Importantly, it asks what the implications of doing so would be (of re-establishing military courts) on Ukraine's international humanitarian law obligations. It partially answers this question by pointing out that the same tribunals used for prosecuting Ukrainian service members' war crimes must also be used for prosecutions of Russian prisoner of war. Hence if military tribunals are to be established, care must be taken that they are structured and resourced to fully meet the fair trial and other due process guarantees mandated by the Geneva Conventions, plus notice paid to the growing recognition that military tribunals are increasingly viewed as unable to best meet (or ever fully comply with) such standards.

This essay concludes by noting that the only "successful" prosecutions of Russian war crimes to date have been in Ukrainian civilian courts. They are "successful" in that the trials resulted in convictions; the satisfactory provision of fair trial guarantees in such proceedings is outside the scope of this essay, though there has been muted criticism.<sup>31</sup> As Ukraine considers re-establishing its military justice system while it continues to prosecute Russian prisoners for war crimes, the time is ripe to deeply consider the issues highlighted herein.

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<sup>27</sup> DANIELA COTELEA ET AL., THE ROLE OF MILITARY COURTS ACROSS EUROPE: A COMPARATIVE UNDERSTANDING OF MILITARY JUSTICE SYSTEMS 13–14 (May 2021), <https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf> [<https://perma.cc/8J87-7KWZ>] (describing the diversity of military justice systems across Europe).

<sup>28</sup> See *infra* Part III; see also COTELEA ET AL., *supra* note 27, at 10 (noting that military justice systems differ significantly across Europe).

<sup>29</sup> The restriction of military courts to military members only (excluding civilians) preceded the trend to abolish separate military justice systems altogether. See COTELEA ET AL., *supra* note 27, at 16–17. The related trend, based on the functionality argument, that military courts' *ratione materiae* be limited to only offenses arising from military duties. See Vargas, *supra* note 26, at 402, 412 (analyzing refinement of military courts' personal as well as subject matter jurisdiction and arguing that war crimes, along with crimes against humanity, be excluded from military courts).

<sup>30</sup> See *Ukraine Military Size 1992–2023*, MACROTRENDS <https://www.macrotrends.net/countries/UKR/ukraine/military-army-size> [<https://perma.cc/JTH4-LKHL>].

<sup>31</sup> See Jenks, *Ukraine Symposium Part 2*, *supra* note 9 (noting the apparent lack of fair trial guarantees in the few Ukrainian war crimes prosecutions of Russian prisoners of war since February 2022).

Sufficient structural safeguards should be in place within the Ukrainian state apparatus to fulfill Ukraine's responsibilities to prevent, suppress and punish grave breaches and to suppress other violations of international humanitarian law. These safeguards should include not only sufficient training, clear reporting and investigative policies and capabilities. A robust system of fair criminal prosecutions is vital, whether in military or civilian criminal justice proceedings. Such a system must be structured and able to provide fair justice for war crimes for enemy and citizen alike.

States parties to the Conventions—all of Ukraine's allies—have both a pragmatic as well as a legal interest in Ukraine's observance of international humanitarian rules regarding the suppression and punishment of war crimes.<sup>32</sup> As the International Committee of the Red Cross (ICRC) has noted, “the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally.”<sup>33</sup> Particularly given the legal-strategic context of the Russian war of aggression against Ukraine—as one regarding the viability of the international rule of law, including international humanitarian law—helping Ukraine best meet its legal obligations in the war crimes accountability arena is paramount.

## II. GENEVA CONVENTIONS' ACCOUNTABILITY FRAMEWORK

Codified in an effort to prevent a reoccurrence of the systematic and widespread battlefield and prisoner camp atrocities of World War II, the 1949 Geneva Conventions built upon their predecessors to establish comprehensive rules of conduct regarding behavior during armed conflict.<sup>34</sup> Of special import for this essay, the Conventions, in an attempt to ensure compliance with their prescriptions, include an accountability framework regarding violations of their

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<sup>32</sup> See INT'L COMM. ON THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶ 152 (Knut Dörmann et al. eds., 2021) [hereinafter ICRC 2020 COMMENTARY ON GC III] (“The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be.”).

<sup>33</sup> *Id.*

<sup>34</sup> See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

regulatory provisions.<sup>35</sup> The Convention drafters recognized that compliance with the Conventions' rules, as is true for all legal regimes, requires punitive consequences for violations of the same; rules require enforcement.<sup>36</sup> Hence accountability measures were included in the 1949 treaties in acknowledgement that international humanitarian law's enforcement mechanisms up to that point had been insufficient.<sup>37</sup>

As the International Military Tribunal at Nuremberg noted following World War II, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>38</sup> In practical terms, punishment is necessary as part of the *jus in bello* legal regime<sup>39</sup> because that body of law cannot achieve its primary objective of reducing suffering in war if its provisions are not followed.<sup>40</sup> Law that is not enforced is law that is ineffective, particularly during war when the most intense of emotions and

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<sup>35</sup> See Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUDS. 343, 346 n.14 (1977) ("At the 1949 Diplomatic Conference the Netherlands delegate (Mouton) took the position, one that is particularly applicable to a code dealing with the law of war, that 'an international convention had no strength without the possibility to enforce it, had no strength without sanctions.'"); see also Corn & VanLandingham, *supra* note 19, at 320–21 (outlining vital need for accountability for war crimes violations as means of ensuring general compliance).

<sup>36</sup> OLIVER WENDELL HOLMES JR., THE COMMON LAW 28 (ReadaClassic 2010) (1881) ("[T]he purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses . . . . [I]ts purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men.").

<sup>37</sup> See Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 554 (2006) (highlighting that prior to World War II, "[w]hile the law of war developed significantly over the course of the two Hague Conferences, mechanisms to enforce that law did not keep pace with it," and that "[s]tates could try their own nationals for war crimes, but they rarely did so").

<sup>38</sup> *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

<sup>39</sup> *Jus in bello* are the laws and customs of war regulating the means and methods of war and outlining protections for those caught up in war, also known as international humanitarian law or the law of war or armed conflict; *jus ad bellum* refers to the legal legitimacy regarding resort to armed force on global stage. See generally U.S. DEP'T OF DEF., LAW OF WAR MANUAL 39 (2016) [hereinafter DOD LAW OF WAR MANUAL] (defining these terms while including within "the law of war" both *jus ad bellum* and the *jus in bello*).

<sup>40</sup> See generally U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (remarking with regard to the rule of law that, "all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency").

dynamics are at play.<sup>41</sup> As has been noted regarding the current armed conflict between Russia and Ukraine,<sup>42</sup> without sufficient accountability for the many violations of international humanitarian law perpetrated during its long bloody months, primarily by Russia, this body of law will continue to fail to meet its goals.<sup>43</sup>

Acknowledging this reality, the Conventions' accountability framework places responsibilities on all States Parties to prevent war crimes, suppress them where and when discovered, and finally to punish them through criminal prosecution, as provided in the following sections.<sup>44</sup> Furthermore, to both supplement and help implement the compliance responsibility triad of war crimes prevention, suppression and punishment, the Conventions link combatant immunity—the legal privilege to not be prosecuted for violent acts of war, such as killing enemy belligerents and destroying enemy military objectives—to the concept of “responsible command.”<sup>45</sup>

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<sup>41</sup> See MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, *Violations by Individuals in HOW DOES LAW PROTECT IN WAR?* 44 (3d ed. 2011) (“The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that [international humanitarian law] is law.”).

<sup>42</sup> *Holding Russian Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Human Rights Watch), <https://www.hrw.org/news/2023/04/19/statement-human-rights-watch-holding-russian-kleptocrats-and-human-rights-violators> [<https://perma.cc/UD2V-NMJE>] (noting that work needs to be done “to strengthen the global system of accountability, address through investigation and, as appropriate, prosecution of serious crimes under international law”).

<sup>43</sup> See generally Corn & VanLandingham, *supra* note 19, at 329 (analyzing the nexus between accountability for war crimes and legitimacy); Donald J. Guter, John D. Hutson & Rachel VanLandingham, *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SEC. (May 24, 2019), <https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code> [<https://perma.cc/XE6U-4U3U>] (“Just and fair consequences for violations safeguard overall fidelity to the law, contributing to the good order and discipline of military units.”).

<sup>44</sup> See GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC III, *supra* note 34, art. 129; GC IV, *supra* note 34, art. 146; see also INT’L COMM. OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (1988), [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0365.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0365.pdf) [<https://perma.cc/EUS8-VWZJ>] (“Military commanders must be watchful to prevent breaches of the Conventions and the Protocol, will suppress them and, if necessary, report them to the competent authorities.”).

<sup>45</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (requiring military commanders to prevent, suppress, and report violations of the Conventions and Protocols and obligating, *inter alia*, that state parties require “any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the

This doctrine provides that combatant immunity is conferred<sup>46</sup> only upon belligerents fighting under members of the military designated as commanders who are legally responsible for the prevention, suppression and punishment of serious violations of international humanitarian law and the Conventions more specifically.<sup>47</sup> The connection between combatant immunity and responsible command strongly underscores the centrality of processes regarding war crimes accountability to the Conventions' overall regulatory and normative scheme; this nexus underscores the dynamic that legitimacy of fighting is tied to legitimacy of war crimes accountability mechanisms.<sup>48</sup>

### A. *The Enforcement Trifecta's Central Feature: The Duty to Prosecute*

#### 1. *Prosecutorial Mandate*

The 1949 Geneva Conventions' "enforcement trifecta"<sup>49</sup> includes the following primary components of its compliance paradigm: (1) the delineation of the most serious violations of the Conventions as grave breaches; (2) the establishment of the obligation, by all States Party, to enact domestic criminal legislation with which to fulfill the separate obligation to punish perpetrators of the Conventions' list of grave breaches; and (3) the creation of an *aut dedere aut judicare* "surrender or judge" obligation that requires all States Party to search for and criminally prosecute those alleged to have committed grave breaches or transfer them to a willing Party.<sup>50</sup> Supplementing this enforcement

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Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof"); *see also* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 8, 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3550 (Yves Sandoz et al. eds., 1987) (noting that at the troop level, "everything depends on commanders").

<sup>46</sup> *See* GC III, *supra* note 34, arts. 1, 4 (outlining requirements for prisoner of war status). International humanitarian law has explicitly linked combatant immunity to responsible command since 1899. *See id.*; Hague Convention with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II] (entered into force September 4, 1900); Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention IV] (entered into force Jan. 26, 1910).

<sup>47</sup> *See* Geoffrey S. Corn, Opinion, *Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command*, 96 INT'L REV. RED CROSS 901, 904 (2014) (analyzing the legal concept of responsible command and highlighting that "[p]reparing a military unit to execute its combat function within the bounds of IHL is therefore an inherent expectation of responsible command").

<sup>48</sup> *See id.* at 906.

<sup>49</sup> Corn & VanLandingham, *supra* note 19, at 320–21 (using "enforcement trifecta" to categorize the three primary components of the four Geneva Conventions' grave breaches regime).

<sup>50</sup> *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5085 ("The obligations to enact legislation providing effective penal sanctions (paragraph 1) and to initiate the investigation and prosecution of alleged offenders suspected of having committed or ordered

trichotomy is the separate obligation to suppress all *other* violations of the Conventions outside of those labeled as grave breaches.<sup>51</sup>

The core component of this accountability regime is the duty to prosecute imposed on States Party.<sup>52</sup> Prior to the 1949 Geneva Conventions, no treaty had ever imposed a prosecutorial requirement to punish individuals in the parties' domestic criminal courts.<sup>53</sup> The other components of the grave breaches regime, such as listing grave breaches and requiring domestic legislation to carry out the prosecutorial duty,<sup>54</sup> are naturally in support of this key mandate. For example, while the specific delineation of what constitutes grave breaches has its own symbolic value, its primary utility lies in grave breaches' tripwire effect: their commission triggers the duty to prosecute.<sup>55</sup> To carry out this duty, States Party need domestic legislation providing war crimes, proceedings, and jurisdiction.<sup>56</sup>

As this essay emphasizes, States Party need judicial (as well as investigative) mechanisms to fulfill this prosecutorial duty. As explained below and in Part II.B, the Conventions recognize that these judicial mechanisms must meet particular standards to be fair, effective, and legal; if they do not, a separate grave breach is manifest. That is, a State Party can commit a grave breach in its

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the commission of grave breaches, regardless of their nationality (paragraph 2) were designed to provide a watertight mechanism which would ensure the effective prosecution of alleged perpetrators of serious violations of the Conventions.”).

<sup>51</sup> See GC III, *supra* note 34, art. 129 (“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”); see also GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC IV, *supra* note 34, art. 146 (repeating the identical duty to suppress all acts other than grave breaches).

<sup>52</sup> The Conventions' duty to prosecute requires sufficient evidence to prosecute; this mandate considers that domestic criminal procedural rules, such as the requirement for probable cause prior to prosecution, will operate. ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5127. However, if such evidence does exist, this obligation eliminates prosecutorial discretion and leaves two choices: to prosecute or extradite to a State Party that will. *Id.* ¶¶ 5128, 5087, 5125.

<sup>53</sup> Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 819–20 (2009) (detailing the history of the grave breaches regime and noting in pertinent part that: “[t]he grave breaches regime of the 1949 Geneva Conventions represented the first treaty-based provision for an unconditional universal criminal jurisdiction applicable to all the states parties to the treaty in question. None of the earlier Geneva Conventions or other previous conventions on the laws of war in force in 1949 had expressly mandated the criminalization of violations of their articles in the first place, let alone specify that the states parties were to vest their courts with jurisdiction over such violations on the basis of universality”).

<sup>54</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5104.

<sup>55</sup> INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION III, art. 129, ¶ 1 (Jean S. Pictet ed., 1960) [hereinafter ICRC 1960 COMMENTARY] (“The penal sanctions to be provided will be applicable to persons who have committed or ordered to be committed a grave breach of the Convention.”).

<sup>56</sup> See *id.* ¶ 2.

attempt to hold others accountable for grave breaches if the State Party fails to provide required fair trial guarantees in its judicial accountability proceedings.

The centrality and importance of the Conventions' duty to prosecute, and hence criticality of corresponding judicial mechanisms to carry out this duty, cannot be overstated. Referred to as the Conventions "repression" of grave breaches, the term repression refers to the "prohibition, prosecution, and adjudication" of the serious violations of the Geneva Conventions known as grave breaches.<sup>57</sup> This grave breaches regime, long considered a remarkable advancement in enforcement of international humanitarian law, not only clearly lists what violations of the Conventions require prosecution.<sup>58</sup> The Conventions, as highlighted above, *require* prosecution or extradition of these named offenses.<sup>59</sup> And not only prosecution or extradition of those suspected of committing grave breaches; one of the reasons that make the grave breaches regime revolutionary is its requirement of prosecution by States Party regardless of nationality and irrespective whether the State Party is a party to the international armed conflict in which the grave breach occurred.<sup>60</sup>

That is, the Conventions adhere to the universality principle, thus requiring the establishment of universal jurisdiction.<sup>61</sup> Thus to fulfill their prosecutorial duty, States Party must (and for the most part have)<sup>62</sup> establish domestic

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<sup>57</sup> See Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 785 (1995) (describing "the repression—the prohibition, prosecution, and adjudication—of grave breaches of the Conventions"); see also *Repression of Breaches*, INT'L COMM. OF THE RED CROSS, [https://casebook.icrc.org/a\\_to\\_z/glossary/repression-breaches](https://casebook.icrc.org/a_to_z/glossary/repression-breaches) [<https://perma.cc/YQU8-K994>].

<sup>58</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5084 ("In 1949, the system of repression contained in the Geneva Conventions (hereinafter referred to as 'the grave breaches regime') was a remarkable innovation in the law regulating international armed conflict.").

<sup>59</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 129 (noting that prior to the 1949 Conventions, "[s]tates were left entirely free to punish or not acts committed by their own troops against the enemy, or again, acts committed by enemy troops, in violation of the laws and customs of war. In other words, repression depended solely on the existence or non-existence of national laws repressing the acts in question").

<sup>60</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5130 ("[U]niversal jurisdiction must also be provided for in national legislation, to ensure that any State Party, and not only States party to an armed conflict, is able to exercise its jurisdiction over alleged offenders regardless of their nationality.").

<sup>61</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 129 ("The obligation on each State to enact the legislation necessary implies that such legislation should extend to any person who has committed a grave breach, whether a national of that State or an enemy.").

<sup>62</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5131 ("Subsequent practice has shown that States Parties undoubtedly understand Article 129 as providing for universal jurisdiction. More than 115 national laws have extended this form of jurisdiction to the list of grave breaches."). *But see id.* ¶ 5132 (noting that many states have universal jurisdiction in principle while conditioning prosecution on the accused's presence in their territory).

criminal laws to prosecute those alleged to have committed grave breaches.<sup>63</sup> Such domestic jurisdiction applies regardless whether a traditional basis for jurisdiction exists, such as territoriality or nationality.<sup>64</sup> Article 49 of the First Convention, Article 50 of Second Convention, Article 129 of the Third Convention, and Article 146 of the Fourth Convention highlight prosecution “regardless of nationality” in order “to give all States Parties the means to prevent impunity and to deny safe haven to alleged perpetrators of grave breaches.”<sup>65</sup>

## 2. *Enabling Legislation and Prosecute or Extradite*

Article 49 of the First Convention, Article 50 of Second Convention, Article 129 of the Third Convention, and Article 146 of the Fourth Convention provide in relevant part that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of the 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in

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<sup>63</sup> The United States did not enact its GC III Article 129 domestic penal legislation until 1986, and even then it did not enact universal jurisdiction, given that the 1986 War Crimes Act (18 U.S.C. § 2441) required either nationality or passive personality jurisdictional nexus. It was not until this year, 2023, that Congress, responding to domestic and international demands for accountability for Russian war crimes, amended 18 U.S.C. § 2441 in its “Justice for War Crimes Act” to apply U.S. federal criminal jurisdiction to named war crimes without any jurisdictional nexus, except for requiring the offender be in the territory of the United States. *See* S. 4240, 117th Cong. (2022); *see also* Todd Buchwald, *Unpacking New Legislation on US Support for the International Criminal Court*, JUST SEC. (Mar. 9, 2023), <https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court/> [<https://perma.cc/PT6R-922G>] (chronicling evolution in U.S. war crimes legislation).

<sup>64</sup> *See* O’Keefe, *supra* note 53, at 811–12 (defining universal jurisdiction and noting that it applies even in the lack of territoriality, nationality, passive personality and the protective principle); *see also* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5129 (“[U]niversal jurisdiction, has been defined as ‘criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.’” (quoting PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (Stephen Macedo ed., 2001))).

<sup>65</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5130; *see also* ICRC 1960 Commentary, *supra* note 55, art. 129 (noting that the experts who drafted the first text of the article believed that the “universality of jurisdiction in cases of grave breaches would justify the hope that such offences would not remain unpunished”).



accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>66</sup>

A few additional points follow regarding the obligations to 1) enact domestic legislation and 2) prosecute or extradite (the below point regarding the military versus civilian nature of required domestic judicial proceedings is explicated further in Part III). First, these provisions do not specify what type of criminal law or type of judicial system the required domestic legislation must establish for grave breaches.<sup>67</sup> The provision leaves it up to States Party to decide how to incorporate grave breaches into their criminal law; notably, it leaves to states whether to utilize military tribunals instead of civilian courts.<sup>68</sup> Indeed, parties such as the United States failed until 1986 to enact *any* new domestic legislation in fulfillment of its 1949 treaty obligation out of the belief that its military criminal code governing courts-martial and military commissions already fulfilled this requirement.<sup>69</sup>

Given that the Conventions do not provide a war crimes penal code,<sup>70</sup> States Party have used a variety of methods, based on their existing laws and traditions, to implement this requirement for legislation outlining effective penal sanctions.<sup>71</sup> Perhaps due to such wide variety in type and quality of such regimes, scholars and the International Committee of the Red Cross have long rightly criticized many parties' enabling legislative frameworks as undeveloped.<sup>72</sup> Despite continuing concern that many statutory regimes fail to provide for the "effective penal sanction" of grave breaches (and, importantly, for those who order them)<sup>73</sup> as mandated—concern reflected in establishment

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<sup>66</sup> GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC III, *supra* note 34, art. 129; GC IV, *supra* note 34, art. 146.

<sup>67</sup> See Knut Dörmann & Robin Geiß, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7 J. INT'L CRIM. JUST. 703, 707–10 (2009).

<sup>68</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5107 ("The implementing legislation ought to provide for penal sanctions that are appropriate and can be strictly applied. Penal sanctions, as opposed to disciplinary ones, will be issued by judicial institutions, be they military or civilian, and will usually lead to the imprisonment of the perpetrators, or to the imposition of fines. Because of their seriousness, imprisonment is widely recognized as a central element in punishing grave breaches and other serious violations of humanitarian law.").

<sup>69</sup> See Corn & VanLandingham, *supra* note 19, at 335–36, 36 n.101 (detailing history of U.S. War Crimes Act); see also *supra* note 63 and accompanying text.

<sup>70</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3557 ("The inclusion of the 'principle of assimilation' in Article 82 reveals that the drafters of the Third Convention did not intend to establish 'a code of penal laws or criminal proceedings' applicable to prisoners of war.").

<sup>71</sup> *Id.* ¶¶ 5113–18 (detailing the variety of options for implementing legislation).

<sup>72</sup> See generally Dörmann & Geiß, *supra* note 67.

<sup>73</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5101 ("[T]he adopted version of Article 129 extends the penal responsibility of the person committing a grave breach to whoever ordered the breach to be committed, a welcome improvement on the Stockholm

of international tribunals such as the International Criminal Court (ICC)—the grave breaches regime favors national prosecution.<sup>74</sup> Indeed, “the Rome Statute has not removed but rather reaffirmed the primacy of national prosecution” of grave breaches.<sup>75</sup> The preamble of the ICC’s governing Rome Statute reflects that court’s status as one of last resort, emphasizing that, ““that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;”<sup>76</sup> the complementarity doctrine operationalizes this national prosecution primacy for grave breaches and other atrocity crimes.<sup>77</sup>

Another point regarding the first two obligations found in Article 129, GC III and the other three Conventions’ corresponding articles is that the obligation to “search for” those alleged to have committed or ordered grave breaches and to “bring such persons . . . before its own courts” includes an obligation to investigate such allegations.<sup>78</sup> This requires procedures and mechanisms for evidence collection: “[i]n addition, the obligations contained in Article 129(2) also imply that a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either it itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction.”<sup>79</sup>

### 3. Fair Trial Guarantees

The grave breaches regime does not end with the prosecute or extradite obligation; it also lays a floor for minimum fair trial guarantees during grave breaches prosecutions, a floor which States Party cannot go below.<sup>80</sup> As detailed below in Part II.B, while silent on type of enabling domestic criminal law for grave breaches, the Conventions are quite vocal regarding the fundamentals of the ensuing judicial prosecutions.<sup>81</sup> Specifically, following the prosecute or

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draft.”); *see also id.* ¶ 5120 (noting that state practice has also recognized that those not only ordering but also “assisting in, facilitating or aiding and abetting the commission of such crimes” possess liability for grave breaches, as well as are “criminally responsible for planning or instigating their commission”).

<sup>74</sup> *See* Dörmann & Geiß, *supra* note 67, at 711.

<sup>75</sup> *Id.* at 706.

<sup>76</sup> Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

<sup>77</sup> *See also* Dörmann & Geiß, *supra* note 67, at 718 (also noting that the ICC Statute “has thus added an important incentive for states to ensure that they are at least capable and ready to prosecute offenders nationally on an equal footing as the ICC”).

<sup>78</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5126 (“The obligations . . . must provide in its national legislation for the mechanisms and procedures to ensure that it can actively search for alleged offenders, *make a preliminary inquiry into the facts* and, when so warranted, submit any such cases to the appropriate authorities for prosecution” (emphasis added)).

<sup>79</sup> *Id.* ¶ 5137.

<sup>80</sup> *See id.* ¶ 5134.

<sup>81</sup> *See id.* ¶¶ 5165–68.

surrender provision, Art. 129, GC III (as well as its kindred articles in all three other conventions), in referring to those accused of grave breaches, provides that:

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.<sup>82</sup>

Such procedural protections are required for grave breach prosecutions to be legitimate, and thus contribute to fair accountability for such crimes in direct support of the goal of compliance with the Conventions. The willful failure to provide such fundamentals in domestic criminal prosecutions of grave breaches of protected persons is itself a grave breach, indeed, it constitutes the only procedural such offense, as discussed in the following section.<sup>83</sup> As the grave breaches regime trial safeguards requirement stipulates, all the fair trial guarantees (found in the Conventions as well as AP I, Article 75) required for judicial criminal proceedings against protected persons for misconduct committed during detention, are also mandated for grave breaches prosecutions.<sup>84</sup> Hence even domestic prosecutions of a state's own service members for grave breaches are therefore required to provide these procedural safeguards.<sup>85</sup>

Related, the principle of assimilation in the juridical arena regarding prisoners of war supplements these fair trial guarantees; prisoners are to be prosecuted, as well as disciplined, according to the same rules applicable the detaining power's own service personnel.<sup>86</sup> They are typically to be prosecuted and sentenced by the same courts and same procedure as the detaining power's military members, in compliance with the principles of equality of combatants and non-discrimination; furthermore, there is a Convention preference for military over civilian courts.<sup>87</sup> Military courts extend to civilians as well; GC IV mandates that prosecutions of civilian internees in occupied territory be carried out only in military courts.<sup>88</sup> The Conventions' primacy of military

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<sup>82</sup> See GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC III, *supra* note 34, at art. 129; GC IV, *supra* note 34, art. 146.

<sup>83</sup> See *infra* Parts II.B, III.

<sup>84</sup> See *infra* Parts II.B, III.

<sup>85</sup> See GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC III, *supra* note 34, art. 129; GC IV, *supra* note 34, art. 146.

<sup>86</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3565 (“The principle of assimilation seeks to avoid prisoners of war being placed in a less favourable position than members of the armed forces of the Detaining Power. At a minimum, the Detaining Power is obliged to apply the same legal safeguards to prisoners of war as are afforded to members of its own forces.”).

<sup>87</sup> GC III, *supra* note 34, arts. 84, 102.

<sup>88</sup> GC IV, *supra* note 34, art. 66.

courts for grave breaches and other prosecutions, and the related concept of assimilation in the juridical arena, is further explored in Part III.

#### 4. *Other (non-grave breach) Violations*

Finally, in addition to the specific grave obligations to (1) prosecute or extradite regardless of nationality and (2) pass enabling domestic legislation, the same four Convention articles that establish the driving grave breaches prosecutorial duty also require that “[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined.”<sup>89</sup> This specific duty of states to suppress all violations of the Conventions’ outside those listed as grave breaches was thought at the time of the Conventions’ drafting to require that states establish repression mechanisms similar to those for grave breaches.<sup>90</sup> That is, parties are to ensure criminal punishment of other Convention violations when such violations are of similar magnitude as the misconduct specifically delineated as grave breaches.

As stated in the 1960 Commentaries to the 1949 Conventions, “[o]ther grave breaches of the same character as those listed in Article 130 can easily be imagined. This shows that all breaches of the Convention should be repressed by national legislation.”<sup>91</sup> Such legislation is to include a “general clause providing that other breaches of the Convention will be punished by an average sentence, for example imprisonment for from five to ten years . . . [t]his general clause should also provide that minor offences can be dealt with through disciplinary measures.”<sup>92</sup> Similar to the grave breaches’ enabling domestic legislation requirement, the Conventions do not specify whether the criminal justice component of parties’ suppression regimes for other violations must be military or civilian systems.<sup>93</sup> Furthermore, while domestic criminalization of

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<sup>89</sup> See GC I, *supra* note 34, art. 49; GC II, *supra* note 34, art. 50; GC III, *supra* note 34, art. 129; GC IV, *supra* note 34, art. 146.

<sup>90</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 129 (quoting draft provision, “[t]he legislation of the Contracting Parties shall prohibit all acts contrary to the stipulations of the present Convention”).

<sup>91</sup> *Id.* (providing that “there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed, and only in the second place administrative measures to ensure respect for the provisions of the Convention”).

<sup>92</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 130 3(b); see also *id.* art. 129 (“[T]he authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.”).

<sup>93</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5163 (“Many States Parties have enacted criminal legislation punishing the commission of a list of war crimes, which goes well beyond the list of grave breaches.”); see also *id.* ¶ 5162.

war crimes varies widely amongst states, most approaches use the same system for both non-grave breach war crimes and grave breaches.<sup>94</sup>

## B. *Grave Breaches*

### 1. *Special List of War Crimes*

Each of the four Conventions includes a list of grave breaches pertaining to those persons protected by that particular Convention.<sup>95</sup> Punishing these specific offenses is, in theory, central to the efficacy of international humanitarian law: “[t]he system of grave breaches, established in the Conventions, is the focal point of the enforcement mechanism of international humanitarian law in general and of the Conventions in particular.”<sup>96</sup> While these grave breaches are war crimes—serious violations of international humanitarian law—not all war crimes are considered grave breaches.<sup>97</sup> This is important because only grave breaches trigger the Conventions’ clear obligation to punish such acts—the *aut dedere aut judicare* duty to prosecute or extradite to a State Party that will, and only grave breaches trigger the corresponding treaty obligation for States Party to create domestic legislation enabling such prosecution.<sup>98</sup> However, as noted immediately above in Part II.A, the Conventions do require repression—criminal prosecution—of other Convention violations that are akin to grave breaches, as well as disciplinary measures for minor violations, though not universal jurisdiction.<sup>99</sup>

The first two Conventions provide an identical list of crimes labeled as grave breaches when committed against the persons protected by their

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<sup>94</sup> See Dörmann & Geiß, *supra* note 67, at 711 (“[M]ost national jurisdictions make no distinction between grave breaches and war crimes. Rather, prosecution of grave breaches usually takes place within whatever model a state has adopted in relation to the prosecution of war crimes more generally.”).

<sup>95</sup> See GC I, *supra* note 34, art. 50; GC II, *supra* note 34, art. 51; GC III, *supra* note 34, art. 130; GC IV, *supra* note 34, art. 147; see also AP I, *supra* note 45, arts. 11, 85.

<sup>96</sup> Gross, *supra* note 57, at 785.

<sup>97</sup> See *id.* (“Grave breaches of the Conventions constitute serious violations of the very core of international humanitarian law.”).

<sup>98</sup> See *id.* at 791–92 (distinguishing grave breaches from other war crimes); see also DOD LAW OF WAR MANUAL, *supra* note 39, at 1088–89, ¶ 18.9.3; see also ICRC 1960 COMMENTARY, *supra* note 59, art. 130 (“If repression of grave breaches was to be universal, it was necessary to determine what constituted them. There are, however, violations which would constitute minor offences or mere disciplinary faults and as such they could not be punished to the same degree.”); ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5173 (“Grave breaches of the Geneva Conventions today form part of a complex set of crimes under international law, consisting of serious violations of international humanitarian law often referred to as war crimes . . . [they] are part of the wider category of serious violations of international humanitarian law that States are called upon to suppress . . . [t]hey remain ‘segregated from other categories of war crimes.’”).

<sup>99</sup> See *supra* Part II.A.

respective provisions.<sup>100</sup> The third and fourth, however, uniquely provide as grave breaches several non-violent acts or omission, the most relevant for this essay being the failure to provide fair trial guarantees. Specifically, the Fourth Convention, the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention or GC IV) adds a grave breach of deprivation of fair trial guarantees as well as that of compulsory service in hostile party's forces; it also adds "unlawful deportation or transfer or unlawful confinement of a protected person" and "taking of hostages" while including all other GC I's and GC II's grave breaches.<sup>101</sup>

The Convention Relative to the Treatment of Prisoners of War (the Third Convention, or GC III) adds the same two additional grave breaches dealing with compulsory military service of prisoners of war, and the failure to provide fair trial guarantees, as GC IV.<sup>102</sup> GC III's grave breaches provision furthermore omits the grave breach of excessive destruction of property found in the first, second and fourth conventions, naturally so given its subject matter of prisoners.<sup>103</sup> Article 130, GC III provides:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.<sup>104</sup>

## 2. Courtroom War Crime

The grave breach war crime most relevant to this essay's analysis is the last one listed above: the willful denial of the rights of a fair trial to a prisoner of war or civilian internee.<sup>105</sup> Such grave breach covers any trial of a person in one of GC III and IV's protected categories, and others as explained below, regardless of whether the criminal proceeding is for a war crime or for other criminal misconduct.<sup>106</sup> Given the numerous fair trial guarantees required for a fair and regular trial, this ostensibly single grave breach is actually several.<sup>107</sup>

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<sup>100</sup> GC I, *supra* note 34, art. 50; GC II, *supra* note 34, art. 51.

<sup>101</sup> GC IV, *supra* note 34, art. 147.

<sup>102</sup> GC III, *supra* note 34, art. 130.

<sup>103</sup> *Id.*; GC I, *supra* note 34, art. 50; GC II, *supra* note 34, art. 51; GC IV, *supra* note 34, art. 147 (listing as a grave breach, *inter alia*, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly").

<sup>104</sup> GC III, *supra* note 34, art. 130.

<sup>105</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 4076.

<sup>106</sup> AP I, *supra* note 45, art. 85.

<sup>107</sup> The Rome Statute uses almost verbatim language to provide the International Criminal Court war crime of denial of fair trial; it also provides an analogous crime for non-

“[T]he breach mentioned here can be split into a number of different offences, for example: making a prisoner of war appear before an exceptional court without notifying the Protecting Power, without defending counsel, etc.”<sup>108</sup>

While this grave breach can take many forms, a deprivation of a Convention-mandated procedural right does not automatically constitute a war crime. Violations of any one or more of these many procedural rights may or may not singly or cumulatively constitute the denial of a fair trial: “[j]udges will have to assess the seriousness of the denial of judicial guarantees in each case.”<sup>109</sup> That is, as the ICRC 2020 Commentary states: “[t]he material element of this grave breach is that the perpetrator deprived one or more prisoners of war of a fair and regular trial by denying their judicial guarantees as set down in the Convention.”<sup>110</sup> Thus it is not the denial of a trial right *per se* that is a grave breach; it is the denial of a fair and regular trial because of the *a priori* procedural denial, if that is indeed its effect, that constitutes the war crime. Furthermore, it is not simply fair trial rights that can lead to deprivation of a fair trial; it is construed more broadly as denial of judicial guarantees which include those associated with trial as well as “all those guarantees related to the criminal proceedings as a whole and their various stages.”<sup>111</sup>

The specific trial guarantees at issue are sprinkled throughout numerous Convention articles; for example, Art. 105, GC III lists numerous fair trial rights for the accused, and complements procedural safeguards included within Articles 82–108, GC III.<sup>112</sup> GC IV provides similar guarantees for civilian internees, who are required to be tried by regular military courts of the occupying power, with jurisdiction limited to offenses during occupation plus war crimes committed prior to it.<sup>113</sup> While Article 130, GC III and Article 147, GC IV’s grave breach language specifies failures to provide the rights “prescribed in this Convention,” these rights extend beyond those listed in those Conventions to at least<sup>114</sup> include those listed in Article 75, AP I.<sup>115</sup> This “mini

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international armed conflicts. See Rome Statute of the International Criminal Court, *supra* note 76, arts. 8(2)(a)(vi), 8(2)(c)(iv).

<sup>108</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 130.

<sup>109</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5284 (“The denial of one of the listed judicial guarantees may not necessarily amount to a denial of fair or regular trial.”).

<sup>110</sup> *Id.* ¶ 5280.

<sup>111</sup> Diletta Marchesi, *The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements*, 54 ISR. L. REV. 174, 183 (2021).

<sup>112</sup> ICRC 1960 COMMENTARY, *supra* note 55, art. 130; GC III, *supra* note 34, arts. 82–108.

<sup>113</sup> GC IV, *supra* note 34, arts. 70, 71–75, 126 (detailing fair trial rights).

<sup>114</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5168 (“Since 1949, the list of judicial guarantees has evolved through the development of both humanitarian and human rights law.”).

<sup>115</sup> Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK Y.B. U.N.L. 341, 374–75 (2003) (explaining that failure to provide judicial guarantees not

convention” repeats many of the Conventions’ fair trial rights while requiring that sentences and convictions only emanate from “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”<sup>116</sup> It also adds to the Conventions’ protections, in requiring the presumption of innocence.<sup>117</sup>

Importantly, AP I, Article 85(4)(e) ensures that Article 75 protections, when willfully deprived and that result in an unfair trial, fall under the rubric of grave breach, plus explicitly states that this grave breach can occur in the prosecution of all those covered by Article 85—meaning that willful deprivations of a fair trial are not only grave breaches when committed against prisoners of war and civilian internees.<sup>118</sup> They are also seemingly grave breaches when committed against *all* those in the hands of the enemy during international armed conflict when prosecuted in their courts, thus triggering the duty to prosecute that’s at the heart of the grave breaches regime.<sup>119</sup>

This AP I grave breach extension to include unfair trials of persons outside of GC III and IV’s narrow protected categories may seem trivial, given the paucity of grave breaches prosecutions by detaining powers (and of that small universe, most are of prisoners of war).<sup>120</sup> Yet the symbolic effect of labeling

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listed in the Conventions, such as the presumption of innocence, also can result in this grave breach).

<sup>116</sup> AP I, *supra* note 45, art. 75. Article 75 echoes GC III’s mandate that “[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized.” GC III, *supra* note 34, art. 84; *see also* GC IV, *supra* note 34, art. 71 (requiring “regular trial[s]”). The other mini-convention, Article 3 common to all four Conventions, reiterates this baseline requirement. *See* sources cited *supra* note 34, art. 3 (“[T]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

<sup>117</sup> AP I, *supra* note 45, art. 75.

<sup>118</sup> *Id.* art. 85; *see also* INT’L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3519 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1978) [hereinafter AP I COMMENTARY OF 1987] (noting that art 85(4)(e) brings AP I Article 75’s protections into the grave breach regime).

<sup>119</sup> AP I, *supra* note 45, art. 85 (referring to those protected by, *inter alia*, art. 45, AP I, which provides in pertinent part “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol,” while also referring to refugees and stateless persons in the hands of the detaining Party).

<sup>120</sup> *See* Prosecutor v. Kaing alias “Duch,” Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 7 (Sup. Ct. Chamber Feb. 3, 2012), <https://www.derechos.org/intlaw/doc/eccc1.html> [<https://perma.cc/FD36-T4E4>] (appeal of conviction in Extraordinary Chambers in the Courts of Cambodia for war crime of willful deprivation of fair trial). *See generally* Marchesi, *supra* note 111, at 180–81 (describing the two Extraordinary Chambers in the Courts of Cambodia cases involving the war crime of



unfair trials as grave breaches for a larger swath of persons is powerful. It is an important reminder that judicial mechanisms utilized to prosecute detained personnel, as well as those used to try members of an armed forces' own personnel (given the assimilation requirements detailed below in Part III.A), must adhere to the growing list of fundamental fair trial guarantees.<sup>121</sup>

Finally, it should be noted that the four grave breaches provisions in each of the Conventions, plus those found in Articles 11 and 85 of Additional Protocol I, provide an exclusive list of categories of grave breaches committed during international armed conflicts.<sup>122</sup> Treaty law does not explicitly include grave breaches for non-international armed conflicts, with no obligation to prosecute or extradite as found in the grave breaches regime discussed here.<sup>123</sup> However, various accountability pathways, including some with universal jurisdiction, have been created or extended by customary international law, international tribunal decisions, and domestic law, for serious violations of international humanitarian law committed during non-international armed conflicts.<sup>124</sup>

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denial of fair trial in international armed conflict context and the International Criminal Court 2019–2023 prosecution of Malian terrorist, Al Hassan, for “war crime of sentencing or execution without due process” during a non-international armed conflict).

<sup>121</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5282 (noting the evolving nature of fundamental fair trial guarantees, the deprivation of which could result in a grave breach).

<sup>122</sup> See *id.* ¶ 5173 (“They remain ‘segregated from other categories of war crimes’, as the list of grave breaches contained in the Geneva Conventions and Additional Protocol I is a limitative one which is only applicable in international armed conflicts.”); see also Gross, *supra* note 57, at 820 (highlighting the sense in which the GC’s list of grave breaches categories is exhaustive).

<sup>123</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5171 (noting the history behind and the current state of not extending the grave breaches regime to non-international armed conflicts). *But see* CHILE EBOE-OSUJI, INT’L CRIM. CT., ‘GRAVE BREACHES’ AS WAR CRIMES: MUCH ADO ABOUT . . . ‘SERIOUS VIOLATIONS’? 9, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf> [<https://perma.cc/LH2V-DKHD>] (arguing that grave breaches exist in non-international armed conflicts).

<sup>124</sup> GARY D. SOLIS, THE LAW OF ARMED CONFLICT 88 (3d ed. 2022) (“[There are] war crimes [and] grave breaches, in non-international [armed] conflicts.”); see also ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 5173 (“Grave breaches are part of the wider category of serious violations of international humanitarian law that States are called upon to suppress in *both* international and non-international armed conflicts.” (emphasis added)).

### III. MILITARY JUSTICE & PROSECUTION OF WAR CRIMES

#### A. *The Geneva Conventions' Military Courts Preference*

It is clear that the Conventions impose, *inter alia*, a strict prosecutorial duty regarding grave breaches.<sup>125</sup> These required prosecutions, carried out through judicial proceedings qualified to impose imprisonment, must comport with fair trial guarantees.<sup>126</sup> The Conventions' procedural rights are considered so vital to the efficacy of the grave breaches regime, as well as separately viewed as a human rights violation particularly harmful during war,<sup>127</sup> that willful failure to provide these fair trial rights is itself a grave breach that must be prosecuted.<sup>128</sup>

Distinct from the Conventions' numerous procedural safeguards designed to ensure fair trials is the issue of appropriate prosecutorial forum. On this point, the Conventions establish a clear jurisdictional presumption in favor of military courts, versus civilian tribunals.<sup>129</sup> Regarding prosecuting prisoners of war, military courts are indeed required, at least if the detaining power uses such courts to prosecute their own soldiers (which at the time of the Conventions' drafting, all relevant militaries did).<sup>130</sup> Specifically, the ICRC explains GC III, Article 82 as:

lay[ing] down the general rule that prisoners of war accused of an offence *must* be tried by military courts. By virtue of Article 102, prisoners of war must

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<sup>125</sup> O'Keefe, *supra* note 64, at 819–23 (detailing the history and criticality of the grave breaches regime).

<sup>126</sup> See ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶¶ 5107, 5167 (“The implementing legislation ought to provide for penal sanctions that are appropriate and can be strictly applied. Penal sanctions, as opposed to disciplinary ones, will be issued by judicial institutions, be they military or civilian, and will usually lead to the imprisonment of the perpetrators, or to the imposition of fines. Because of their seriousness, imprisonment is widely recognized as a central element in punishing grave breaches and other serious violations of humanitarian law.”).

<sup>127</sup> See Vargas, *supra* note 26, at 405 (“[Q]ualities of impartiality and independence lie at the core of accountability systems that are well regarded and trusted by public opinion.”). See generally James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT'L CRIM. JUST. 26, 29 (2007) (noting the host of international humanitarian law procedural safeguard mandates that were established “precisely in order to counter the understandable temptation to offer enemy prisoners lesser justice in exceptional circumstances”).

<sup>128</sup> See ICRC 1960 Commentary, *supra* note 55, art. 129 (noting the World War II practice of trying enemy soldiers according to special laws established after the fact, and that most such domestic war crimes prosecutions had not been seen as fair).

<sup>129</sup> See generally ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3600.

<sup>130</sup> See GC III, *supra* note 34, arts. 82, 102. *But see* Vargas, *supra* note 26, at 411 (sidelining the Conventions' penal sanctions provisions by claiming that “no indication or requirement is made as to the type of jurisdictional forum” in the grave breaches regime, which is a statement made in support of the author's general argument that civilian courts are superior for prosecution of both human rights violations and war crimes).

moreover be tried by the same military courts that have competence to try members of the armed forces of the Detaining Power accused of the same offence.<sup>131</sup>

A detaining power may utilize civilian courts to prosecute prisoners of war, but only if a member of its armed forces could, and would, be prosecuted for similar misconduct in that particular civilian court system.<sup>132</sup> In other words, prisoners of war are to “be tried by the same courts as members of the detaining State’s own forces.”<sup>133</sup> If that is civilian court for the particular offense the prisoner of war is facing, then they are to be tried in that identical forum as the detaining power’s service members. Not only must there be a legislative basis for trying the State’s own forces in civilian courts; it must be the practice of that State to use such a forum.<sup>134</sup>

GC III’s requirement to use military courts to prosecute prisoners of war both for offenses during detention as well as grave breaches committed prior to capture is originally based on reasons of function and non-discrimination.<sup>135</sup> GC III provides that prisoners of war are, while in detention, subject to the same regulatory regime as members of the detaining power’s armed forces.<sup>136</sup> This pragmatic arrangement, developed as the drafters could not reach agreement as to a penal code for prisoners and the reality that applying prisoners’ host state laws would be impractical, is largely premised on the assumption most prisoners of war are military personnel.<sup>137</sup> Since prisoners are subject to the same orders and regulations as the military personnel detaining them, GC III commensurately mandates that detaining powers employ their own disciplinary and judicial mechanisms utilized to deal with prisoner non-compliance with such regulatory schema; the detaining powers military courts have the expertise to do so.<sup>138</sup> In other words, if the same rules apply, so should the same disciplinary and military criminal proceedings as designed for and capable of dealing with violations. Yet this is not a comprehensive assimilative model, given that some military rules and offenses are designed to maintain loyalty that a prisoner is not expected to show.<sup>139</sup>

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<sup>131</sup> ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3600 (emphasis added).

<sup>132</sup> *Id.* ¶ 3602 (explaining the option to try prisoners of war in civilian courts).

<sup>133</sup> *Id.* (further clarifying that “[i]n other words, where a member of the armed forces would be prosecuted within the civilian justice system for a particular offence, a prisoner of war accused of the same offence must likewise be tried by a civilian court”).

<sup>134</sup> *Id.*

<sup>135</sup> *See id.*; *see also* Vargas, *supra* note 26, at 411 (emphasizing the non-discrimination rationale).

<sup>136</sup> *See* GC III, *supra* note 34, art. 82.

<sup>137</sup> *See* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3557 (noting that the drafters did not opt for a standard penal code).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* ¶ 3560.

While this functional argument carries weight regarding offenses committed during prisoner of war detention, it appears far less relevant when it comes to the prosecution of grave breaches and other war crimes committed by enemy prisoners prior to detention.<sup>140</sup> Instead, when it comes to the prosecutorial fora for grave breaches, reasons of non-discrimination as well as pragmatic ease support the Convention's requirement of the same juridical forum for both prisoners of war and members of the detaining power's armed forces.<sup>141</sup> As history continues to demonstrate (a nod to the substandard, torture-riddled Guantanamo Bay Military Commissions is appropriate here) human passions in war too often lead to differential, and lesser, treatment of the enemy than of one's own citizens.<sup>142</sup> As emphasized by the primary authors<sup>143</sup> of the Commentaries to the 1949 Geneva Conventions when describing GC III's mandate for same courts:

The court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try War criminals of enemy nationality.<sup>144</sup>

The protective nature of the principle of non-discrimination, given historical legacies, helps explain the Convention requirement to employ the same procedures, for enforcing the same rules, with respect to prisoners of war as those that govern the detaining military. This obligation is also a component of the historical assumption of prisoners of war into the capturing military's own ranks.<sup>145</sup> The ICRC calls this ancient dynamic "the principle of assimilation" that "runs through the Convention as a whole"—an accurate statement, given

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<sup>140</sup> The functional argument is not relevant to GC IV's requirement for military courts for civilian internees during occupation. Instead, the historical abuse of civilian courts in World War II drove this requirement. *See id.* ¶ 3599.

<sup>141</sup> *See generally* Vargas, *supra* note 26, at 411–12 (noting that the non-discrimination principle also motivates the imposition of same penalties found in Art. 87, GC III).

<sup>142</sup> However, states may also fail to accord their own service members the full panoply of fair trial and due process safeguards they are due; hence the Conventions' numerous requirements to, despite the presumptive use of the same juridical forum, provide specifically delineated fair trial guarantees in all prosecutions of protected persons. *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 3557 (emphasizing the minimum standards of fair trial the Convention mandates).

<sup>143</sup> *Commentary on the Geneva Conventions of August 12, 1949. Volume I, 1952*, INT'L COMM. OF THE RED CROSS (2020), <https://www.icrc.org/en/publication/0203-commentary-geneva-conventions-12-august-1949-volume-i> [<https://perma.cc/E56Y-KXPA>] (noting the authors of the official commentaries to the 1949 Geneva Conventions).

<sup>144</sup> ICRC 1960 Commentary, *supra* note 55, art. 129, ¶ 2.

<sup>145</sup> *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶¶ 32, 3600.

that equal treatment of prisoners, as to the detaining armed forces, is found in no less than fifteen separate GC III articles.<sup>146</sup>

In general, assimilation in the 1949 Conventions and their Protocols calls for treating prisoners of war as if they were part of the detaining power's armed forces, given their military status.<sup>147</sup> This analogous treatment is subject to limitations to ensure minimum treatment standards, regardless how the detaining power treats its own military members.<sup>148</sup> Such assimilative principle seems to retain its practical and normative utility in the juridical realm, given that detaining powers should find it relatively easy to apply their existing military tribunal proceedings, limited by baseline requirements, to prisoners of war.<sup>149</sup>

However, it would be an understatement to observe that today's modern military criminal justice systems—those systems that the Conventions mandate be used for both prisoners of war as well as civilian internees in occupied territory—are not what they were when the Conventions were drafted. The majority of military justice systems in western democracies have experienced significant and some seemingly seismic shifts since World War II, with some States abolishing military courts all together.<sup>150</sup> This essay now turns to evolving military justice<sup>151</sup> and the implications of the same for adherence to international humanitarian law obligations regarding repression of war crimes.

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<sup>146</sup> *But see* Sean Watts, *Lieber Studies POW Volume Symposium—Military Assimilation and the Third Geneva Convention*, LIEBER INST.: ARTICLES OF WAR (Feb. 22, 2023), <https://lieber.westpoint.edu/military-assimilation-third-geneva-convention> [<https://perma.cc/2RLG-34R9>] (arguing that the ICRC overstates its case, seemingly because the ICRC considers assimilation a “principle” which, it correctly notes, is demonstrated throughout GC III, subject to limitations the ICRC Commentaries clearly emphasize). *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶ 4003 (describing assimilation and listing the assimilation provisions).

<sup>147</sup> *See generally* ICRC 2020 COMMENTARY ON GC III, *supra* note 32, ¶¶ 3559, 3567. However, given the fact that not all prisoners of war are military personnel, per GC III, art. 4, the assimilation principle loses rational footing. *See generally id.* ¶ 3567 (highlighting the difficulty of squaring this circle and noting the original protective nature of such application of assimilation principle to civilian prisoners of war).

<sup>148</sup> *See id.* at ¶¶ 33, 36 (“The principle does not operate in a vacuum but in conjunction with the minimum standards and safeguards spelled out in the rest of the Convention.”).

<sup>149</sup> *Id.* ¶ 3557 (noting that the drafters did not opt for a standard penal code).

<sup>150</sup> *See* COTELEA ET AL., *supra* note 27, at 13 (highlighting the “civilianization of military jurisdictions”); *see also* FEDERICO ANDREU-GUZMÁN, INT’L COMM’N OF JURISTS, MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS 13 (2004), <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf> [<https://perma.cc/P2EN-UJJN>] (highlighting the abolition of military jurisdiction by numerous armed forces, at least during peacetime).

<sup>151</sup> *See, e.g.*, Eugene R. Fidell & James A. Young, *Military Justice and Modernity 2* (Jan. 24, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4301436> [<https://perma.cc/X8TA-KW58>] (chronicling the many changes to the U.S. military justice system over the last decade plus).

### B. *Modern Military Justice in Context*

Military justice broadly refers to criminal justice systems that typically consist of substantive criminal law, criminal procedure, and criminal proceedings that operate together within a nation's armed forces in order to hold military members accountable for their criminal misconduct.<sup>152</sup> Distinct and separate from parallel civilian criminal justice systems, military criminal courts have an ancient lineage linked to the necessities of war.<sup>153</sup> Military courts and their supporting justice systems originated with the vital need to harshly control the men forced to fight for their emperors, queens and kings.<sup>154</sup> Men forced and resourced to wield lethal violence, plus forced to expose themselves to mortal danger, are dangerous. The controlled unleashing of such savagery early on came with the understanding of how to exercise and maintain such control: the difference between a violent mob and an army is strict discipline, and such rigid discipline requires systemic reinforcement.<sup>155</sup> This reinforcement and implementation came to be realized through military justice proceedings. Courts-martial and other forms of rough justice have long laser-focused on the maintenance of good order and discipline, with robust conceptions of justice, fair trial guarantees, structural independence and impartiality only slowly, and still incompletely, becoming part of military justice systems.<sup>156</sup>

The jurisdictional reach of such mechanisms of control—military courts employing military criminal law—has at times extended to all types of crimes, both of military and civil nature. Given its doctrinal foundation of necessity, western European military courts' personal jurisdiction originally extended only to those in uniform, while occasionally including the prosecution of civilians such as those who accompany armed forces on deployment—given that criminal accountability through civilian courts was not possible while fighting in foreign lands.<sup>157</sup> However, such extension was also subject to abuse; for example,

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<sup>152</sup> See RACHEL E. VANLANDINGHAM, GRAZVYDAS JASUTIS & KRISTINA CERNEJUTE, GENEVA CTR. FOR SEC. SECTOR GOVERNANCE, *MILITARY JUSTICE* 4–7 (2023), <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf> [<https://perma.cc/6UD5-EV7L>] (defining military justice as “the specialized processes and procedures which provide criminal justice for those serving in the armed forces”).

<sup>153</sup> See generally Vargas, *supra* note 26, at 403 (describing the use of military tribunals in the Roman Legions).

<sup>154</sup> See generally LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 1–2 (2010) (noting the “need for military discipline [for] as long as there have been organized militaries”).

<sup>155</sup> See Robert P. Patterson, *Military Justice*, 19 TENN. L. REV. 12, 12 (1945) (“An Army without discipline is a mob, worthless in battle.”).

<sup>156</sup> See MORRIS, *supra* note 154, at 1 (noting that military justice systems began as “summary, cruel, and unmonitored” and largely focused only on “retribution and deterrence” and not fairness nor rights).

<sup>157</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 22–23 (noting “expansive approach” to military criminal jurisdiction, particularly in common law countries).

military courts were used by the King of England centuries ago, as did military dictatorships in Latin America during the 1970s and 1980s, as tools of repression to persecute political opponents through criminal prosecution of civilians in military courts.<sup>158</sup>

In England, such 17<sup>th</sup> Century abuse of civilians in military courts led Parliament to mandate the exclusive use of civilian courts during peacetime for both military members and civilians, thus restricting military jurisdiction to foreign deployments during time of war only.<sup>159</sup> Mutiny was a military-unique crime, and King William of Orange faced mutiny by officers within the British Army following the Glorious Revolution, yet could not punish it, neither in the civilian courts as it was exclusively a military crime under the military Articles of War, or in military courts as they were unavailable to him domestically in peacetime. Hence in 1688 the first of many Mutiny Acts was passed; it allowed English military courts during peacetime to prosecute military members for sedition, mutiny and desertion.<sup>160</sup>

Gradually such domestic military jurisdiction grew to include other military crimes triable by military courts during peacetime, with the more expansive Articles of War governing military members overseas.<sup>161</sup> The latter became the basis of the military justice system of many former colonies post-independence, including the United States.<sup>162</sup> The United States merged its vast military subject matter jurisdiction with its *in personam* jurisdiction, making military members subject to a huge array of both common law crimes and military-unique crimes due to their military status, regardless of the alleged crime's nexus to military function, and regardless of the existence of war.<sup>163</sup>

Today, military justice is “an institution [that] presents a rich and heterogeneous panorama [] [i]n terms of personal, territorial, temporal and subject-matter jurisdiction, national legislation regulates military justice in a wide variety of ways.”<sup>164</sup> Modern military justice is both long in the tooth and

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<sup>158</sup> See generally Andrew Marshall, *What Were the Mutiny Acts?*, BOOT CAMP & MIL. FITNESS INST. (Mar. 21, 2021), <https://bootcampmilitaryfitnessinstitute.com/2021/03/21/what-were-the-mutiny-acts/> [<https://perma.cc/ZCZ2-J3LJ>] (describing the King of England's abuse of military courts in the 1600s); Brett J. Kyle & Andrew G. Reiter, *Dictating Justice: Human Rights and Military Courts in Latin America*, 38 ARMED FORCES & SOC'Y 27, 30 (2012); Brett J. Kyle & Andrew G. Reiter, *Militarized Justice in New Democracies: Explaining the Process of Military Court Reform in Latin America*, 47 LAW & SOC'Y REV. 375, 380 (2013).

<sup>159</sup> Marshall, *supra* note 158.

<sup>160</sup> *Id.*

<sup>161</sup> See ARTICLES OF WAR (1912–1920), LIBRARY OF CONGRESS <https://www.loc.gov/collections/military-legal-resources/articles-and-essays/military-law-and-legislative-histories/articles-of-war-1912-to-1920/> (on file with the *Ohio State Law Journal*).

<sup>162</sup> *Id.*

<sup>163</sup> See MORRIS, *supra* note 154, at 7–8 (explaining the jurisdiction of U.S. military justice system).

<sup>164</sup> See ANDREU-GUZMÁN, *supra* note 150, at 13.

varies greatly amongst nations, with powerful dynamics having prompted significant reform in military justice systems in numerous western democracies since World War II. Most of such major change is due to international human rights law coming of age; some more recent structural changes, particularly those since the early 2000s, were prompted by failures of militaries to stem the epidemic of sexual assault in the ranks, such as in the United States, Canada and Australia.<sup>165</sup> This fitful though progressive structural change has resulted in numerous modern military justice systems that are quite unlike their ancestors some countries like the Netherlands and Ukraine have even abolished their military justice systems, using the same civilian court and processes for those in the military as they do for civilians.<sup>166</sup>

The general development of military criminal law and jurisdiction since the end of World War II is multifaceted. It includes several key developments that are fitfully reflected to various degrees in the armed forces of western democracies.<sup>167</sup> First, there is a marked trend toward limiting the personal jurisdiction to military members only, excluding civilians.<sup>168</sup> This exclusion, along with other military justice reforms, stems from an evolving understanding of what Article 14, the International Covenant on Civil and Political Rights (ICCPR) fair trial rights mean in a military context.<sup>169</sup>

Second, there has been significant movement toward a narrowing of military court's subject matter jurisdiction, *ratione materia*, to only offenses connected to military functions.<sup>170</sup> Military jurisdiction, per this doctrine, normatively is appropriate only for service-related offenses<sup>171</sup> that deal with crimes against military discipline, obedience, military capability, and operational effectiveness.<sup>172</sup> Various human rights bodies have endorsed this

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<sup>165</sup> See generally EUGENE FIDELL ET AL., *MILITARY JUSTICE: CASES AND MATERIALS*, at xxvii (3d ed. 2020) (noting the “convergence in military law across national boundaries” and changes prompted in the U.S. and Australian systems due to sexual misconduct).

<sup>166</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 9, 40 (highlighting the elimination of military justice systems in both these countries).

<sup>167</sup> See DECAUX PRINCIPLES WORKSHOP, *THE YALE DRAFT* ¶ 15 (Mar. 2018) [hereinafter *YALE DRAFT*], <https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf> [<https://perma.cc/Z4ZJ-6UHF>].

<sup>168</sup> *Id.* ¶ 17; see also COTELEA ET AL., *supra* note 27, at 13.

<sup>169</sup> See generally International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>170</sup> *YALE DRAFT*, *supra* note 167, ¶ 76.

<sup>171</sup> *But see* Solorio v. United States, 483 U.S. 435, 436 (1987) (the U.S. Supreme Court bucking this trend by reversing an almost-twenty-year-old decision that had required such service-connection for military jurisdiction).

<sup>172</sup> See Vargas, *supra* note 26, at 404 (referring to this restrictive jurisdiction as only including functions crimes, or “offences strictly related to the military function”); see also *id.* at 403–04 nn.6–8 (outlining the relevant jurisprudence of the Inter-American Court of Human Rights as limiting military jurisdiction to service-connected offenses only); COTELEA ET AL., *supra* note 27, at 6–7.



restrictive approach.<sup>173</sup> For example, the Inter-American Court of Human Rights in *Durand and Ugarte v. Peru* concluded that not only are civilians excluded from military jurisdiction, but that military courts should only handle offenses that are “against legally protected interests of military order.”<sup>174</sup>

The growing exclusion of serious human rights violations from military jurisdiction is related to the movement toward further constriction of military criminal jurisdiction to only military-unique crimes such as disobedience.<sup>175</sup> Supplementing this movement are calls for war crimes to likewise be handled exclusively in civilian courts, given the serious nature and lack of relationship to purely military crimes like disobedience or desertion. War crimes such as torture, killing combatants who are *hors de combat*, etc., are more analogous to serious human rights violations (and can double as such) than they are to “military-unique” crimes.<sup>176</sup>

Third, as mentioned above, some nations have abolished military courts and criminal military justice systems all together, leaving only non-criminal disciplinary administrative systems operating within the military domain.<sup>177</sup> This has naturally entailed a corresponding exclusive utilization of civilian courts to dispose of service member criminal conduct. In many of the states that have eliminated military courts, there remains the ability to constitute such courts during war, though none have yet to do so.<sup>178</sup>

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<sup>173</sup> See, e.g., Human Rights Comm. Res. 1548/2007, U.N. Doc. CCPR/C/106/D/1548/2007, ¶ 10.5 (Dec. 11, 2012) (finding that military jurisdiction should be exceptional).

<sup>174</sup> See *Durand and Ugarte v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶¶ 117–18 (Aug. 16, 2000); see also MINDIA VASHAKMADZE, GENEVA CTR. FOR DEMOCRATIC CONTROL OF ARMED FORCES, MILITARY JUSTICE IN UKRAINE: A GUIDANCE NOTE 7 (2018), [https://www.dcaf.ch/sites/default/files/publications/documents/Military\\_Justice\\_Guidance\\_Note\\_eng.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/Military_Justice_Guidance_Note_eng.pdf) [<https://perma.cc/TVD8-GS9B>].

<sup>175</sup> See Emmanuel Decaux (Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights), *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity*, ¶¶ 29–31, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) [hereinafter Decaux Principles]; see also Vargas, *supra* note 26, at 402; ANDREU-GUZMÁN, *supra* note 150, at 17 (highlighting that human rights mechanisms have called for the exclusion of human rights violations from military jurisdiction); YALE DRAFT, *supra* note 167, ¶ 15 (listing the major trends in modern military justice evolution).

<sup>176</sup> ANDREU-GUZMÁN, *supra* note 150, at 109.

<sup>177</sup> See, e.g., COTELEA ET AL., *supra* note 27, at 7 (noting the Danish system that maintains a strictly disciplinary non-criminal regime for handling misconduct within the military, while using civilian courts for all military and civilian criminal matters); see also LARS STEVNSBORG, THE DANISH MILITARY JUSTICE SYSTEM 9–10 (Mar. 2020), <https://www.fauk.dk/globalassets/fauk/dokumenter/2020/-the-danish-military-justice-system-2020-.pdf> [<https://perma.cc/9U7A-HTBU>] (noting that under the Danish military justice system, the prosecution is still decided by and carried out by military prosecutors under a distinct military penal code, albeit in a civilian court with a civilian judge).

<sup>178</sup> COTELEA ET AL., *supra* note 27, at 9.

These trends of shrinking military justice jurisdiction (both personal and substantive) and of eliminating military justice systems all together, continue due to the increasing prominence of international human rights law, realized and supercharged by human rights tribunals' jurisprudence.<sup>179</sup> This general movement away from military justice, at its core, stems from the related recognition that military courts, by their very nature, fundamentally lack the structural independence and impartiality required for trials to be fair, and be seen as fair, through a human rights law lens.<sup>180</sup>

The movement away from military courts<sup>181</sup> is not only a product of scandals, such as outrage over military sexual assault; it has been influenced by understandings drawn from sociology as well as organizational psychology.<sup>182</sup> Military justice has long been noted as a harsh commander's disciplinary tool, one not worthy of the "justice" label.<sup>183</sup> Georges Clémenceau's famous quip that "military justice is to justice what military music is to music" was justified.<sup>184</sup> Such criticisms emanate from the inherent tensions surrounding military justice. Creating a system of fair criminal accountability reliant upon independent decision-making that is based on facts and evidence, within a top-down hierarchical organization whose lifeblood is obedience to orders and unit loyalty, produces inherent tensions that are perhaps simply irreconcilable.<sup>185</sup>

### C. Ukraine

Reflecting the global trend of shrinking military criminal jurisdiction, Ukraine abolished its military justice system in 2010—a system that had only been extant since 1991.<sup>186</sup> This move was due in part to the European Court of

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<sup>179</sup> *Id.* at 13.

<sup>180</sup> See ANDREU-GUZMÁN, *supra* note 150, at 10–11 (explaining that military justice has long been of concern: “[e]arly on in their existence, several United Nations mechanisms expressed their concern about ‘military justice’”).

<sup>181</sup> See generally EUGENE R. FIDELL, *MILITARY JUSTICE: A VERY SHORT INTRODUCTION* 22 (2016) (highlighting the internal civilianization of military justice by way of similar dynamics).

<sup>182</sup> See generally Thomas Crosbie & Meredith Kleykamp, *Military Systems of Justice: A Sociological Overview*, 47 *J. POL. & MIL. SOCIO.* 37, 50 (2020) (characterizing U.S. military justice as one “controlled by officers judging their professional subordinates”).

<sup>183</sup> David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 *MIL. L. REV.* 1, 5–6 (2013).

<sup>184</sup> ANDREU-GUZMÁN, *supra* note 150, at 10.

<sup>185</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 6, 16 (discussing structural weaknesses of military justice systems and calling them a “round peg in a square hole”).

<sup>186</sup> See VASHAKMADZE, *supra* note 174, at 1; see also Gaiane Nuridzhanian, *Prosecuting War Crimes: Are Ukrainian Courts Fit to Do It?*, *EUR. J. INT’L L.: TALK!* (Aug. 11, 2022), <https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/> [<https://perma.cc/6A2U-QBTC>] (noting that Ukraine eliminated their military courts in 2010). But see VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 40–41 (noting

Human Rights (ECtHR). It found that the Ukrainian military justice process, due to the lack of a sufficiently independent trial judiciary (because the Ministry of Defense provided lodging for military judges), failed to comport with Article 6(1) of the European Convention on Human Rights, that in relevant part requires trial “by an independent and impartial tribunal established by law.”<sup>187</sup>

While a non-criminal disciplinary regime exists in the Ukrainian military, since 2010 all criminal offenses committed by members of its armed forces have been prosecuted in ordinary civilian courts.<sup>188</sup> Notably, even military unique crimes such as desertion and disobedience have been tried in civilian court.<sup>189</sup> However, Russia’s unlawful annexation of Crimea in 2014 caused this decision to be revisited; this discussion has grown in depth and urgency since the full-scale Russian invasion in February 2022.<sup>190</sup> Indeed, Ukraine has sought external consultative assistance while it considers re-instituting military courts.<sup>191</sup>

With a military that has grown exponentially since Russia’s 2022 invasion, it is natural that Ukraine’s military and political leaders would seek effective mechanisms to deal with criminal as well as disciplinary misconduct within its armed forces’ burgeoning ranks.<sup>192</sup> It appears that Ukraine has considered the renewal of military courts, hence a new military justice system, due to the wartime necessity of ensuring good order and discipline within a rapidly expanded and inexperienced fighting force.<sup>193</sup> has been argued that, with at least 20% of Ukrainian civilian criminal courts not operating due to the war, at least as of 2022—courthouses closed, civilian judges evacuated, etc.—that there is a

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that there were some heavily criticized “military prosecutions” between 2014–2019, though it is unclear if such prosecutions were conducted in civilian court by military prosecutors, or within military courts by military personnel).

<sup>187</sup> *Miroshnik v. Ukraine*, App. No. 75804/01, ¶¶ 33–37, 50, 64 (Nov. 27, 2008), <https://hudoc.echr.coe.int/eng?i=001-89862> [<https://perma.cc/2N76-SAFR>] (finding that Ukraine’s military judiciary, because its lodging was provided by the Ministry of Defense, was not independent as required under Article 6(1), European Convention on Human Rights).

<sup>188</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 40.

<sup>189</sup> See *id.*

<sup>190</sup> See generally Nuridzhanian, *supra* note 186 (noting discussion of reinstating military courts starting with the 2014 Russian aggression); see also VASHAKMADZE, *supra* note 174, at 1 (noting interest in military courts resulted from involvement in armed conflict starting in 2014).

<sup>191</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 41; see also VASHAKMADZE, *supra* note 174; Interview with members of Ukrainian Verkhovna Rada, in Kosice, Slovakia (June 30, 2023) (on file with author) (author met with members of the Ukrainian Verkhovna Rada in Slovakia in May, 2023, at their request, to discuss re-instituting their military justice system).

<sup>192</sup> See Ellie Cook, *Is Ukraine’s Army Now the Best in the World? Major Countries Compared*, NEWSWEEK (Apr. 1, 2023), <https://www.newsweek.com/ukraine-army-best-world-compared-russia-us-military-china-1791441> [<https://perma.cc/YN3P-Z82Y>] (detailing expansion of Ukrainian military).

<sup>193</sup> See VASHAKMADZE, *supra* note 174, at 1.

military necessity for a criminal justice system that is operated within the military, for the military, wherever operations exist.<sup>194</sup>

A need may very well exist for quick and effective criminal prosecutions for military service-related crimes such as absence without leave and disobedience, offenses that have serious implications for good order and discipline within the ranks and on unit efficacy. In addition to the capacity issue of civilian courts partially closed by military operations, military courts would arguably be best positioned for such proceedings, as one could imagine that being sent back to a civilian courthouse far from the front lines is incentive itself to disobey orders or absent oneself without leave. Judicial proceedings instead of administrative disciplinary ones, capable of meting out appropriately severe penal consequences, are likely needed given the serious nature of such offenses, particular during wartime.

Yet this essay's preceding long explication of international humanitarian law's regulation of domestic criminal prosecutions of grave breaches, and particularity the requirement to prosecute enemy prisoners of war for their grave breaches in the same judicial proceedings as used for the detaining power—subject to strict fair trial and due process guarantees—must be brought to bear on the issue of re-constituting Ukrainian military courts. If such military proceedings are re-established, it would seem wise to limit their *ratione materia* to offenses connected to military functions; that is, only service-related offenses that deal with crimes against military discipline, obedience, military capability, and operational effectiveness.

This means that a Ukrainian service member's prosecution for war crimes, particularly war crimes constituting grave breaches, should continue being prosecuted in civilian courts, as should serious human rights violations outside of the war crime category. This means that prosecution of Russian prisoners would likewise remain in those same civilian courts as well, given the non-discrimination and assimilation principles in the Conventions that require the same forum for trying enemy prisoners accused of war crimes as that of the detaining power. Plus, given military tribunals' general legitimacy crisis based on their inability to function independently and impartially within a hierarchical military society that prizes obedience and loyalty, civilian courts are simply better suited to meet the demands of wartime accountability, with appropriate safeguards provided to shield its actors from public and government pressure.

It would be a daunting task to re-establish a functioning military justice system with military tribunals that guarantee fair trial and due process rights in the midst of an armed conflict. Intense scrutiny would be placed on such

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<sup>194</sup> See VANLANDINGHAM, JASUTIS & CERNEJUTE, *supra* note 152, at 41; see also Interview with members of Ukrainian Verkhovna Rada, in Kosice, Slovakia (June 30, 2023) (on file with author) (meeting with members of the Ukrainian Verkhovna Rada to discuss future military justice in Ukraine).

proceedings if used for war crimes prosecutions,<sup>195</sup> and the requirement that the same proceedings for grave breaches be utilized for prisoners of war as for those fighting for Ukraine would mandate that they be used for others outside the Ukrainian military. Hence the appropriate forum for Ukrainian soldiers' war crimes (as well as serious human rights violations) should remain civilian courts, albeit courts that are appropriately resourced and regulated to provide fair trial and due process guarantees.

#### IV. CONCLUSION

As the international community continues to support Ukraine's defense against unlawful aggression, it should also increase its support to Ukraine's efforts on the domestic criminal justice front. Specifically, allied nations should encourage Ukraine to carefully consider re-establishment of military courts. If such tribunals are deemed necessary, military jurisdiction should be tightly restricted to service-connected crimes, leaving war crimes and human rights offenses to Ukraine's civilian courts. Meanwhile, civilian courts should be sufficiently reinforced and resourced to ensure compliance with fair trial and due process guarantees, otherwise lawful prosecutions of Russian prisoners for serious violations of international humanitarian law will not be possible—and claims of war crimes, specifically grave breaches, by Ukrainian officials for denying fair trials could be unfortunately leveraged by Russia.

Reinforcing Ukrainian civilian courts to better support war crimes prosecutions, instead of creating new military courts for the same, better fulfills the fair trial and due process guarantees, including that of juridical independence and impartiality, required by both international humanitarian and human rights law. Lastly, the international community should provide robust support to investigative capabilities and the establishment of reporting mechanisms within the Ukrainian armed forces to fulfill legal obligations to prevent, suppress, and punish grave breaches, as well as to suppress and provide appropriate accountability for other violations of international humanitarian law.

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<sup>195</sup> See, e.g., OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020, ¶¶ 221, 278 (Dec. 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/69W9-GVS5>] (noting possibility of war crime of denial of denying judicial guarantees in Palestine and Donbass region of Ukraine).