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All is Fair in Love and War: But What About War Trials?

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The right to a fair trial is not just protected by a state's domestic statute but also by international law under the 1949 Geneva Convention. In the most basic sense, a fair trial theoretically requires competent courts, penalty proportionality, proper notification, right of defense, right of appeal, and restrictions on the issuance of the death penalty. However, the requirements set by international law often fail to account for the desire of justice that may diminish the true fairness of a trial even though all requirements are present. This note examines the recent domestic war crime trials conducted by Ukraine during the ongoing Russo-Ukraine War and their compliance with a fair trial under international law. Further, this note discusses advantages, disadvantages, and alternatives to domestic prosecution for war crimes.

I. Introduction

On February 24, 2022, the Russian Federation's president authorized special military operations against Ukraine.² The invasion of Ukraine has resulted in tens of thousands of civilian and soldier deaths on each side.³ In response to these countless tragedies, international and domestic actors launched war crime investigations, primarily focusing on alleged war crimes committed by Russia.⁴ In March of 2022, Ukraine commenced the first war crime trial of the Russo-Ukrainian War.⁵ Generally, trials for alleged war crimes occur *in absentia* or when the conflict is over.⁶ Although permitted under international law, the war crime trials conducted by Ukrainian domestic courts during an ongoing conflict raises concerns about fairness, impartiality, and justice of the current trials of the Russo-Ukraine War and the future of international trials in general.

In this paper, I will first provide details from the current Ukrainian war crimes trials. Next, I will analyze how international criminal law, international humanitarian law, and domestic law approach prosecuting war crimes and possible conflicts and overlap among the laws. From there, I will analyze the potential advantages and disadvantages of prosecuting in domestic courts during an ongoing conflict. Lastly, I will present alternatives to prosecuting in domestic courts during an ongoing conflict and what we can learn from the Ukrainian trials.

II. The Ukrainian War Crime Trial

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² Jeffrey Mankok, *Russia's War in Ukraine: Identity, History, and Conflict*, CSIS (Apr. 22, 2022), <https://perma.cc/8VSQ-8DQC>; see also, *Timeline: The Events Leading Up to Russia's Invasion of Ukraine*, REUTERS (Mar. 1, 2022), <https://perma.cc/8HZ3-BWSK>.

³ Julian Hayda et al., *Six Key Numbers that Reveal the Staggering Impact of Russia's War in Ukraine*, NPR (Aug. 24, 2022), <https://perma.cc/EX8V-T2ET>.

⁴Id.

⁵ Steve Inskeep & Greg Myre, *Ukrainian Judge Hands Down a Sentence in the First War Crime Trials in that Conflict*, NPR (May 23, 2022), <https://perma.cc/V6SM-DBE3>.

⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 08, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

In May of 2022, Russian soldier and defendant Vadim Shishimarin stood trial by the Ukrainian government for allegedly violating the laws and customs of war, combined with murder⁷. Shishimarin was accused of killing a sixty-two-year-old civilian, Oleksandr Shelipov, during the Russian invasion of Ukraine⁸. During the Moscow Tank Invasion, Shishimarin, under orders of his superior, shot and killed the civilian who was believed to have been giving away the Russian soldier's location via cellphone⁹. Under Article 438 of the Ukrainian Criminal Code, a defendant may be held criminally liable for the "cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, the pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments."¹⁰ For the listed acts accompanied by murder, sentencing begins at ten to fifteen years or life imprisonment.¹¹ The Ukrainian government appointed Shishimarin with competent defense counsel, attended pre-trial hearings, and was provided an interpreter.¹² Shishimarin pled guilty to the charges of murder but did not admit to having direct intent to kill. The Ukrainian court convicted Shishimarin of murder with the intent to kill and sentenced him to life in prison.¹³

III. The Prosecution of War Crimes: General Information

A. Governing Law

The 1949 Geneva Convention (IV) defines war crimes as "grave breaches" against persons or property.¹⁴ Grave breaches include, among many other examples and descriptions, the willful killing, torture, or inhuman treatment of persons or the willful deprivation of a protected person of the rights of fair and regular trial prescribed in the present Convention.¹⁵ The gravity of these international human rights violations resulted in international regulation to ensure accountability and avoid impunity. While no single document or body codifies all war crimes, the Rome Statute of the International Criminal Court¹⁶ and the 1949 Geneva Convention (IV) provide the international community with procedural and substantive legal guidelines for prosecuting war crimes.¹⁷ Notably, Ukraine and Russia are *not* parties to the Rome Statute.¹⁸ While international treaties are binding only on those states which are party to them, customary international law is

⁷ Shuan Walker, *Ukrainian Court Sentences Russian Soldier to Life in Prison for Killing Civilian*, THE GUARDIAN (May 23, 2022), <https://perma.cc/5ERY-NJF2>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Ukrainian Criminal Code*, Art. 348, DOJ (last accessed, Oct. 13, 2022), <https://perma.cc/8YHC-DSVZ>.

¹¹ *Id.*

¹² Chris Jenks, *Ukraine Symposium – The Atrocity Crimes Advisory Group & Ukrainian Prosecutions of Russian POWS – Part 1*, LIEBER INSTITUTE (Jun. 22, 2022), <https://perma.cc/LH3E-ANDG>.

¹³ *See, supra* note, 6.

¹⁴ *Supra*, note 5.

¹⁵ *Id.*

¹⁶ Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90.

¹⁷ *Supra*, note 5.

¹⁸ *Briefing Russia's War on Ukraine: Investigating and Prosecuting International Crimes*, EPRS (Jun. 2022), <https://perma.cc/Q4BV-AEYV>.

binding on all states and fills in the gaps left by treaty law.¹⁹ Customary international humanitarian law includes the Hague Convention of 1954²⁰ and the Convention Against Torture of 1948.²¹

B. Jurisdiction

Article 146 of the Geneva Convention (IV) states that each signing party is under the legal obligation to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its *own* courts.”²² Similarly, under international customary law, a state must exercise criminal jurisdiction that their national legislation confers upon their courts in the event of grave breaches.²³ Thus, under international law, a state may extraterritorially prosecute an individual accused of war crimes. Extraterritorial jurisdiction requires: (1) the committed persons be a national of the state, (2) the committed actions are against nationals of the state, or (3) the committed actions affect the security of the state.²⁴ Domestic courts in Ukraine *and* Russia can prosecute war crimes since the alleged crimes have occurred within their territorial jurisdiction.

In addition to state jurisdiction, the International Criminal Court (ICC) may investigate and try cases of genocide, crimes against humanity, war crimes, and crimes of aggression.²⁵ The ICC’s jurisdiction requires that: (1) the crimes were committed by a national of the party-state, within the territory of a state party, or in a state that has accepted the jurisdiction of the court; (2) the crimes were referred to the ICC prosecutor by the UN Security Council pursuant to a resolution; or (3) in the case of individuals, the individual must consent or be handed over to the ICC.²⁶ As is later discussed, the ICC is unlikely to receive jurisdiction over Russian nationals in the Russo-Ukrainian War.

Lastly, international law recognizes grave breaches as so serious that the duty to prosecute them transcends all borders to give rise to universal jurisdiction.²⁷ Universal jurisdiction may be exercised by any “competent and ordinary” judicial body of any state when the territorial state is unable or unwilling to conduct an effective investigation or trial.²⁸ As the Shishimarin trial demonstrates, the extension of universal jurisdiction would be inappropriate.

C. Fair Trial Guarantees Under International Law

Under the Rome Statute of the ICC, depriving a protected person of a fair and regular trial constitutes a war crime. A trial is “fair and regular” when the following requisites are present: competent courts, penalty proportionality, proper notification, right of defense, right of appeal, and

¹⁹ *Customary Law*, THE INTERNATIONAL COMMITTEE OF THE RED CROSS (last accessed, Oct. 13, 2022), <https://perma.cc/HP6R-9RVS>.

²⁰ *Universal Jurisdiction Over War Crimes*, Advisory Service on IHL, Int’l Committee of the Red Cross (May 21, 2020), <https://perma.cc/5GJH-E2DR>.

²¹ *Id.*

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 08, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

²³ *Rule 100. Fair Trial Guarantees*, INTERNATIONAL HUMANITARIAN DATABASE (last accessed, Oct. 13, 2022), <https://perma.cc/PM3X-UCYP>.

²⁴ *Supra*, note 5.

²⁵ *See, supra*, note 15.

²⁶ *Id.*

²⁷ *Supra*, note 21.

²⁸ *Id.*

restrictions on the issuance of the death penalty²⁹. International Humanitarian Law prescribes a far more extensive list of fair trial guarantees.³⁰ But, because International Humanitarian Law is not mandatory, this paper will primarily focus on international criminal law and domestic criminal law, with an emphasis on the requisites of competent courts, penalty proportionality, and the right of defense.

The 1949 Geneva Convention (IV) gives little basis as to what a “competent court” consists of, listing only that the court used is in the occupying country.³¹ Thus, turning to international humanitarian law³² and various human rights treaties,³³ a fair trial occurs by an “independent, impartial, and regularly constituted court.” An “independent court” must be able to perform its functions independently from any other branch of the government,³⁴ and an “impartial court” comprises of judges that do not harbor preconceptions about the matter before them nor act in a way that promotes the interests of one side.³⁵ Notably, the Geneva article specifying the requirement of a “competent court” does not specify the use of a military court.³⁶ Some debate exists among the community as to whether the language of the Geneva article prefers military courts or whether military courts naturally fail the impartiality requirement.³⁷

The proportionality principle is relatively well-defined as to other guarantees.³⁸ The Geneva article simply requires that the crime's penalty is proportional to the crime's gravity. In practice, however, the proportionality principle may be hard to administer as sentencing depends on each state's criminal code rather than uniform sentencing. Moreover, sentencing measures on a state-by-state basis runs the risk of bias as a domestic court is likely to believe any crime committed against the state or its nationals requires the harshest sentencing. International Humanitarian law does not expressly speak to the proportionality principle.

In a fair trial, accused persons have the right to a defense.³⁹ These rights include the right to present evidence necessary to their defense, such as calling witnesses⁴⁰, and the right to be assisted by qualified counsel of their own choice. Moreover, counsel must be able to visit them freely.⁴¹ If the accused cannot secure qualified counsel on their own, the accused person's state may provide them with an advocate or counsel.⁴² And in the event the accused person cannot obtain counsel or an advocate, the occupying state will provide such.⁴³ Lastly, an interpreter must be provided unless

²⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 66-75, Aug. 08, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³⁰ *Supra*, note 22.

³¹ *Supra*, note 28, art. 66.

³² *Supra*, note 28.

³³ *Supra*, note 22.

³⁴ *Supra*, note 5.

³⁵ *Supra*, note 28.

³⁶ *Supra*, note 30.

³⁷ *See, supra*, note 28; *contrast, supra*, note 22.

³⁸ *Supra*, note 28, art. 67.

³⁹ *Supra*, note 28, art. 72.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

waived. International Humanitarian Law does not differ from international law concerning the right to self-defense.⁴⁴

D. Is There Such Thing as a Fair Trial During an Ongoing Conflict?

The concerns surrounding the Ukrainian war crime trials can be broken down into two components: (1) the effect of conducting a trial in a domestic court and (2) the effect of conducting a trial, regardless of court, during an ongoing conflict. The following sections analyze arguments as to whether war crime trials in domestic courts during an ongoing conflict strike the proper balance between fairness and justice.

I. *Can a Fair Trial be Provided in a Domestic Court During an Ongoing Conflict?*

The requirement to provide a fair trial under international law contains detailed nuances of what a fair trial constitutes. The following sections analyze arguments primarily focused on the sub-requirements of capacity, impartiality, and fairness.

a. The Capacity of the Domestic Courts

The use of domestic courts under active hostilities may render the courts not only incapable of providing a fair trial but incapable of providing *a trial*. Some concern centers around Ukraine's use of domestic courts rather than military or international courts. As discussed above, international law does not expressly require war crimes to be tried by a military court.⁴⁵ The "bare" requirement is a court used in the occupied country.⁴⁶ While there is no debate or concern about the court used, at least in the case of Shishimarin's trial, being in the occupied territory; the court was located in Kyiv.⁴⁷ While the current trials have occurred within Ukraine's territory, there is concern about Ukrainian courts operating in such close proximity to hostilities and how such constant threats may diminish the courts' capacity to conduct a fair trial.

According to the President of the Supreme Court of Ukraine: "132 or about twenty percent of the country's courts, mostly those located in areas of Ukraine controlled by Russian forces, were not functioning at the end of April 2022."⁴⁸ So far, the war crime trials of Russian soldiers, including Shishimarin's, have taken place either in courts located in the regions where the crimes occurred or in the adjacent regions where the events in question took place close to the frontline.⁴⁹ These same areas where courts continue or are renewing operations are the same areas under constant threat by Russian hostilities. The work of courts located within or close to the frontlines may be hindered by security concerns, ongoing hostilities, destruction, targeting, and lack of personnel.⁵⁰ Even courts located outside the frontlines may still face threats of similar nature to courts located within or close to the frontlines. The scale of criminality, the wide scope of affected geographical areas, and the high number of potential victims would challenge any judicial system, let alone one

⁴⁴ *Supra*, note 28.

⁴⁵ *Supra*, note 30.

⁴⁶ *Id.*

⁴⁷ *Supra*, note 6.

⁴⁸ Margarita Kinakh, *War as a Challenge for the New Justice System*, YURIDICHNA GAZETA JOURNAL (Apr. 27, 2022), <https://perma.cc/DV8M-KNTB>.

⁴⁹ Gaiane Nuridzhanian, *Prosecuting War Crimes: Are Ukrainian Courts Fit to Do it?*, EJI:TALK! (Aug. 11, 2022), <https://perma.cc/NS3P-FMYP>.

⁵⁰ *See, id.*

affected by an ongoing war. Thus, to no fault of their own, courts within the Ukrainian territory may be so consumed or hindered by Russian hostilities that the courts are incapable of functioning at a level conducive to providing fair trials during an ongoing conflict.

Moving away from the timing of the trials, domestic *civilian* courts themselves may not hold the capacity to properly adjudicate complex areas of international criminal law such as war crimes. International criminal law is arguably highly technical and extremely nuanced. Most domestic criminal law only creates offenses derived from international law, and these same complexities arise in applying domestic criminal law.⁵¹ For example, a central issue in Shishimarin's case – whether the civilian killed could be seen as a legitimate target – is highly complex and technical.⁵² Military court officials would theoretically have the training required to understand these technical nuances in a way civilian courts may not. Simply put, civilian courts, in general, may not contain the technical understanding required to adjudicate the gravest breaches under international law where defendants are at risk of life imprisonment, and Ukraine's courts are no exception.

b. Impartiality and Fairness

Even if domestic courts are operable during an ongoing conflict, the arena of war may irreparably prejudice domestic courts to the point of being unable. Regardless of the timing, *in absentia* or during the ongoing conflict, there will always be an element of bias in domestic proceedings. But, conducting trials for the gravest crimes under international law in the territory of the victim, which is under hostilities of the defendant's state, may increase the natural bias of any trial beyond a tolerable amount. In the case of Ukraine, there may already be evidence of a bias affecting the impartiality and fairness of the domestic courts and thus rendering the Ukrainian courts ineffective in conducting war crime trials. With the highly publicized trials being conducted within the state, there is immense pressure from the wider public to ensure the conviction of defendants. A lawyer representing one of the Russian soldiers spoke about “hostile reactions on social media and phone calls that he had received in connection with his work on this case.”⁵³ The demands from the Ukrainian public, and even the international community, to convict the Russian soldiers in retribution for killing one of their own may prove too consequential for all parties to the case.

Similarly, the war crime trial of Shishimarin and the proportionality of sentencing provides possible evidence of bias in the current trials. As discussed above, under the Ukrainian Criminal Code, sentencing periods range from ten years to life in prison.⁵⁴ Judges generally increase or decrease the respective period for murder based on factors such as the defendant's sincerity, whether they were following orders, and whether they are a first-time offender.⁵⁵ In the case of Shishimarin, the soldier apologized to the victim's family, claimed to be following the orders of his superior commander, and was a first-time offender.⁵⁶ Yet, as many critics of the trial noted, Shishimarin received a sentence of the utmost severity – life in prison.⁵⁷ The factors influencing

⁵¹ Jaime Lopez & Brady Worthington, *The ICC Investigates the Situation in Ukraine: Jurisdiction and Potential Implications*, LAWFARE (Mar. 10, 2022), <https://perma.cc/X46U-HTK8>.

⁵² See, Robert Goldman, *War Crime Trial of Russian Soldier Was Perfectly Legal – But That Doesn't Make It Wise*, THE CONVERSATION (May 23, 2022, 7:40am), <https://perma.cc/N5VX-N898>.

⁵³ *Supra*, note 47.

⁵⁴ *Supra*, note 9.

⁵⁵ *Id.*

⁵⁶ *Supra*, note 6.

⁵⁷ *Supra*, note 11.

sentencing ranges are not conclusive of bias. Still, the arguably disproportionate sentencing to the gravity of the crime lends credence to the argument that Ukrainian courts cannot remain sufficiently impartial and fair under international law.

c. But Might Domestic Courts be More Effective in Administering Justice?

By utilizing domestic courts rather than international courts and prosecuting during an ongoing conflict, Ukraine may be more capable of providing expedient justice by avoiding arduous procedural hurdles international courts are burdened by. The following sections primarily discuss international courts in general, specifically the International Criminal Court (ICC), because of its authority and specification in the Rome Statute.

The International Criminal Court (ICC) receives jurisdiction in three ways: (1) the alleged crimes were referred by state parties; (2) the United Nations Security Council, acting under chapter seven powers, refers the case to the ICC; or (3) the ICC prosecutor initiates an investigation *proprio motu*.⁵⁸ The first two options for the ICC to exercise jurisdiction are not viable. Neither Russia nor Ukraine are a party to the Rome Statute which establishes and governs the authority of the ICC to prosecute cases on behalf of state parties.⁵⁹ Although Ukraine has accepted the jurisdiction of the ICC⁶⁰, Russia is unlikely to do so. The lack of acceptance from both states leaves a large portion of war crimes—those that occur on Russian territory—left to domestic courts. Thus, the ICC's first option to exercise jurisdiction cannot be met. The second option, Security Council referral, is a “near dead end.”⁶¹ As a permanent power, Russia is likely to exercise its veto power to ensure a referral to the ICC does not occur.⁶² The final option, ICC prosecutor prerogative, is the most likely to result in ICC jurisdiction. Under Article 13(c) of the Rome Statute, the ICC prosecutor may initiate an investigation of a list of international crimes, such as war crimes.⁶³ For an investigation to proceed with arrest warrants and actual prosecutions requires pre-trial approval.⁶⁴ Thus, the ICC may retain jurisdiction even though domestic courts have already proven capable of retaining jurisdiction.

Even if the ICC can exercise jurisdiction over alleged perpetrators, the ICC may not have the capacity to provide timely justice and enforcement of punishment. The investigation and pre-trial approval take years to complete.⁶⁵ Many of the alleged perpetrators may be dead and evidence destroyed by the time the war is over. Lack of accountability and evidence will likely hinder the capability of the ICC to prosecute and bring justice to the victims and their families. In contrast, by conducting trials in Ukraine *during* the conflict, evidence may be better preserved, and the alleged perpetrators are prosecuted when their grave crimes occur.

⁵⁸ *Supra*, note 50.

⁵⁹ *Id.*; *see, supra*, note 5.

⁶⁰ *Supra*, note 38; *see, Understanding the International Criminal Court*, INTERNATIONAL CRIMINAL COURT (last accessed, Oct. 13, 2022), <https://perma.cc/96V7-D3PQ>.

⁶¹ *Supra*, note 50.

⁶² *Id.*

⁶³ *Supra*, note 15, Art. 13(c).

⁶⁴ *Id.*

⁶⁵ Alice Speri, *The Mother Crime: Will Putin Face Prosecution for the Crime of Aggression in Ukraine?*, THE INTERCEPT (Oct. 8, 2022), <https://perma.cc/SM3L-XPT7>.

Moreover, even after establishing jurisdiction, the ICC must still deal with the final hurdles of enforcement.⁶⁶ Holding individuals accountable for their crimes is predicated upon obtaining physical custody of the alleged perpetrators.⁶⁷ The ICC typically relies on states to physically apprehend alleged perpetrators because the Court does not possess an enforcement mechanism to execute arrest warrants.⁶⁸ Given Russia's open hostilities towards the ICC, it is unlikely that Russia will turn over its own nationals.⁶⁹ Thus, the required custody will prove difficult even if the trials are held *in absentia*. An individual state, in contrast, may resort to its own armed forces, executive branch, and extradition treaties to physically apprehend foreign perpetrators to stand trial.

Thus, while one can argue that Ukraine's trial during an ongoing conflict toes the line of violating international law, there may be an equally strong argument that these trials are the best chance of providing justice to victims and their families. The procedural hurdles of international courts may result in victims and victims' families waiting years for trials to occur and finally bring them justice. Moreover, not all the victims may even receive justice through these international court trials. The ICC focuses on prosecuting "big fish" perpetrators, those who bear the most responsibility for the commission of atrocity crimes.⁷⁰ As a result, the ICC will likely only ever prosecute a handful of individuals even though there is mounting evidence of war crimes occurring at all levels. Ukraine's trials have already proven effective in providing expedient justice to victims regardless of the perpetrator's status.⁷¹ By shifting this view to prioritize the administration of justice, the concerns of domestic trials during an ongoing conflict are tempered by the ability to ensure justice.

E. If Not Domestic Trials During an Ongoing Conflict, Then What?

The following sections will discuss the viability of alternative forums for striking a balance between providing a fair and impartial trial to alleged perpetrators and providing justice for victims and their families.

1. International Courts

The same procedural hurdles often criticized in international courts may simultaneously provide a fairer and more impartial judicial forum to try alleged perpetrators. The surrounding criticism facing the ICC may be offset by the ICC providing alleged perpetrators with a fair and impartial trial. The ICC comprises 15 judges of different national backgrounds, with Ukraine not being one of them.⁷² The neutral judges, in theory, would retain far less bias than a domestic judge. Moreover, the judges and approved lawyers of the ICC are highly experienced and trained in the complex nuances of international criminal law.⁷³ A similar argument appears for the Court of Human Rights. Notably, Russia was expelled from the Council of Europe, which grants the Court of Human Rights jurisdiction over states. Thus, the Court is only competent to deal with pending and

⁶⁶ *See, supra*, note 50.

⁶⁷ *Cf. supra*, note 30.

⁶⁸ *Supra*, note 15.

⁶⁹ *Supra*, note 50.

⁷⁰ *Id.*

⁷¹ *See, supra*, note 6 (prosecuting a low-ranking soldier).

⁷² *Current Judges*, INTERNATIONAL CRIMINAL COURT (last accessed, Oct. 13, 2022), <https://perma.cc/L6VH-XRYL>.

⁷³ *Cf. Supra*, III(c).

new cases relating to abuses and violations occurring *before* September 16, 2022.⁷⁴ This time frame includes the decision related to Ukraine’s February application alleging massive human rights violations by Russian troops.⁷⁵ Although international courts may better provide a fair and impartial trial for alleged perpetrators, the discussed concerns of expedient justice remain. The arduous procedures required by international law protect alleged perpetrators at the cost of delaying justice.

Moreover, in the case of the Court of Human Rights, precedent demonstrates the Court takes a narrow approach in applying jurisdiction in cases of extraterritorial acts during active hostilities. As discussed above, the ICC is similarly limited in jurisdiction.⁷⁶ Thus, while international courts may provide a fair and impartial trial, there is the initial hurdle of getting *into* court.

a. International Criminal Tribunals

Given the support from the Ukrainian government⁷⁷, an ad hoc international criminal tribunal may provide a fair and impartial judicial forum to try alleged perpetrators. Under an agreement between Ukraine and an international organization or between Ukraine and other states, the tribunal would exercise universal jurisdiction to prosecute individuals responsible for international crimes such as war crimes.⁷⁸ Similarly, a hybrid tribunal may be created between the United Nations and the Ukrainian government to prosecute individuals alleged to have committed war crimes. Hybrid tribunals used in the past include the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.⁷⁹ Much like the arguments for international courts, outside tribunals may provide a fairer and more impartial forum than the domestic courts of Ukraine because the judges, and in some cases the prosecutors and defense lawyers, would not be of Ukrainian nationality. The concern, then, that the domestic judges and lawyers hold highly prejudicial biases would theoretically be checked by the neutral decision-makers in a tribunal.⁸⁰ The efforts to create such tribunals, find neutral decision-makers, and collect sufficient evidence would likely cause the trials to be delayed until *after* the war. In this respect, the same arguments *for* trials during an ongoing conflict would remain. Thus, an international tribunal would not likely provide expedient justice for victims and their families.

IV. Conclusion

The Ukrainian trials set the stage for not only for other war crimes trials in the Russo-Ukraine War but also for how future war crime trials in other conflicts may occur. Underlying the arguments and concerns is the international legal obligation to provide a fair trial to alleged perpetrators regardless of the egregious nature of their crimes. The concerns and arguments surrounding domestic war trials during an ongoing conflict outline the delicate balance between guaranteeing a fair trial and guaranteeing justice. It is clear a fair war crime trial during an ongoing conflict and

⁷⁴ *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS (Mar. 3, 2022), <https://perma.cc/S5J8-MS7R>.

⁷⁵ *Id.*

⁷⁶ *Supra*, IV(b).

⁷⁷ *Briefing Russia’s War on Ukraine in International Law and Human Rights Bodies: Bringing Institutions Back In*, EUROPEAN PARLIAMENT (Apr. 08, 2022), <https://perma.cc/TB3X-WMDF>.

⁷⁸ *Id.*

⁷⁹ *Supra*, note 75.

⁸⁰ *Cf. Supra*, IV(a)(ii).

adjudicated in domestic court *can* occur. The question left unresolved is how the international community will hold states accountable for providing these guarantees.