

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

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October 28, 2022

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

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

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.*

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

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

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