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# War-Torn Justice: Empirical Analysis of the Impact of Armed Conflict on Fair Trial Guarantees in Ukraine

*Justiça devastada pela guerra: análise empírica do impacto do conflito armado sobre garantias do justo processo na Ucrânia*

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**ABSTRACT:** Amidst the ongoing armed conflict triggered by Russian aggression, Ukraine faces the formidable task of upholding fair trial standards and ensuring justice for conflict-related crimes. This research explores the challenges encountered by the Ukrainian judicial system in the aftermath of the aggression. The study investigates the impact of the conflict on the country's ability to prosecute violations of international humanitarian law. Despite the complexity of the situation, Ukraine's judiciary has demonstrated resilience in upholding fair trial guarantees. However, obstacles persist, necessitating a thorough examination of the legal and operational context. The study adopts a systematic approach, delving into contextual considerations, the state of the Ukrainian judiciary, and survey data analysis to highlight organizational, ethical, political and social challenges. The research contributes valuable insights to the discourse on justice and accountability in regions affected by armed conflict, underscoring the need for continuous efforts to safeguard fair trial principles in Ukraine.

**KEYWORDS:** Ukraine; Armed conflict; Fair trial; Conflict-related crimes; Judicial challenges.

**RESUMO:** *Em meio ao conflito armado em curso desencadeado pela agressão russa, a Ucrânia enfrenta a enorme tarefa de defender padrões do justo processo*

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*e garantir justiça para crimes relacionados com o conflito. Este artigo explora os desafios enfrentados pelo sistema judicial ucraniano após a agressão. O estudo investiga o impacto do conflito na capacidade do país de processar violações do direito humanitário internacional. Apesar da complexidade da situação, o sistema judicial da Ucrânia demonstrou resiliência na defesa de garantias de um julgamento justo. No entanto, persistem obstáculos que exigem uma análise aprofundada do contexto jurídico e operacional. Esta pesquisa adota uma abordagem sistemática, investigando considerações contextuais, o estado do sistema judicial ucraniano e a análise de dados de inquéritos para destacar os desafios organizacionais, éticos, políticos e sociais. A pesquisa apresenta informações valiosas para o debate sobre justiça e responsabilização em regiões afetadas por conflitos armados, sublinhando a necessidade de esforços contínuos para salvaguardar os princípios de um processo justo na Ucrânia.*

**PALAVRAS-CHAVE:** *Ucrânia; conflito armado; justo processo; crimes relacionados com conflitos; desafios judiciais.*

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## 1 INTRODUCTION

Amidst the enduring grip of armed conflict, Ukraine finds itself entangled in a struggle against the aggression perpetrated by the Russian Federation in 2014 that intensified in 2022. Such acts of aggression clearly contravene the fundamental principles of international law, including the provisions delineated in the UN Charter, as well as the peremptory prohibition of aggression.<sup>2</sup> Consequently, Ukraine faces the arduous task of contending with the occupation of a portion and an ongoing assault in the remainder of the territory, all while simultaneously fulfilling its obligation to defend the country and ensuring the uninterrupted delivery of essential public services to its citizens.

Unfortunately, this ongoing international armed conflict has witnessed alleged egregious violations of international humanitarian law, encompassing war crimes, crimes against humanity, and the looming

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<sup>2</sup> KRESS, Claus. *The Ukraine War and the Prohibition of the Use of Force in International Law*.

specter of possible genocide. In this backdrop, the pressing need for prosecution and justice for the victims becomes increasingly evident. Ukraine is compelled to uphold democratic standards to secure international support while also demonstrating its unwavering commitment to internal societal cohesion by rejecting any semblance of impunity.

The use of force, whether kinetic or cybernetic, disrupts daily life at both public and private levels, leading to a tangible disarray. This observation finds reflection in the normative system, wherein certain provisions of constitutional and international order allow for the reevaluation of priorities and levels of protection for specific goods in the name of overriding necessity. This includes safeguarding values such as public safety, health, and the survival of the state as the basis for derogations from international human rights law (IHRL) obligations. Nonetheless, such situations do not result in a suspension of the law, leaving state institutions and individuals in a sudden regulatory void. This also applies to the judiciary, where certain non-derogable rights and obligations as core of the fair trial standards persist despite changes in factual circumstances. However, their implementation becomes even more intricate during times of conflict compared to periods of peace.

This research endeavors to explore the challenges faced by Ukraine as it grapples with its obligation to maintain fair trial, affording all essential judicial guarantees in the aftermath of Russia's aggression. The central research question guiding this investigation is: What are the challenges Ukraine faces in upholding the fair trial standard after Russia's aggression in the context of prosecuting conflict-related crimes?

The outlined analysis necessitates a delineation of the notion of conflict-related crimes.<sup>3</sup> A widely recognized classification of core international crimes pertains to offenses that pose a threat to global peace, security, and the overall well-being of the international community.<sup>4</sup> However, due to legislative gaps and lack of prosecutorial and judicial

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<sup>3</sup> The concept of conflict-related crimes is borrowed from the Global Rights Compliance report comprehensively describing legal implications of such a classification of violations. GLOBAL RIGHTS COMPLIANCE. *The Enforcement of International Humanitarian Law in Ukraine*, 2022, p. 22–26, 43–36.

<sup>4</sup> This category encompasses genocide, war crimes, crimes against humanity, torture, and enforced disappearances.

acknowledgment of Ukraine's involvement in armed conflict,<sup>5</sup> many violations were and potentially will be prosecuted as ordinary crimes arising from an emergency situation known as the Anti-Terrorist Operation,<sup>6</sup> rather than as core international crimes. While not inherently prohibited, an erroneous categorization of an act can result in insufficient sentencing and, notably, distort the perception of the extent of violations stemming from the ongoing conflict.<sup>7</sup>

In this paper, I posit that despite the ongoing armed conflict, the Ukrainian judicial system has not collapsed and demonstrates sufficient capacity to uphold fair trial standards in conflict-related cases. Nevertheless, the Ukrainian judicial system has not been immune to obstacles. This study seeks to offer a concise and informative examination of the legal and operational context in which Ukraine is situated. Through the analysis of survey data, valuable insights were obtained regarding the impact of ongoing hostilities and the overall situation in the country on the attainment of fair trial, specifically in conflict-related criminal cases.<sup>8</sup>

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<sup>5</sup> Non-international armed conflict since 2014 (NIAC) and subsequently in an international armed conflict (IAC) from 2022. *International armed conflict in Ukraine* | Rulac. Available at: <<https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine>>. Access on: July 5, 2023; GLOBAL RIGHTS COMPLIANCE. *The Enforcement of International Humanitarian Law in Ukraine*, p. 22, 76.

<sup>6</sup> ZIMMERMAN, Vera. *What Does Ukraine's New Military Approach Toward the Donbas Mean?*, Atlantic Council, 2018.

<sup>7</sup> For instance, separatists were convicted for participation in a terrorist group instead of a war crime for killing a captured serviceman. GLOBAL RIGHTS COMPLIANCE, *The Enforcement of International Humanitarian Law in Ukraine*, p. 56–57.

<sup>8</sup> The use of the latter term (instead of core international crimes) was intended to allow survey respondents to accurately articulate their experiences following the events of 2014, particularly considering the limited timeframe between the full-scale aggression and the relatively low number of trials conducted in a formally acknowledged IAC context (31 convictions of Russian war criminals), juxtaposed with a significant number of 80,000 registered incidents of potential war crimes. AMERICAN BAR ASSOCIATION, *Additional U.S. Support Needed for Ukraine War Crimes Investigations and Prosecutions*. Available at: <[https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/may-23-wl/ukraine-0523wl/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may-23-wl/ukraine-0523wl/)>. Access on: July 5, 2023.

This research article adopts a systematic framework, consisting of three primary sections. The contextual section emphasizes the importance of the fair trial principle during armed conflict and investigates various international and national avenues for prosecuting individuals involved in conflict-related crimes. The second section presents the condition of the Ukrainian judiciary. The third section delineates the methodology employed in the survey and presents the survey findings, which confirm the organizational and normative, ethical, and political challenges confronted by the Ukrainian judiciary. Ultimately, conclusions synthesize the key findings and implications derived from the study.

## **2 UNVEILING THE CONTEXT**

### **2.1 DENIAL OF FAIR TRIAL GUARANTEES AS A VIOLATION OF HUMAN RIGHTS AND INTERNATIONAL CRIME**

The standard of fair trial is a fundamental principle of IHRL and is enshrined in various international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), regional human rights treaties such as the European Convention on Human Rights (ECHR), and domestic law. Amidst the differing perspectives, a fundamental nucleus of elements exists that enjoys a consensus and is indisputably integral to the concept, even in times of armed conflict. It is commonly understood that the fair trial standard encompasses such elements as impartiality, equality before the law, adequate legal representation, presumption of innocence, right to be informed, timely trial, public hearing, examination of witnesses and evidence, and protection against self-incrimination. By recognizing and upholding these fundamental components, the standard of fair trial aims to secure the integrity, impartiality, and legitimacy of legal proceedings, ensuring that individuals facing criminal charges are afforded a genuine opportunity to present their case, challenge the evidence brought against them, and receive a just and equitable judgment. By maintaining fair and impartial proceedings, democratic societies demonstrate their resilience and commitment to justice, even in the face of adversity.

In the context of armed conflict, although the ECHR and ICCPR do not explicitly provide a separate set of simplified basic standards for fair trials, it has been acknowledged that adjustments or accommodations may be necessary due to the exceptional circumstances prevailing during armed conflicts. For instance, emergency laws may be enacted to introduce simplified procedures or temporarily suspend certain procedural formalities. Additionally, judges may be granted a significant degree of judicial discretion, allowing them to adapt procedural rules to suit the unique needs of the prevailing situation. Still, any adjustments must uphold core principles of fairness and human rights protection.

Despite Ukraine's submission of multiple derogations since 2015,<sup>9</sup> these measures have proven inadequate in their objective to totally derogate from fair trial guarantees. This is because this legal standard is a non-derogatory right, as guaranteed by Article 6 of the ECHR<sup>10</sup> and Article 14 of the ICCPR.<sup>11</sup> Therefore, Ukraine is still bound to adhere to the fundamental principles of fair trial guarantees and can be held accountable before the Strasbourg court for any potential violations.

The recognition of the denial of fair trial as a war crime finds firm footing within the realms of international humanitarian law (IHL)<sup>12</sup> and the International Criminal Court (ICC) Rome Statute.<sup>13</sup> Furthermore,

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<sup>9</sup> *Informal chronology of derogations under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 5)*: Council of Europe, 2022.

<sup>10</sup> *Guide on Article 6 of the European Convention on Human Rights*: Council of Europe, 2022.

<sup>11</sup> *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, Geneva: UN Human Rights Committee, 2007; *General comment no. 29, Article 4, States of emergency*, UN Human Rights Committee, 2001, parag. 3.

<sup>12</sup> ICRC, *Fair Trial Guarantees*, IHL Databases. Available at: <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule100>>. Access on: July 5, 2023; Article 85(4)(e) Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts.

<sup>13</sup> In case of IAC: Article 8(2)(a)(vi) and in NIAC: Article 8(2)(c)(iv) Rome Statute of the International Criminal Court. The regulation of the crime of denial of fair trial varies depending on the nature of the armed conflict, with the term "denial of judicial guarantees" being used in the context of NIAC.

should the conditions of widespread or systematic conduct be fulfilled, it may also warrant classification as a crime against humanity.<sup>14</sup> Regrettably, prosecutions related to this offense before international tribunals have been infrequent since the culmination of the Second World War, thus adding to the intricate nature of its interpretation and underlying principles. In general, it is important to distinguish between cases where no trial took place or where the trial was conducted in such a deficient manner that it failed to meet the criteria of a fair trial.<sup>15</sup> Nonetheless, as aptly pointed out by Marchesi, numerous unanswered questions persist regarding the precise parameters of this latter case.<sup>16</sup> Given the prevailing uncertainties surrounding the issue, it is reasonable to surmise that the gravity of fair trial violations, particularly those reaching the extent of complete absence of trials (like a mock trial), increases the likelihood of prosecution under the international criminal law (ICL) framework. However, ultimately each violation will be examined on a case-by-case basis.

## **2.2 EXAMINING COMPLEMENTARY PROSECUTION OPTIONS FOR CRIMES COMMITTED IN UKRAINE**

Following the escalation of hostilities after February 24, 2022, there has been a surge in reports detailing alleged grave breaches of IHL, violations of human rights, and war crimes and crimes against humanity.<sup>17</sup>

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<sup>14</sup> DEPIAZZA, Jennifer, Denial of Fair Trial as an International Crime. Precedent for Pleading and Proving it under the Rome Statute, *Journal of International Criminal Justice*, n. 15, p. 257–289, 2017.

<sup>15</sup> *Ibid.*

<sup>16</sup> These lingering uncertainties encompass crucial aspects: the interpretation of IHL judicial guarantees, the interplay between IHRL and its jurisprudence in their interpretation, the determination of which violated guarantees trigger criminal responsibility, the necessity of assessing the fairness of proceedings as a whole, the potential criminalization of additional judicial guarantees from IHRL, and whether the denial of a fair trial without a conviction constitutes a war crime. MARCHESI, Diletta, The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements, *Israel Law Review*, v. 54, n. 2, p. 174–204, 2021.

<sup>17</sup> BENEDEK, Wolfgang; BÍLKOVÁ, Veronika; SASSÒLI, Marco, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022*, OSCE,



The massacres that transpired in Bucha<sup>18</sup> and Mariupol<sup>19</sup> garnered significant attention from the global public. Confronted with the magnitude of these infractions and the lack of action from the UN Security Council, the international community has amplified its efforts to provide assistance. Among the forms of support offered, various investigations have been initiated, garnering recognition as the “Ukraine moment” due to their extensive scope, yet also attracting global criticism for perceived selectivity.<sup>20</sup> The variety of initiatives and their extent needs to be synthesized in order to better reflect the perspective of the prosecution of war criminals, in which the Ukrainian justice system is not left to its own devices.

Moreover, I believe that we are witnessing the emergence of a novel ecosystem characterized by digitalization and democratization of international criminal justice efforts. The profound significance of employing innovative technologies for purposes such as evidence gathering, victim data collection, and damage assessment cannot be overstated. Simultaneously, these endeavors are increasingly being carried out through the collaborative engagement of state and international authorities with civil society at large. These factors have become crucial in addressing the fact-rich and resource-intensive nature of investigations

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2022; Resolution ES-11/1. Aggression against Ukraine; Resolution 49/1. Situation of human rights in Ukraine stemming from the Russian aggression; European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism; Resolution. Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine; *Report of the Independent International Commission of Inquiry on Ukraine*, United Nations Human Rights Council, 3023; *Emergency in Ukraine: external situation report. Reporting period: 28 July–10 August 2022*, WHO, 2022; *Human rights in Ukraine*, Amnesty International. Available at: <<https://www.amnesty.org/en/location/europe-and-central-asia/ukraine/report-ukraine/>>. Access on: July 5, 2023; HUMAN RIGHTS WATCH, *Ukraine: Events of 2022*, World Report 2023. Available at: <<https://www.hrw.org/world-report/2023/country-chapters/ukraine>>. Access on: July 5, 2023.

<sup>18</sup> SAVITSKY, Alexander, *The mass graves of Bucha*, DW, 2022; Bucha killings: Satellite image of bodies site contradicts Russian claims, BBC News, 2022.

<sup>19</sup> “It was a massacre”: Mariupol residents recall battle for Ukrainian city, Reuters, 2022.

<sup>20</sup> LABUDA, Patryk I., Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law’s selectivity in the wake of the 2022 Ukraine invasion, *Leiden Journal of International Law*, p. 1–22, 2023.

into core international crimes. However, in the realm of international criminal justice, the proliferation of such diverse initiatives entails certain risks that warrant careful consideration (the potential for duplication and confusion arising from inconsistent mandates among various actors, the potential re-traumatization of victims, and the waste of valuable resources). Consequently, the coordination of activities and databases established represents a significant challenge to the efficacy of the system. Furthermore, there are indications that the “Ukraine moment” presents a breakthrough in this regard, as evidenced by the technological initiatives outlined below and the tangible significance of nongovernmental organizations (NGOs) supporting authorities in training efforts and documentation of violations.

### 2.2.1 INTERNATIONAL CRIMINAL COURT AND INVESTIGATION ON THE SITUATION IN UKRAINE

Ukraine is not a State Party to the Rome Statute but pursuant to Article 12(3) of the Statute, the Government of Ukraine accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from November 21, 2013.<sup>21</sup> On March 2, 2022, the ICC Prosecutor opened an investigation into the situation in Ukraine following the 39 States Parties referrals.<sup>22</sup> This investigation pertains to allegations of war crimes, crimes against humanity, and genocide, with the notable exclusion of the crime of aggression due to the stringent jurisdictional requirements associated with it.<sup>23</sup> The ongoing investigation encompasses the examination of Rome Statute crimes committed by various parties

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<sup>21</sup> Recognition of the ICC jurisdiction by the Government of Ukraine in 2014; Recognition of the ICC jurisdiction by the Government of Ukraine in 2015.

<sup>22</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, International Criminal Court. Available at: <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>>. Access on: July 5, 2023.

<sup>23</sup> KRESS, Claus; HOBE, Stephan; NUSSBERGER, Angelika, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*. JustSecurity.

engaged in the conflict, including the Ukrainian government forces, separatist groups, and other relevant actors.

Given the substantial financial and resource limitations faced by the Office of the Prosecutor (OTP), as it lacks its own police or executive forces, the efficacy of the investigation relies heavily on the support extended by the States Parties.<sup>24</sup> The “Ukrainian moment” serves as a notable example that such backing is attainable when there exists sufficient political determination, even from states with historically strained relations with the ICC.<sup>25</sup> The provision of financial and human resources has facilitated the largest deployment of OTP personnel in the field since its establishment.<sup>26</sup> Also, in March 2023, the ICC Prosecutor introduced a novel application called OTPLink, allowing external stakeholders and witnesses to submit evidence electronically through online platforms and email.<sup>27</sup>

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<sup>24</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and support from States Parties will accelerate action across our investigations*, International Criminal Court. Available at: <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will>>. Access on: July 5, 2023; *Lithuania intends to allocate EUR 100,000 to Hague Process over war in Ukraine*, Delfi EN. Available at: <<https://www.delfi.lt/en/politics/lithuania-intends-to-allocate-eur-100-000-to-hague-process-over-war-in-ukraine-89663335>>. Access on: July 5, 2023; MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES, *International Criminal Court investigation into crimes committed in Ukraine* (23 Mar. 2022), Available at: <<https://www.diplomatie.gouv.fr/en/country-files/ukraine/news/article/international-criminal-court-investigation-into-crimes-committed-in-ukraine-23>>. Access on: July 5, 2023; CORDER, Mike. *Coalition backs war crimes probe over Russia-Ukraine war* | AP News, AP News, 2022.

<sup>25</sup> BUCHWALD, Todd, *Unpacking New Legislation on US Support for the International Criminal Court*.

<sup>26</sup> *ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands*, International Criminal Court. Available at: <<https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>>. Access on: July 5, 2023; PRESS, Associated, *Millions in Extra Funding Pledged for ICC Work in Ukraine*, VOA, 2023.

<sup>27</sup> *OTP Link*, International Criminal Court. Available at: <<https://otplink.icc-cpi.int/>>. Access on: July 5, 2023.

On March 17, 2023, the ICC Pre-Trial Chamber II issued arrest warrants for two individuals in relation to the situation in Ukraine.<sup>28</sup> These individuals are Mr. Vladimir Vladimirovich Putin, President of the Russian Federation, and Ms Maria Alekseyevna Lvova-Belova, Commissioner for Children’s Rights in the Office of the President of the Russian Federation. This significant development aligns with the ICC’s mandate to hold accountable those responsible for grave crimes, including heads of state and government officials. While the practical likelihood of successfully prosecuting these defendants in The Hague may be low, the issuance of these arrest warrants carries significant political implications.<sup>29</sup> It sends a strong message that impunity will not be tolerated, while also symbolically upholding the fundamental principles of ICL and offering hope to the victims who have been awaiting justice.

Considering the aforementioned factors, including the inherent principle of complementarity in the ICC,<sup>30</sup> which establishes its reliance on national justice systems, it is not feasible to expect the OTP investigation to comprehensively address all war criminals or provide justice for every victim of war. Hence, the ICC serves as the central pillar of the international criminal justice system, complemented by regional and national mechanisms, including those operating under the principle of universal jurisdiction.

### 2.2.2 REGIONAL AND STATE INITIATIVES

Universal or national jurisdiction investigations in relation to the crimes committed during the 2022 Russian invasion of Ukraine are conducted by individual states in their domestic legal systems. According to the recent Trial International report, a total of eleven investigations

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<sup>28</sup> *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court. Available at: <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>>. Access on: July 5, 2023.

<sup>29</sup> JACKSON, Miles, *The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues*.

<sup>30</sup> Article 1 Rome Statute.

pertaining to international crimes committed in Ukraine have been initiated in various European countries and Canada<sup>31</sup>. Also, several public prosecutors have commenced “structural investigations” aimed at gathering evidence concerning the crimes committed during this armed conflict, with the purpose of proactively constructing cases for potential future criminal proceedings, rather than initially targeting specific individuals or incidents.<sup>32</sup> This aspect of the “Ukrainian moment” highlights the increasing prominence of universal jurisdiction as a mechanism for addressing international crimes. These investigations hold significant importance as they encompass a wider jurisdictional scope when compared with the ICC, extending to the prosecution of aggressive war crimes, as exemplified by the case of Poland.<sup>33</sup> However, it is essential to acknowledge the complex and contentious issue of immunities, which poses a legal constraint by preventing the prosecution of heads of state.<sup>34</sup>

A joint investigation team has been established via Eurojust, involving seven European countries and the ICC, in order to coordinate and strengthen their collective endeavors in the prosecution of crimes committed in Ukraine.<sup>35</sup> Two notable initiatives have emerged as pivotal in these efforts. Firstly, recognizing the inherent challenges pertaining to evidentiary matters in such investigations, the establishment of the Core International Crimes Evidence Database announced the intensification of international efforts in this regard. This database has received numerous files from various countries, including Ukraine, for the purpose of preservation and analysis. Secondly, Eurojust has taken the lead in hosting

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<sup>31</sup> Estonia, France, Latvia, Lithuania, Germany, Norway, Poland, Slovakia, Spain, Switzerland, and Sweden. LEVY, Shoshana, *Universal Jurisdiction Annual Review 2023*, TRIAL International, p. 10.

<sup>32</sup> Sweden, France, and Germany. *Ibid.*

<sup>33</sup> Polish prosecutors launch investigation into Russia’s attack on Ukraine, *The First News*, 2022.

<sup>34</sup> LEMOS, Miguel, *The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine*.

<sup>35</sup> *Eurojust and the war in Ukraine*. Available at: <<https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine>>. Access on: July 5, 2023. The participating countries include: Ukraine, Lithuania, Poland, Estonia, Latvia, Slovakia, and Romania.

the International Centre for the Prosecution of the Crime of Aggression Against Ukraine. This unique judicial hub, launched on July 3, 2023, serves as a catalyst for cooperation among national prosecutors, facilitating the exchange of evidence and fostering a shared prosecution strategy specifically in the context of crimes of aggression. This initiative is the first practical undertaking in the debate on a forum or tribunal that could try those responsible for Russian aggression.<sup>36</sup> Eurojust also hosts the Genocide Network, a hub for expertise exchange in investigating and prosecuting genocide, crimes against humanity, and war crimes.

Also, at the Council of Europe Summit in Reykjavik in May 2023, 46 member states and several non-member states reached an agreement to establish the Register of Damage for Ukraine.<sup>37</sup> This database aims to serve as a comprehensive repository of evidence and claims information regarding the damage, loss, or injury incurred by all affected natural and legal persons and the State of Ukraine since February 24, 2022.

In addition to cooperation and support networks and new evidence data repositories, both the Council of Europe and the European Union offer Ukraine multifaceted programs of support for judicial reform,<sup>38</sup>

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<sup>36</sup> ANDERSON, Janet, Everything you need to know or argue about a special tribunal on Russia's crime of aggression – JusticeInfo.net, 2022; CORTEN, Olivier; KOUTROULIS, Vaios, *Tribunal for the crime of aggression against Ukraine – a legal assessment*, Policy Department for External Relations Directorate General for External Policies of the European Union, 2022; HELLER, Kevin Jon, Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea; MCDOUGALL, Carrie, Why Creating a Special Tribunal for Aggression Against Ukraine Is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics.

<sup>37</sup> *Register of Damage for Ukraine*. Available at: <<https://www.coe.int/en/web/human-rights-rule-of-law/register-of-damage-for-ukraine>>. Access on: July 5, 2023; MEŻYKOWSKA, Aleksandra, Establishment of the Registry of Damage – The first element in ensuring Russia's financial accountability for the aggression against Ukraine, *ESIL Reflection*, v. 12, n. 3, 2023.

<sup>38</sup> *EU solidarity with Ukraine*. Available at: <[https://eu-solidarity-ukraine.ec.europa.eu/index\\_en](https://eu-solidarity-ukraine.ec.europa.eu/index_en)>. Access on: July 5, 2023; *Support to the functioning of justice in the war and post-war context in Ukraine*, Council of Europe Office in Ukraine. Available at: <<https://www.coe.int/en/web/kyiv/support-for-judicial-institutions-and-processes-to-strengthen-access-to-justice-in-ukraine>>. Access on: July 5, 2023; *Pravo-Justice*. Available at: <<https://www.pravojustice.eu/>>. Access on: July 5, 2023.

whether in the light of possible accession to the EU<sup>39</sup> or the fulfilment of obligations as a member of the Council of Europe.

The legal and institutional landscape described above exemplifies the substantial international and regional support garnered by intergovernmental organizations and individual states (also outside the region), contributing to what has been coined as the “Ukraine moment”. While eleven domestic investigations have been launched, their outcomes remain uncertain, as their future trajectory largely hinges on the political determination to allocate resources toward achieving justice for Ukraine. Nevertheless, what unifies these initiatives is the robust cooperation and knowledge sharing with Ukrainian law enforcement agencies and the justice system. This collaborative approach should be recognized as both valid and commendable, as the Ukrainian authorities shoulder the primary responsibility for ensuring accountability and justice for the victims. With the aid of international assistance and the utilization of digital infrastructure, their prospects for achieving this goal are significantly enhanced.

### **3 EXAMINING THE CONDITION OF THE UKRAINIAN JUDICIARY: ASSESSING CAPACITIES AND CHALLENGES**

The armed conflict poses a formidable obstacle for any nation and its governing institutions. In the context of Ukraine, international support assumes particular significance due to the inherent deficiencies of its justice system, which had long been in a state of flux even prior to the onset of extensive aggression. The effective operation of the justice system necessitates substantial efforts during and following the armed conflict. Furthermore, the system’s structure and capacity to resist undue influence, especially in prosecuting individuals implicated in the aggression, play a pivotal role in ensuring Ukraine’s adherence to

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<sup>39</sup> MAASIKAS, Matti, *All Ready for the Judicial Reform?*. Available at: <[https://www.eas.europa.eu/delegations/ukraine/all-ready-judicial-reform\\_en?s=232](https://www.eas.europa.eu/delegations/ukraine/all-ready-judicial-reform_en?s=232)>. Access on: July 5, 2023; *Ukraine and the EU membership application*. Available at: <<https://www.consilium.europa.eu/en/policies/enlargement/ukraine/>>. Access on: July 5, 2023.

its international commitments under IHRL and ICL. Hence, a concise depiction of the present condition of the Ukrainian judicial system serves as a contextual introduction to the survey results, which elucidate the practical challenges encountered in individual cases.

### 3.1.1 INSTITUTIONAL REFORM

Since 2014, Ukraine has undertaken significant reforms in its judicial system with the aim of increasing its independence, transparency, and efficiency.<sup>40</sup> These reforms were implemented in response to longstanding concerns about corruption, political influence, and a lack of public trust in the judiciary. The judicial reform in Ukraine encompassed several significant measures, including the establishment of key institutions, involvement of civil society representatives, and the temporary engagement of international experts.<sup>41</sup> Notable steps include the establishment of the High Anti-Corruption Court of Ukraine in 2019<sup>42</sup> and the 2021 reform of two key bodies responsible for judicial self-governance: the Selection Commission for the High Qualification Commission of Judges and the Ethics Council of the High Council of Justice.<sup>43</sup> Furthermore, since 2016, the Public Integrity Council has been implementing a comprehensive vetting process to assess the integrity and qualifications of incumbent judges.<sup>44</sup>

This institutional reform holds significant implications for assessing violations of fair trial guarantees in two key aspects. Firstly,

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<sup>40</sup> *Judicial reform in Ukraine: a short overview*. Available at: <<http://en.dejure.foundation/library/judicial-reform-in-ukraine-what-has-changed-for-the-last-three-years>>. Access on: July 5, 2023; Timeline of the Judicial Reform; HRYSHCHENKO, Kateryna; VALKO, Vadym; CHYZHYK, Tetiana, *Reforms in the Rule of Law in Ukraine. Report for 2022*, DEJURE Foundation, 2022.

<sup>41</sup> CHYZHYK, Halyna, Judicial Reform in Times of War.

<sup>42</sup> Ukraine's President Creates Anti-Corruption Court, Radio Free Europe/Radio Liberty.

<sup>43</sup> The HQC conducts competitive and transparent examinations and interviews to evaluate candidates' qualifications and integrity, while the HCJ's Ethics Council nominates judges for appointment by the president. CHYZHYK, Judicial Reform in Times of War.

<sup>44</sup> HOPPE, Tilman, International integrity vetting of public officials: guest blog.



as DiPiazza suggests,<sup>45</sup> the lack of *de jure* and *de facto* independence and impartiality in the administration of justice can serve as evidence of the manipulation of the judicial system to advance governmental policies, as seen in the *Justice* case<sup>46</sup> concerning Nazi Germany. In the case of Ukraine, such manipulation of the justice system may serve the interests of influential groups rather than the government, as evidenced by cases involving widespread corruption. This is exemplified by the revelations concerning the Constitutional Court.<sup>47</sup> Secondly, the overall state of the national proceedings is considered by the ICC when evaluating the admissibility of a case, employing the “unable and unwilling” doctrine as a criterion.<sup>48</sup> Hence, the reform measures have garnered significant international support, emphasizing the ongoing importance of maintaining a fair and effective judicial system, even in the midst of armed conflict.<sup>49</sup>

### 3.1.2 LEGISLATIVE SHORTCOMINGS

In addition to institutional weaknesses, the presence of inadequate and potentially discriminatory laws or policies contributes to the potential denial of fair trial. Ukraine has initiated the amendment of specific legislative acts to incorporate the norms of IHL and ICL into national legislation. The War Crimes Draft Bill (Draft Bill no. 2689)<sup>50</sup> expands jurisdiction of the Ukrainian courts to prosecute war crimes, crimes against humanity, aggression, and other conflict-related crimes, clarifies command responsibility and definitions of war crimes and aggression,

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<sup>45</sup> DEPIAZZA, Denial of Fair Trial as an International Crime. Precedent for Pleading and Proving it under the Rome Statute, p. 269–271.

<sup>46</sup> United States of America v. Alstötter et al.

<sup>47</sup> HUBENKO, Dmytro, Ukraine: “Large-scale corruption” in Supreme Court reported, DW, 2023.

<sup>48</sup> AGIRRE, Xabier; ET. AL., *Informal expert paper: The principle of complementarity in practice*, International Criminal Court, 2003, p. 13–15.

<sup>49</sup> *The Ukrainian Judicial System in a Time of Armed Conflict*, International Commission of Jurists, 2022.

<sup>50</sup> Draft Bill No. 2689 on Amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the implementation of the norms of International Criminal and Humanitarian Law – comparative table.

introduces the definition of crimes against humanity, and strengthens penalties and sentencing guidelines. However, despite its adoption by the Ukrainian parliament in May 2021, its implementation is pending the signature of the president.

The lack of political will to finalize this reform, as well as the reluctance to ratify the Rome Statute (with Ukraine still withholding its signature),<sup>51</sup> is closely linked to concerns regarding the application of inconsistent standards to perpetrators of atrocities. In light of the existing legal framework, the resistance exhibited by certain politicians and high-ranking military officials, who express concerns over the potential prosecution of Ukrainian citizens for IHL violations, appears contradictory and unsustainable. Such an attitude is perplexing, considering that Ukraine's recognition of the ICC jurisdiction already provides a pathway for the OTP to investigate and potentially prosecute its citizens. Similarly, albeit to a somewhat more limited degree, domestic law enforcement agencies have the authority to prosecute all individuals for their involvement in IHL violations. This apprehensive stance suggests a partial pursuit of justice, wherein discrimination against one group (those aligned with Russia) and lenient treatment toward others (those supporting Ukraine) undermine the fundamental principles of ICL. Such actions, in turn, may give rise to allegations of a persecutory nature<sup>52</sup> in denying individuals their right to a fair trial and may prove a selective "willingness"<sup>53</sup> in the admissibility test before the ICC.

### 3.1.3 TECHNOLOGICAL ADVANCEMENTS AND SUPPORT

As previously discussed, the investigation of international crimes in contemporary times relies heavily on advanced technologies. Furthermore, the global impact of the COVID-19 pandemic has prompted numerous judicial systems to expedite their digital transformation.

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<sup>51</sup> BULEIKO, Mariia, Why Has Ukraine Not Ratified the Rome Statute?

<sup>52</sup> DEPIAZZA, Denial of Fair Trial as an International Crime. Precedent for Pleading and Proving it under the Rome Statute, p. 272–273.

<sup>53</sup> AGIRRE; ET. AL., *Informal expert paper: The principle of complementarity in practice*, parag. 45.

The implementation of the judicial system digitalization reform in Ukraine, which commenced in 2017<sup>54</sup> and underwent testing during the COVID-19 pandemic, has significantly contributed to the resilience and accessibility of the justice system during hostilities. Ukraine implemented the Unified Judicial Information and Telecommunication System (UJITS)<sup>55</sup> to improve efficiency and transparency in the judicial process. UJITS enables electronic filing, case management, and public access to court decisions, enhancing accountability and reducing opportunities for corruption.

What is more, the implementation of electronic identity documents, exemplified by the Diia application, has not only provided Ukrainian citizens with expanded access to public services including courts, particularly beneficial for war refugees residing abroad, but has also facilitated improved communication between the government and citizens amidst the ongoing armed conflict.<sup>56</sup> Two applications developed by the Ukrainian government are particularly relevant in terms of collecting data on violations: WarCrimes.gov.ua, where victims and witnesses of violations can send information about evidence, and ChildrenOfWar.gov.ua, which aims to report child abductions and help families find them.

Last but not least, law enforcement authorities, both national and international, can greatly benefit from the significant support provided by NGOs in collecting information and evidence related to violations.<sup>57</sup> While NGOs vary in terms of professionalization, they possess substantial human resources and motivation, often serving as first responders at crime

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<sup>54</sup> SHENK, Olga; PROTSIUK, Oleksandr; HRYSHYN-HRYSHCHUK, Roman, *Digital Litigation in Ukraine | CMS Expert Guide*. Available at: <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-digital-litigation/ukraine>>. Access on: July 5, 2023.

<sup>55</sup> *Unified Judiciary Information and Telecommunication System Development Strategy*, Pravo-Justice, 2019.

<sup>56</sup> THELWELL, Kim, Ukrainian Diia App Helps Refugees Receive Aid and News. The Ukrainian government has developed applications such as Air Raid Alert (to warn of impending air raids and the need to take shelter), eEnemy and ePPo (allowing citizens to send data to the military on the location of the enemy), UNITED24 (a crowdfunding platform for the war effort), or TacticMedAid (containing data on how to provide first aid).

<sup>57</sup> *Ukraine 5 AM Coalition*. Available at: <<https://www.5am.in.ua/en>>. Access on: July 5, 2023.

scenes. Consequently, they have emerged as one of the crucial actors in the pursuit of international justice<sup>58</sup> and sustainable peace.<sup>59</sup> Also, the Ukrainian judicial reform underscored the indispensable role of NGOs in advancing the principles of the rule of law, particularly through their involvement in transparency and vetting procedures within the Public Integrity Council.

After presenting the general condition of the Ukrainian judiciary and the support provided by foreign and nongovernmental actors, including through new technological solutions, the next section will present the findings of empirical research conducted with practitioners operating within the system. Notwithstanding the absence of systemic collapse, the Ukrainian judiciary confronts a range of challenges that can be traced back to the pre-war era and have been further intensified by the ongoing hostilities. In light of this, a survey was undertaken among judges and defense counsels involved in handling conflict-related crimes, with the aim of gaining insights into and enhancing comprehension of the barriers impeding the attainment of a fair trial standard in practice.

## **4 CHALLENGES IN UPHOLDING FAIR TRIAL GUARANTEES AMIDST UKRAINE'S ARMED CONFLICT: A SURVEY STUDY**

### **4.1 METHODOLOGY**

The survey was conducted in an online format, utilizing an activation link distributed to judges and defense counsels through the National School of Judges and the Ukrainian Bar Association. This method of dissemination aimed to mitigate the risk of unsolicited responses, such as trolling. It is important to note that while the survey ensured anonymity, there was a potential for individuals outside the intended target group

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<sup>58</sup> *Shared Guiding Principles on Accountability for Grave Crimes Committed in Ukraine*. Available at: <<https://www.coalitionfortheicc.org/news/20230405/shared-guiding-principles-accountability-grave-crimes-committed-ukraine>>. Access on: July 5, 2023.

<sup>59</sup> *The Nobel Peace Prize 2022*. Available at: <<https://www.nobelprize.org/prizes/peace/2022/press-release/>>. Access on: July 5, 2023.

to complete the survey. The survey questionnaire consisted of 17 open-ended and seven closed multiple-choice questions. Participants had the option to complete the survey in either Ukrainian or Russian, with the questions presented in Ukrainian after being translated from English by associates of the Sunflowers Project Foundation. Only questions regarding the type of legal profession practiced and the date of starting the profession were mandatory. Data collection took place between April 20 and May 9, 2023, resulting in a total of 94 participants, including 21 judges and 73 defense counsels (Table 1).

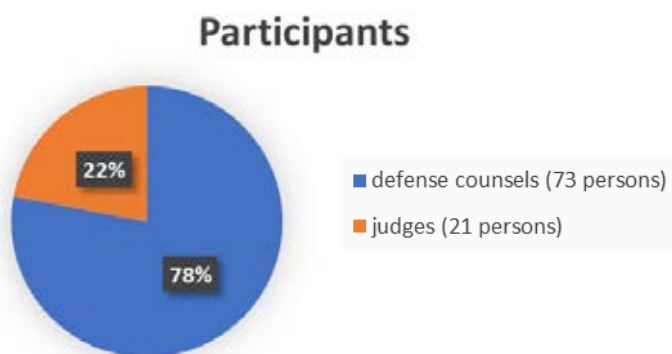


FIGURE 1. Participants. Source: Survey “Challenges in Upholding Fair Trial Guarantees amidst Ukraine’s Armed Conflict,” April 20–May 9, 2023.

To assess the respondents’ involvement and experience in conflict-related cases, participants were requested to provide an approximate count of their engagements in such cases (Table 2). This inquiry aimed to contextualize the situation, considering the assertions made by the prosecutor’s office regarding the substantial number of cases initiated in connection with the ongoing armed conflict.<sup>60</sup> Prior to presenting the findings on this matter, it is pertinent to provide a succinct overview of the case assignment process. Judges are assigned cases through an automated allocation system, whereas defense counsels operate on the basis of

<sup>60</sup> As of February 2023, 65,000 alleged war crimes were catalogued. Prosecuting war crimes in Ukraine, NPR, 2023.

contractual agreements with clients or appointments made *ex officio*. Notably, a subset of respondents (15 individuals) reported being appointed by the Center for Legal Aid Provision, a ministerial institution tasked with providing cost-free legal assistance to ensure effective representation in conflict-related cases. This mode of representation assumes particular significance, particularly in trials conducted *in absentia*, with respondents indicating their involvement in approximately 15 such trials. The provision of defense counsel by the state signifies a reduced probability of violating the right to defense and underscores Ukraine's proactive stance in ensuring the protection of this fundamental right.

Among the respondents, it was found that nearly a third had no experience with conflict-related crimes, while the largest segment of participants had fewer than a dozen such cases (43 individuals). An illustrative example was provided by a respondent who, as a judge, highlighted the consequences of regional occupation and the resulting restructuring of court activities. This respondent initially handled only three conflict-related cases following the 2014 aggression, but the number surged to around 500 cases following the occupation of Kharkiv in 2022. This demonstrates the profound influence of territorial and jurisdiction changes on the judicial workload.

### Number of conflict-related cases

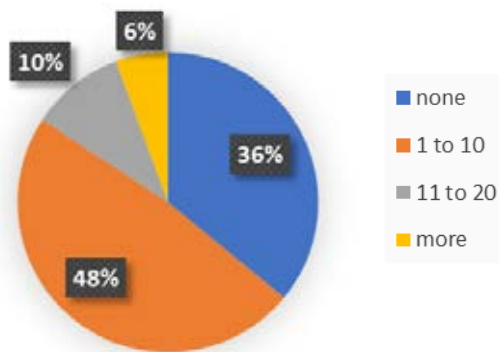


FIGURE 2. Number of conflict-related cases. Source: Survey "Challenges in Upholding Fair Trial Guarantees amidst Ukraine's Armed Conflict," April 20–May 9, 2023.

The fog of war, characterized by chaos, confusion, and fear, affects the judiciary across multiple dimensions. This includes obvious factors, such as the endangerment of physical security and the psychological toll stemming from an assault on the nation, as well as nuanced factors that necessitate contextual analysis. In this survey, the identified factors are categorized into three groups: organizational and normative, ethical, and political and social challenges. Nonetheless, it is crucial to acknowledge the interconnectedness and interdependence of these issues, as they converge to produce an unfavorable synergy.

#### **4.2 ORGANIZATIONAL AND NORMATIVE CHALLENGES**

These challenges refer to the hostilities conducted in contravention of the fundamental principles of IHL, namely the destruction, casualties, and endangerment of the safety of the civilian population,<sup>61</sup> which encompasses justice personnel, as well as civilian objects, including court buildings.<sup>62</sup> Since the commencement of the armed conflict in 2014, significant organizational challenges have emerged, such as safeguarding case files from courts situated in occupied territories, relocating staff members, and appropriately adjusting the jurisdictional scope of courts under Ukrainian control. The implementation of UJITS has been very convenient in this regard. By securely storing case files on court servers, facilitating videoconferencing for judges, and enabling electronic filing and document retrieval, UJITS has improved the operational efficiency of the judicial system. However, as the Russian offensive progressed, courtrooms and servers were destroyed, necessitating evacuations and the assignment of new cases. Courts operating in close proximity to the front lines or under prolonged attacks faced exceptional conditions, including power outages, concerns for personal safety, staffing shortages, and data security vulnerabilities.

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<sup>61</sup> *Ukraine: Winter must not be used as a weapon of war*, NRC. Available at: <<https://www.nrc.no/news/2022/october/ukraine-winter-must-not-be-used-as-a-weapon-of-war/>>. Access on: July 5, 2023.

<sup>62</sup> ZUBOVA, Anastasia, *Courts in Evacuation: How the War Has Redefined the Landscape of Ukrainian Justice*, The Media Initiative for Human Rights, 2023.

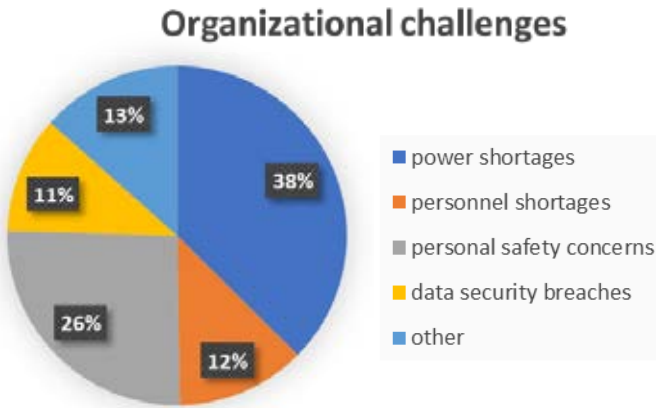


FIGURE 3. *Organizational challenges*. Source: Survey “Challenges in Upholding Fair Trial Guarantees amidst Ukraine’s Armed Conflict,” April 20–May 9, 2023.

When asked to identify the biggest organizational challenges, respondents identified power shortages (38%) as the most problematic. While courts in Ukraine are recognized as part of the country’s critical infrastructure and receive support from governmental and local authorities (albeit insufficiently, as indicated by respondents), their functioning has heavily relied on the self-reliance of staff members. Remarkably, two survey participants mentioned that they personally acquired power generators to mitigate the impact of power outages.

In second place, respondents indicated concerns about personal safety (26%). Concerns for the personal safety of judges and defense counsels closely align with those of civilians, who bear the brunt of attacks conducted in disregard of the principle of distinction resulting in continuous physical and psychological peril. Moreover, in light of the requirements of their profession, respondents expressed difficulties in locating secure environments for client consultations and a shortage of suitable housing options for displaced judges and their families.

Another organizational challenge pointed out by 12% of respondents were personnel shortages. The displacement of civilians following the aggression in 2022 and subsequent hostilities has affected



court staffing.<sup>63</sup> Despite attempts to fill staff gaps through new job advertisements, respondents highlight that the primary obstacle are the inadequate salaries of court staff, which has led to a continuous departure of employees. Additionally, the unresolved issue of life insurance for court employees working on the front lines further compounds their precarious situation. Defense counsels handling cases assigned by the Center for Legal Aid Provision have also experienced significant payment delays and a lack of transparency in the client assignment system.

With the introduction of UJITS and increasing awareness of cybersecurity in general, 11% of respondents indicated that ensuring data security is an organizational challenge.

These organizational challenges are intertwined with the normative framework that governs the functioning of the justice system. Consequently, it is imperative to juxtapose these responses with the approaches to normative challenges within the context of the study.

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<sup>63</sup> Some court personnel, including judges, joined the armed forces, while administrative staff, mainly consisting of women, were forced to flee with their families to other regions or abroad. This has worsened the shortage of judges, resulting from the prior comprehensive reform of judicial governance that involved the voluntary resignation of HJC members who refused integrity assessment and froze recruitment for judicial vacancies. BREWSTER, Murray, In Ukraine, a judge becomes a soldier and fights for his country | CBC News, CBC, 2022; CHYZHYK, Judicial Reform in Times of War.

## Normative challenges

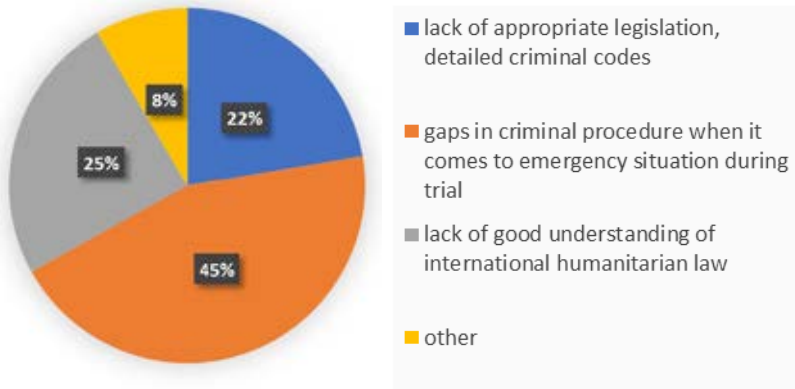


FIGURE 4. Normative challenges. Source: Survey "Challenges in Upholding Fair Trial Guarantees amidst Ukraine's Armed Conflict," April 20–May 9, 2023.

When asked about the biggest normative challenge, almost half of the respondents mentioned gaps in criminal procedure as to the emergency situation during trial (45%). Respondents highlighted that the disruption of court hearings due to raids or the lack of internet connection and electricity had consequential effects on ongoing cases. The absence of adequate regulations pertaining to the suspension of hearings in emergency situations, such as air raids or flooding, resulted in the discontinuation of cases, necessitating their reopening or abandonment. Furthermore, many respondents pointed out the lack of detailed procedural guidelines for remote criminal trials, which operated analogously to conventional trials, leading to problematic situations where the court had to make determinations on the course of proceedings. Some defense counsels expressed concerns about unjustified refusals to conduct videoconference hearings. Additionally, one respondent emphasized the need for a reasonable acceptance of missed court deadlines due to the ongoing hostilities as a practical measure to be implemented.

As many as 25% of respondents felt they did not have a good understanding of IHL. This indicates inadequate preparedness of

lawyers to correctly address conflict-based crimes. Despite the widely publicized offers of substantial assistance from specialized national and foreign governmental and nongovernmental organizations, a significant number of respondents expressed the need and desire for IHL training. Out of the 94 respondents, only nine (including three judges) confirmed receiving an offer of IHL training, and some were unable to attend due to heavy workload. Respondents emphasized the scarcity and delayed provision of training opportunities. As a remedial measure, it was suggested that a compilation of international judgments on conflict-related crimes be prepared to facilitate judges' rapid familiarity with this legal domain. This challenge has significant implications in terms of legal norms, as judges, particularly during armed conflicts and periods of martial law, are entrusted with the task of thoroughly examining introduced regulations in light of IHRL and IHL standards. They must assess the proportionality and necessity of these measures. Furthermore, this challenge compounds the earlier unsuccessful attempts to derogate from IHRL instruments, which indicates a political inclination to excessively limit legal protections due to the prevailing armed conflict situation.

Moreover, respondents confirmed (22%) that a normative challenge is the lack of appropriate legislation, including detailed criminal codes. As indicated above, legislative shortcomings, including in particular the expected adoption of the War Crimes Bill, are burdensome in practice and awaited by the judiciary.

#### **4.3 ETHICAL CHALLENGES**

At the core of the right to a fair trial lies the fundamental principle of being judged by a court that is independent and impartial. Judicial independence pertains to the separation of powers, specifically the judiciary's autonomy from the executive branch, as discussed further below. On the other hand, impartiality relates to the mindset of the judge and entails a lack of bias toward the case and its participants.<sup>64</sup>

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<sup>64</sup> BELTRÁN MONTOLIÚ, Ana, Imparcialidade judicial e atividade probatória no Tribunal Penal Internacional, *Revista Brasileira de Direito Processual Penal*,

Should reasonable doubts arise regarding a judge's impartiality, the parties involved have the right to request the judge's disqualification, or the judge may choose to recuse themselves from presiding over the case.

In cases involving judges presiding over trials of war criminals within their own homeland, particularly amidst an ongoing armed conflict, maintaining impartiality may appear exceedingly challenging, if not impossible. This is especially true when confronted with egregious acts of aggression and the persistent reports of widespread IHL and IHRL violations. However, such an assertion is not without legitimate criticism. Firstly, it would lead to the illogical conclusion that judges from a victimized country are incapable of adjudicating war criminals from the aggressor's side – an assertion that is contrary to factual circumstances and a general rule of international criminal justice. Secondly, the decision to disqualify a judge should be individualized and supported by proper justification. Nevertheless, it remains undeniable that upholding impartiality for Ukrainian judges and defense counsels poses significant ethical challenges, given the direct and indirect impact of the war on their life on multiple levels. As expressed by one respondent judge, “[i]t is difficult to maintain impartiality when we are confronted daily with reports of heinous atrocities and the utter disregard for legal and moral norms by the Russian occupiers. Russia's current presidency of the UN feels like a mockery of common sense.”

Given the multifaceted nature of impartiality, the survey employs a comprehensive approach by exploring various factors that potentially influence attitudes toward conflict-related crimes, rather than solely relying on self-perceived impartiality.

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v. 4, n. 2, p. 605, 2018.



FIGURE 5. Ethical challenges. Source: Survey "Challenges in Upholding Fair Trial Guarantees amidst Ukraine's Armed Conflict," April 20–May 9, 2023.

In response to inquiries regarding ethical challenges encountered in the practice of their profession, the respondents indicated the relevance of individual factors as follows. The most frequently mentioned concerns included the psychological burden and potential trauma experienced by individuals (44%). Additionally, a significant number of respondents reported the involvement of their family members in the armed forces (18%) or humanitarian aid efforts (12%). Furthermore, a notable number of respondents expressed the loss of close acquaintances (8%), personal and direct exposure to war atrocities (8%), as well as prior service in armed conflict and direct engagement in hostilities (5%).

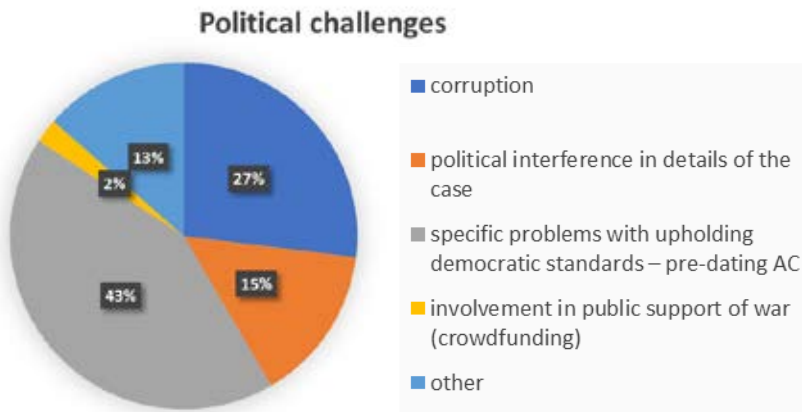
The collected responses unequivocally highlight that the ethical challenges emanate from concerns related to personal safety, both physically and psychologically, as well as the well-being of their loved ones who have been affected by adversities such as fatalities, injuries, displacement, and engagement in armed conflict and humanitarian aid efforts. This in turn has the potential to influence impartiality, especially on an unconscious cognitive level. The individual perceptions

of personal experiences are also shaped by the pervasive media coverage of war atrocities, political strife, and the expressions (or absence) of solidarity and support.

Tailored psychological assistance is deemed crucial in the context of war, which inherently engenders traumatic experiences. While some respondents expressed no need for additional relief in this domain, others emphasized the practice of self-care and self-administration of sedatives. Only a small number of individuals (two respondents) reported being offered psychotraumatic training, and only one of them participated. Nonetheless, the most prevalent response to the open question regarding the greatest challenge in general was the requirement for psychological support among judges, lawyers, court personnel, and clients. Indications of significant psychological burden were also evident across various other responses. Participants referred to persistent psychological pressure stemming from ongoing hostilities and the potential risk of military mobilization, limited resilience to stress, perpetual anxiety, the unpredictable nature of daily life, professional burnout, moral fortitude, and, not least, the loss of statehood.

#### **4.4 POLITICAL AND SOCIAL CHALLENGES**

The final set of factors falls within the category of political challenges, as they pertain to the public sphere and governance in Ukraine. These challenges encompass concerns regarding the impact of the executive branch and public opinion on the judiciary, as well as the normative framework that governs its operations. Furthermore, this group sheds light on the perspective of defense counsels and the obstacles they encounter in fulfilling the right to a fair trial and providing effective legal representation.



*FIGURE 6. Political challenges. Source: Survey “Challenges in Upholding Fair Trial Guarantees amidst Ukraine’s Armed Conflict,” April 20–May 9, 2023.*

Nearly half of respondents (43%) acknowledged that specific issues pertaining to the preservation of democratic principles – including pre-existing concerns that currently affect the fairness of trials – constitute a significant political obstacle. The assertion made by one of the participants effectively underscores a pivotal consideration and implication of the uncertainty inherent in times of war on the functioning of the Ukrainian (and conceivably any) state: “The challenges that were present before have become markedly intensified during the conflict.” Despite the government’s active engagement in international diplomatic and judicial forums, the domestic implementation of reforms to align Ukrainian law with international and European standards<sup>65</sup> has stagnated due to the ongoing armed conflict and political reluctance, resulting in frustration among various stakeholders. In the absence of a shift in this attitude, the prevailing issues will persistently escalate.

Secondly, corruption was identified as a significant political challenge by 27% of the respondents. This finding is unsurprising when considering the substantial lack of public trust in the judiciary (with

<sup>65</sup> What are the “European standards” for the judiciary and how should they be applied?

only 10% of the population expressing trust, while 59% exhibit distrust as of June 2021)<sup>66</sup>, closely linked with the pervasive existence of a “culture of bribery.”<sup>67</sup>

Thirdly, 15% of respondents (three judges and ten defense counsels) disclosed instances where they personally witnessed political interference in the ongoing legal proceedings. This interference manifested through actions such as physical obstruction by law enforcement or armed forces agents, as well as public comments from the legislative power. Based on comments provided by defense counsels, a number of significant political implications that affect the right to defense were highlighted, including challenges related to attorney–client privilege, limited access to clients during searches and arrests, and overall deficiencies in the quality of pretrial proceedings.<sup>68</sup> During the pretrial phase, the identified violations may also meet the criteria for breaches of the right to a fair trial. Such direct and indirect interventions pose a significant challenge to the principles of democracy and can be a relevant factor in evaluating a state’s capacity and commitment to prosecuting individuals responsible for war atrocities. The survey findings affirm the urgent necessity to address the politicization of courts,<sup>69</sup> which remains unresolved by the nascent democracy and demands focused attention to ensure the establishment of impartial justice and, to some extent, achieve a moral triumph over the aggressor. The imperative to uphold the rule of law in Ukraine transcends mere legal obligations and encompasses both political and moral imperatives.

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<sup>66</sup> *Survey of Ukrainian Population Regarding Trust in the Judiciary and Other Branches, Judicial Independence and Accountability, Perception of and Reporting Corruption*, INFOSAPIENS, 2020. According to DEJURE foundation, in December 2020 the level of distrust toward the judiciary increased to 77% (from 73% in 2019) and the prosecution up to 68% (from 63% in 2019). HRYSHCHENKO; VALKO; CHYZHYK, *Reforms in the Rule of Law in Ukraine. Report for 2022*.

<sup>67</sup> HUBENKO, Ukraine: “Large-scale corruption” in Supreme Court reported.

<sup>68</sup> SAKOWICZ, Andrzej, Suspect’s access to a lawyer at an early stage of criminal proceedings in view the case-law of the European Court of Human Rights, *Revista Brasileira de Direito Processual Penal*, v. 7, n. 3, p. 1979, 2021.

<sup>69</sup> NEKOLIAK, Andrii, Ukraine’s Presidents and the Judiciary: An Uneasy Relationship.



Furthermore, on a practical level, it was raised that the defense counsels' work representing individuals tried *in absentia*, despite the government's provision of salaries, poses significant challenges. Respondents emphasized the complete lack of cooperation and communication with Russian authorities, which hinders their ability to obtain mitigating evidence, effectively transmit indictments, or establish contact with clients who are beyond the reach of Ukrainian authorities. Given the evident lack of genuine intentions on the part of Russia, it is apparent that the Ukrainian government has limited control over addressing these issues. Nevertheless, this emphasizes the need for judges to pay special attention to these matters during the judicial phase of the process. Considering that a notable portion of trials pertaining to conflict-related cases are conducted *in absentia*<sup>70</sup> (a practice permitted under domestic criminal law for minor offences but restricted under IHRL and ICL regimes),<sup>71</sup> Ukraine will likely encounter additional financial and organizational challenges associated with arranging retrials, if such a request were to arise.

Only 2% (one judge and one defense counsel) considered involvement in public support of war (like crowdfunding) as a political challenge to the professional performance of their profession. The limited number of indications of this factor is not surprising, considering that Ukraine is engaged in a legally and morally justified defensive war. The scenario would vary if lawyers openly endorsed an aggressive war, as this could raise apprehensions regarding the maintenance of fair trial standards.

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<sup>70</sup> MATOLA, Victoria, Ukraine: Justice in Absentia.

<sup>71</sup> *Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing In Absentia Judgments. Case-Law Guide*, InAbsentieAW, 2020; WAHL, Thomas, CJEU Clarifies Conditions for Trials and Convictions in absentia; KNOOPS, Geert-Jan Alexander, Trials in Absentia. In: *An Introduction to the Law of International Criminal Tribunals. A Comparative Study*, Second. Brill | Nijhoff, 2014, p. 327–341.

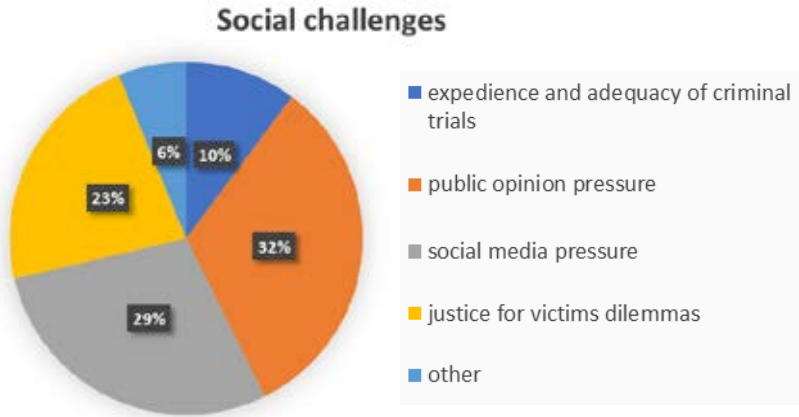


FIGURE 7. Social challenges. Source: Survey “Challenges in Upholding Fair Trial Guarantees amidst Ukraine’s Armed Conflict,” April 20–May 9, 2023.

When asked about social challenges, respondents mainly mentioned public opinion pressure (32%) and social media pressure (29%). This observation is not unexpected, considering the widespread recognition of the conflict in Ukraine as one of the most extensively documented and extensively covered by the media. The accessibility of information about violations during the conflict acts as a double-edged sword, facilitating evidence provision while impacting the mental well-being of its observers. The widespread availability of frontline news, especially through smartphones and apps, also plays a role in how cases are handled and how judges and defense counsels are treated by public opinion. For instance, some defense counsels expressed concerns for their personal safety, given the public’s tendency to associate defense counsels with the accused and the occurrence of kidnappings and murders targeting legal professionals.<sup>72</sup>

In third position, 23% of the participants identified justice for victims dilemmas as a social challenge. Furthermore, a social challenge highlighted by 10% of the respondents pertains to the expediency and

<sup>72</sup> Ukraine murder of lawyer a chilling blow to justice.

adequacy of criminal trials. These two identified factors are closely intertwined. On the one hand, victims have the right to receive an appropriate response to address their needs, including the identification and adjudication of those accountable for the harm they have endured. Conversely, protracted trials, trials conducted *in absentia*, deficiencies in the proper classification of crimes, and subsequently insufficient sanctions exacerbate the plight of the victims. Simultaneously, excessively expedited or perfunctory trials undertaken to appease public sentiment raise concerns regarding the adherence to due process. In Ukraine's situation, the significant volume of conflict-related investigations and short timeframe between the onset of full-scale aggression and the first convictions (first one delivered within three months)<sup>73</sup> prove that justice for victims is an important consideration.

In response to these challenges, respondents have suggested various corrective measures. These include implementing more robust deterrents against undue influence on the courts and improving the effectiveness of judicial communication. One proposed approach is the provision of public summaries elucidating the reasoning behind significant and contentious verdicts, which could enhance transparency and promote better comprehension of judicial decisions. Hence, alongside institutional reforms, a comprehensive initiative to raise awareness and restore trust in the judiciary appears necessary as the subsequent stage in the rehabilitation process of Ukraine's judicial system.

## 5 CONCLUSIONS

Despite the ongoing armed conflict, Ukraine has not been left to face its challenges alone. The emergence of what is commonly referred to as the "Ukrainian moment" is evident in the initiation of international investigations, heightened training and knowledge sharing efforts, and the provision of unprecedented political support. Furthermore, there

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<sup>73</sup> VASILIEV, Sergey, Ukraine's First War Crimes Trials of Russian Soldiers Are Important Test Cases, *Foreign Policy*, 2022; MARCHUK, Iryna, Domestic Accountability Efforts in Response to the Russia–Ukraine War, *Journal of International Criminal Justice*, v. 20, n. 4, p. 787–803, 2022.

has been a growing reliance on new technologies and the establishment of digital repositories for data. While these activities are not standalone solutions, they significantly enhance Ukraine's capacity to ensure accountability for perpetrators and deliver justice to victims. However, it is the Ukrainian authorities who bear the primary responsibility, with other components of the international criminal justice system playing a complementary role. Considering the substantial number of ongoing proceedings pertaining to conflict-related crimes, encompassing tens of thousands of cases, the weight imposed on the Ukrainian judicial system is notably burdensome.

This study has focused on assessing the capacity of the Ukrainian justice system to ensure basic fair trial rights in the context of the ongoing armed conflict taking place in Ukraine since 2014 and significantly intensified in February 2022. The principle of a fair trial serves as a cornerstone in democratic states, representing a non-derogable standard that necessitates unwavering commitment. In the context of Ukraine, it is imperative for the authorities to acknowledge and anticipate that any infringement upon this standard may result in accountability under IHRL, with the most severe cases potentially constituting a crime of denial of fair trial. Considering that the latter can arise from systemic flaws, such as the manipulation of judicial systems, as well as violations in individual cases, it was essential to examine both perspectives to obtain a comprehensive understanding of the challenges faced by Ukraine.

Overall, Ukraine's judiciary is in a transitional phase, striving to overcome its deficiencies and meet the demands of the armed conflict. Two significant challenges that require consideration are the politicization of courts and the issue of corruption. By prioritizing the strengthening of institutional capacity, addressing legislative shortcomings, embracing technological advancements, and fostering collaboration with domestic and international partners, Ukraine can make substantial progress in ensuring fair trial guarantees and promoting justice for all parties affected by the conflict. These efforts are crucial for the restoration of public trust, the upholding of human rights, and the establishment of a robust and impartial judicial system.

Based on the empirical research conducted, three interconnected sets of factors that are pertinent to ensuring fair trial rights in individual

cases were identified: organizational and normative, ethical, and political considerations. The organizational challenges encompassed proper case management, including file security and jurisdiction changes, which carried the risk of case discontinuation or significant delays. While digitalization reforms, such as the introduction of UJITS, have improved efficiency, certain challenges persist. A shortage of staff poses a hindrance to the system's ability to effectively handle cases, compounded by a heavy workload and potential influx of new cases. Delays in payments and low salaries further contribute to the departure of personnel, exacerbating the staffing issue. From a normative perspective, judges are granted discretionary power in emergency situations, which may lead to potential risks of disproportionate and unjustified decisions, particularly in cases involving remote hearings and missed court deadlines. The lack of IHL training and important legislation in this area increases the risk of inadequate qualification of crimes and improper sanctions, thus diminishing the consideration for justice for victims. Furthermore, a potential bias toward perpetrators of aggression and a lack of judicial expertise in international law may amplify the effects of martial law and excessive restrictions on human rights.

The study highlights two significant ethical challenges in ensuring fair trials. The first relates to the lack of personal safety for legal professionals and their clients, which can lead to irregularities and potentially result in the denial of a fair trial. The second challenge pertains to maintaining impartiality when legal professionals witness and experience mass violations of IHL and IHRL. This challenge is compounded by the absence of psychological support and training.

The presence of political interference in individual cases and the prevalence of corruption as significant challenges were also noted. Actors involved in the judicial process emphasize the importance of enhancing resilience to public opinion while simultaneously improving public trust in the judiciary. Furthermore, defense counsels highlight the need to strengthen the pretrial phase, emphasizing that even during armed conflict, certain core principles must be upheld.

By carefully examining the challenges faced in practice and presenting some potential remedial measures, this study provided an examination of the specific dynamics within the Ukrainian context. The

survey results establish a foundation for comprehending the complexities and nuances inherent in the relationship between any armed conflict and the guarantee of a fair trial, thus making a contribution to the broader discourse on justice and accountability in regions affected by mass violence.

The analysis of the survey findings suggests that the fundamental aspects of fair trial in Ukraine are upheld. However, there is still a possibility that significant breaches may come to light in the future. While some of the challenges can and should be addressed by the public authorities, others remain beyond its control. The assessment of IHRL and ICL violations will primarily focus on the former. However, assessing the impact of armed conflict on the justice system's capacity is a factual matter, and its legal evaluation concerning potential denial of fair trial falls within the jurisdiction of national and international courts, which should consider all relevant legal and factual circumstances.

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