Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law’s selectivity in the wake of the 2022 Ukraine invasion

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Abstract
Russia’s full-blown invasion of Ukraine has reinvigorated the debate over international criminal law’s selectivity. While many have welcomed the renewed interest in accountability for international crimes in the wake of the ‘Ukraine moment’, others have emphasized double standards in the enforcement of international criminal law, including a lack of accountability for Western violations and disproportionate attention to European victims. This article interrogates the master narratives about international criminal law’s post-Ukraine selectivity and complicates accusations of bias by emphasizing Ukraine’s liminal status in the global order and the cross-border nature of aggression as an explanatory factor for differentiated responses from states. It suggests that concerns about an invidious ‘Ukraine effect’ on international criminal law enforcement are less persuasive after the International Criminal Court’s decade-long conflict with the African Union, and that a decentring of investigations to Eurasia should be construed not only as a moment of soul-searching but also as a welcome opportunity to rebalance the scales of justice. The article encourages international criminal law stakeholders to move beyond critique that unwittingly essentializes Eurocentric assumptions and to devise a more compelling vision of global criminal law enforcement that challenges crimes and inequalities both between and within states.

Keywords: aggression; critique; Eurocentrism; international criminal law; Ukraine

1. Introduction
The international criminal justice project is often critiqued for its selectivity and illegitimacy. Established in 2002, the International Criminal Court (ICC) now has 123 states parties but more than half of the world’s people remain beyond its jurisdiction, including those living in powerful states like China, Russia, and the US. Albeit mandated to prosecute ‘the most serious crimes of concern to the international community as a whole’, the ICC has prosecuted only a handful of perpetrators in 20 years. At best, it has met demands for accountability only partially. At worst, critics argue that the ICC has done more harm than good, exacerbating conflicts or forcing

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22002 Rome Statute of the International Criminal Court, 2187 UNTS 3, Preamble.
dictators to dig in their heels rather than seek compromise.\textsuperscript{3} Saddled with divergent and contradictory expectations,\textsuperscript{4} the Court has plodded along from crisis to crisis, with recurring predictions that international criminal justice is on its deathbed.\textsuperscript{5}

Russia’s full-blown invasion of Ukraine in February 2022 has reinvigorated the debate over international criminal law’s selectivity, the ICC’s (il-)legitimacy and – in a somewhat novel twist on these themes – the Eurocentricity of the global accountability regime.\textsuperscript{6} While supporters of international criminal justice welcomed the renewed interest in accountability for serious violations of international law, many also noted the double-edged nature of the ‘Ukraine moment’ or ‘Ukraine effect’.\textsuperscript{7} As Reed Brody explains, while the invasion of Ukraine has ‘given the ICC a golden opportunity to demonstrate its relevance . . . it has also exposed the political calculations and double standards which have plagued both the ICC and the international justice system more generally’.\textsuperscript{8}

Although varying in kind and intensity, core critiques of the international criminal justice project after Russia’s 2022 invasion contend that ‘Western’ states\textsuperscript{9} have prioritized the investigation of violations of international law in Ukraine while similar attention has not been given to crimes committed in other parts of the world. It is argued that the push for a Ukraine-specific Special Tribunal for Aggression (STA) exemplifies double standards in the global order, as Western violations of the prohibition of force, especially the US-led invasion of Iraq, did not produce comparable advocacy around aggression prosecutions. Observers point out that Western states have rushed to support investigations of genocide, crimes against humanity and war crimes in Ukraine, exposing a Eurocentric bias at the heart of the international criminal justice project, while insufficient funding for non-European countries undermines the ICC’s ability to provide impartial justice in those contexts. Others argue that majority-white Western states prioritize the suffering of white victims while victims of colour do not receive the same generosity, illustrating how systemic racism permeates the global order.

Against this backdrop, this article interrogates the assumptions, the coherence of master narratives, and the overall persuasiveness of the critique of international criminal law in the wake of the 2022 Ukraine invasion. It argues that, while critique can perform a useful function in unveiling the law’s biases and blind spots, concerns about a widespread and invidious ‘Ukraine effect’ in international criminal law suffer from reductionism and risk turning potentially constructive critique\textsuperscript{10} into hyper-critique ‘pitched at a level of generality bordering on sloganeering’.\textsuperscript{11} Given that

\begin{footnotesize}
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\item See Brody, ibid.
\item In this article, ‘West’ is understood to include Australia, North American and European states, with the proviso that Eastern European and post-Soviet states (the former Second World) occupy a liminal ‘semi-peripheral’ status as neither fully Western, nor fully Global South. See Section 5, infra.
\item D. Robinson and G. MacNeil, ‘The Tribunals and the Renaissance of International Criminal Law: Three Themes’, (2016) 110 AJIL 191 (‘the dominant tone in ICL scholarship is fairly critical; an upbeat assessment runs the risk of being labeled as triumphalist or as a progress narrative’).
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the ‘Ukraine moment’ is transpiring after a decade-long conflict between the African Union (AU) and the ICC – where international criminal law was denounced for selectively targeting Africa and the systemic racialization of black people – a decentring of investigations to Eurasia should be seen not only as a moment of crisis or soul-searching but also as a welcome opportunity to rebalance the scales of justice. By foregrounding Ukraine’s liminal status within the global order and the cross-border nature of Russia’s aggression, this article not only complicates some one-dimensional accusations of bias and offers more plausible explanations for Ukraine-related mobilization; it also suggests that international criminal justice stakeholders should move beyond rhetorical denunciations of double standards that unwittingly essentialize Eurocentric assumptions and offer a more enticing vision of global accountability that challenges crimes and inequalities both between and within states going forward.

This article proceeds in five parts. First, against the backdrop of divergent responses to Russian aggression from different parts of the world, it explains what is the ‘Ukraine moment’ in international criminal law. Second, the article analyses, interrogates and, where applicable, nuances key post-2022 critiques of the legitimacy of investigations of genocide, crimes against humanity and war crimes. It argues that Ukraine-related critique, when analysed in light of analogous complaints about the law’s selectivity in the decade-long stand-off between the AU and the ICC, reveals a more complex story of international criminal law enforcement in different regions and that Ukraine-related accusations of systemic racism suffer from internal contradictions. Third, after drawing attention to the inter-state nature of Russian aggression as an explanatory factor for differentiated responses to the war in Ukraine, the article places criticisms of the STA in perspective, by exposing their West-centric assumptions and showing that analogously selective ad hoc tribunals in Africa and Asia do not occasion as much introspection and anti-Western critique. Fourth, by reconceptualizing Ukraine’s liminal place within the European and global order – as a country straddling East and West, Global North and South, racial boundaries, and inter-imperial rivalries – the article questions strident criticisms of the ‘Ukraine moment’, especially the STA’s illegitimacy qua response to imperial aggression. In conclusion, the article suggests that Ukraine-related critiques of international criminal law’s selectivity, while accurately identifying Western powers’ reluctance to hold themselves to account, nevertheless flatten the complexities of international criminal law enforcement in a state-centric global order and risk reproducing an inward-looking Eurocentric epistemology by eliding how non-Western actors should respond to the ‘Ukraine moment’ in pursuit of a more equitable and sustainable system of global accountability.

2. The ‘Ukraine moment’ in international criminal law

The 2022 invasion of Ukraine is widely considered a turning point in global affairs. The field of international criminal justice is no different. Soon after the Russian army launched its attack, the ICC Prosecutor announced he would ‘proceed with opening an investigation into the Situation in Ukraine’ and appealed to states for support. Within a week, 39 states (joined by four more later) referred Ukraine to the Prosecutor for investigation. At the same time, owing to the ICC’s lack of
jurisdiction over the crime of aggression in Ukraine, the first calls emerged for a special tribunal focused on this specific violation of international law.\textsuperscript{15}

After opening its investigation, the ICC received further support from a growing coalition of states. Responding to Prosecutor Karim Khan’s appeal for voluntary contributions, more than 20 governments pledged assistance, including through financial contributions and \textit{gratis} personnel.\textsuperscript{16} In May 2022, the OTP sent 42 investigators and forensics experts, its largest ever deployment in a single situation, to collect evidence in Ukraine.\textsuperscript{17} In addition to domestic proceedings in the Ukrainian justice system, several states – e.g., Poland, Lithuania, Latvia, Slovakia, Estonia, Germany, and France – launched parallel national investigations of aggression, genocide, crimes against humanity and war crimes, supplemented by transnational co-operation initiatives, notably through Eurojust and an Atrocity Crimes Advisory Group, to avoid a duplication of proceedings and resource inefficiencies.\textsuperscript{18}

While this support has been remarkable in many ways, it was not universal. Notwithstanding many Western states’ support for criminal accountability measures, similar enthusiasm from non-Western countries seemed largely absent.\textsuperscript{19} As early as the first vote in the UN General Assembly on Russia’s invasion, over 40 states, often collectively labelled ‘Global South’, abstained.\textsuperscript{20} A non-committal response deepened in subsequent resolutions, with fewer non-Western states voting to eject Russia from the UN Human Rights Council or to endorse reparations against Russia.\textsuperscript{21}

Similarly, to date, it seems no non-Western state has offered financial or in-kind support for ICC investigations in Ukraine.


\textsuperscript{17}See ICC-OTP Announces Deployment, ibid.


\textsuperscript{19}An exception is Chile, which joined the mass referral to the ICC Prosecutor on 1 April 2022. See Letter from Embassy of Chile to the ICC Prosecutor, 1 April 2022, at www.icc-cpi.int/sites/default/files/2022-04/20220401-Chile-Letter-to-OTP.PDF.


Enthusiasm for the proposed STA proved yet more uneven. While the Parliamentary Assembly of the Council of Europe formally called upon all member and observer states ‘to urgently set up an ad hoc international criminal tribunal’ as early as May 2022,22 key Western governments remained uncommitted. Illuminating fault lines among regional blocs in the global order, advocacy for a special tribunal centred around a handful of Eastern European states in geographical proximity to Ukraine and with prior histories of Russian aggression.23 It was not until early 2023 that key Western powers, notably the UK, France, and Germany, threw their support behind some type of aggression mechanism, though serious divergences remained between Western and Eastern European states on the preferred model.24

Against the backdrop of these uneven and at times contradictory responses to the 2022 invasion from different states and regional blocs, an emerging Ukraine-related critique of international criminal law’s selectivity has coalesced. The next two sections analyse the substance of these critiques in turn.

3. The ICC: From ‘targeting Africans’ to ‘ignoring black suffering’?

Efforts to hold perpetrators accountable for genocide, crimes against humanity and war crimes committed in Ukraine are unfolding within an international criminal justice system dominated, for much of the 2010s, by the ICC’s fraught relations with the AU. Much scholarly ink has been spilt on the causes and consequences of the stand-off, which culminated in plans for a collective African withdrawal from the Court and the eventual withdrawals (attempted or failed) of Burundi, the Gambia, and South Africa.25 Although the legal dimension of the withdrawal debate centred around the (absence of) immunities for heads of state accused of international crimes,26 ICC-AU tensions carried a strong political valence, including accusations that the Prosecutor was ‘targeting Africans’ and that the Court amounted to a form of ‘judicial neo-colonialism’.27 According to the


Ethiopian Prime Minister, the ICC was ‘race-hunting’ and the Gambia famously labeled it the International Caucasian Court.28

Upon taking office in 2012, Fatou Bensouda, the second ICC Prosecutor and herself a Gambian national, spent much of her nine-year mandate countering the narrative of the ICC qua anti-African Court. To her credit, she diversified the ICC’s situation docket while also emphasizing that the ICC served primarily African victims. In doing so, Bensouda also illuminated the self-serving and hypocritical rhetoric of African leaders, several of whom had referred their countries to the ICC for investigation but did not hesitate to criticize the Court when they themselves were threatened with accountability.29

Although her counter-narrative of an ICC serving the interests of Africans was (rightly) contested by critics as reductionist and self-congratulatory in nature, the racial dynamics of ICC interventions received less scholarly attention until the Black Lives Matter movement spurred a belated (re)-appraisal of this issue.30 For instance, Frédéric Mégret and Randle DeFalco focus on structural racism to analyse criticisms of ‘a specifically racist dimension’ to ICC prosecutorial discretion that ‘persistently ends up shifting the international judicial gaze towards Black bodies’ and conclude that ‘claims about the ICC’s racism may, in fact, be even more valid than is commonly thought’ but ‘more complex than typically understood’.31 Others have followed suit.32

Enter Ukraine. If, for some, Khan and states’ quick response to Russian aggression has allayed concerns as to the ICC’s anti-African bias and systemic racism, it seems that for many others the invasion of Ukraine is part and parcel of the same global power dynamics, including a persistent Eurocentricity at the heart of international law.33 After a record 43 states leveraged the power of state referral to trigger the ICC Prosecutor’s investigation in Ukraine, some openly wondered why European states did not exhibit the same enthusiasm to condemn crimes in other parts of the world. As noted by Jacqueline McAllister, ‘[d]ozens of nations, including the United States, have pledged a windfall of support to the ICC, which many of them had not done for other conflicts before the court’.34

Similarly, after the same European and North American states began offering targeted contributions to support the ICC Prosecutor’s investigations in Ukraine, commentators and civil society groups raised concerns about a two-tiered system of justice, especially that states might be able to shape the Prosecutor’s investigative priorities and, in so doing, solidify a perception of double standards in international criminal justice. As noted by Amnesty International:


33Eurocentrism is a contested concept, but it can be defined as a focus on Europe or the West in the production and legitimation of international law, or assigning a special and superior status to norms originating in the European/Western world. On different meanings of the term see N. Tzouvala, ‘The Specter of Eurocentrism in International Legal History’, (2021) 31 Yale Journal of Law & the Humanities 413. See also European University Institute, Decentering Eurocentrism, available at www.eui.eu/research-hub?id=decentering-eurocentrism-1&subpage=description.

While the Prosecutor is no doubt taking advantage of a rare opportunity to harness the support of many of the biggest funders of the ICC for the Ukraine investigation, that is precisely the concern – that the OTP will gravitate towards situations that powerful western states are willing to throw additional resources, voluntary contributions and secondments at in order to advance their interests, while it pragmatically accepts impunity for crimes committed in other situations, especially if the same states continue to starve the Court of resources through its annual budget.35

Others noted the disparate racial impact of such contributions. Mark Kersten argued that:

[s]ystemic racism . . . influences the institutions of international relations and global justice . . . It is only natural to worry that the overwhelming support offered to the ICC in Ukraine represents another instance in which justice is made available to some people in some places some of the time and not to all.36

Yet others worried that ad hoc support for investigations would reinforce the geographically and racially unequal composition of ICC personnel, emphasizing that contributions from Western states risked further entrenching inequitable representation.37

Khan sought to allay some concerns, for instance by emphasizing that financial donations would be ‘deployed based on . . . needs across all situations’.38 However, technical fixes cannot obviate all challenges. To take one example, a tension arises between demands for equitable geographical representation and the need for local expertise, which in the case of Ukraine-Russia investigations would imply far more Eastern European staff with knowledge of local culture and languages.39 At any rate, allegations of double standards, Eurocentrism, and racial discrimination deserve scrutiny, not least because similar complaints have featured elsewhere in Ukraine-related commentary on international law, for instance in regard to proceedings before the International Court of Justice, European migration policy, and universal jurisdiction.40 Is the critique compelling and if so, what should be done about it?

39This tension is illusory as Eastern Europeans are, like all regional groups except the Western group, severely underrepresented at the ICC. The perception that additional Eastern European staff would challenge diversity at the Court stems from a focus on phenotype over other markers of diversity, and reductionist mental maps of Eastern Europe. See Section 4, infra. On geographical imbalance at the ICC see ASP, Report of the Bureau on Equitable Geographical Representation and Gender Balance in the Recruitment of Staff of the International Criminal Court, ICC Doc. No. ICC-ASP/20/29 (29 November 2021), paras. 15–19.
To begin with, it should be acknowledged that the ICC Prosecutor has struggled to investigate powerful states like the US (in Afghanistan), Israel (in Palestine), the UK (in Iraq), or Russia (in Georgia or Ukraine). Despite her efforts to change the narrative of the ICC *qua* anti-African court, Bensouda ultimately failed to make much progress in holding suspects from powerful states to account. Even in Georgia, where the ICC opened its first non-African investigation in 2016, no arrest warrants materialized until after the 2022 invasion of Ukraine. As noted by some scholars, the strange temporal coincidence of arrest warrants against three Russian nationals for crimes committed in Georgia in April 2022 suggests that the Ukraine invasion made it possible to diversify not just the ICC’s investigative geography, but to finally issue charges against non-Africans.41 Others emphasized the specifically racial dynamics of ICC arrest warrants.42

It seems undeniable also that European countries have prioritized, to an unprecedented degree, criminal accountability in the wake of Russia’s 2022 invasion. One would have to go back to the mid-1990s, the period in which the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as negotiations on what became the Rome Statute, for evidence of similar mobilization around international criminal justice.

Yet, while a variety of motives can be identified to explain certain states’ renewed enchantment with international criminal accountability, some post-2022 critiques run into factual problems when subjected to scrutiny. For starters, few commentators engage the puzzle of why Western states failed to react strongly in 2014 when the war in Ukraine started. Although Russia’s violations were the same in Crimea (an illegal use of force followed by illegal territorial annexation) and the Donbas (allegations of war crimes and crimes against humanity) as in the post-2022 phase of the war, the erstwhile Prosecutor’s preliminary examination met with no unusual enthusiasm on the part of Western or non-Western states. It bears recalling also that Bensouda refused to open an investigation into Ukraine even after she had determined that the legal parameters therefor had been met.43 No state sought to refer the situation for investigation, which in turn extended the preliminary examination – a fact criticized repeatedly by NGOs and Ukrainian activists44 – and necessitated the mass referral in March 2022. Similarly, although the annexation of Crimea produced some fleeting consternation in Western capitals, it failed to generate any serious discussion of aggression trials. In short, it is undeniable that Ukraine benefited from no ‘special regime’, ‘Eurocentric bias’ or ‘racial preference’ in the eight years preceding the 2022 invasion.

Post-2022 critique has also over-simplified the regional dynamics of international criminal law enforcement. It bears noting that, while the 2014 invasion of Ukraine produced no palpable reaction from Western or non-Western states on international crimes, two other regions have previously responded selectively to accountability gaps. Against the backdrop of the ICC-AU standoff, African stakeholders produced the Malabo Protocol for a regional court with jurisdiction over international crimes. Although it has garnered no state ratifications since 2014, the Protocol is understood mainly as a regional reaction on the part of African leaders seeking to contest the ICC’s jurisdictional claims on the African continent.45 Albeit for different reasons, six South

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42P. Clark, Twitter, 1 July 2022, available at [twitter.com/philclark79/status/1542801420835078146](https://twitter.com/philclark79/status/1542801420835078146).


and North American states collectively referred the situation in Venezuela to the ICC Prosecutor in 2018.

To the best of my knowledge, this collective and selective action on the part of African and American states garnered no comparable criticisms of double standards or hypocrisy, although it too could be analysed in such a critical register. Why did South American states not push for ICC involvement in non-South American contexts, ensuring a more equitable distribution of cases across different continents? Relatedly, why has there not been more criticism of South American and other ICC states parties’ reluctance to use the referral power to bring serious situations onto the Prosecutor’s docket, whether it be in Colombia, Honduras, Cambodia, or the Philippines? If nothing else, contrary to critiques of post-2022 Eurocentricity in international criminal law, a track record of selective regional enforcement seems present both within and across different regional groupings in the global (criminal) order.

To be clear, it would make little sense to defend European double standards or the West’s unequal application of norms by pointing to examples of selectivity or hypocrisy in other regions. This would amount to a type of whataboutism, where others’ transgressions are used to distract from one’s own violations or responsibility. Although whataboutism has featured prominently in debates over global responses to the war, the point being made here is different. Going forward, scholars should reflect more carefully on the rationales and dynamics of regional responses to international crimes, and to what extent regionalism is an aberration worthy of denunciation, impacting international criminal law’s legitimacy.

On that score, critiques of Eurocentricity in the wake of the ‘Ukraine moment’ and calls for greater attention to non-European conflicts seems oddly disconnected from a decade of Africa-centric critiques of international criminal law. Whereas critics previously focused on the race of ICC suspects (almost all of whom have been black), and derided Bensouda’s attempts to portray Africa-centric investigations as privileging black victims, the war in Ukraine has seen a spectacular reversal of past assumptions as critics now emphasize the race of (European) victims while ignoring who future defendants will be (and disregarding how Russia’s arguments for extinguishing Ukrainian identity are themselves racist). It should be remembered also that post-2022 mobilization for accountability comes against the backdrop not only of a decade-long standoff between the ICC and the AU, but also persistent (and well-founded) critique of the ICC’s performance in African states. As many scholars have shown, African states have leveraged ICC interventions to pursue selective co-operation and stigmatize domestic rivals, which

50 There is often a tendency to equate African with black, but suspects, e.g., from Libya and Sudan do not map neatly onto a white-black racial binary.
52 On this missing angle in discussions about racism in the Ukraine war see P. Labuda, ‘On Eastern Europe, “Whataboutism” and “West(s)Plaining”: Some Thoughts on International Lawyers’ Responses to Ukraine’, EJIL: Talk!, 12 April 2022, available at www.ejiltalk.org/on-eastern-europe-whataboutism-and-west(s)plaining-some-thoughts-on-international-lawyers-responses-to-ukraine/.
may have inadvertently entrenched authoritarian power rather than promote genuine domestic accountability.54 While some highlight the neo-colonial logic of ICC intervention in Africa and others emphasize the agency of African states vis-à-vis The Hague,55 two decades of ‘distant justice’ on the African continent are widely perceived as underwhelming.56 It is for this reason that, in 2019, an independent review of the ICC was proposed, as ‘the powerful impact of the Court’s central message is too often not matched by its performance as a judicial institution’.57

And yet, just three years later, the dominant Ukraine-related critique seems to be that there has been too little of the ICC in Africa (and other non-European contexts). This sudden pivot from ‘too much ICC in Africa’ to ‘too little Western support for non-Europeans’ should at least consider African states’ consistent denunciations of Western-led prosecutions under universal jurisdiction. As early as 2008, the AU questioned the ‘abuse of the principle by some Non-African States’, emphasizing how prosecutions of government officials challenge sovereign equality and advocating a consent-based reading of universal jurisdiction.58 While trials under universal jurisdiction have seen a surprising revival, with over 100 suspects prosecuted mainly in Europe for crimes committed exclusively in non-Western states in the intervening 15 years,59 there is little evidence that ‘Global South’ states are pushing for more international criminal accountability. On the contrary, the AU maintains a restrictive position on foreign states’ powers to exercise universal jurisdiction over government officials, including through the adoption of a Model National Law on Universal Jurisdiction over International Crimes.60 There is also no indication that governments in Syria or Myanmar, or that non-European regional alliances view the lack of Western-led accountability as their primary concern.61

In light of critiques of the ICC’s negative effects on African countries as well as accusations of Western ‘judicial imperialism’62 on the continent, international criminal justice has increasingly faced a chicken-and-egg problem: on the one hand, donors are reluctant to fund the ICC and other criminal justice interventions, which are critiqued as ‘ineffective’ at best or ‘racist’ at worst, producing backlash and legitimacy problems; on the other hand, in light of these funding shortfalls, the Prosecutor lacks resources to pursue all crimes, including those committed outside Africa.63

54P. Labuda, International Criminal Tribunals and Domestic Accountability. In the Court’s Shadow (2023).
55For these contrasting narratives see O. Ba, States of justice: The Politics of the International Criminal Court (2020); K. M. Clarke, Affective Justice: The International Criminal Court and the Pan-Africanist Pushback (2019).
59Despite criticisms, prosecutions of defendants from Syria, Liberia, Iraq, and Rwanda under universal jurisdiction are usually celebrated by victim groups, including from the defendants’ countries of origin. TRIAL International, Universal Jurisdiction Annual Review 2022 (2022). See also J. Crawford and T. Cruvellier, ‘Philip Grant: Ukraine is Accelerating a Revival of Universal Jurisdiction’, Justice Info, 29 November 2022, available at www.justiceinfo.net/en/109532-philip-grant-ukraine-revival-universal-jurisdiction.html (‘Universal jurisdiction is not a substitute for fair trials happening on the ground, it’s a substitute for nothing happening at all’).
In the past five years, states parties have repeatedly withheld funding for the ICC, arguing *inter alia* that they needed to see results first, while NGOs have consistently lamented that a ‘zero-growth’ budget frustrates the Court’s ability to deliver impartial justice. To be sure, controversial ‘mistrials’ and acquittals of (former) senior African officials were hardly the only reason that (mainly) Western donors refused to provide a blank check to the Court; it was also the fact that, due in part to backlash from African states, the ICC increasingly turned its attention to crimes in Afghanistan, Israel or Iraq, where the interests of Western powers were at stake. In this regard, the UK’s thinly veiled threats against the ICC in the run-up to the Prosecutor’s decision whether to investigate British soldiers for crimes committed in Iraq illustrates systemic problems at the heart of a justice system that relies on state support to investigate wrongdoing committed by states themselves.65

What does all this tell us about the state of international criminal law? On the one hand, the 2022 Ukraine invasion came at the confluence of several separate but overlapping longer-term trends that fueled critique of the ICC and contributed to a sense of crisis in international criminal law: first, critiques of double standards in the Prosecutor’s ‘targeting’ of Africans and allegations of institutional racism; second, a similar set of ‘neo-colonial’ critiques of universal jurisdiction targeting Global South officials; third, an increased Western reluctance to fund an under-performing and illegitimate Court; and fourth, Western states’ backlash against investigations that could expose their citizens to accountability.

On the other hand, while post-2022 developments again point to uneven enforcement of international criminal law, 20 years of ICC investigations and the chronology of Russia’s decade-long intervention in Ukraine suggest that some master narratives about the ‘Ukraine moment’ are more compelling than others. The Western response can be seen as evidence of Eurocentricity or systemic racism, but a holistic appraisal of African backlash to the ICC, the Prosecutor’s stumbling pre-2022 investigation in Ukraine, and Western states’ non-committal response to the annexation of Crimea, also point to a familiar story of national self-interest in an international order conditioned on sovereignty. Unlike serious crimes committed in the context of messy multi-party civil wars, Russia’s clear-cut cross-border aggression against a sovereign state and Ukraine’s unequivocal appeal for foreign support facilitated not just military aid but also the exercise of criminal law across borders. It proved much easier, both logistically and diplomatically, for the ICC and states to assert criminal jurisdiction over crimes committed in Ukrainian territory when the incumbent government actively encouraged this, instead of denouncing foreign intervention as neo-colonialism (to be sure, Ukraine’s enthusiasm may evaporate if investigations target its own state officials).66

At the end of the day, the main reason for a seemingly united and unprecedented responses to Russian crimes in Ukraine seems to be the inter-state nature of the invasion and associated crimes,

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which provide an additional accountability dimension compared to atrocity crimes occurring in intra-state conflicts. As Kate Cronin-Furman and Anjali Dayal argue, ‘Russia’s invasion has created victims the world recognizes’ because ‘violence among states is easier to acknowledge than internal brutality’.67 While acknowledging that racism and Islamophobia shape perceptions of victimhood and condition international solidarity, Cronin-Furman and Dayal emphasize that:

there’s something else going on as well that makes Ukrainian victims more legible on the international stage than Chechen, Syrian, Tamil, Uyghur, or Rohingya . . . [n]amely, that international institutions and international law are built to protect states from other states, whereas those under attack from their own government have far fewer protections available to them—and far fewer willing allies.68

Nowhere is international law’s inherently selective bifurcation of attention between intra- and inter-state victims more pronounced than with respect to the inter-state par excellence crime of aggression,69 to which the article turns next.

4. A Special Tribunal for Ukraine: Western hypocrisy or giving aggression a chance?

Russia’s 2022 invasion of Ukraine has triggered unprecedented mobilization around the crime of aggression, which the International Military Tribunal in Nuremberg labeled ‘the supreme international crime’ because ‘it contains within itself the accumulated evil of the whole’.70 Few experts deny the illegality of Russia’s use of force, and there is little debate over whether it rises to the nebulous concept of a ‘manifest violation’ of Article 2(4) of the UN Charter, implicating individual accountability for aggression before the ICC.71 And yet, following a similar pattern of critique, a special ad hoc tribunal to hold Russian leaders accountable for aggression has raised various concerns, ranging from legal obstacles (immunities, jurisdiction, and the tribunal’s legal basis),72 to financial constraints and (geo)-politics.

A particularly prominent line of critique is that a lack of accountability for similar acts of aggression by Western states undermines the viability of the STA.73 As argued by Kevin Heller:

the war in Iraq [did not] lead to high-profile calls for creating a Special Tribunal for the Punishment of the Crime of Aggression Against Iraq . . . [so] to create a Special

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67A. Dayal and K. Cronin-Furman, ‘Russia’s Invasion Has Created Victims the World Recognizes’, Foreign Policy, 5 April 2022, available at www.foreignpolicy.com/2022/04/05/russia-invasion-victims-bucha-ukraine/. On the novelty of transitional justice in an international conflict see Muddell and Roccatello, supra note 16.

68See Dayal and Cronin-Furman, ibid. (emphasis added).

69For an understanding of aggression as more than inter-state violence see T. Dannenbaum, ‘Why Have We Criminalized Aggressive War?’, (2017) 126 Yale Law Journal 1242. See also E. Lieblich, ‘Can There Be a Crime of Internal Aggression?’, in S. Bock and E. Conze (eds.), Rethinking the Crime of Aggression (2022), 97.


72On immunities, see Dannenbaum, Special Tribunal, ibid.

Tribunal now for Russia’s invasion of Ukraine would . . . send a message that the “international community” cares about some crimes of aggression more than others.74

Many emphasize also that the only reason an ad hoc solution is needed is because Western powers, notably the UK, France and the US, lobbied for the ICC’s peculiar two-track jurisdictional regime that now makes it impossible for Khan to prosecute aggression on Ukrainian territory (contrary to war crimes, crimes against humanity and genocide).75 Drawing on this critique of Western double standards, some scholars also suggest that ‘Global South’ states in particular will be reluctant to support prosecutions of Putin and his entourage.76 Andreas Schüller concludes that:

the legitimacy of any new court created under international law would likely be fragile at best, if not non-existent . . . [s]uch a court would go down in history as a special court created for one specific situation, and not as one applicable to others . . . when a permanent international criminal court exists.77

The objections to a Special Tribunal are diverse in nature, but the selectivity critique is straightforward. It would be a double standard for Western states to advocate holding Russia accountable when Western powers, especially the US, committed analogous violations and suffered no consequences for their unlawful interventions in Kosovo or Iraq. Even if one accepts the argument that Russian aggression coupled with annexation constitutes a geo-political risk of a different magnitude and a graver violation of Article 2(4), as some argue,78 it is difficult to deny that Israel is currently annexing land unlawfully in Palestine, yet no efforts to hold the Israeli leadership accountable for aggression are underway.79

There seems to be no denying that an ad hoc aggression tribunal lacks precedent and that prosecuting Putin would be a form of selective justice, yet many commentators still emphasize the potentially catalytic and forward-looking nature of aggression prosecutions. According to Chile Eboe-Osuji, a former ICC President, while Nuremberg and Tokyo were deemed ‘flawed’, they are now ‘celebrated’ as ‘worthy precedents’, and hence ‘[y]ears from now, [the STA] would have correctly earned its place as one of the building blocks in the never-ending construction project of international law’.80 As Tom Dannenbaum notes, ‘the revival of the crime of aggression

75See Heller, Creating a Special Tribunal, ibid.
77A. Schüller, ‘What Can(t) International Criminal Justice Deliver for Ukraine?’, Verfassungsblog, 24 February 2023, available at www.verfassungsblog.de/justice-ukraine/ (arguing the STA would lack legitimacy even if the UN General Assembly were to endorse it).
79While the Israel-Palestine conflict remains one of the most heavily litigated in the world, attempts to prosecute aggression specifically – as opposed to Rome Statute crimes – have never gotten off the ground. See generally O. F. Kitttrie, Lawfare: Law as a Weapon of War (2016), at 197–238.
80See Eboe-Osuji, supra note 76.
has to begin somewhere. STA advocates also propose a two-track approach, consisting of a special tribunal for Ukraine and amendments to the Rome Statute to remove the ICC’s jurisdictional limitations for future cases of aggression.

However, beyond these rejoinders and reform proposals, it is worth pausing on the selectivity critique of the STA to interrogate a subset of assumptions implicit in how (mainly) Western scholars analyse the proposed tribunal. First, contrary to commentary focused on a handful of Western celebrities supportive of the STA, especially Gordon Brown and Philippe Sands, it is Eastern European states that have pushed for aggression prosecutions. Until recently, Western powers opposed the tribunal precisely because it exposed them to the risk of future prosecution. As will be argued below, Ukraine’s compelling interest in repelling aggression by its former colonial overlord, and the groundbreaking precedent this sets for post-colonial states, is correspondingly overlooked in West-centric commentary focused on double standards.

Second, there is a degree of schizophrenia on the part of STA critics, many of whom have for years denounced the ICC for its selectivity and prosecutorial double standards, only to now embrace that same Court as an idealized solution for aggression prosecutions. The reality is that, if the ICC had jurisdiction over aggression in Ukraine, the challenge of overcoming selectivity would remain. Put differently, selectivity at the ICC and STA is a problem of degree, not kind.

Lastly, the idea of creating (another) ad hoc institution to deal with Ukraine is often critiqued as a regressive step from the universal aspirations of a permanent ICC, that would serve mainly the interests of a Western expert elite that specializes in international crimes.

While the three strands of critique are interrelated and make some compelling points, they also suffer from selective amnesia. The past 30 years have seen a proliferation of ad hoc international and hybrid criminal tribunals, almost all of which focused on crimes in the Global South. The list includes institutions for Rwanda, Cambodia, Sierra Leone, Chad, the Central African Republic, and Colombia (even if the latter two ad hoc tribunals are embedded in the national justice system and may eventually have trickle down benefits for local stakeholders). At the time of writing, at least three ad hoc proposals are being mooted for South Sudan, Liberia, the Democratic Republic of Congo (DRC) – all of which have different degrees of ad hocness and hybridity built into them.

For many years, international attention focused on the war in Syria, including proposals for an ad hoc tribunal for atrocity crimes.

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84See note 24, supra.

85It bears noting that commentary on alleged Global South resistance to the STA is, to date, mainly by Western scholars.


As someone who has worked on and studied some of these initiatives, what is striking about the rhetoric surrounding the STA is that few critics have ever portrayed Western-backed and funded ad hoc tribunals in other regions as evidence of double standards or hypocrisy. After all, the trial of a single person, Hissene Habré, which materialized in part due to sustained pressure from Western stakeholders and with foreign funding, could be denounced as a particularly egregious form of selective, retroactive, and regional justice on the part of African states against a deposed dictator. No comparable critique of hypocrisy and racism accompanied the West’s (then) unprecedented and arguably disproportionate focus – to the exclusion of crises elsewhere – on crimes in Syria. Similarly, an ad hoc tribunal for the DR Congo, as advocated by Nobel Prize Winner, Denis Mukwege, would divert scarce resources and attention from other conflicts in Africa or Asia, while creating problems of selectivity, legitimacy, and jurisdictional overlap with the ICC.

It is worth reiterating also that, contrary to critiques of ‘insufficient attention’ to crimes outside of Europe, the main problem plaguing accountability initiatives in Africa and Asia is not a lack of Western support but rather national and regional stakeholders’ ambivalence about international criminal law. As mentioned, there was no shortage of proposals to prosecute Syrian perpetrators. The US has pledged funding for hybrid tribunals in South Sudan and Liberia, but the opposition of national counterparts has knee-capped both initiatives – to the chagrin of local civil society. An ad hoc tribunal for the DRC has not been created mainly because some African leaders strategically leverage critiques of selectivity to block any discussion of African accountability – not surprisingly for crimes committed mainly by their own troops and potentially attributable to themselves.

In short, whether it be in the DRC, South Sudan, Syria, Cambodia, or elsewhere, each and every ad hoc tribunal grapples with selectivity and legitimacy challenges. Yet it is in Ukraine that the potential prosecution of international crimes, especially aggression through a special court, has created uniquely acrimonious debates about double standards. This critique of Western hypocrisy would be understandable if, say, US support for the Cambodia or South Sudan hybrid tribunals had triggered similar pushback, potentially knee-capping these projects as examples of hypocrisy. After all, only one side in the ‘Cambodian genocide’ was ever prosecuted, and the US government, while shielding its own crimes from scrutiny in Afghanistan, is the main backer of the

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95For (limited) critiques of US support for the Cambodia tribunal see A. R. Bird, US Foreign Policy on Transitional Justice (2015), 55–85.
Hybrid Court for South Sudan – a country it helped midwife into existence in 2011.96 Yet cries of double standards were virtually absent in these non-European cases, which in turn prompts questions about the rationales behind critiques of the ‘Ukraine moment’. To help answer this question, the next section turns to the mental maps that structure the war in Ukraine and the global responses thereto.

5. Beyond false binaries: Complicating Ukraine’s place in the world order

Eastern Europe and especially Ukraine occupy a liminal space within the international (legal) imaginary. As a country from the former Soviet bloc, also known as the ‘Second World’ during the Cold War – a term used in contradistinction to the (Western) First World and the (non-Western) Third World97 – Ukraine straddles the boundary between Europe and Asia, the East and West, and the Global North and South.98 It is neither part of the core or the periphery, but rather a semi-peripheral ‘space located close to the core yet not the core itself, always “lagging behind” yet not distant enough to develop an alternative scale of evaluation, hence forever measuring itself with the yardstick of the core’.99 As a country whose right to exist has been denied systematically by empire, Ukraine is also a post-colonial society.100

Yet Ukraine’s complex liminal and post-colonial status – at the intersection of both political and cognitive empires – rarely registers in public debates, including in post-2022 international law analyses. As Marta Grzechnik observes, ‘mental maps of most Western Europeans (and North Americans) do not include Eastern Europe at all’.101 To be sure, a lack of deep knowledge about Ukraine, Europe’s largest country but at its periphery, is partly understandable, especially outside of Europe.102 Nevertheless, reductionist mental maps of Ukraine are not without consequences for critiques of international law, including those shaped by TWAIL, which tend to be overwhelmingly West-centric in nature. This reductionism is present among international (criminal) lawyers, where Ukraine and other Eastern European states have often been simplistically lumped together with the West and ‘whiteness’ on account of the racial make-up of majority populations in this part of the world.103

These generalizations deserve critical scrutiny. While Ukrainians and Eastern Europeans may seem ‘white’ to an uninitiated observer, this colour-based characterization obscures the ‘inferior’ cognitive status that Ukrainians occupy within the European imaginary, rooted in nineteenth

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96See Gramer and Lynch, supra note 93.
101See Grzechnik, ibid., at 1000.
Asian or Latin American states, conventionally considered also a victim of imperialism, but many of these indices (of course, this does not take into account the massive drop in living standards in Iran, Uruguay, Argentina, and Peru, today rank above Ukraine in wealth and development status at the gates of Europe. But this completely ignores Ukraine’s continuing ‘in-between’ status at the gates of Europe. By the same token, sweeping generalizations about EU enlargement in 2004. But this completely ignores Ukraine’s continuing ‘in-between’ status at the gates of Europe.

Debates on Ukraine, which frame Ukrainians as racially privileged white subjects come short of grasping how racialisation has operated in Europe as well as accounting for the socio-historical background of imperial violence that has impacted on Ukrainian lives. The relatively recent part of this history has been shaped by the inter-imperiality between Western Nazism, that has treated Slavs after Jews, Roma and fellow racialised and othered population groups as sub-humans for subjugation, extraction of forced labour and resources, extermination and colonisation of their land – Ukraine, indeed, was meant to be swallowed as Nazi Germany’s ‘Lebensraum’ (territorial imperial expansion) and millions of Ukrainians were murdered as part of the endeavour – and the repeating history of genocidal violence perpetrated against Ukrainians by Soviet and contemporary fascist Russia.

Yet, despite its contested and liminal status as ‘European’, ‘white’, or ‘Global North’, commentary has often trivialized Ukraine’s struggle for self-determination against Russia as a fight between the


Eastern Europe is still formally recognized as a region unto itself in the post-Cold War UN system, but Eastern Europeans are the most underrepresented group in terms of appointments, largely on account of their ‘indistinguishability’ from Westerners in the post-Cold War era. For a breakdown of senior appointments within the UN system see Center on International Cooperation, UN Senior Appointments Dashboard, available at cic.nyu.edu/UN-Senior-Appointments-Dashboard. Illustrative of this dynamic, the 2016 election of the UN Secretary General was, in line with the UN’s rotation system, expected to be reserved for an Eastern European. Although qualified candidates from the region, for instance Irina Bokova, put forward their candidacy, Antonio Guterres was eventually elected and the exclusion of an Eastern European candidate barely registered in a time of fierce identity politics. See M. Vlahovic, ‘Eastern Europe Risks Losing UN ’Top Job Race’, Balkan Insight, 13 September 2016, available at www.balkaninsight.com/2016/09/13/eastern-europe-risks-losing-un-top-job-race-09-13-2016/.


See Hendl, supra note 97, at 76. Hendl argues further that ‘[c]rucially, the structures of power and racialisation within this historical background are context specific and cannot be grasped through the employment of US-centric racial frameworks, which currently dominate debates in critical race studies . . .’.
West and the Rest or a struggle pitting the Global North against the Global South.\footnote{109} Lost in this story is how Ukraine’s resistance is a quintessentially anti-imperial and anti-colonial struggle analogous to the fight of peoples in Asia, Africa, or Latin America against their former imperial masters.\footnote{110} Master narratives about a proxy war between the West and Russia often yoke Ukrainian resistance to ‘great power rivalry’ and ‘spheres of influence’ concepts, denying the agency of Ukraine in a neo-colonial and neo-imperial fashion. Such narratives have become a framing device for the war among Western and, more remarkably, Global South audiences, which seem unaware how these narratives reproduce the same neo-colonial frames that other post-colonial peoples abhor when on their receiving end.\footnote{111}

This cognitive reductionism may be regrettable, but it underscores the limits of the frames that structure international criminal law’s conditions of possibility in this war. It is Ukraine which has consciously pursued a strategy of international ‘lawfare’ to stake out its case against Russia and, at the same time, delegitimize Putin’s case for intervention.\footnote{112} Ukrainian thinkers and politicians have put forward compelling reasons why a Nuremberg-style ad hoc tribunal is their preferred institutional design on account of the Nuremberg judgment’s pernicious legacy for Russia’s neo-imperial psyche and ongoing arguments about ‘denazification’ of Ukraine qua rationale for extinguishing Ukrainian identity.\footnote{113} Yet these viewpoints are often overlooked or casually dismissed in legal commentary. Closer attention to Ukraine-centric arguments – understood as distinct from ‘Eurocentric’ or ‘West-centric’, which assumes simplistically that Ukraine is a full member of Europe or the West – might help to view the STA and war crimes investigations as a long overdue anti-imperial reckoning and an opportunity to remedy Ukraine’s marginalization within the global legal order, while nuancing more strident critiques of Western states’ ‘hypocrisy’ in supporting Ukrainian-led accountability efforts.

To be sure, critique of the limits and blind spots of international (criminal) law can play a useful ‘corrective’ function in post-2022 debates.\footnote{114} However, greater attention must be paid to the context within which the pursuit of accountability against Russia is unfolding. At first blush, it may make sense for an Iraqi or Palestinian to view the STA as little more than ‘Western double standards’ or ‘a plaything of imperial powers’,\footnote{115} but a more complex story can be told about the

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similarities between Palestine and Ukraine’s post-colonial struggles for self-determination and resistance to neo-imperial aggression. A more nuanced appreciation of Ukraine’s complex place within mental and geo-political hierarchies of inclusion and exclusion would also help move beyond reductionist allegations of Eurocentricity (Ukraine’s ‘Europeanness’ is, in fact, contested) or racially preferential treatment (Ukrainians are both racialized beneficiaries and victims)\textsuperscript{116} and foster a richer debate over how the post-2022 push for accountability in Ukraine is a significant and welcome departure from past neglect, oppression, and discrimination against people in this part of the world. Put simply, rather than a one-dimensional story of ‘Western’ or ‘European’ double standards in action, accountability for crimes against Ukrainians is a surprising story of how international (criminal) law’s prior selectivity vis-à-vis this region is finally on the cusp of being partly alleviated, though it will never be fully overcome.

6. Conclusion: Of narratives, assumptions, and the future of international criminal justice

Russia’s war against Ukraine has triggered an unprecedented demand for accountability. In addition to funding and expertise for the ICC, a special tribunal is under active consideration at the time of writing. Yet the ‘Ukraine moment’ has also prompted much soul-searching. As Human Rights Watch observes, ‘[t]he support for accountability efforts for Ukraine should become a paradigm for the international community’s response to crises and conflicts elsewhere in the world, such as in Ethiopia, Myanmar, Palestine, and Yemen’.\textsuperscript{117}

Two overarching critiques and proposals for reform have been put forward. First, while supportive of accountability for Ukrainian victims, NGOs have denounced ‘attention disparities’ and advocated increased support to all crises around the world, including by ensuring more balanced funding for the ICC.\textsuperscript{118} As Raji Sourani, director of the Palestinian Centre for Human Rights, observes, ‘[t]he [ICC] prosecutor never sought outside money for the ICC’s Palestine investigation, never spoke about a “crime scene,” never opened a portal for observers to report crimes, never sought to visit Palestine’.\textsuperscript{119} Second, activists and scholars have implored Western states to hold themselves to the same standards as they demand of others, lest the international criminal justice

\textsuperscript{116}On the racist underpinnings of Russia’s extermination ideology in Ukraine see Labuda, supra note 52. Eastern Europeans’ liminal status within global hierarchies of race is analogous to that of, e.g., Asians who are simultaneously victims of racism but also benefit from privilege compared to other groups in, e.g., the United States. See E. O’Brien, The Racial Middle: Latinos and Asian Americans Living beyond the Racial Divide (2008); E. Park and J. Park, ‘A New American Dilemma?: Asian Americans and Latinos in Race Theorizing’, (1999) 2 Journal of Asian American Studies 289. On simultaneous victimhood and oppressor status see Grzechnik, supra note 97. See also Hendl, supra note 97, at 75. (‘While we certainly must critique and oppose the structural racism and white supremacy that has shaped and governed Europe and its asylum and immigration politics, when speaking on Ukraine, we also need to critique the subjugation of Ukrainians within European racial hierarchies.’).


project lose legitimacy. Dannenbaum notes that ‘the charge of selective justice will ring true unless the states involved in facilitating accountability for it demonstrate with more than just words that they are ready to be held to the same standard’.120

While it is easy to agree with these critiques and reform proposals, the dominant master narratives around accountability in Ukraine also suffer from selective amnesia and reductionism while obscuring difficult challenges that lie ahead for international criminal justice. For one, the ‘Ukraine moment’ has prompted a sudden pivot from the ICC qua anti-African court targeting black perpetrators toward a Eurocentric system of international criminal law enforcement catering to white victims; for another, reductionist mental maps that structure the discourse around Ukraine qua ‘European’, ‘Western’, ‘privileged’, ‘white’, and ‘Global North’ misunderstand the context of Ukrainian resistance and inadvertently legitimize selective enforcement on the part of non-Western states who view this war as a ‘European’ problem.121 There are also other riddles that critics must face: since Ukrainian victims benefited from no favourable protection or disproportionate attention for over eight years, how does one reconcile pre-2022 Africa-centric critiques with the emerging post-2022 critiques of Eurocentricity? How exactly does one pivot from critiquing international criminal law as a form of ‘neo-colonial judicial intervention’ under the guise of human rights, democracy, and the rule of law, only to now denounce ‘attention disparities’ and, hence, ‘too little intervention’ in non-European contexts?122

In trying to address these questions constructively, this article moves beyond the master narratives and suggests that, contrary to the at times heated rhetoric about selectivity and double standards, the world’s fragmented response to Russian crimes is surprisingly conventional in how it incarnates the state-centric global order within which international criminal law operates. We should of course reflect critically upon the ‘Ukraine moment’, but mass mobilization for accountability seems largely to be a function of the war’s inter-state nature and the Ukrainian government’s unconditional embrace of law as a means of de-legitimizing imperialism. As Dayal and Cronin-Furman emphasize, ‘states may see no inconsistency in lending full-voiced support to Ukraine’s international law-based arguments while simultaneously opposing action on behalf of civilians under attack by their own governments.’123

Similar to the Malabo Protocol or Venezuela’s collective ICC referral, many states have found it easier to act when their own (perceived) self-interest were at stake. One may label state self-interest as ‘hypocrisy’, ‘double standards’ or worse, but the emerging reality of a post-liberal and multipolar world order, in which sovereignty has greater resonance, makes transnational solidarity across borders even harder to achieve than before.124 Following the US withdrawal from Afghanistan and the Libyan intervention’s interminable sequels in the Sahel, the end of


123 See Dayal and Cronin-Furman, supra note 67.

Western hegemony and the rise of multipolarity suggests that governments everywhere will be increasingly reluctant to allow foreign involvement in their domestic affairs, raising new questions and resurrecting old dilemmas for the protection of human rights in intra-state contexts. The resurgence of sovereignty will be nowhere clearer than in international criminal law, where the ICC’s (dubious) power to pierce the veil of state immunity and act on behalf of victims of intra-state oppression has given rise to much discussion in the last 20 years. If anything, the failed prosecutions of Kenya’s leaders and the never-ending saga of Al-Bashir’s travels underscored the ICC’s powerlessness to act against both strong and (nominally) weak states. Put differently, if the international criminal justice project is under strain today, this state of affairs has as much to do with the hypocrisy of Western states as it does with the hypocrisy of a state-centric system tout court. Beyond Western double standards, the ICC’s legitimacy crisis is in no small part the result of self-serving arguments on the part of African elites that see no contradiction in self-referrals and denunciations of the ICC for prosecutions of fellow African officials. Similar patterns of behaviour can be observed in Asia, where the Philippines withdrew from the Rome Statute rather than subject itself to investigation, or in South America, where Venezuela’s co-operation with the ICC is now being put to the test.

Where does this leave international criminal justice? What is striking about the ‘Ukraine moment’ is not the existence of critique – this has been the dominant scholarly take for some time – but its vehemence. While NGO and scholarly focus on Western double standards is a useful corrective, this article argues also that the Ukraine-related critique has been one-dimensional, inward-looking and, ultimately, circular. It may be tempting to analyse Western action on Ukraine primarily through the lens of double standards, while downplaying its groundbreaking anti-imperial potential or the equally hypocritical inaction of non-Western states in this case, but this analytical frame risks reproducing the very Western-centric bias that it sets out to overcome. A more radical critique requires all states to take seriously their obligations to support the ICC and other accountability initiatives, especially in the more numerous intra-state conflicts around the world. In other words, the answer to the inequalities of international criminal law is not just to double down on West-centric critiques, but for all governments to take responsibility for justice between and, crucially, within states.

Maybe, after nearly a decade of inaction, African states can bring the AU-sponsored Malabo Protocol into force and provide justice to their citizens, while removing immunities for their heads of state? Perhaps, unlike its efforts in South Sudan, the AU can take more robust action, permitted under the AU Charter, to promote accountability in Ethiopia? Can Latin American countries use the transitional justice experiment in Colombia to export richer models of justice to other regions, including to Europe and Africa? By the same token, in the post-Ukraine moment, international


criminal law critics will need to grapple more honestly with both the benefits and drawbacks of a ‘return of sovereignty’ in international relations.\footnote{A. Rana, ‘Left Internationalism in the Heart of Empire’, Dissent, 23 May 2022, available at www.dissentmagazine.org/online_articles/left-internationalism-in-the-heart-of-empire. See also A. Getachew, ’Responses to Aziz Rana’, Dissent, Summer 2022, available at dissentmagazine.org/article/responses-to-aziz-rama#Getachew (‘anti-imperialism cannot be reduced to a reflexive invocation of the principle of nonintervention. Nonintervention is an important principle, and one that should be defended in certain cases; it is an important reason for opposing the current Russian invasion of Ukraine. But it has its limits. With the Ethiopian civil war, it obscures dynamics of regional involvement in search of a phantom American intervention . . . an anti-imperialism that recognizes we live in a world of nation-states and responds to the exigencies of that order, without limiting its moral and political vision to current institutional configurations . . . requires a flexible, experimental, and imaginative approach to both international and domestic institutions . .’.)} Whatever the causes of impunity in Asia, Europe, Africa and beyond, the work of advancing international criminal justice does not and should not, and – in an increasingly multipolar world – cannot and will not depend on the West.

To be sure, none of this will be easy. But if international criminal justice in the post-Ukraine moment is to meet the demands and expectations of victims around the world, it may be time to accept that relying on an awakening from Western states is not necessarily the only, or best, path forward. As argued by Oleksandra Matviichuk, a Ukrainian activist and 2022 Nobel Peace Prize winner, ‘All people deserve justice . . . Not only those who get media attention or have some social position.’\footnote{See Clancy, supra note 113.} By using mass crimes in Ukraine to un-reflexively double down on West-centric critiques of international criminal selectivity,\footnote{See Interview with Frédéric Mégret, supra note 112. (‘There is a danger of discrediting the ICC, considering that it is a court that serves us until it does not serve us in this or that conflict, and then we say in this case it is not serious, we will create a new court that will allow us to achieve our objectives. But maybe it is not serious, maybe it is just the right thing to do. Maybe that is the right division of labour: the ICC is there for a good part of the crimes and then, from time to time, we must be ready to put a patch on it.’).} there is a risk that critics and supporters reproduce a nineteenth century neo-colonial mentality, wherein the fate of justice between and within states ultimately depends on the wishes of a few imperial powers in Washington, London or Berlin. This is a future that no one should aspire to.

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