


ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

# 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.<sup>1</sup> Albeit mandated to prosecute 'the most serious crimes of concern to the international community as a whole',<sup>2</sup> 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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<sup>1</sup>Coalition for the ICC, available at [www.coalitionfortheicc.org/fight/state-support-and-cooperation](http://www.coalitionfortheicc.org/fight/state-support-and-cooperation).

<sup>2</sup>2002 Rome Statute of the International Criminal Court, 2187 UNTS 3, Preamble.

dictators to dig in their heels rather than seek compromise.<sup>3</sup> Saddled with divergent and contradictory expectations,<sup>4</sup> the Court has plodded along from crisis to crisis, with recurring predictions that international criminal justice is on its deathbed.<sup>5</sup>

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.<sup>6</sup> 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'.<sup>7</sup> 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'.<sup>8</sup>

Although varying in kind and intensity, core critiques of the international criminal justice project after Russia's 2022 invasion contend that 'Western' states<sup>9</sup> 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<sup>10</sup> into hyper-critique 'pitched at a level of generality bordering on sloganeering'.<sup>11</sup> Given that

<sup>3</sup>A. Prorok, 'The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination', (2017) 71 *International Organization* 213.

<sup>4</sup>D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', (2015) 28 *LJIL* 323.

<sup>5</sup>J. Powderly, 'International Criminal Justice in an Age of Perpetual Crisis', (2019) 32 *LJIL* 1; D. Guilfoyle, 'Part II - This Is Not Fine: The International Criminal Court in Trouble', *EJIL:Talk!*, 22 March 2019, available at [www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/](http://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/).

<sup>6</sup>N. Khrushcheva, Interview with Javier Solana, 'The World Order After the Ukraine War', *Project Syndicate*, 3 August 2022, available at [www.project-syndicate.org/onpoint/world-order-after-the-ukraine-war-by-javier-solana-and-nina-l-khrushcheva-2022-08](http://www.project-syndicate.org/onpoint/world-order-after-the-ukraine-war-by-javier-solana-and-nina-l-khrushcheva-2022-08). On Eurocentricity, see note 31, *infra*.

<sup>7</sup>R. Brody, 'The ICC at 20: Elusive Success, Double Standards and the "Ukraine Moment"', *JusticeInfo.Net*, 30 June 2022, available at [www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html](http://www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html). On the 'Ukraine Effect' see J. Egeland, 'The "Ukraine Effect" on the World's Poorest and Most Vulnerable', *Al Jazeera*, 5 April 2022, available at [www.aljazeera.com/opinions/2022/4/5/the-ukraine-effect-on-the-worlds-poorest-and-most-vulnerable?sf163008762=1](http://www.aljazeera.com/opinions/2022/4/5/the-ukraine-effect-on-the-worlds-poorest-and-most-vulnerable?sf163008762=1).

<sup>8</sup>See Brody, *ibid*.

<sup>9</sup>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*.

<sup>10</sup>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').

<sup>11</sup>D. Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice', (2019) 13 *International Journal of Transitional Justice* 570, at 589 ('ritualized mantras devoid of substance').

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 decentering 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.<sup>12</sup> 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.<sup>13</sup> Within a week, 39 states (joined by four more later) referred Ukraine to the Prosecutor for investigation.<sup>14</sup> At the same time, owing to the ICC’s lack of

<sup>12</sup>Along these lines, see the symposium organized by the American Journal of International Law shortly after Russia’s invasion; E. Chachko and K. Linos, ‘International Law After Ukraine: Introduction to the Symposium’, (2022) 116 *AJIL Unbound* 124. For international criminal law see *Journal of International Criminal Justice*, Vol. 20, Issue 4, September 2022.

<sup>13</sup>ICC-OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I Have Decided to Proceed with Opening an Investigation.” (2022), available at [www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening](http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening).

<sup>14</sup>ICC-OTP, 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 (2 March 2022). ICC-OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact Portal Launched for Provision of Information (2022), available at [www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and](http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and).

jurisdiction over the crime of aggression in Ukraine, the first calls emerged for a special tribunal focused on this specific violation of international law.<sup>15</sup>

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 *gratis* personnel.<sup>16</sup> In May 2022, the OTP sent 42 investigators and forensics experts, its largest ever deployment in a single situation, to collect evidence in Ukraine.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> As early as the first vote in the UN General Assembly on Russia's invasion, over 40 states, often collectively labelled 'Global South', abstained.<sup>20</sup> 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.<sup>21</sup> Similarly, to date, it seems no non-Western state has offered financial or in-kind support for ICC investigations in Ukraine.

<sup>15</sup>P. Wintour, 'Ukraine Backs International Tribunal Plan to Try Putin for Crime of Aggression', *Guardian*, 4 March 2022, available at [www.theguardian.com/world/2022/mar/04/ukraine-backs-plan-for-international-tribunal-to-try-putin-for-of-aggression](http://www.theguardian.com/world/2022/mar/04/ukraine-backs-plan-for-international-tribunal-to-try-putin-for-of-aggression).

<sup>16</sup>See ICC-OTP, *supra* note 13. ICC-OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and Support from States Parties Will Accelerate Action across Our Investigations (2022), available at [www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will](http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will). ICC-OTP, 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 (2022), available at [www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine](http://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine) (ICC-OTP Announces Deployment). For an overview see K. Muddell and A. M. Roccatello, 'Reflections on Victim-Centered Accountability in Ukraine', (2023) *ICTJ Briefing Paper*.

<sup>17</sup>See ICC-OTP Announces Deployment, *ibid*.

<sup>18</sup>EUROJUST, 'Estonia, Latvia and Slovakia Become Members of Joint Investigation Team on Alleged Core International Crimes in Ukraine', 31 May 2022. Security Council Report, Ukraine: High-Level Briefing, 21 September 2022, available at [www.securitycouncilreport.org/whatsinblue/2022/09/ukraine-high-level-briefing.php](http://www.securitycouncilreport.org/whatsinblue/2022/09/ukraine-high-level-briefing.php). US State Department, 'The European Union, the United States, and the United Kingdom Establish the Atrocity Crimes Advisory Group (ACA) for Ukraine', available at [www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/](http://www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine/).

<sup>19</sup>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](http://www.icc-cpi.int/sites/default/files/2022-04/20220401-Chile-Letter-to-OTP.PDF).

<sup>20</sup>C. Lynch, 'The West Is With Ukraine. The Rest, Not So Much', *Foreign Policy*, 30 March 2022, available at [www.foreignpolicy.com/2022/03/30/west-ukraine-russia-tensions-africa-asia-middle-east/](http://www.foreignpolicy.com/2022/03/30/west-ukraine-russia-tensions-africa-asia-middle-east/). J.-L. Maurer, 'Avec Le Conflit Russie-Ukraine, Le Renouveau Des Non Alignés?', *The Conversation*, 15 June 2022, available at [www.theconversation.com/avec-le-conflit-russie-ukraine-le-renouveau-des-non-alignes-184295](http://www.theconversation.com/avec-le-conflit-russie-ukraine-le-renouveau-des-non-alignes-184295). On the 'Global South' as a concept see P. Dann, 'The Global South in Comparative Constitutional Law', *Verfassungsblog*, 14 July 2017, available at [www.verfassungsblog.de/the-global-south-in-comparative-constitutional-law/](http://www.verfassungsblog.de/the-global-south-in-comparative-constitutional-law/).

<sup>21</sup>S. Shidore, 'Global South Again Shows Ambivalence on the Ukraine War', *Responsible Statecraft*, 13 October 2022, available at [www.responsiblestatecraft.org/2022/10/13/global-south-again-shows-ambivalence-on-the-ukraine-war/](http://www.responsiblestatecraft.org/2022/10/13/global-south-again-shows-ambivalence-on-the-ukraine-war/). On the reparations vote in November 2022 see P. Fabricius, 'SA Abstains from UN General Assembly Resolution Demanding Russia Pay Reparations to Ukraine for War Damage', *Daily Maverick*, 15 November 2022, available at [www.dailymaverick.co.za/article/2022-11-15-sa-abstains-from-un-general-assembly-resolution-demanding-russia-pay-reparations-to-ukraine-for-war-damage/](http://www.dailymaverick.co.za/article/2022-11-15-sa-abstains-from-un-general-assembly-resolution-demanding-russia-pay-reparations-to-ukraine-for-war-damage/). More critically, on 'Global South' and 'Non-alignment' as analytical categories see A. Frachon, 'Guerre En Ukraine : "Présenter Le Sud Global Comme Un Bloc d'opposition Antioccidentale Est Une Caricature"', *Le Monde*, 22 September 2022, available at [www.lemonde.fr/idees/article/2022/09/22/guerre-en-ukraine-presenter-le-sud-global-come-un-bloc-d-opposition-antioccidentale-est-une-caricature\\_6142657\\_3232.html](http://www.lemonde.fr/idees/article/2022/09/22/guerre-en-ukraine-presenter-le-sud-global-come-un-bloc-d-opposition-antioccidentale-est-une-caricature_6142657_3232.html). R. Gowan, 'The Global South and the Ukraine War at the UN', *International Crisis Group*, 9 March 2023, available at [www.crisisgroup.org/global-ukraine/global-south-and-ukraine-war-un](http://www.crisisgroup.org/global-ukraine/global-south-and-ukraine-war-un).

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,<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> Although the legal dimension of the withdrawal debate centred around the (absence of) immunities for heads of state accused of international crimes,<sup>26</sup> 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’.<sup>27</sup> According to the

<sup>22</sup>Council of Europe – Parliamentary Assembly, ‘PACE Calls for the Setting Up of an *Ad Hoc* International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression against Ukraine’, available at [pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine](https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine). See also European Parliament, ‘Ukraine: MEPs Want a Special International Tribunal for Crimes of Aggression’, 19 May 2022, available at [www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression](https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression).

<sup>23</sup>ERR News, ‘Baltic Foreign Ministers Want Special Tribunal for Russian War Crimes’, 17 October 2022, available at [news.err.ee/1608754012/baltic-foreign-ministers-want-special-tribunal-for-russian-war-crimes](https://news.err.ee/1608754012/baltic-foreign-ministers-want-special-tribunal-for-russian-war-crimes). ERR News, ‘France Does Not yet Support Special Tribunal for Russian Crimes in Ukraine’, 25 October 2022, available at [news.err.ee/1608765499/france-does-not-yet-support-special-tribunal-for-russian-crimes-in-ukraine](https://news.err.ee/1608765499/france-does-not-yet-support-special-tribunal-for-russian-crimes-in-ukraine).

<sup>24</sup>On the divergence, see ‘Zelenskyy Calls on UN General Assembly to Approve Resolution in Support of Special Tribunal Creation’, *European Pravda*, 3 March 2023, available at [www.pravda.com.ua/eng/news/2023/03/3/7391931/](https://www.pravda.com.ua/eng/news/2023/03/3/7391931/). See also Eurojust, ‘Start of Operations of Core International Crimes Evidence Database and New International Centre for Prosecution of the Crime of Aggression’, Press Release, 23 February 2023, available at [www.eurojust.europa.eu/news/start-operations-core-international-crimes-evidence-database-and-new-international-centre](https://www.eurojust.europa.eu/news/start-operations-core-international-crimes-evidence-database-and-new-international-centre).

<sup>25</sup>M. Ssenyonjo, ‘State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia’, (2018) 29 *Criminal Law Forum* 63.

<sup>26</sup>P. Gaeta and P. Labuda, ‘Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases’, in I. Bantekas and C. C. Jalloh (eds.), *The International Criminal Court and Africa* (2018), 138.

<sup>27</sup>T. Kirabira, ‘NGOs and the Legitimacy of International Criminal Justice: The Case of Uganda’, in F. Jeßberger, L. Steinhilber and K. Mehta (eds.), *International Criminal Law—A Counter-Hegemonic Project?* (2023), 153, at 154. (‘the issuance of warrants of arrests against sitting heads of states in Africa by the ICC—also viewed as a form of “judicial neo-colonialism”—elicited strong criticism from the African Union’). Critical scholarship and Third World Approaches to International Law (TWAAIL) are generally sympathetic to the neo-colonial critique, see, e.g., J. Reynolds and S. Xavier, ‘The Dark Corners of the World: TWAAIL and International Criminal Justice’, (2016) 14 *Journal of International Criminal Justice* 959. On the confluence of US and Third World critiques of the ICC see R. DeFalco, ‘Is Pompeo Unintentionally Helping Out the International Criminal Court?’, *Just Security*, 25 March 2020, available at [www.justsecurity.org/69362/is-pompeo-unintentionally-helping-out-the-international-criminal-court/](https://www.justsecurity.org/69362/is-pompeo-unintentionally-helping-out-the-international-criminal-court/).

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

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.<sup>29</sup>

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.<sup>30</sup> 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’.<sup>31</sup> Others have followed suit.<sup>32</sup>

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.<sup>33</sup> 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’.<sup>34</sup>

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:

<sup>28</sup>‘Ethiopian Leader Accuses International Court of Racial Bias’, *Reuters*, 27 May 2013, available at [www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527](http://www.reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527). S. O’Grady, ‘Gambia: The ICC Should Be Called the International Caucasian Court’, *Foreign Policy*, 26 October 2016, available at [www.foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/](http://www.foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/).

<sup>29</sup>M. De Guzman, ‘Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment’, in R. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (2016), 333. On self-referrals see P. Akhavan and D. Matyas, ‘International Criminal Justice in the Context of Fragile States: The ICC Self-Referral Debate’, (2022) 44 *Human Rights Quarterly* 233.

<sup>30</sup>For an early analysis see M. Kersten, ‘Is the ICC Racist?’, *Justice in Conflict*, 22 February 2012, available at [www.justiceinconflict.org/2012/02/22/is-the-icc-racist/](http://www.justiceinconflict.org/2012/02/22/is-the-icc-racist/).

<sup>31</sup>R. DeFalco and F. Mégret, ‘The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System’, (2019) 7 *London Review of International Law* 55, at 56.

<sup>32</sup>See, e.g., K. M. Clarke, ‘Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality’, *Just Security*, 24 July 2020, available at [www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/](http://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/); R. López, ‘Black Guilt, White Guilt at the International Criminal Court’, in M. Sirleaf (ed.), *Race and National Security* (forthcoming).

<sup>33</sup>Eurocentrism 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](http://www.eui.eu/research-hub?id=decentering-eurocentrism-1&subpage=description).

<sup>34</sup>J. McAllister, ‘It’s Still Easy for Great Powers to Avoid International Justice’, *Washington Post*, 15 April 2022, available at [www.washingtonpost.com/outlook/2022/04/15/war-crimes-icc-us/](http://www.washingtonpost.com/outlook/2022/04/15/war-crimes-icc-us/).

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.<sup>35</sup>

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.<sup>36</sup>

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.<sup>37</sup>

Khan sought to allay some concerns, for instance by emphasizing that financial donations would be ‘deployed based on . . . needs across all situations’.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> Is the critique compelling and if so, what should be done about it?

<sup>35</sup>C. Arinze-Onyia, ‘Are There Hidden Costs of the ICC Prosecutor’s Campaign for Additional Budget Support, Voluntary Contributions and Secondments?’, *Amnesty International*, 11 October 2022, available at [hrj.amnesty.nl/are-there-hidden-costs-of-the-icc-prosecutors-campaign-for-additional-budget-support-voluntary-contributions-and-secondments/](http://hrj.amnesty.nl/are-there-hidden-costs-of-the-icc-prosecutors-campaign-for-additional-budget-support-voluntary-contributions-and-secondments/).

<sup>36</sup>M. Kersten, ‘Should the ICC Accept Western Funding for Its Probe in Ukraine?’, *Al Jazeera*, 7 April 2022, available at [www.aljazeera.com/opinions/2022/4/7/should-the-icc-accept-western-funding-for-its-probe-in-ukraine](http://www.aljazeera.com/opinions/2022/4/7/should-the-icc-accept-western-funding-for-its-probe-in-ukraine). See also Arinze-Onyia, *ibid.* E. Evenson and J. O’Donohue, ‘States Shouldn’t Use ICC Budget to Interfere with Its Work’, *Open Democracy*, 23 November 2016, available at [www.opendemocracy.net/en/openglobalrights-openpage/states-shouldn-t-use-icc-budget-to-interfere-w/](http://www.opendemocracy.net/en/openglobalrights-openpage/states-shouldn-t-use-icc-budget-to-interfere-w/).

<sup>37</sup>C. Arinze-Onyia, ‘Secondments of Investigators to the OTP – A Second Best Solution to the Court’s Capacity Crisis?’, *Amnesty International*, 19 October 2022, available at [hrj.amnesty.nl/secondments-of-investigators-to-the-otp-a-second-best-solution-to-the-courts-capacity-crisis/](http://hrj.amnesty.nl/secondments-of-investigators-to-the-otp-a-second-best-solution-to-the-courts-capacity-crisis/).

<sup>38</sup>R. Goodman, ‘How Best to Fund the International Criminal Court’, *Just Security*, 27 May 2022, available at [www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court/](http://www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court/).

<sup>39</sup>This 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.

<sup>40</sup>J. McIntyre and A. Simpson, ‘Myanmar’s Genocide Overshadowed by Ukraine’, *East Asia Forum*, 5 October 2022, available at [www.eastasiaforum.org/2022/10/05/myanmars-genocide-overshadowed-by-ukraine/](http://www.eastasiaforum.org/2022/10/05/myanmars-genocide-overshadowed-by-ukraine/). T. Ananthavinayagan, ‘From Bandung to Kiev: Revisiting Imperialism’, *Jurist*, 19 March 2022, available at [www.jurist.org/commentary/2022/03/thamil-ananthavinayagan-russian-imperialism-ukraine/](http://www.jurist.org/commentary/2022/03/thamil-ananthavinayagan-russian-imperialism-ukraine/). J. Ramasubramanyam, ‘Some Refugees Are Welcome, Others Not So Much Revisiting the “Myth of Difference”’, *Völkerrechtsblog*, 28 April 2022, available at [www.voelkerrechtsblog.org/some-refugees-are-welcome-others-not-so-much/](http://www.voelkerrechtsblog.org/some-refugees-are-welcome-others-not-so-much/). B. McGonigle Leyh, ‘Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes’, (2022) *International Journal of Transitional Justice* 363;

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.<sup>41</sup> Others emphasized the specifically racial dynamics of ICC arrest warrants.<sup>42</sup>

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.<sup>43</sup> No state sought to refer the situation for investigation, which in turn extended the preliminary examination – a fact criticized repeatedly by NGOs and Ukrainian activists<sup>44</sup> – 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.<sup>45</sup> Albeit for different reasons, six South

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I. Marchuk and A. Wanigasuriya, 'Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ', (2022) *Journal of Genocide Research* 1.

<sup>41</sup>ICC-OTP, 'Karim A.A. Khan QC, Announces Application for Arrest Warrants in the Situation in Georgia', 10 March 2022, available at [www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-application-arrest-warrants-situation-georgia](http://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-application-arrest-warrants-situation-georgia). See S. Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice', (2022) 20(4) *Journal of International Criminal Justice* 893.

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

<sup>43</sup>ICC-OTP, 'Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine', 11 December 2020.

<sup>44</sup>N. Volkova, 'Delays in Initiating an ICC Investigation in Ukraine Leave Victims in Limbo', *Amnesty International*, 6 August 2021, available at [hrij.amnesty.nl/delays-in-initiating-an-icc-investigation-in-ukraine-leave-victims-in-limbo/](https://www.amnesty.nl/delays-in-initiating-an-icc-investigation-in-ukraine-leave-victims-in-limbo/).

<sup>45</sup>On the Malabo Protocol see C. C. Jalloh, K. M. Clarke and V. O. Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019).



and North American states collectively referred the situation in Venezuela to the ICC Prosecutor in 2018.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> Although whataboutism has featured prominently in debates over global responses to the war,<sup>49</sup> 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),<sup>50</sup> and derided Bensouda's attempts to portray Africa-centric investigations as privileging black victims,<sup>51</sup> 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).<sup>52</sup> It should be remembered also that post-2022 mobilization for accountability comes against the backdrop not only of a decade-long stand-off 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,<sup>53</sup> which

<sup>46</sup>ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Referral by a Group of Six States Parties Regarding the Situation in Venezuela', 27 September 2018.

<sup>47</sup>I. Garfunkel, 'The Referral of the Situation in Venezuela to the International Criminal Court: The Office of the Prosecutor Should Not Step In . . . Yet', (2021) 12 *Journal of International Humanitarian Legal Studies* 5.

<sup>48</sup>B. Curtis, 'Whataboutism: What It Is and Why It's Such a Popular Tactic in Arguments', *The Conversation*, 20 May 2022, available at [www.theconversation.com/whataboutism-what-it-is-and-why-its-such-a-popular-tactic-in-arguments-182911](http://www.theconversation.com/whataboutism-what-it-is-and-why-its-such-a-popular-tactic-in-arguments-182911).

<sup>49</sup>A. Bacevich, 'We Can't Reduce the Ukraine War to a Morality Play', *The Nation*, 14 February 2023, available at [www.thenation.com/article/world/russia-ukraine-war-civilization/](http://www.thenation.com/article/world/russia-ukraine-war-civilization/). See also R. Knox, 'Imperialism, Hypocrisy and the Politics of International Law', (2022) 3 *TWAIL Review* 25.

<sup>50</sup>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.

<sup>51</sup>J. Iyi, 'Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations', in Jeßberger, Steinel and Mehta, *supra* note 27, at 27.

<sup>52</sup>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-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/](http://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/).

<sup>53</sup>M. Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending War and Building Peace* (2016); S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2010) 21 *EJIL* 941.

may have inadvertently entrenched authoritarian power rather than promote genuine domestic accountability.<sup>54</sup> 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,<sup>55</sup> two decades of ‘distant justice’ on the African continent are widely perceived as underwhelming.<sup>56</sup> 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’.<sup>57</sup>

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.<sup>58</sup> 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,<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

In light of critiques of the ICC’s negative effects on African countries as well as accusations of Western ‘judicial imperialism’<sup>62</sup> 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.<sup>63</sup>

<sup>54</sup>P. Labuda, *International Criminal Tribunals and Domestic Accountability. In the Court’s Shadow* (2023).

<sup>55</sup>For 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).

<sup>56</sup>P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (2018).

<sup>57</sup>Z. R. Al Hussein et al., ‘The International Criminal Court Needs Fixing’, *New Atlanticist*, 24 April 2019, available at [www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/](http://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/).

<sup>58</sup>AU Executive Council Thirteenth Ordinary Session, Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African states as Recommended by the Conference of Ministers of Justice/Attorneys General (2008).

<sup>59</sup>Despite 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](http://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’).

<sup>60</sup>AU Executive Council, African Union Model National Law on Universal Jurisdiction over International Crimes, Twenty-First Ordinary Session, 9–13 July 2012. See M. Mennecke, ‘The African Union and Universal Jurisdiction’, in C. C. Jalloh and I. Bantekas (eds.), *The International Criminal Court and Africa* (2017), 10. UN Press Release, ‘Concluding Debate on Universal Jurisdiction Principle, Sixth Committee Speakers Wrestle with Challenging Balance between State Sovereignty, Fighting Impunity’, 22 October 2021, available at: [press.un.org/en/2021/gal3642.doc.htm](http://press.un.org/en/2021/gal3642.doc.htm).

<sup>61</sup>D. Ahdab, ‘Universal Jurisdiction: Jurisdictional Imperialism or Syria’s Only Hope for Justice?’, *Columbia Journal of Transnational Law*, 2 November 2021, available at [www.jtl.columbia.edu/bulletin-blog/universal-jurisdiction-judisdictional-imperialism-or-syrias-only-hope-for-justice](http://www.jtl.columbia.edu/bulletin-blog/universal-jurisdiction-judisdictional-imperialism-or-syrias-only-hope-for-justice).

<sup>62</sup>T. Murithi, *Judicial Imperialism: Politicisation of the International Criminal Justice in Africa* (2019). See Iyi, *supra* note 51, at 28 (equating military and judicial intervention).

<sup>63</sup>On the ICC’s effectiveness see B. Kotecha, ‘The ICC’s Office of the Prosecutor and the Limits of Performance Indicators’, (2017) 15 *Journal of International Criminal Justice* 543.

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.<sup>64</sup> 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.<sup>65</sup>

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).<sup>66</sup>

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,

<sup>64</sup>J. O’Donohue, ‘Wanted—International Prosecutor to Deliver Justice Successfully Across Multiple Complex Situations with Inadequate Resources’, *Opinio Juris*, 14 April 2020, available at [www.opiniojuris.org/2020/04/14/icc-prosecutor-symposium-wanted-international-prosecutor-to-deliver-justice-successfully-across-multiple-complex-situations-with-inadequate-resources/](http://www.opiniojuris.org/2020/04/14/icc-prosecutor-symposium-wanted-international-prosecutor-to-deliver-justice-successfully-across-multiple-complex-situations-with-inadequate-resources/). See also Coalition for the ICC, ‘Victims Could Lose out with States’ Double-Standard on International Criminal Court Resources’, 30 March 2022, available at [www.coalitionfortheicc.org/news/20220330/OpenLetter\\_ICCresources](http://www.coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources). E. Evenson and J. O’Donohue, ‘States Shouldn’t Use ICC Budget to Interfere with Its Work’, *Amnesty International*, 23 November 2016, available at [www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/](http://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/).

<sup>65</sup>UK Statement to ICC Assembly of States Parties 17th Session’, 5 December 2018, available at [www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session](http://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session). See also Human Rights Watch, ‘United Kingdom: ICC Prosecutor Ends Scrutiny of Iraq Abuses’, 10 December 2020, available at [www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses](http://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses). On the US’ selective co-operation see H. Clapp and K. Sikkink, ‘From “Invade the Hague” to “Support the ICC”: America’s Shifting Stance on the International Criminal Court’, 27 April 2022, available at [scholar.harvard.edu/ksikkink/blog/%E2%80%9CInvade-hague%E2%80%9D-%E2%80%9Csupport-icc%E2%80%9D-america%E2%80%99s-shifting-stance-international-criminal-court](http://scholar.harvard.edu/ksikkink/blog/%E2%80%9CInvade-hague%E2%80%9D-%E2%80%9Csupport-icc%E2%80%9D-america%E2%80%99s-shifting-stance-international-criminal-court).

<sup>66</sup>On Ukraine’s uneven engagement with the ICC see S. Masol, ‘Ukraine and the International Criminal Court’, (2022) 20 *Journal of International Criminal Justice* 167.

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’.<sup>67</sup> 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.<sup>68</sup>

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,<sup>69</sup> 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’.<sup>70</sup> 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.<sup>71</sup> 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),<sup>72</sup> 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.<sup>73</sup> 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

<sup>67</sup>A. 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/](http://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.

<sup>68</sup>See Dayal and Cronin-Furman, *ibid.* (emphasis added).

<sup>69</sup>For 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.

<sup>70</sup>*Nuremberg judgment, France and ors v. Göring (Hermann) and ors*, Judgment and Sentence, [1946] 22 IMT 203, (1946) 41 AJIL 172, (1946) 13 ILR 203, ICL 243 (IMTN 1946), 1 October 1946, International Military Tribunal.

<sup>71</sup>T. Dannenbaum, ‘Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine’, *Just Security*, 10 March 2022, available at [www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/](http://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/) (Dannenbaum, Mechanisms). See also T. Dannenbaum, ‘A Special Tribunal for the Crime of Aggression?’, (2022) 20 *Journal of International Criminal Justice* 859 (Dannenbaum, Special Tribunal).

<sup>72</sup>On immunities, see Dannenbaum, Special Tribunal, *ibid.*

<sup>73</sup>On Global South resistance see note 20, *supra*. But see The Elders, ‘The Elders Call for a Criminal Tribunal to Investigate Alleged Crime of Aggression in Ukraine’, 5 March 2022, available at [www.theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine](http://www.theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine).

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.<sup>74</sup>

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).<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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,<sup>78</sup> 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.<sup>79</sup>

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'.<sup>80</sup> As Tom Dannenbaum notes, 'the revival of the crime of aggression

<sup>74</sup>K. J. Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *Opinio Juris*, 7 March 2022, available at [www.opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/](http://www.opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/) (Heller, Creating a Special Tribunal). See also K. J. Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis', (2022) *Journal of Genocide Research* 1, at 12–15.

<sup>75</sup>See Heller, Creating a Special Tribunal, *ibid.*

<sup>76</sup>K. Ambos, 'Ukraine and the Double Standards of the West', (2022) 20 *Journal of International Criminal Justice* 875; Heller, *ibid.*; M. Kersten, "'Global South' Voices Are Muted in Debates over the Crime of Aggression: What Three Books on Illegal War Tell Us About Why', (2023) *International Journal of Transitional Justice* 1; L. Moreno Ocampo, 'Ending Selective Justice for the International Crime of Aggression', *Just Security*, 31 January 2023, available at [www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/](http://www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/). Contra, see C. Eboe-Osuji, 'Letter to Editor: On So-Called Selectivity and a Tribunal for Aggression Against Ukraine', 10 February 2023, *Just Security*, 10 February 2023, available at [www.justsecurity.org/85060/letter-to-editor-on-so-called-selectivity-and-a-tribunal-for-aggression-in-ukraine/](http://www.justsecurity.org/85060/letter-to-editor-on-so-called-selectivity-and-a-tribunal-for-aggression-in-ukraine/).

<sup>77</sup>A. Schüller, 'What Can('t) International Criminal Justice Deliver for Ukraine?', *Verfassungsblog*, 24 February 2023, available at [www.verfassungsblog.de/justice-ukraine/](http://www.verfassungsblog.de/justice-ukraine/) (arguing the STA would lack legitimacy even if the UN General Assembly were to endorse it).

<sup>78</sup>I. Brunk and M. Hakimi, 'Russia, Ukraine, and the Future World Order', (2022) 116 *AJIL* 687. For a critique see 'Use of Force, Territorial Integrity, and World Order: Continuing the Debate', available at [cil.nus.edu.sg/blog/symposia/use-of-force-territorial-integrity-and-world-order-continuing-the-debate/](http://cil.nus.edu.sg/blog/symposia/use-of-force-territorial-integrity-and-world-order-continuing-the-debate/).

<sup>79</sup>While 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. Kittrie, *Lawfare: Law as a Weapon of War* (2016), at 197–238.

<sup>80</sup>See Eboe-Osuji, *supra* note 76.

has to begin somewhere'.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> Until recently, Western powers opposed the tribunal precisely because it exposed them to the risk of future prosecution.<sup>84</sup> 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.<sup>85</sup>

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.<sup>86</sup>

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.<sup>87</sup> For many years, international attention focused on the war in Syria, including proposals for an *ad hoc* tribunal for atrocity crimes.<sup>88</sup>

<sup>81</sup>See Dannenbaum, *supra* note 71. For a legal argument alleging the unavailability of a definition of aggression in 2003 see C. McDougall, 'Why Creating a Special Tribunal for Aggression Against Ukraine Is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics', *Opinio Juris*, 15 March 2022, available at [www.opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/](http://www.opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/).

<sup>82</sup>C. Kress, S. Hobe and A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System, Just Security*, 23 January 2023, available at [www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/](http://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/).

<sup>83</sup>G. Brown, 'We Owe It to the People of Ukraine to Bring Vladimir Putin to Trial for War Crimes', *Guardian*, 24 February 2023, available at [www.theguardian.com/world/commentisfree/2023/feb/24/people-ukraine-vladimir-putin-trial-war-crimes](http://www.theguardian.com/world/commentisfree/2023/feb/24/people-ukraine-vladimir-putin-trial-war-crimes). P. Sands, 'There Can Be No Impunity for the Crime of Aggression against Ukraine', *Financial Times*, 17 February 2023, available at [www.ft.com/content/c26678cb-042c-4b84-bb26-88047046601a](http://www.ft.com/content/c26678cb-042c-4b84-bb26-88047046601a).

<sup>84</sup>See note 24, *supra*.

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

<sup>86</sup>Critics of the STA's 'ad hoc-ness' have suggested a hybrid tribunal as a less bad alternative. On this, see J. Trahan, 'Why a "Hybrid" Ukrainian Tribunal on the Crime of Aggression Is Not the Answer', *Just Security*, 6 February 2023, available at [www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/](http://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/). K. J. Heller, 'No, a Hybrid Tribunal Would Not Need to Apply Ukraine's Aggression Definition', *Opinio Juris*, 23 February 2023, available at [www.opiniojuris.org/2023/02/07/no-a-hybrid-tribunal-would-not-be-required-to-apply-ukraines-aggression-definition/](http://www.opiniojuris.org/2023/02/07/no-a-hybrid-tribunal-would-not-be-required-to-apply-ukraines-aggression-definition/).

<sup>87</sup>On these tribunals see Open Society Justice Initiative, *Options for Justice. A Handbook for Designing Accountability Mechanisms for Grave Crimes* (2018).

<sup>88</sup>The Chautauqua Blueprint for a Statute for Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes. B. Van Schaack, *Imagining Justice for Syria: Water Always Finds Its Way* (2020).

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.<sup>89</sup> After all, the trial of a single person, Hissène 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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup>

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,<sup>95</sup> and the US government, while shielding its own crimes from scrutiny in Afghanistan, is the main backer of the

<sup>89</sup>P. Labuda, 'Institutional Design and Non-Complementarity: Regulating Relations between Hybrid Tribunals and Other Judicial Institutions', in K. Ainley and M. Kersten (eds.), *Hybrid Justice: Innovation and Impact in the Prosecution of Atrocity Crimes* (forthcoming).

<sup>90</sup>S. Weill, K. T. Seelinger and K. B. Carlson (eds.), *The President on Trial: Prosecuting Hissène Habré* (2020). Critically, see K.-J. Bluen, 'Justice, But Only for Some: The Trial of Hissène Habré', *LSE Blog*, 5 August 2015, available at [www.blogs.lse.ac.uk/africaatlse/2015/08/05/justice-but-only-for-some-the-trial-of-hissene-habre/](http://www.blogs.lse.ac.uk/africaatlse/2015/08/05/justice-but-only-for-some-the-trial-of-hissene-habre/). P. Hazan, 'Hissène Habré, the Little Bird on the Branch, and the Challenges of International Criminal Justice', in Weill, Seelinger and Carlson, *ibid.*, at 393.

<sup>91</sup>M. Kersten, 'Calls for Prosecuting War Crimes in Syria Are Growing: Is International Justice Possible?', *Washington Post, Monkey Cage*, 14 October 2016, available at [www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/](http://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/). See Van Schaack, *supra* note 88, at 1–43.

<sup>92</sup>On jurisdictional overlap between the ICC and the DR Congo tribunal see P. Labuda, 'Applying and "Misapplying" the Rome Statute in the Democratic Republic of Congo', in C. M. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015), 408. On the same problems in the Central African Republic see Labuda, *supra* note 89.

<sup>93</sup>On South Sudan see R. Gramer and C. Lynch, 'U.S. Quietly Gives Up on South Sudan War Crimes Court', *Foreign Policy*, 20 July 2021, available at [www.foreignpolicy.com/2021/07/20/south-sudan-war-crimes-court-state-department-africa-biden-human-rights/](http://www.foreignpolicy.com/2021/07/20/south-sudan-war-crimes-court-state-department-africa-biden-human-rights/). On Liberia see D. Menjor, 'US Gov't Willing to Finance War Crimes Tribunal in Liberia', *Daily Observer*, 10 July 2022, available at [www.liberianobserver.com/us-govt-willing-finance-war-crimes-tribunal-liberia](http://www.liberianobserver.com/us-govt-willing-finance-war-crimes-tribunal-liberia).

<sup>94</sup>On Kagame's opposition to the Mapping Report, see AFP, 'Campaign for DR Congo's War Victims Puts Rwanda's Kagame on Defensive', *France 24*, 20 May 2021, available at [www.france24.com/en/live-news/20210520-campaign-for-dr-congo-s-war-victims-puts-rwanda-s-kagame-on-defensive](http://www.france24.com/en/live-news/20210520-campaign-for-dr-congo-s-war-victims-puts-rwanda-s-kagame-on-defensive).

<sup>95</sup>For (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.<sup>96</sup> 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 World<sup>97</sup> – Ukraine straddles the boundary between Europe and Asia, the East and West, and the Global North and South.<sup>98</sup> 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’.<sup>99</sup> As a country whose right to exist has been denied systematically by empire, Ukraine is also a post-colonial society.<sup>100</sup>

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’.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup>

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

<sup>96</sup>See Gramer and Lynch, *supra* note 93.

<sup>97</sup>On the First, Second, and Third Worlds see M. Grzechnik, ‘The Missing Second World: On Poland and Postcolonial Studies’, (2019) 21 *Interventions* 998. See also T. Hendl, ‘Towards Accounting for Russian Imperialism and Building Meaningful Transnational Feminist Solidarity with Ukraine’, (2022) 26 *Gender Studies* 62.

<sup>98</sup>L. Wolff, *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment* (1994); P. Twardzisz, *Defining ‘Eastern Europe’: A Semiotic Inquiry into Political Terminology* (2018).

<sup>99</sup>T. Zarycki, *Ideologies of Eastness in Central and Eastern Europe* (2014), 5 (quoting Marina Blagojević). On the concepts of core, periphery, and semi-periphery from World Systems Theory see I. M. Wallerstein, *World-Systems Analysis: An Introduction* (2004); E. Kwiecińska, *A Civilizing Relay. The Concept of the Civilizing Mission as a Cultural Transfer in East-Central Europe, 1815–1919* (2021).

<sup>100</sup>On Ukraine and post-coloniality see M. Mälksoo, ‘The Postcolonial Moment in Russia’s War Against Ukraine’, (2022) *Journal of Genocide Research* 1. On Eastern Europe and post-colonial studies see Grzechnik, *supra* note 97. E. Thompson, ‘A Jednak Kolonializm: Uwagi Epistemologiczne’, (2011) 6 *Teksty Drugie: Teoria Literatury, Krytyka, Interpretacja* 289.

<sup>101</sup>See Grzechnik, *ibid.*, at 1000.

<sup>102</sup>O. Khromeychuk, ‘Where is Ukraine on the Mental Map of the Academic Community?’, Keynote Lecture, BASEES, 8 April 2022, available at [www.youtube.com/watch?v=CJthJb1tK0Y](http://www.youtube.com/watch?v=CJthJb1tK0Y). O. Khromeychuk, ‘Putin Says Ukraine Doesn’t Exist. That’s Why He’s Trying to Destroy It’, *New York Times*, 1 November 2022, available at [www.nytimes.com/2022/11/01/opinion/ukraine-war-national-identity.html](http://www.nytimes.com/2022/11/01/opinion/ukraine-war-national-identity.html).

<sup>103</sup>On the liminality of ‘whiteness’ see I. D. Kalmar, *White but Not Quite: Central Europe’s Illiberal Revolt* (2022); A. Lewicki, ‘East–West Inequalities and the Ambiguous Racialisation of “Eastern Europeans”’, (2023) 49 *Journal of Ethnic and Migration Studies* (2023) 1481. See also J. Lingelbach, *On the Edges of Whiteness: Polish Refugees in British Colonial Africa During and After the Second World War* (2020).



century race science, serving *inter alia* as a justification for sacrificing Eastern Europe in the post-1945 settlement between the West and East.<sup>104</sup> Superficially, an amalgamation of the West and Eastern Europe (or of the First and Second Worlds) seems plausible for former Soviet bloc countries like Poland or Estonia, which have seen living standards rise exponentially in the years after EU enlargement in 2004.<sup>105</sup> But this completely ignores Ukraine's continuing 'in-between' status at the gates of Europe.<sup>106</sup> By the same token, sweeping generalizations about Ukrainians' 'privileged' status may seem plausible from the perspective of sub-Saharan African countries, but they are unpersuasive for Europe's poorest country in relation to many Asian or Latin American states, conventionally considered 'Global South'. Not only is Ukraine also a victim of imperialism, but many of these 'Global South' states, e.g., Thailand, Sri Lanka, Iran, Uruguay, Argentina, and Peru, today rank above Ukraine in wealth and development indices (of course, this does not take into account the massive drop in living standards in post-2022 Ukraine).<sup>107</sup> As Tereza Hendl observes,

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.<sup>108</sup>

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

<sup>104</sup>See Wolff, *supra* note 98. On racism against Eastern Europeans see, e.g., R. Dunin-Wasowicz, 'Post-Brexit Hate Crimes against Poles Are an Expression of Long-Standing Prejudices and Contestation over White Identity in the UK', *LSE Blog*, 29 September 2016, available at [blogs.lse.ac.uk/brexit/2016/09/29/post-brexit-hate-crimes-against-poles-are-an-expression-of-long-standing-prejudices-and-contestation-over-white-identity-in-the-uk/](https://blogs.lse.ac.uk/brexit/2016/09/29/post-brexit-hate-crimes-against-poles-are-an-expression-of-long-standing-prejudices-and-contestation-over-white-identity-in-the-uk/).

<sup>105</sup>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](https://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/](http://www.balkaninsight.com/2016/09/13/eastern-europe-risks-losing-un-top-job-race-09-13-2016/). For the ICC see note 39, *supra*.

<sup>106</sup>S. Plokhy, *The Gates of Europe: A History of Ukraine* (2015). On Ukraine and other Eastern European states' place within Europe after the fall of communism see L. I. Jukić, 'Ukraine's Identity Has Been Decided by Putin's Invasion', *New Lines Magazine*, 21 October 2022, available at [www.newlinesmag.com/essays/ukraines-identity-struggles-have-been-decided-by-putins-invasion/](https://www.newlinesmag.com/essays/ukraines-identity-struggles-have-been-decided-by-putins-invasion/).

<sup>107</sup>See UNDP, Human Development Index, available at [www.hdr.undp.org/data-center/human-development-index#/indicies/HDI](https://www.hdr.undp.org/data-center/human-development-index#/indicies/HDI) (Ukraine at 77, with other Global South countries above). See also OECD List of Overseas Development Assistance Recipients, available at [www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf](https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf). See also T. Bilous, 'The War in Ukraine and the Global South', *Commons*, 14 March 2022, available at [www.commonsonline.com.ua/en/vijna-v-ukrayini-ta-globalnij-pivden/](https://www.commonsonline.com.ua/en/vijna-v-ukrayini-ta-globalnij-pivden/).

<sup>108</sup>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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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',<sup>115</sup> but a more complex story can be told about the

<sup>109</sup>On master narratives in Ukraine see R. Suny, 'The Ukraine Conflict Is a War of Narratives – and Putin's Is Crumbling', *The Conversation*, 27 October 2022, available at [www.theconversation.com/the-ukraine-conflict-is-a-war-of-narratives-and-putins-is-crumbling-192811](http://www.theconversation.com/the-ukraine-conflict-is-a-war-of-narratives-and-putins-is-crumbling-192811). On the expressly race-based grounds for the Global South's reluctance to express solidarity with Ukraine and the West see Frachon, *supra* note 21.

<sup>110</sup>See Bilous, *supra* note 107. Ł. Stanek, 'Colonialism and the War in Ukraine', 29 November 2022, *Africa Is a Country*, available at [www.africasacountry.com/2022/11/why-africa-needs-eastern-europe](http://www.africasacountry.com/2022/11/why-africa-needs-eastern-europe).

<sup>111</sup>On the need to decolonize Western thinking about Ukraine and Eastern Europe see Mälksoo, *supra* note 100. Less has been written about addressing Global South perceptions of Ukraine. But see K. St. Julian-Varnon, 'Ukraine's Story Can Find Listeners in Africa', *Foreign Policy*, 30 August 2022, available at [www.foreignpolicy.com/2022/08/30/ukraine-russia-war-africa-diplomacy-zelensky/](http://www.foreignpolicy.com/2022/08/30/ukraine-russia-war-africa-diplomacy-zelensky/). See Labuda, *supra* note 52.

<sup>112</sup>On Ukraine and lawfare see J. Crawford and T. Cruvellier, 'Ukraine Responds to Warfare with "Lawfare"', *Justice Info*, 25 March 2022, available at [www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html](http://www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html). Critically on 'lawfare' in the Ukrainian context see F. Petit, 'Frédéric Mégret: Justice for Ukraine Depends on the Outcome of the Fighting', *Justice Info*, 23 February 2023, available at [www.justiceinfo.net/en/112886-frederic-megret-justice-for-ukraine-depends-outcome-fighting.html](http://www.justiceinfo.net/en/112886-frederic-megret-justice-for-ukraine-depends-outcome-fighting.html).

<sup>113</sup>K. Busol, 'Russia's Aggression against Ukraine and the Idealised Symbolism of Nuremberg', *EJIL:Talk!*, 16 June 2022, available at [www.ejiltalk.org/21022-2/](http://www.ejiltalk.org/21022-2/). D. Clancy, 'A Ukrainian's Crusade to Fix the International Justice System for Everyone', *PassBlue*, 18 October 2022, available at [www.passblue.com/2022/10/18/a-ukrainians-crusade-to-fix-the-international-justice-system-for-everyone/](http://www.passblue.com/2022/10/18/a-ukrainians-crusade-to-fix-the-international-justice-system-for-everyone/). F. Hirsch, 'Ukraine and Russia Are Both Looking to the Nuremberg Trials—But Finding Different Lessons in the History', *Time*, 26 May 2022, available at [www.time.com/6181464/ukraine-war-crimes-nuremberg/](http://www.time.com/6181464/ukraine-war-crimes-nuremberg/).

<sup>114</sup>B. Sander and I. Tallgren, 'On Critique and Renewal in Times of Crisis: Reflections on International Law(yers) and Putin's War on Ukraine', *Völkerrechtsblog*, 16 March 2022, available at [www.voelkerrechtsblog.org/on-critique-and-renewal-in-times-of-crisis/](http://www.voelkerrechtsblog.org/on-critique-and-renewal-in-times-of-crisis/).

<sup>115</sup>See Kersten, *supra* note 76. N. Mashni, *Twitter*, 19 March 2023, available at [twitter.com/iamthenas/status/163734810726772417](https://twitter.com/iamthenas/status/163734810726772417).

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)<sup>116</sup> 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'.<sup>117</sup>

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.<sup>118</sup> As Raji Sourani, director of the Palestinian Centre for Human Rights, observes, 'the [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'.<sup>119</sup> 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

<sup>116</sup>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.')

<sup>117</sup>Human Rights Watch, 'UN: Support Impartial Justice for War Crimes in Ukraine', 27 April 2022, available at [www.hrw.org/news/2022/04/27/un-support-impartial-justice-war-crimes-ukraine](http://www.hrw.org/news/2022/04/27/un-support-impartial-justice-war-crimes-ukraine). A. Speri, 'Momentum Grows on Special Tribunal to Prosecute Putin's Aggression in Ukraine', *The Intercept*, 13 February 2023, available at [www.theintercept.com/2023/02/13/russia-ukraine-war-crimes/](http://www.theintercept.com/2023/02/13/russia-ukraine-war-crimes/). See Brody, *supra* note 7.

<sup>118</sup>Amnesty International, 'The ICC at 20: Double Standards Have No Place in International Justice', 1 July 2022, available at [www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/](http://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/). See also M. Sterio and Y. Dutton, 'The War in Ukraine and the Legitimacy of the International Criminal Court', *Just Security*, 30 August 2022, available at [www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/](http://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/).

<sup>119</sup>Cited in Brody, *supra* note 7. See also A. Keith and N. Jeiranashvili, 'In ICC Investigation of 2008 Russia-Georgia War Crimes, Don't Let Justice Delayed Become Justice Denied', *Just Security*, 23 September 2022, available at [www.justsecurity.org/83169/in-icc-investigation-of-2008-russia-georgia-war-crimes-dont-let-justice-delayed-become-justice-denied/](http://www.justsecurity.org/83169/in-icc-investigation-of-2008-russia-georgia-war-crimes-dont-let-justice-delayed-become-justice-denied/); P. Zangeneh, 'Is Now the Time for the International Community to Intervene Peacefully in Iranian Human Rights Affairs?', *Intlawgrrls*, 20 October 2022, available at [www.ilg2.org/2022/10/20/is-now-the-time-for-the-international-community-to-intervene-peacefully-in-iranian-human-rights-affairs/](http://www.ilg2.org/2022/10/20/is-now-the-time-for-the-international-community-to-intervene-peacefully-in-iranian-human-rights-affairs/); J. Emtseva, 'Small Conflicts with Big Impact: The Tajik-Kyrgyz War No One Talks About', *EJIL:Talk!*, 11 October 2022, available at [www.ejiltalk.org/small-conflicts-with-big-impact-the-tajik-kyrgyz-war-no-one-talks-about/](http://www.ejiltalk.org/small-conflicts-with-big-impact-the-tajik-kyrgyz-war-no-one-talks-about/).

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’.<sup>120</sup>

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.<sup>121</sup> 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?<sup>122</sup>

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’.<sup>123</sup>

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.<sup>124</sup> Following the US withdrawal from Afghanistan and the Libyan intervention’s interminable sequels in the Sahel, the end of

<sup>120</sup>T. Dannenbaum, ‘The ICC at 20 and the Crime of Aggression’, *Völkerrechtsblog*, 14 July 2022, available at [www.voelkerrechtsblog.org/the-icc-at-20-and-the-crime-of-aggression/](http://www.voelkerrechtsblog.org/the-icc-at-20-and-the-crime-of-aggression/). See also C. Arinze-Onyia, ‘While Pursuing International Justice at the ICC, the US and UK Must Ensure Justice at Home’, *Opinio Juris*, 1 November 2022, available at [www.opiniojuris.org/2022/11/01/while-pursuing-international-justice-at-the-icc-the-us-and-uk-must-ensure-justice-at-home/](http://www.opiniojuris.org/2022/11/01/while-pursuing-international-justice-at-the-icc-the-us-and-uk-must-ensure-justice-at-home/).

<sup>121</sup>V. Prasad, ‘Global South Refuses Pressure to Side with West on Russia’, *News Click*, 25 February 2023, available at [www.newsclick.in/global-south-refuses-pressure-side-west-russia](http://www.newsclick.in/global-south-refuses-pressure-side-west-russia). W. J. Mpofu, ‘Against War: Africa in the World Disorder’, *Africa Is a Country*, 13 March 2023, available at [www.africasacountry.com/2023/03/against-war-africa-in-the-new-world-disorder](http://www.africasacountry.com/2023/03/against-war-africa-in-the-new-world-disorder). But see K. Krishnan, ‘Kavita Krishnan on “Peace” and Ukrainian Liberation’, *Workers Liberty Blog*, 19 November 2022, available at [www.workersliberty.org/story/2022-11-19/kavita-krishnan-peace-and-ukrainian-liberation](http://www.workersliberty.org/story/2022-11-19/kavita-krishnan-peace-and-ukrainian-liberation).

<sup>122</sup>See Iyi, *supra* note 51, at 28.

<sup>123</sup>See Dayal and Cronin-Furman, *supra* note 67. On the relationship of sovereignty and humanitarian intervention see A. Enabulele, ‘Humanitarian Intervention and Territorial Sovereignty: The Dilemma of Two Strange Bedfellows’, (2010) *International Journal of Human Rights* 407.

<sup>124</sup>On the rise of sovereignty and authoritarianism see T. Ginsburg, ‘Authoritarian International Law?’, (2020) 114 *AJIL* 221.

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.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> 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

<sup>125</sup>On China at the UN Human Rights Council see A. Z. Borda, 'The Debate on the Debate on Xinjiang at the Human Rights Council: Three Framings', *EJIL:Talk!*, 18 November 2022, available at [www.ejiltalk.org/the-debate-on-the-debate-on-xinjiang-at-the-human-rights-council-three-framings/](http://www.ejiltalk.org/the-debate-on-the-debate-on-xinjiang-at-the-human-rights-council-three-framings/). For a TWAAIL perspective see I. Chakrabarty and G. Kaur, 'Double Whammy: Targeted Minorities in South-Asian States', in Jeßberger, Steinl and Mehta, *supra* note 27, at 87. ('Second-generation TWAAIL scholarship continues to be constricted by the inapt binary of First World versus Third World. This narrow contextualisation of TWAAIL scholarship restricts its lens to interests of Third World nation-states rather than the needs of their people, especially minorities.')

<sup>126</sup>G. Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya', (2017) 11 *International Journal of Transitional Justice* 9.

<sup>127</sup>On Venezuela's opposition to an investigation see PTC I, Prosecution Request to Resume the Investigation into the Situation in the Bolivarian Republic of Venezuela I, ICC-02/18, 1 November 2022.

<sup>128</sup>On selectivity, especially in selecting situations, see W. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court', (2010) 43 *John Marshall Law Review* 535; B. Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice', (2020) 18 *Journal of International Criminal Justice* 107.

criminal law critics will need to grapple more honestly with both the benefits and drawbacks of a ‘return of sovereignty’ in international relations.<sup>129</sup> 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.’<sup>130</sup> By using mass crimes in Ukraine to un-reflexively double down on West-centric critiques of international criminal selectivity,<sup>131</sup> 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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<sup>129</sup>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](http://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-rana#Getachew](http://dissentmagazine.org/article/responses-to-aziz-rana#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 . . .’).

<sup>130</sup>See Clancy, *supra* note 113.

<sup>131</sup>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.’).