

Prosecuting Russia's Crime of Aggression: A critical reflection

El enjuiciamiento del crimen de agresión de Rusia: una reflexión crítica

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ABSTRACT: Since the beginning of Russia's war of aggression against Ukraine, international law has become a center piece in Ukraine's war efforts. The Hyper response of legal and other international institutions have prompted some to call these developments as the "Ukraine moment". The term suggests that the legal response to the war represents, potentially, a transformative moment for international law in its pursuit of justice. Focusing on the crime of aggression, the aim of this article is to answer the question whether the international response to the Russian war of aggression against Ukraine symbolizes genuinely a transformative international law moment.

KEYWORDS: Ukraine; Russia; Aggression; International Tribunals; Double Standards.

RESUMEN: Desde el comienzo de la guerra de agresión de Rusia contra Ucrania, el derecho internacional se ha convertido en una pieza central de los esfuerzos bélicos de Ucrania. La hiperrespuesta de las instituciones jurídicas y otras instituciones internacionales ha llevado a algunos a denominar estos acontecimientos como el "momento Ucrania". El término sugiere que la respuesta jurídica a la guerra representa, potencialmente, un momento transformador para el derecho internacional en su búsqueda de la justicia. Centrándose en el crimen de agresión, el objetivo de este artículo es responder a la pregunta de si la respuesta internacional a la guerra de agresión rusa contra Ucrania simboliza realmente un momento transformador del derecho internacional.

PALABRAS CLAVE: Ucrania; Rusia; Agresión; Tribunales Internacionales; Doble rasero.

INTRODUCTION

On February 24, 2022, Russia launched a war of aggression against Ukraine. Few dispute that Russia's actions violate the prohibition on the use of force by one state against the territorial integrity and the political dependence of another state. This prohibition is embodied in Article 2(4) of the United Nations Charter (UN, 1945), and it constitutes the cornerstone of modern international law and the post WWII international order. While Russia's actions undermine a key principle of international law, Oona Hathaway rightly argues that the centrality of a legal norm is tested not only by compliance with it, but also by the responses to its violation (Hathaway, 2023).

Responses to the Russian war of aggression came strong and fast. While the UN Security Council (UNSC) was unable to act due to Russia's veto power, the Uniting for Peace Resolution was the answer (UN, 1950). This resolution was adopted in 1950 in connection to the Korean War, and it states that if the UNSC, due to lack of unanimity among the permanent members, fails to exercise its responsibility to maintain international peace and security, the UN General Assembly (UNGA) can consider the matter immediately with the view to making recommendations to member states. Consequently, the UNGA voted by a vote of 141 to 5 to demand Russia to "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders" (UN, 2022a). The UNGA also endorsed setting up a reparation mechanism for the compensation for damage, loss and injury resulting from the Russian invasion of Ukraine (UN, 2022b).

Russia was also 'outcasted' by central international bodies and international organizations. Outcasting entails excluding a law-violating state from the benefits of international cooperation (Hathaway & Shapiro, 2019). For example, the UNGA voted in favor of suspending Russia from the Human Rights Council (UN, 2022c). Likewise, the Committee of Ministers of the Council of Europe (CoE) decided to exclude Russia from the organization (CoE, 2022). However, diplomatic and economic sanctions remain the strongest forms of outcasting. The EU on its part has imposed massive and unprecedented sanctions against Russia in response to its war of aggression against Ukraine and the illegal annexation of Donetsk, Luhansk, Zaporizhzhia and Kherson regions. EU sanctions included targeted restrictive measures against individuals, economic sanctions and visa measures (European Council, 2022).

Beyond lobbying the international community to adopt decisive measures against Russia's war of aggression, Ukraine deployed international law as a central tool in its war efforts against Russia (Hathaway, 2024). Ukraine's decision to submit an application to the International Court of Justice (ICJ) against Russia was an important step in this direction (ICJ, 2022a). The application aimed at discrediting Russia's claim that Ukraine was committing genocide in its eastern regions- a claim that was used by Russia to justify the invasion of the country. The ICJ issued provisional measures ordering Russia to immediately suspend the military operations that it had commenced (ICJ, 2022b). However, the ICJ ruled that it has jurisdiction only in relation to the question of whether Ukraine was committing a Genocide, and not in relation to the question whether Russia's military actions in Ukraine and its recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' contravene the Genocide Convention (ICJ, 2024a). Still, discrediting Russia's claims that Ukraine was committing a genocide enhances the claim that Russia is engaged in a war of aggression.

The International Criminal Court (ICC) also took the extraordinary step of issuing two arrest warrants on March 17, 2023 against Putin and Maria Alekseyevna Lvova-Belova

for their alleged responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute) (ICC, 2023). On March 5, 2024, the ICC issued warrants of arrest for two additional Russian individuals, Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov, for allegedly being responsible for the war crime of directing attacks at civilian objects (article 8(2)(b)(ii) of the Rome Statute) and the war crime of causing excessive incidental harm to civilians or damage to civilian objects (article 8(2)(b)(iv) of the Rome Statute), and the crime against humanity of inhumane acts under article 7(1)(k) of the Rome Statute (ICC, 2024).

However, the ICC was unable to exercise jurisdiction over the crime of aggression due to the restrictive jurisdictional regime attached to this particular crime in comparison to the ICC's other crimes—genocide, crimes against humanity, and war crimes. This has led to the emergence of different initiatives to close the gap based on two main approaches. The first approach assumes that the gap could be closed by establishing some kind of an *ad-hoc* tribunal to prosecute the Russian leadership for committing the crime of aggression against Ukraine. A less dominant approach calls for amending the Rome Statute restrictive jurisdictional regime that prevents the ICC from investigating the crime of aggression committed against Ukraine. Initiatives adopting the first approach were paralleled with the establishment of International Centre for the Prosecution of the Crime of Aggression against Ukraine, a “unique judicial hub embedded in Eurojust to support national investigations into the crime of aggression related to the war in Ukraine” (European Union Agency for Criminal Justice Cooperation, 2023). Some have called this moment as the “Ukraine moment” (Brody, 2022).

Hilary Charlesworth (2002: 377) points out “[a] crisis provides a focus for the development of the [international law] discipline”. Russia's aggression was perceived as one of those moments where a serious threat to the international order requires certain evolvement of international legal norms. Carrie McDougall (2003: 204) highlights that “[w]hile it is easy to be cynical about international lawyers' hyper-response to the crisis in Ukraine, the notion that we are sitting at a crossroads, where one path further weakens the prohibition of the use of force and another helps restore its integrity, is compelling”. This echoes the declaration by President Biden that the Russian aggression is “nothing less than a direct challenge to the rule-based international order established since the end of World War Two” (The White House, 2022) and the declaration of the former Prime Minister of the United Kingdom, Boris Johnson, that it is “no longer enough to express warm platitudes about the rules-based international order. We are going to have to actively defend it against a sustained attempt to rewrite the rules by force and other tools, such as economic coercion” (Johnson, 2022).

Condemnation of Russia's aggression soon followed. On March 1, 2022, the UN General Assembly (UNGA) adopted a resolution in which it deplored “in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter” (UN, 2022a). In a subsequent resolution from November 7, 2022, the UNGA recognized that Russia “must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations... and that it must bear the legal consequences of all of its internationally wrongful acts” (UN, 2022d).

But as Trita Parsi (2022) highlights, in the Global South, “[m]any of these states also see flagrant hypocrisy in framing the Ukraine war in terms of the survival of the rules-based order”. This echoes a longstanding critique of international law by the scholars

from the Global South, including what is known as Third World Approaches to International Law (TWAIL), that focus on the Eurocentric foundation of international law. Such an approach unfolds the ways in which colonial powers used international law to create and perpetuate a “racialized hierarchy of international norms and institutions” (Mutua, 2000: 31). According to Reynolds (2017: 24), “international law is deeply rooted in the political, cultural and economic backdrop of the European imperial project, and that colonial patterns persist within the structures, institutions and norms of international law”. This fact about international law is not only crucial for understanding its past evolution, but it has “a formative role in contemporary international law” (2017: 24). The unprecedented and decisive response of international legal (and other) institutions to the war in Ukraine crystalized the “Eurocentric bias at the heart of the international criminal justice project” (Labuda, 2023c: 1096), especially when compared to the response of the international community to the illegal use of force by other Western countries, such as the US-led invasion of Iraq, or the Israeli occupation of the Palestinian Territories.

Focusing on the crime of aggression and on the use of force, the aim of this article is to answer the question whether the international response to the Russian war of aggression against Ukraine symbolizes a genuinely transformative moment for the international law project. The article is divided to three main sections. The first section focuses on the crime of aggression and its prosecution in international law. The second section focuses on the various models that have been advocated for prosecuting Russian leaders for the crime of aggression, and how these models diverge on key issues, such as their ability to circumvent the hurdle of immunity. Based on the analysis in the first two sections, the last section tries to confront from a critical perspective the question of whether we are witnessing a transformative moment for the international law project.

THE CRIME OF AGGRESSION AND ITS PROSECUTION IN INTERNATIONAL LAW

The International Military Tribunal at Nuremberg (Nuremberg Tribunal), established after WWII, was the first international tribunal to prosecute the crime of aggression. The allies charged twenty-four German political, military, and economic leaders with committing crimes against peace, namely “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” (Control Council Law No. 10, 1945: Art. II(1)(a)). In its judgment, the Nuremberg Tribunal declared that the crime of aggression “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole” (Nuremberg Trial Proceedings, 1946: 427). Subsequently, the United UNGA affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Tribunal judgment (UN, 1946). It also directed the International Law Commission to formulate those principles and to prepare a code of offences against the peace (UN, 1947).

The crime of aggression is closely related to the prohibition on the use of force in international law, as embedded in Article 2(4) of the UN Charter. This article states “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Article 51 of the UN Charter is an exception to the prohibition on the use of force and it recognizes the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

international peace and security". Only in 1974, the UNGA adopted a resolution by consensus annexing the "Definition of Aggression" (UN, 1974). The definition enumerates a series of acts that violate article 2(4) of the UN Charter:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Although the UNSC had established *ad-hoc* tribunals to prosecute war crimes, crimes against humanity and genocide, it refrained from doing so in relation to the crime of aggression. Aggression was excluded from the jurisdiction of these tribunals because it was viewed as a different species of offense. The crime of aggression focuses on the legality of war itself, a branch of international law known as *jus ad bellum*, as opposed to the other crimes that focus on the way the belligerent parties are conducting their war, a branch of law known as *jus in bello* (Scharf, 2012). Moreover, as Scharf points out, the permanent members of the UNSC were constantly accused of violating the prohibition on the use of force, and they had little interest in encouraging international prosecutions of the crime of aggression (Scharf, 2012).

The Rome Statute of the International Criminal Court (the Rome Statute) allows the ICC to exercise jurisdiction over four crimes: Genocide, crimes against humanity, war crimes and the crime of aggression (UN, 1998: Article 5). The Rome Statute distinguishes between an act of aggression and the crime of aggression. Article 8 bis defines an act of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." The same article defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". Therefore, the crime of aggression, by definition, is a "leadership" crime. In enumerating acts that amount to the crime of aggression, the Rome Statute echoes the 1974 UNGA resolution on the definition of aggression (UN, 1998: Article 8 bis(2)).

The drafting process of the Rome Statute demonstrates the contestability of the definition of the crime of aggression and the condition for prosecuting those who are suspected of committing it. In 1998, when States agreed to include the crime of aggression within the jurisdiction of the international court, they postponed defining it or setting the conditions triggering the jurisdiction of the court. The definition of the crime was adopted in 2010 in the Kampala review conference only after a compromise was reached between those who wanted any illegal use of force to be prosecuted and those who wanted to reserve prosecutions to flagrant violations of article 2(4) of the UN charter (Scharf, 2012; Grzebyk, 2023). A compromise was reached by introducing the word “manifest” violation of the UN Charter. Scharf highlights that the United States promoted a specific understanding of “manifest” that has a “double function”. First, it refers to what extent it is clear that the use of force constitutes an illegal act, and second, it refers to the scale of gravity of the act itself. The introduction of the term was meant to exempt some cases of the so-called military humanitarian intervention from being classified as an act of aggression (Scharf, 2012).

Another controversy was related to the jurisdiction of the ICC itself. One camp lead by China, France, Russia, the United Kingdom and the United States, the five permanent members of the UNSC, insisted that the UNSC has the exclusive power to mandate prosecutions of the crime of aggression. Another camp lead by Latin American States, Caribbean states, African States and smaller European States called for the adoption of the same jurisdictional requirements applied to other crimes, i.e., genocide, crimes against humanity and war crimes (Van Schaack, 2010). Eventually a compromise was reached. Unlike the other crimes, where the ICC can exercise jurisdiction if the crime was committed by a national of a State Party, or in the territory of a State Party, in the case of aggression, Article 15 bis limits the jurisdiction of the ICC to situations in which the crime was committed by a national of a State Party, excluding hence the territorial basis for the exercise of jurisdiction. The amendment also allows a State Party to declare that it does not accept such jurisdiction by lodging a declaration with the Registrar. Acting under Chapter VII of the UN Charter, the UNSC can refer a case involving any State to ICC in relation to the crime of aggression.

Even after the adoption of the Kampala amendment, the United States continues to be concerned with the ICC exercising jurisdiction over the crime of aggression. In 2015, Sarah Sewall (2015), the Under Secretary for Civilian Security, Democracy, and Human Rights said in the annual meeting of the American Society of International Law that the US is concerned “that activation could chill the willingness of states to cooperate in certain military action where the legal basis for that action might be contested, including action aimed at stopping the very kinds of outrages, including mass atrocities, that prompted the Court’s creation”. She further added that the US is “concerned that activation of the amendments may reduce the ability of the international community to manage and resolve conflicts” and that “that activation of the aggression jurisdiction will harm the Court’s ability to carry out its core mission – deterring and punishing genocide, crimes against humanity, and war crimes”. Resistance to the idea that a permanent international court can prosecute the crime of genocide has not faded even in the aftermath of Russia’s invasion of Ukraine. Even the possible creation of an *ad-hoc* tribunal for Ukraine was influenced by lack of enthusiasm on the part of Key states to encourage international prosecutions of the crime of aggression.

PROSECUTING RUSSIAN LEADERS FOR THE CRIME OF AGGRESSION

Russia is not a State party to the Rome Statute and it would veto a UNSC referral to the ICC. It is not surprising, then, that various initiatives have emerged to bridge the gap. These initiatives include reliance on the universal jurisdiction principle that allows domestic prosecution of international crimes or the establishment of a special tribunal.

Prosecutions based on the Universal Jurisdiction Principle

Some States are contemplating the possibility of domestic prosecutions. In the case of Ukraine, a prosecution would be based on the territoriality principle. Other countries like Lithuania and Poland have opened investigations based on the principle of universal jurisdiction (McDougall, 2023). According to Reydams (2004: 5), universal jurisdiction could be negatively defined as the absence of “link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit”. In *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, Lord Millet considered crimes against peace as international crimes of universal jurisdiction (Reg v Bow Street Magistrate, 1999). Principle 2 of the Princeton Principles on Universal Jurisdiction classifies crimes against peace as a serious crime under international law to which universal jurisdiction attaches (Princeton Project on Universal Jurisdiction, 2001). Likewise, Scharf (2012) argues that it is reasonable to assume that Nuremberg trials provide a customary international law basis for prosecuting the crime of aggression under universal jurisdiction.

However, according to the ICJ, Heads of State enjoy personal and functional immunity and inviolability as long as they are serving in office (ICJ, 2002). Functional immunity continues to persist even after Heads of States leave office. In the Pinochet case the court ruled that extending functional immunity to systematic torture is contrary to the logic of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. But as McDougall highlights, “it is a stretch to claim that a use of force authorized by the leader(s) of a state is not an ‘official act’, when by definition the state act element of the crime would attract state responsibility” (McDougall, 2023). This entails that immunity claims could seriously undermine the prosecution of the crime of aggression based on the universal jurisdiction principle.

A hybrid or an international tribunal? Special Tribunal for the Crime of Aggression (STCoA)

Acting under Chapter VII of the UN Charter (UN, 1945), the UNSC can decide on the existence of any threat to the peace, breach of the peace, or act of aggression. Subsequently, it can make recommendations, or decide to adopt measures within its power to maintain or restore international peace and security.¹ The UNSC has used its power to adopt “measures not involving the use of armed force” to establish two *ad-hoc* international criminal tribunals, one to prosecute international crimes committed during the Yugoslav war and the other to prosecute international crimes committed in connection to the Rwandan genocide (Jones & Powels, 2003). This option is unfeasible in the case of Russia, since it can veto any decision on the matter. The UNGA does not have the same power to impose a tribunal, it can authorize the Secretary General to work with Ukraine to establish a tribunal based on the consent of the latter.

¹ Article 39 of the UN Charter.

Therefore, a tribunal created upon the recommendation of the UNGA, based on an agreement between the UN and Ukraine is more feasible. Such a tribunal would reflect a broad multilateral consensus. The Uniting for Peace resolution can serve as a basis for the UNGA to deal with the Russian aggression due to the Security Council paralysis (Trahan, 2022). The UNGA has been involved on two occasions in the creation of two tribunals: The Special Court for Sierra Leone (SCSL), formed by agreement between Sierra Leone and the United Nations pursuant to the recommendation of the UNSC (not acting under its Chapter VII), and the Extraordinary Chambers in the Courts of Cambodia (ECCC), formed by agreement between Cambodia and the United Nations pursuant to the recommendation of the UNGA (Trahan, 2022).

However, there is a difference between an international tribunal and a hybrid one. Ukraine and its allies, especially States from Eastern Europe, push for an international tribunal. The main Western powers, including Germany, the U.K. and the United States are in favor of a hybrid tribunal based on Ukraine's domestic jurisdiction (Labuda, 2023a). Some argue that a "hybrid" tribunal avoids a contentious vote in the UNGA (Labuda, 2023b). Although hybrid tribunals are heterogeneous, they share certain key features. One of their defining characteristics is that they enjoy material jurisdiction over a mix of international and national crimes. A second defining feature is the mixed composition of the bench, which includes local and international judges (Hobbs, 2015).

Others suggested the establishment of a hybrid tribunal under the auspices of the CoE. Ukraine is a member of the CoE. Heller (2022a) argues that Article 15(a) of the Statute of the Council of Europe, which enables "the conclusion of conventions or agreements and the adoption by governments of a common policy" to promote the aims of the CoE, can be used to establish a hybrid tribunal as part of the Ukrainian judicial system. The expulsion of Russia from the CoE guarantees the necessary votes to implement this option. The text of the treaty would be negotiated within the institutional framework of the CoE. Judges and prosecutors would be drawn from both Ukraine and from other CoE member states (Heller, 2022a).

However, making the tribunal part of Ukraine's judicial system, raises a set of constitutional concerns stemming from Art. 125 of the Ukrainian Constitution (Komarov & Hathaway, 2022). Article 125 of the Ukrainian Constitution states that, "The establishment of extraordinary and special courts shall not be permitted." Komarov and Hathaway (2022) point out, this Article is "directly rooted in Ukraine's status as a post-Soviet state. At the time the Constitution was adopted in 1996, the memory of special and extraordinary tribunals which took place during the Soviet era was still fresh". They further argue that the Article 125 of the Constitution should be read in conjunction with the Law on the Judiciary and the Status of Judges, which contains a similar provision focusing on the judicial system in Ukraine. This entails that Article 125 would allow the establishment of an international tribunal, as opposed to a hybrid court or an extraordinary chamber of a domestic court, or one that is "complementary" to the judicial system of Ukraine (Komarov & Hathaway, 2022). This interpretation is consistent with the 2001 opinion of the Constitutional Court of Ukraine on the constitutionality of ratifying the Rome Statute. In its opinion, the Constitutional Court stated that the ICC is an international judicial body and cannot be referred to as an extraordinary or a special court in the meaning of Article 125 of the Constitution (Constitutional Court of Ukraine, 2001). However, the Constitutional Court expressed the view that the principle of complementarity in the Rome Statute is inconsistent with Article 124 of the Constitution, which prohibits the delegation of the functions of the courts, and also the appropriation of these functions by other bodies or officials (Constitutional Court of Ukraine, 2001). In

other words, the Ukrainian Constitution would support the establishment of an international tribunal, but not a hybrid one.

Another hurdle that could be faced by a hybrid tribunal is the question of Heads of State immunity. The establishment of an international court is preferable because it can pierce the veil of immunities. In the *Prosecutor v. Taylor*, the Appeals Chamber of the SCSL affirmed that no personal immunity attaches for a serving head of state before an internationally established court. It further held that the SCSL is an international tribunal because its creation through the United Nations represented “an expression of the will of the international community” (SCSL, 2013: para. 38) as a whole, and therefore the court was “truly international” (SCSL, 2013: para. 38). The Appeals Chamber further clarified that “the Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone” (SCSL, 2013: para. 40). In the case of a court that is hybrid court, immunity could persist, constituting, hence, a serious procedural obstacle.

Beyond the question of immunities, Hathaway rightly argues that creating an international tribunal has a symbolic and expressive importance, as it sends the message that “Russia’s war of aggression has harmed not just Ukraine but the international community as a whole” (Hathaway, 2022). Trahan emphasizes that “a mixed bench of Ukrainian and international judges) will carry nowhere near the authoritative weight as judgments rendered by a fully international tribunal created through the U.N. system” (Trahan, 2023).

A Special Tribunal

A special tribunal created by a number of states was also suggested as a viable option. The Nuremberg tribunal and the International Military Tribunal for the Far East (Tokyo tribunal), established in the aftermath of WWII are early examples of such a model. Both the president of the European Commission Ursula Von der Leyen and the High Representative of the EU for Foreign Affairs and Security, Josep Borrell, declared their support for the idea (Anderson, 2022). However, such a tribunal would face serious challenges concerning the immunity of serving heads of states. Even Philippe Sands, one of the most prominent advocates a special tribunal for Ukraine, argued in an amicus brief submitted to the SCSL that “two States may not establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts” (Sands & Macdonald, 2003: 34). According to Madeline Morris, both the Nuremberg tribunal and Tokyo tribunal did not base their competence on the collective exercise of universal jurisdiction. Instead, they based their jurisdiction on the consent of the state of nationality of the defendants (Morris, 2000). The consent of Russia is hardly imaginable while Putin is still in power.

Additionally, as Heller (2022a) highlights, such a tribunal would be “extremely vulnerable to allegations of selectivity given the international community’s failure to seriously contemplate, much less create, a similar tribunal for the invasion of Iraq in 2003”. Elsewhere Heller (2022b) argues:

The hands of those states — particularly the UK and US, but also other states involved in the invasion itself such as Australia and Spain — are simply too unclean. It would also be a travesty if the Special Tribunal was created by the same states that were responsible for neutering the crime of aggression at the ICC.

It is hard to disagree with the argument that such a tribunal would enjoy less legitimacy, especially given the lack of action in the face of the involvement of some Western States in the illegal use of force in Iraq and elsewhere.

DISCUSSION AND CONCLUSIONS

As mentioned earlier, the hyper response to the crisis in Ukraine lead some to believe that this was a transformative moment for international law, but was this an international law moment?

Indeed, some tangible changes could be seen already. In April 2022, amid the growing criticism of the failure of the UNSC to respond adequately to the war in Ukraine, the UNGA adopted a landmark resolution known “the veto initiative” aimed at holding the five permanent Council members accountable for their use of veto powers to paralyze the Security Council. In it, the UNGA agreed that “the President of the General Assembly shall convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation” (UN, 2022e).

However, some believe that the “Ukraine moment” is less promising than what it initially appeared to be. Louis Moreno Ocampo, the first prosecutor of the ICC argues creating an *ad-hoc* international tribunal to prosecute Russian officials instead of removing the jurisdictional limitations attached to the crime of aggression in the ICC statute “will consecrate selective justice” (Moreno Ocampo, 2023). Reed Brody, a prominent human rights lawyer, argues that Russia’s flagrant violations of international law had prompted a “Ukraine moment”, providing the ICC with an opportunity to prove its relevance in responding to threats to the international order. However, this hyper-response “has also exposed the political calculations and double standards which have plagued both the ICC and the international justice system more generally” (Brody, 2023). Focusing on the rapid mobilization by the ICC compared to other situations referred to the court, Brody argues that “[i]f the office of the ICC prosecutor is not to be seen as just the legal arm of NATO, it must devise an equally robust response in other country situations it is supposed to be investigating, or risk, the words of the Coalition for the ICC, “exacerbating perceptions of politicization of and selectivity in the Court’s work.”” (Brody, 2023), therefore, “global commitment to accountability should be the model for other crises in places such as Afghanistan, Ethiopia, Mali, Myanmar, Palestine, and Yemen. And yet, of course, it is the exception” (Brody, 2023).

Allegations of double standards also focus on the unprecedented financial support that the ICC has received from Western states to pursue investigation in Ukraine. Underfunding has hindered the work of the ICC in the past decade. The largest financial contributors to the court, such as Canada, France, Germany, Italy, Japan, Spain and the United Kingdom have opposed the court’s requests to increase its budget, even when its workload expanded exponentially (Amnesty International, 2022). However, after the Russian invasion of Ukraine, an international conference held in London in 2023 managed to raise 4 million pounds to support the ICC’s investigations in Ukraine (Radio Free Europe, 2023). This have lead Amnesty international (2022) to argue:

Concerns that a two-tier system of justice will emerge are only partly addressed by the Prosecutor’s refusal of voluntary contributions earmarked for specific investigations and his insistence that the newly acquired resources “will be deployed based on my assessment of needs across all situations.” Although these assurances are welcome, a

majority of contributions announced publicly so far have been committed by NATO member states, many of which have made it clear that they expect their contributions to benefit the Ukraine situation. The unprecedented size of the Ukraine investigation suggests that the Prosecutor is meeting their expectations.

This unequal funding has only buttressed allegations of selective justice. However, some have argued that by juxtaposing the West and the Global South, allegations of double standards risk overlooking internal hierarchies within Europe (and the West in general) and their relevance to understanding the response of major Western countries concerning the establishment of an aggression tribunal. The dichotomy “the West versus the Global South” pays little or no attention to the question why the US and other Western states have insisted on a hybrid route. As Labuda (2023b) highlights, by opting for a hybrid tribunal, these key States purport to reduce the precedential value of the tribunal making it less likely that aggression by Western States be brought to justice.

Some have invoked a post-colonial critique of international law to highlight the “continuing role [of coloniality] in perpetuating inequalities in the global order” (Labuda, 2023b). Although post-colonialist approaches are usually invoked by the Global South, post-colonialism have been invoked also in relation to the hierarchy that exists between Western and Eastern Europe to illuminate the blind spot that exists in post-colonial literature on the so called Second World (Ibid). Marta Grzechnik highlights that “Eastern Europe’s position vis-à-vis Western Europe remains ambiguous: it is both inside and outside, not “European” enough, nor “White” enough” (Grzechnik, 2019: 1002). Labuda (2023b) argues “Ukraine and Eastern Europe occupy a contested space within the international (legal) imagination”. Elsewhere, he reasserts that:

[T]he concomitant invisibility of Ukrainians on international lawyers’ mental maps, has resulted in a tendency to ignore the severity of Russia’s imperial ambitions while fomenting sweeping generalizations about Ukrainians qua avatars of the ‘West’, ‘Global North’ or ‘whiteness’ and ‘privilege’... these generalities ignore anti-Slavic and anti-Eastern European racism as well as the ‘inferior’ cognitive status that Ukrainians occupy within the European imaginary. (Labuda, 2023d)

Simplistic arguments on double-standards fail to recognize the Eastern European states in pushing for an international tribunal model and in resisting the hybrid model endorsed by major Western countries. Eastern European insistence on an international tribunal model is connected to their history with Russian and Western imperialism alike (Labuda, 2023b). Eastern European states were also the first to ratify the Kampala amendments, especially after the annexation of Crimea (Labuda, 2023b).

The Israeli occupation and annexation of Palestinian lands was frequently invoked as an acute case of double standards in responding to aggression (Kuttab, 2022; Rabbani, 2023). As Nikita Smagin (2023) puts it:

Washington’s pro-Israel stance undermines the legitimacy of the West’s broader reasons for supporting Ukraine in the eyes of many in the Global South. The moral argument against Russia’s invasion of Ukraine now looks like empty words, particularly in Middle East nations.

The recent wave of violence in Israel/Palestine has only intensified allegations of double standards. The slow or no reaction of key Western states to the elevated number of civilian casualties in Gaza accentuated the South/North divide regarding the role and relevance of international law. The unconditional support of Israel’s military operations in Gaza without sending a clear message that Israel’s use of force must meet the test of necessity and proportionality as indicated by the ICJ in *Nicaragua v. The US* (ICJ, 1986)

undermines the global attempts to confront Russia's aggression in Ukraine. The support of key Western countries like the US and Germany to Israel has not waived even when the ICJ issued provisional measures in the case brought by South Africa against Israel for the alleged violation of the Genocide Convention by Israel (ICJ, 2023). The indication of provisional measures by the ICJ means that based on the facts on the ground, the violation of the rights of Palestinian people under the Genocide Conventions is plausible (ICJ, 2024b). Still, no meaningful measures were adopted immediately to respond to the ICJ decision.

Parallel to the case brought by South Africa, on 19 February 2024, the ICJ began a public six days hearing regarding the advisory opinion requested by virtue of the UNGA Resolution 77/247 of December 30, 2022. The court was requested to provide an advisory opinion regarding "the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures" (ICJ, 2022c). In other words, in this advisory opinion, the ICJ is requested to address the legality of the Israeli Occupation as a whole, and not specific practices arising from or connected to it.

As for the hearings, fifty-two states and three international organizations expressed their determination to participate in the court's oral proceedings (Eid, 2024). The vast majority of the participants expressed the opinion that the occupation itself was illegal and urged the ICJ to declare it as such. On the other hand, the United States and few other countries expressed opposing opinions (Kuttab, 2024). The United States urged the ICJ to refrain from issuing an advisory opinion that demands Israel to "immediately and unconditionally withdraw" from the Occupied Palestinian Territories (Corder, 2024).

The oral presentations at the Hague in relation to the illegality of the Israeli occupation prove that at least on a discursive level, the North/South divide is not as clear as some would argue. Ireland, for example, argued "by its prolonged occupation of Palestinian territory, and the settlement activities it has conducted there for more than half a century, Israel has committed serious breaches of a number of peremptory norms of general international law" (Aljazeera, 2024a). Belgium argued that Israel's settlement policy and its attempt to alter the demography of the space "is in violation of fundamental rules of international law: the prohibition of the acquisition of territory by force; the principle of self-determination" (Al Jazeera, 2024b). Luxembourg argued that Israel's "activities of colonization cannot be justified under self-defence" (Aljazeera, 2024c). Slovenia argued that "the ongoing Israeli occupation is an impediment to the right to self-determination and the establishment of the Palestinian state" (Aljazeera, 2024d). The Netherlands argued that "a prolonged occupation obstructs the principle of self-determination" (Aljazeera, 2024b). The question remains how such statements can be translated into a political action just like the case of Ukraine.

For the Ukraine moment to become an international law moment, response to the war in Gaza must be robust too. In fact, even the robust response to the war in Ukraine has not guaranteed justice so far for Ukrainian victims of aggression. For the Ukraine moment to work, the agenda of Eastern European states must align with the agenda of the Global south in decolonizing international law and making it more equitable. Otherwise, the Ukraine moment would transform into a polarizing moment devaluating further the international law project.

NOTA SOBRE EL AUTOR:

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