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DOI
10.1093/jicj/mqac044

Publication date
2022

Document Version
Final published version

Published in
Journal of International Criminal Justice

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Ukraine and the Future of International Criminal Justice

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Abstract

This note places the revitalization of international criminal law spurred by the international community's response to the large-scale commission of core crimes in Ukraine in the aftermath of Russia's February 2022 invasion into a broader (geo)-political context. The unprecedented financial and operational support the International Criminal Court (ICC) Prosecutor has received since raises questions about its implications for the future of international criminal justice and the ways forward for the ICC and the Rome Statute system. The ICC states parties should avoid turning this crisis into a special case for international criminal law enforcement and seize the 'Ukraine moment' to remedy rather than perpetuate existing enforcement asymmetries.

> [W]e are also presented with an opportunity to reaffirm the continued real-world relevance of international law. I believe that the strong support shown for the work of my Office through these contributions, and with that to the International Criminal Court as a whole, represents an important, early step in demonstrating our unity of purpose as we seek to vindicate the legitimate hopes for justice of all those impacted by atrocities.
>
> ICC Prosecutor Karim Khan, 28 March 2022

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This article is part of a Current Events symposium on 'Russian Aggression and the War in Ukraine'. For full description of the contributions, please see J. Geneuss and F. Jeßberger, 'Russian Aggression and the War in Ukraine: An Introduction', published in this issue of the *Journal*.

Journal of International Criminal Justice **20** (2022), 893–909 https://doi.org/10.1093/jicj/mqac044

 Advance Access publication 15 November 2022

1. Introduction

The devastating conflict in Ukraine in the aftermath of Russia's full-scale invasion on 24 February 2022 pushed the topic of accountability to the top of the international agenda. As daily reports of war crimes flowed in and the information about mass atrocities in the occupied territories filled the news feeds, the imperative of holding the political and military leaders of Russia responsible became prevalent in the media and public discourse. Expectably given the criminality of such baseness and scale, international criminal justice has experienced an upsurge of popular attention, with its institutions gaining increased visibility and renewed relevance. A multilateral referral of the Situation in Ukraine to the ICC Prosecutor fast-tracked the start of the investigation on 2 March 2022. States parties responded to Prosecutor Khan's plea for voluntary contributions by injecting extra resources to beef up the investigative capacity of his Office.

While this Ukraine-induced revitalization of international criminal law may be cause for cautious optimism, it should also give a reason for pause. The field of international criminal justice has grown and evolved in rhythm with geopolitical jolts and humanitarian cataclysms. The norm-development and institution-building in international criminal law has been revolutionary rather than incremental, being a way of responding to 'crises' such as the war in Ukraine. But the framing such crisis-driven dynamics impose has its blind spots. The imagery of one-off situation — a special case warranting exceptional treatment — provides no sound and sustainable basis for international justice strategies in the long run. Instead, it forces a selective amnesia and tailormade solutions while at the same time obscuring systemic causes and dislocating events from their relevant historical patterns and geopolitical realities. Even if this penchant for adhockery secures a degree of 'justice for some', it leaves the promise of 'justice for all' unfulfilled. It fuels critiques of double standards, selectivity and racism, and undermines the legitimacy of international criminal justice.

The unprecedented justice mobilization for Ukraine — complete with calls for a special tribunal for the crime of aggression in that situation and outpouring of extrabudgetary contributions to the ICC — has raised these exact concerns. Yet again, it threw the chronic asymmetry of empathy, attention and funding across different mass atrocity situations into sharper relief.[1] Are such concerns justified and how does the revived enthusiasm for international

1 See e.g. V. Tampa, 'Justice Should be Colour Blind. So Why is it Served for Ukraine but not the Congolese?' *Guardian*, 23 August 2022, available online at www.theguardian.com/global-development/2022/aug/23/justice-should-be-colour-blind-so-why-is-it-served-for-ukraine-but-not-the-congolese (visited on 27 October 2022); R. Brody, 'The ICC at 20: Elusive Success, Double Standards and the "Ukraine Moment"', *JusticeInfo.net*, 30 June 2022, available online at www.justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html (visited on 27 October 2022); CICC, 'Victims Could Lose out With States' Double-Standard on International Criminal Court Resources', 30 March 2022, available online at https://coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources (visited on 27 October 2022); Amnesty International, 'The ICC at 20: Double Standards Have no Place in International Justice', 1 July

criminal justice bode for its future? A colossal humanitarian (nuclear, food and environmental security and migration) crisis as it were, the situation in Ukraine might now be headed for 'exceptional treatment' for the purpose of international criminal law enforcement. If this were to happen, what would the cost be in terms of the integrity of the Rome Statute system and the legitimacy of international criminal justice more generally?

2. Justice Mobilization for Ukraine

Criminal law has been at the forefront of the international response to Russia's war of aggression against Ukraine. The events since 24 February 2022 galvanized accountability initiatives on multiple parallel yet communicating planes. This 'solidarity justice' movement entailed a rapid activation and interlinking of standing international, European, and domestic criminal justice mechanisms.[2] The explosion in documentation efforts by civil society organizations and fact-finding organs, such as the Commission of Inquiry dispatched by the UN Human Rights Council in March 2022, has been an integral, if less visible, aspect of this mobilization for justice, raising pressing issues of coordination between them.[3]

On the domestic justice front, the War Crimes Unit of the Office of the Prosecutor-General of Ukraine (OPG) has been painstakingly registering war crime incidents — running up to tens of thousands — and gathering evidence since the start of the conflict. A handful of low-level perpetrators have been convicted by Ukrainian courts, with dozens more cases in the works.[4] Moreover, several states including Canada, Estonia, France, Germany, Lithuania, Sweden and Spain have opened structural probes into the situation in Ukraine based on universal jurisdiction, with some capitalizing on their accumulated experience with core crimes cases arising from other contexts (notably, Syria). Structural investigations allow amassing and systematizing evidence pending the identification of suspects to enable future prosecutions, wherever they may be held. In late March 2022, Ukraine, Poland and

2022, available online at www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice (visited on 27 October 2022).

2 S. Vasiliev, 'The Future of Justice for Ukraine is Domestic', *JusticeInfo.net*, 29 March 2022, available online at www.justiceinfo.net/en/89434-future-justice-for-ukraine-domestic.html (visited on 27 October 2022).

3 UN Human Rights Council Resolution 49/1, Situation of human rights in Ukraine stemming from the Russian Aggression', UN Doc. A/HRC/RES/49/1, 4 March 2022. See B. McGonigle Leyh, 'Ukraine Symposium—Documentation and Investigation Responses to Serious International Crimes', Articles of War, West Point, 13 July 2022, available online at https://lieber.westpoint.edu/documentation-investigation-responses-serious-international-crimes (visited on 27 October 2022).

4 On the first two cases, see S. Vasiliev, 'The Reckoning for War Crimes in Ukraine Has Begun', *Foreign Policy*, 17 June 2022, available online at https://foreignpolicy.com/2022/06/17/war-crimes-trials-ukraine-russian-soldiers-shishimarin (visited on 27 October 2022). On this, see also the contribution by Iryna Marchuk in this issue.

Lithuania formed, with the support of Eurojust, a joint investigative team, which was in due course joined by Estonia, Latvia, Romania and Slovakia as members and by the ICC OTP as a participant. By synergizing with national authorities in this novel fashion, the OTP — which had been active in Ukraine for nearly two months by the time it joined the team — inserted itself into an ongoing investigative cooperation endeavour.

In parallel, the ICC's lamentable lack of jurisdiction over the crime of aggression in Ukraine has provoked debates on the feasibility and optimal modalities of establishing a special tribunal to prosecute it.[5] The Council of Europe's Parliamentary Assembly called upon states to 'urgently set up an ad hoc international criminal tribunal' to investigate and prosecute Russian leaders' alleged crime of aggression and subsequently to speed up its establishment.[6] In addition, Western states and the EU have sought to spur and reinforce the ongoing domestic and international criminal investigations. The EU, USA and the UK established the Atrocity Crimes Advisory Group to provide operational and strategic support to Ukrainian investigators and prosecutors in their gargantuan task of gathering evidence and building cases.[7] Mobile Justice Teams of international and domestic experts have been deployed to help the OPG and regional prosecutors with field investigations.

States parties' rallying around the ICC following Russia's latest invasion of Ukraine has been a quiet revolution in terms of the backing the Court has received. It represents a tectonic shift in the parameters of the possible within the Rome Statute system that no previous 'crisis' — pre-February 2022 Ukraine included — ever made thinkable. The then ICC Prosecutor Bensouda had concluded back in December 2020 that the investigation in Ukraine was warranted but — likely for budgetary and OTP transition-related reasons — the situation was put on a backburner for 14 months. It was not until four days

5 'Combined Statement and Declaration Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine', 4 March 2002, available online at https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (visited on 27 October 2022); Letter dated 12 August 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General, UN Doc. A/ES-11/7-S/2022/616, 17 August 2022, Annex, Chair's Summary, 'Yale Club Roundtable: A Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly?', 22 June 2022, New York; K.J. Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis', *Journal of Genocide Research* (forthcoming). On this, see also the contribution by Tom Dannenbaum in this issue.

6 PACE Resolution 2436 (2022), 'The Russian Federation's Aggression against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes', para. 11.6; see also PACE Resolution 2463 (2022), 'Further escalation in the Russian Federation's aggression against Ukraine', para. 13.6.1 ('speed up the establishment of a Special (ad hoc) International Tribunal to prosecute the crime of aggression against Ukraine').

7 US Department of State, 'The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine', 25 May 2022, available online at www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine (visited on 27 October 2022). On this, see also the contribution by Alexa Koenig in this issue.

after the full-scale invasion that Prosecutor Khan was prepared to request judicial authorization to start investigating. But this step proved unnecessary. In an unseen show of support for the ICC's urgent engagement, a record number of 43 states parties referred the situation to the Prosecutor between 1 March and 1 April 2022. The Prosecutor then proceeded to launch his investigation into the alleged war crimes, crimes against humanity, and genocide on the territory of Ukraine from November 2013 onwards.

Events at the ICC have moved at a brisk pace since. The OTP team was dispatched to the region right away. The Prosecutor has visited Ukraine several times to meet with officials and to observe crime scenes. He has addressed the situation regularly in media interviews. The new investigation being a contingency, he pleaded the international community to provide additional budgetary support, voluntary contributions, and gratis personnel in order to boost his Office's capacity. In response, well over 20 states parties — mostly EU members but also Canada, New Zealand and the UK — committed funds to the OTP's dedicated Trust Fund for Advanced Technology and Specialized Capacity (OTP Trust Fund) and seconded national personnel to the Office, over and above their assessed contributions to the ICC budget.

Lithuania started with a €100,000 contribution. France pledged an initial €500,000 tranche and seconded a team of magistrates and forensic experts. Sweden committed an additional 7mln SEK. The UK donated £1mln and seconded military intelligence experts and investigators from the Metropolitan Police's Counter Terrorism Command as well as international criminal law experts. Germany pledged an additional €1mln. In May, the Netherlands seconded a forensics and investigative team of thirty officers of the Royal Military Police and other Defence Ministry units as well as experts from the Netherlands Forensic Institute. Operating under the ICC banner as part of a 42-strong team — the largest one ever deployed to a situation country by the Prosecutor — the Dutch personnel gathered evidence of crimes around Kyiv over the period of two weeks. Moreover, the Dutch government plans to dispatch three more forensic teams to support the ICC investigation in Ukraine in the fall of 2022 and in 2023. Canada has contributed CA$1mln and deployed additional police investigators and civilian law-enforcement experts to the ICC OTP. Last but not least, the EU scaled up the ICC's investigative capacity with a grant of €7.25mln.

Extraordinary times call for extraordinary measures. The wide-ranging financial and operational support the ICC has received from states and organizations over a record time, taken on its terms, is a positive development which has given justice advocates cause for cautious optimism. Indeed, judging by states parties' dogged insistence on 'zero nominal growth' in yearly budgetary discussions in the Assembly of States Parties (ASP), such support is nothing short of extraordinary. State party reactions to the ICC Prosecutor's plea for assistance have shown that they are prepared to go the extra mile and try out-of-box solutions in order to equip the ICC, at least in situations where they deem the exercise of its mandate to be of particular importance.

3. ICC and Ukraine at the Fault-lines

While the remarkable international mobilization for justice in Ukraine is reassuring, there is a shadow side to it. The exceptionality of 'crisis' pervading the international criminal law field and seeping into the strategic and operational workings of the Rome Statute system is fraught with serious legitimacy risks for the ICC and for international criminal justice in the long run. The question these developments raise is: what comes after? If the *quantity* of the situation-specific support for accountability can be transformed into the new *quality* of support becoming more sustained, systemic and cascaded, Ukraine may well come to mark a watershed moment strengthening the global commitment to accountability and international criminal justice. But, on the other hand, there is also a real risk that international 'solidarity justice' for Ukraine could end up being another instance fitting squarely into, and reproducing, the old familiar pattern of self-interested and selective investment by states in accountability initiatives. If so, it would leave intact and reinforce the selectivity of international criminal law instead of helping remedy it.

Treating the large-scale commission of core crimes in Ukraine as a geopolitical 'state of exception' for the purpose of enforcement gives rise to concerns about international criminal justice remaining a multi-geared system in which accountability is pursued and secured asymmetrically between atrocity situations, even though they all warrant equal and adequate attention. What the headlights of 'crisis' will eclipse, is that the feverish revitalization of international criminal law on the crest of the response to the war in Ukraine was preceded by a period of downturn unfolding amid the broader crisis of multilateralism, the rise of the right-wing populist 'International', and the erosion of the international rule of law over the past decade.

Only recently international criminal justice appeared to have run out of steam. States' commitment to accountability had seemingly been worn out or become markedly less steadfast, and international rule-of-law institutions had to grapple with unprecedented political challenges and overt backlash. Some of the major powers not merely withdrew their already episodic and selective support for international criminal justice institutions, but also went as far as to actively undermine their prosecutorial and judicial mandates. This is epitomized by the previous US administration's blunt and petulant anti-ICC rhetoric, which proved anything but toothless. It escalated into the imposition of arbitrary and racist financial sanctions and visa restrictions on senior OTP personnel in retaliation for the opening of the investigations in Afghanistan implicating US Armed Forces and the CIA and in Palestine implicating the Israeli authorities.[8]

Whatever fails to kill international criminal justice institutions does not necessarily make them stronger. Despite states parties' expressions of support in the wake of politicized attacks from Washington, the ICC was cruelly reminded

8 Executive Order 13928, 'Blocking Property of Certain Persons Associated with the International Criminal Court', 11 June 2020.

of the earthly *Realpolitik* constraints on its mandate. The Trump administration's measures were repealed as 'inappropriate and ineffective' under President Joe Biden in April 2021, less than a year before the start of a full-scale war in Ukraine. 'America' was back — bygones be bygones — without due accounting and without truly redeeming itself for its unseemly assault on the Court. When rescinding the sanctions, the State Department made the point of restating its strong disagreement with the ICC's engagement in two — in its view contested — situations.[9] In September 2021, the Prosecutor refocused the Afghanistan investigation on the Islamic State–Khorasan Province and on the Taliban while de-prioritizing, without much fanfare, other aspects of the probe.[10] Whether informed by prosecutorial pragmatism more than by a conscious need to de-escalate and avoid head-on confrontations with the USA, at least in the near future, this step has created an indelible appearance of the ICC coming to terms with the 'real world' limitations.

In Ukraine, the ICC finds itself, yet again, at the center of a geopolitical storm but the power relations are different this time. Like with its stagnant investigation into Russia's 2008 war in Georgia since 2016, no meaningful steps had been taken in Ukraine until after the 2022 invasion. Between 2014 and 2022, the 'Western world' watched Russia occupy and annex the Crimea and wage its proxy war in Donbas — the prelude to the current events — with displeasure, but ultimately also with relative indifference as far as meaningful economic countermeasures and financial sanctions were concerned. The international opprobrium did not quite reach the level of precluding states, even those strongly opposed to such blatant acts of aggression, from going back to 'business (almost) as usual' with the Kremlin. Besides mere symbolic steps, the ICC's response mostly tracked that lukewarm approach. This changed radically in February 2022. The ICC's current action in Ukraine takes place in the context of a full-out political, economic and military-aid standoff between the broad international coalition including the EU, NATO members and their allies backing Ukraine, on the one hand, and Russia backed, in one way or another, by Belarus, Eritrea, Iran, Nicaragua, North Korea and Syria, on the other hand.

The ICC's positionality in this heavily charged geopolitical context is relevant to consider. In pursuing justice for the victims (and the alleged perpetrators) of core crimes in Ukraine, what political and economic forces and powers-that-be can it be perceived to lean against? What broader agendas may its pursuit of

9 A.J. Blinken, Secretary of State, 'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court', 2 April 2021, available online at www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court (visited on 27 October 2022).

10 Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, following the application for an expedited order under Article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan, 27 September 2021, available online at www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application (visited on 27 October 2022) (referring to the 'gravity, scale and continuing nature of alleged crimes by the Taliban and the Islamic State' and the need 'to construct credible cases capable of being proved beyond reasonable doubt in the courtroom').

accountability appear to be aligned with? Ukraine is defending its sovereignty, territorial integrity and its very right to exist as a nation against a major power's revanchist attempt at subjugating or destroying it. It is in this context that the ICC has intervened at the behest of a large group of states parties constituting more than a third of its membership. Both the 'solidarity justice' movement and the initiative to engage and give a boost to the ICC was spearheaded in particular by Eastern European and Baltic states — the erstwhile Russian Empire's colonies and former republics of the Soviet Union. The same countries share with Ukraine a common history of having been forced, at different periods and under different guises, into what effectively constituted an empire as part of which they were subjected to decades-long occupation and oppression.[11]

On the other side is Russia — a permanent UN Security Council member and one of the largest nuclear powers in the world. It has not shied away from creating frozen conflicts at its ever-expanding borders. It has engaged in overt nuclear (food security, migration) blackmail and been waging an aggressive war of neo-imperial reconquest against Ukraine and illegally annexing its territories since 2014. Over and above posing the gravest threat to post-WWII collective security system, Russia's war and methods of warfare have possibly ticked every box on the core crimes list several times over — which will be for the courts of law to establish in the future. This hints at, yet not quite expresses, the degree of horror Russia's predatory war has wreaked upon the millions of people in Ukraine and beyond. By finally taking the necessary action in Ukraine, if belatedly so only after the start of the 2022 invasion, the ICC can be said to have firmly and boldly aligned itself with the emancipatory agenda of the anti-imperialist liberation struggle against foreign occupation and recolonization which the armed resistance against the aggressor embodies to Ukrainians and their European neighbours. The ICC has risen up to the occasion and in defence of victims in Ukraine — a sovereign nation being torn apart and brutally dragged back into the subaltern status by a resurgent, undead empire.

While this rings true, the picture is more complicated — as often is the case — as far as the ICC's positionality is concerned. While consonant with the emancipatory decolonial politics, its pro-accountability stand is simultaneously in a perfect alignment with the consolidated position of powerful Western/Global North military and economic alliances (NATO and EU) against a common foe they are determined to defeat on all fronts, including the legal one. The ICC's hyper-activation in Ukraine since March 2022 rides on the back of the extra-budgetary, operational and political support by the NATO and EU members. Even the USA — a super-hegemon that, lest we forget, only a while ago reviled the Court and tried to bully it into submission while still continuing to vehemently oppose its jurisdiction over the US personnel — is now looking into ways of supporting it. A senior US senator has called for the leadership of

11 See Y. Gaidar, *Collapse of an Empire: Lessons for Modern Russia* (Brookings Institution Press 2007).

Russia — also not an ICC state party — to be prosecuted for war crimes before the Court while the US Ambassador-at-Large for Global Criminal Justice mentioned it among multilateral accountability efforts supported by the USA, thus unequivocally backing the ICC's involvement in Ukraine.[12]

Insofar as this change of heart testifies, yet again, to a selective engagement with, and situational support for, the ICC, it is hardly conducive to reinforcing the integrity and credibility of the accountability efforts thus promoted. Instead, it would put the wind in the sails of critics who point out the habitual self-interest, double standards and holier-than-thou mentality at play. In a predictable extension of such critiques — and in a spin that Russian official propaganda might find appealing — the ICC would be readily painted as an obedient instrument of lawfare deployed by Western powers to beat Russia into submission. By seeking to make 'unhandshakeable' war criminals of its leaders, the 'biased' ICC implements the objective of the 'collective West' to ostracize Russia from the 'international community' and deprive it of its 'superpower' status in what must have been a 'multipolar world'.

The no less important aspect of the ICC's positionality concerns its own agency in determining the forms and timing of action it chooses to take in this context when articulating and responding to the 'crisis'. The ICC has had its share of existential struggles and quests for recognition both by major powers and members of regional organizations, most notably, the African Union states before its stand-off with Trump's USA and now with Putin's Russia. Given the Court's bumpy ride thus far and the recent assaults on its independence, it may now appear to ride on the crest of the wave or, putting it even more bluntly, to piggyback on the 'crisis' in Ukraine while scrambling for its own continued relevance and salvation. Under this cynical view, the ICC seizes the 'solidarity justice' movement as a chance to redeem itself, turn the page, and shore up its battered authority. It is only after inordinate, inexplicable delays that it finally sprang into action—when 'doing what is right' both aligned with its institutional self-interest *and* was politically least controversial.

Contorted and unfair as such perceptions may possibly be, the fact remains that the firm and broad backing the ICC has received throughout 2022 did embolden it to take on Russia in earnest. In the 'forsaken' Situation in Georgia as well, the Court issued three arrest warrants against Russian and South Ossetian officials in June 2022.[13] The OTP had likely sat on those materials

12 'Graham Resolution Supports Ukraine Complaint Urging Investigation of Putin as War Criminal', 2 March 2022, available online at www.lgraham.senate.gov/public/index.cfm/press-releases?ID=F99DC05D-326B-4759-B10A-8C9790FEF44D (visited on 27 October 2022); 'War Crimes and Accountability in Ukraine', FPC Briefing, B. Van Schaack, Ambassador-At-Large For Global Criminal Justice, 15 June 2022, available online at www.state.gov/briefings-for eign-press-centers/war-crimes-and-accountability-in-ukraine (visited on 27 October 2022) ('The United States is also supporting a range of multinational efforts to advance accountability. This includes cases that are being considered by the International Criminal Court.').

13 The ICC Prosecutor applied for arrest warrants against David Sanakoev, Gamlet Guchmazov and Mikhail Mindzaev on 10 March 2022, which PTC I issued on 24 June 2022 (public redacted versions were released on 30 June): ICC press release, 'Situation in Georgia: ICC Pre-Trial Chamber Delivers Three Arrest Warrants', ICC-CPI-20220630-PR1663, 30 June

for years, and the timing of its application for arrest warrants (March 2022) was hardly accidental. The newfound vigor and sense of purpose the ICC mustered for its mission in Ukraine (and against the Putin regime in Russia) have led advocates for justice working on situations of occupation, apartheid and colonial oppression elsewhere to question *why* the plight of *those other victims* of core crimes had not been addressed with comparable creativity, expediency and determination by the ICC, states parties, and the international community at large.

Like with notorious inequalities in the treatment of refugees based on their origin, race and skin color, the chronic and seemingly inextricable asymmetries in international criminal justice responses contribute to the impression that it is the 'white, blue-eyed, European-looking' victims (as one of racial stereotypes goes) that qualify for immediate and swift protection. By contrast, victims in Palestine, Afghanistan, Iraq, Georgia and other communities which find themselves between geopolitical cracks and marginalized in the global economy and multilateral cooperation frameworks are met with protraction and stonewalling in response to their legitimate and repeated pleas for justice. Those victims, more often than not the people of color, have not seen and might not see the ICC Prosecutor visiting their country several times in a matter of months, hear him speak repeatedly about the situation on CNN, issue stern warnings about the impermissibility of crimes and the certainty of punishment, establish a field office or plead states parties for additional budget and voluntary contributions with the same sense of urgency. What is more likely to happen, however, is that investigations into the crimes against them would remain in limbo for years on end (Georgia), be 'deprioritized' (Afghanistan), or stopped in their tracks despite the apparent lack of progress in domestic inquiries (UK/Iraq).[14] To be clear, this is not, or not only, for the lack of trying on the part of the ICC but also because, and often largely because, the more affluent and powerful states either do not regard those investigations as a priority or have a direct stake in not letting them go forward.

Ukrainians fully deserve 'solidarity justice' that multiple actors now work to deliver. And so do victims in Palestine, Georgia, Iraq, Afghanistan and in places outside of the ICC's purview — Syria, Tigray, Nagorno-Karabakh, Yemen and so on. At least with respect to the situations under its watch, the ICC must be willing and able to tackle crimes within its jurisdiction, by and against whomever they are committed, with an equal degree of firmness and stamina. States and international organizations backing the Court in Ukraine cannot be promoting the ideal of accountability for international crimes in good faith — and by the same token to be claiming to advance emancipatory objectives such as supporting the oppressed peoples in their fight against occupation, colonialism and imperialism — if they do so discriminately in some situations while remaining mute and inert in others.

2022, available online at www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants (visited on 27 October 2022).

14 Situation in Iraq/UK, Final Report, ICC OTP, 9 December 2020.

4. Seizing the 'Ukraine Moment'

The 'Ukraine moment' will be a crucial test for the Rome Statute system of international justice. Its credibility will hinge not only on the Court and states parties' handling of this 'crisis' but also, and especially, on their treatment of other contemporaneous and future situations in its wake. Will the turbo-charged enthusiasm for international criminal law in Ukraine — which in itself is not a new phenomenon — be allowed to graduate into a more genuine and principled commitment to accountability everywhere?

One measurable parameter to keep in mind is finances. The management of extrabudgetary contributions the 'Ukraine moment' has generated and states parties' readiness to mainstream such ad hoc financial support into the ICC's regular budget for the coming years will attest unmistakably to whether indeed they are willing to put their money where their mouth is. The level of assistance the ICC has obtained in connection with its Ukraine investigation thus far is previously unseen and bound to serve as a landmark in the future. Now that the requested resources have been granted, the Court and states parties must ensure that Ukraine does not become a one-off case. Substantial funding asymmetries across situations, based primarily on variations in states' willingness to meet the ICC's incidental resource needs, will only exacerbate the existing enforcement asymmetries and prove deleterious for the system's integrity. Rather, any resource needs must be met in the manner enabling the Court to perform its mandate adequately over its entire docket, not only in the situations favoured by its more affluent and invested members.

State communications around extrabudgetary assistance to the ICC matter a great deal because they shape public perceptions of how the Court is funded and where its loyalties lie. In this regard, statements made by numerous states parties to date have given rise to confusion and concerns. The Prosecutor's calls for voluntary financial contributions and seconded national experts addressed to states emphasized consistently that OTP resource needs were to be covered *across all situations* in which it was engaged.[15] Unfortunately, this 'all situations' formula has often been lost in translation, if statements accompanying pledges by states and international organizations are anything to go by. First, such pledges hardly ever left any doubt that the provision of assistance was linked namely to the investigation in Ukraine and was aimed primarily at increasing the OTP's capacities in that situation. As a result, the appearance was created that the extra funding was 'earmarked' for the Situation in Ukraine and that the OTP was the only organ to benefit from it. Even where states framed their donations as contributions towards a specific objective — for example, strengthening accountability for conflict-related sexual violence — rather than towards an individual situation, they still explicitly

15 E.g. Note Verbale, Office of the Prosecutor, OTP2022/005608, 7 March 2022 ('in order to address its urgent resource needs and allow it to effectively address all situations presently under investigation or in trial').

stated the imperative to investigate the alleged atrocities by the Russian forces in Ukraine.[16]

Secondly, the donors' announcements regarding the additional funds and seconded personnel to be placed at the ICC's disposal have not been carefully worded and adequately sensitive to the nature of the institution being assisted. On occasion, and completely unnecessarily, the language therein crossed into prejudging facts and issues material to the determination of responsibility, such as the occurrence of specific crimes and their authorship, that lie squarely with the Prosecutor and the Court.[17] This is quite problematic. All of the donors so far — be those the EU or individual ICC states parties and EU and/or NATO members — participate in the anti-Russia coalition and have a stake in the conflict. What may be a catchy newspaper headline, is not necessarily appropriate in a pledge of assistance to an independent and impartial international adjudicatory organ that promotes and operates under the rule of law. Pronouncements foreshadowing issues of responsibility are doubly concerning when included in communications regarding financial and operational support to the ICC because they send a wrong message. 'He who pays the piper calls the tune' — as if the extra funding came with strings, i.e. funders' expectations, attached — is antithetical to the ICC's judicial and prosecutorial independence and casts a dark shadow over the Ukraine investigation for no reason other than desired rhetorical effect.

Under the ICC and ASP legal framework, voluntary contributions may not be 'earmarked' for individual situations or specific Court organs, as opposed to promoting certain *purposes*—or without indicating such. Article 116 of the ICC Statute authorizes the *Court* — the ICC as a whole — to 'receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities' in accordance with relevant criteria adopted by the ASP. The ICC Financial Regulations and Rules (FRR) allow the Registrar to establish trust funds funded wholly by voluntary contributions, which is to be reported to the Presidency and, through the Committee on Budget and Finance, to the ASP.[18] It is also the Registrar who, as 'the appropriate authority', must clearly define 'the purposes and limits' of such trust funds.[19]

16 E.g. Global Affairs Canada, 'Canada Provides Funding to International Criminal Court to Strengthen Accountability for Conflict-related Sexual Violence', 26 May 2022, available online at www.canada.ca/en/global-affairs/news/2022/05/canada-provides-funding-to-international-criminal-court-to-strengthen-accountability-for-conflict-related-sexual-violence.html (visited on 27 October 2022).

17 E.g. European Commission, 'Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million', 8 June 2022, available online at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3543 (visited on 27 October 2022) (quoting EU High Representative Borrell: '[t]here can be no impunity for the crimes committed under Russian occupation' and confirming that '[t]he European Union is committed to make Russian decision-makers accountable').

18 Regulation 6.5, ICC Financial Regulations and Rules (last amended by Resolution ICC-ASP/7/5), 21 November 2008.

19 Regulation 6.5 FRR.

The FRR distinguish between, on the one hand, the voluntary contributions accepted for the purposes specified by the donors, which must be treated as trust funds or special accounts, and, on the other hand, those for which no purpose has been specified, which count as 'miscellaneous income' and are to be reported as 'gifts'. Hence voluntary contributions towards specific purposes are to be framed as trust funds but not, formally speaking, to be earmarked for individual Court organs detached from any substantive purpose. The FRR further specify that '[v]oluntary contributions, gifts and donations, whether or not in cash, may only be accepted by the Registrar, *provided that they are consistent with the nature and functions of the Court* and the criteria to be adopted by the [ASP] on the subject, in accordance with article 116 of the Rome Statute'.[20] In the 2002 resolution setting out the 'relevant criteria', the ASP requested all potential donors to declare that any voluntary contributions 'are not intended to affect the independence of the Court'.[21] This resolution imposes a duty on the Registrar to assure him- or herself that such contributions will not affect the Court's independence and will fulfil the criteria set by the ASP, as well as to report any offered contributions, whether accepted or declined, to the ASP.

Therefore, voluntary contributions accompanied by statements which appear to 'earmark' funds for investigations in specific situations or indicate future directions for the OTP investigations, are not in strict compliance with the FRR and the ASP criteria. Such pledges are not clearly 'consistent with the nature and functions' of the ICC as an independent Court and of the OTP as an independent prosecutorial organ.[22] This is not as directly problematic for contributions to individual organs, as long as the specified purpose is aligned with their functions and competences. Even though purpose-specific contributions benefitting some organs but not the others are not at odds with the ICC's 'nature and functions', any resulting internal funding asymmetries will be objectionable. Thus, the increased capacity and workload of the OTP will by definition lead to an increased pressure on other Court organs (the Registry and the Chambers), without their resource needs being properly catered for through tailored donations.

The ASP 'relevant criteria' from 2002 frame as a 'request' the instruction to donors to emphasize that *ad hoc* contributions are not meant to prejudice the ICC's independence. Yet, the inclusion of such a declaration is a rule that contributors are meant to observe. The Registrar must ensure that contributions neither undermine the Court's independence nor appear to do so before accepting them. Since the Registrar is responsible for managing trust funds made wholly of voluntary contributions, it is not the role of the Prosecutor to vet contributions against the applicable requirements, decide whether to accept or reject them, or react to, let alone correct, statements donors choose to make when pledging contributions. Notably, so far only the Prosecutor has been providing updates on the OTP Trust Fund. Despite the lack of public

20 Regulation 7.2 FRR (emphasis added).

21 Resolution ICC-ASP/1/Res.11, Relevant criteria for voluntary contributions to the International Criminal Court, 3 September 2002.

22 ICC Statute, Preambular para. 9, Art. 40(1), and Art. 42(1).

communications from the Registrar pending his report to the ASP, which may have been desirable in the interests of transparency, it can be presumed that, for the voluntary contributions received in 2022, the vetting has been duly carried out and conclusion reached in each case that they complied with the applicable requirements.

In his updates, the Prosecutor made clear that the extrabudgetary contributions would be channeled to the OTP Trust Fund and used to cover his Office's urgent resource needs across all situations at the investigation or case stage. He identified three priority areas in which the funds would be deployed: the integration of advanced evidentiary technologies; the enhancement of the psycho-social support to survivors and witness protection; and increasing investigative capacity for crimes of sexual and gender-based violence and crimes against children.[23] Capital investments in upgrading OTP technological infrastructure to enable it to collect, store, process and analyse digital and multimedia evidence and integrate it effectively into cases are clearly aimed at strengthening operations across the board. This manner of spending voluntary contributions is meant to benefit all investigations and raises no red flags.

This may be more difficult to achieve with national experts in case a seconding state party expects them to be allocated namely to specific *situations* over and above certain areas of work. As part of the Prosecutor's 'full authority' over the management of the Office's staff, facilities and 'other resources', he may accept offers of gratis personnel on behalf of the Office in accordance with the ASP guidelines: 'only on an exceptional basis to provide expertise not available within the organ, for very specialized functions for which such expertise is not required on a continuing basis …, *as identified by*' the OTP.[24] Therefore, states' preferences and expectations in that regard should not limit the Prosecutor's prerogative to frame seconded national experts' functions and assignments based on demands arising across situations.

With the Prosecutor being on a receiving end of a staff secondment, it may be hard for him to assert that prerogative; in the worst-case scenario, the donor state could withdraw the offer. Any issues with respect to experts' deployment need to be settled through consultations. The Prosecutor must be able to use in-kind contributions such as loan of gratis personnel in the way which best meets the demands for human resources and expertise across the situations the Office is addressing.[25] If a donor state is serious about providing assistance, it will refrain from dictating the allocation of seconded staff to the

23 'Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and support from States Parties will accelerate action across our investigations', 28 March 2022, available online at www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will (visited on 27 October 2022).

24 Arts 42(2) and 44(4) ICC Statute; Guidelines for the selection and engagement of gratis personnel at the International Criminal Court, Annex II, Resolution ICC-ASP/4/Res.4, 3 December 2005, Section 2.1 (emphasis added).

25 Statement of ICC Prosecutor, 28 March 2022 (n 22) (national experts 'will be critical as we seek to accelerate our work *across our investigations* and effectively meet the challenges faced in conducting investigations *across all situations addressed by my Office*').

ICC. In the Situation in Ukraine, which has already seen a large ICC team composed of Dutch officers dispatched once, with several more on the way, the risk of disbalance is not theoretical and will need to be managed carefully in accordance with the 'all situations' approach.

States will be states, after all. Their public statements and pledges of *ad hoc* assistance to the ICC will be political. Addressed to domestic electorates and international allies, they will endeavour to show whom the governments stand with and how strongly their commitment is. Still, states, international organizations such as the EU, and other donors must at all times ensure that their voluntary contributions to the ICC fully comport with the relevant requirements relating to the ICC's 'nature and functions' as an independent judicial organ, if they wish those contributions to be admissible and uncontaminated by actual or perceived bias. It falls to both states parties and the Court to safeguard its independence. Even as the beneficiary, the Court must remain alert and retain full agency in the matter of voluntary donations by protecting, through the Registrar, the integrity of its financial resources. The Registrar must remind donors of the legal framework for voluntary contributions and, if need be, emphasize the impermissibility of giving rise to perceptions that the Court's independence may be compromised by incidental, goal-specific financial injections.

Finally, states and organizations must eschew any wording which could be interpreted as suggesting that extra funds are donated not for a specified purpose or as a gift but rather towards the Court's activities in specific situations. Their statements and pledges must steer clear of prejudicial issues of fact or law, which are for the Prosecutor and for the Chambers to determine. The inclusion of the formula required by the 2002 ASP Resolution should go some way to warding off concerns regarding the impact of voluntary contributions on the ICC's independence. Donors would thus be reminded of the judicial nature of the ICC — and of the detrimental consequences of ignoring these basic rules for the legitimacy of the Court and for the success of its mission in Ukraine and beyond.

5. Conclusion

The mobilization for justice in Ukraine holds a significant promise for international criminal justice. The renewed recognition of the importance of accountability institutions, the unprecedented support the ICC has received, and the growing appetite for a new tribunal to close an impunity gap with respect to the crime of aggression, indicate that a different, better future may be possible for the international criminal law project. The 'Ukraine moment' could, and hopefully will, mark a paradigm shift in states' attitude, that would contribute to restoring the international rule of law and to reconfiguring the multilateral cooperation in international justice, that have been under assault in recent years. In this new climate, more states would feel compelled to reinvest in their commitment to accountability for international crimes, double

down on their support for international criminal law institutions, and to make true of the imperative of delivering justice across geopolitical fault-lines.

But this is far from guaranteed. The Ukraine momentum is steeped in existential questions and anxieties for the ICC and for the international criminal accountability project as a whole. By inviting — and obtaining — extrabudgetary support from states and international organizations at the turning point in the ICC's two-decade lifetime, the ICC Prosecutor has seriously upped the ante for the Court, and not just in one situation but generally. The risk of crushing failure now, at the start of the Court's third decade, is prohibitively high and the fear of betraying the expectations of constituencies, and above all victims, more pulpable than ever. If, despite the outpouring of support, the OTP ends up having too little to show for it, in terms of bringing strong, thoroughly investigated cases to the Court reasonably soon, the fallout with states and affected communities will likely be enormous.

Considering its own 'crises' over the past decade or so, the ICC itself is now running short of time, space, and chances to reassert itself as the bearing pillar in the international criminal law institutional architecture. There is a possibility that its failing to deliver a degree of justice in Ukraine — just as elsewhere — that is commensurate to the expectations it has raised, would send its institutional reputation down the drain. The disillusionment could become so great that it might take states parties, civil society organizations, citizens and, in particular, victims of core crimes a long time to overcome it, if possible at all. I admit that such a deplorable outcome will not necessarily become the fatal 'kiss of death' spelling the end of the international criminal law enterprise as such.[26] On the contrary, one can be certain that the 'Ukraine moment' will not die out without making waves; its discursive pull and political impacts will be powerful and lasting. Quite possibly, it will compel at least some states to reinvest in international justice and pursue accountability through a variety of revamped institutional mechanisms and cooperation modalities, although the effects of that will not be felt from one day to another.

For now, states must by all means continue backing the Court in Ukraine. It is even more crucial that the reinvigorated enthusiasm for the ICC and the willingness to provide it with incidental financial, operational and technical expert support are rechanneled into solid and sustained structural backing. In my view, it is unreasonable to expect that *ad hoc*, contingency-based and crisis-driven voluntary funding can 'trickle down' from Ukraine to other situations and from the OTP to other Court organs, which are all now struggling under an increased workload. Therefore, it is time for states to cardinally revise their attitude to the ICC budget. They should translate their rhetorical appreciation of the importance of its mandate into an adequate increase of their yearly assessed contributions to the ICC's regular budget. Only then can states parties rest assured that there are no under-resourced situations or organs at the ICC. For 2023, the ICC has programmed a 15.9 per cent increase.[27] The eventful

26 Many thanks to an anonymous reviewer for their generous engagement with this argument.

27 Proposed Programme Budget for 2023 of the International Criminal Court: Executive Summary, ICC-ASP/21/INF.2, 21 June 2022, (proposing a total budget of €175,327.4

year of 2022 and the measures taken to address the shortfall should make states draw their conclusions. They should support the Court not only or to a large extent because it is now engaged in Ukraine but because of the centrality of its mandate and the importance of enabling the Court to exercise it meaningfully in other situations too — especially those where it has been unjustifiably slow and lukewarm to date.

The Ukraine moment must not be allowed to turn out to be another extraordinary 'crisis' eligible for exceptional treatment; a hyper-special case illuminated by a myopic flash of 'Western' empathy. The ICC's engagement in Ukraine presents this institution with a golden opportunity to address its pro-hegemony, 'neo-colonial' image it still bears in some quarters in the Global South, which stuck to it in its teenage decade. The ICC will succeed in reaffirming its emancipatory credentials if, and only if, it seizes this opportunity to mitigate rather than entrench the existing enforcement asymmetries. The ICC officials are surely conscious of the high stakes involved and of the need to exercise their agency as boldly and creatively elsewhere, as they are now doing in Ukraine. They must stick to their mandates unwaveringly and demand the resources and support necessary to deliver on their mandate across all situations.

Courts endeavour to manage crises, but this is no one-way street: crises in turn shape courts and the fields of law and practice they embody. In Ukraine, international criminal justice finds itself at a crossroads again, and the ante has been elevated substantially by the scale of multilateral support provided to the ICC, as it were, in the present geopolitical conditions. Ukraine will turn out to be an indisputably positive, transformative moment only if states do not turn into a unique 'crisis' benefitting from international criminal law enforcement privileges. Unless solidarity around Ukraine translates into the promotion of justice equally across all situations within the ICC's reach, the current agitation around it could well become akin to the Lazarus effect: an artificially stimulated spasmodic bout of activity upon which the Court might not truly recover. And yet, hope springs eternal.

thousand, representing an increase for 2023 of approximately €24,057.5 thousand, or 15.9 per cent, over the approved budget for 2022 of €151,269.9 thousand).