

Ukraine: “Selectivity in international criminal law has always been a major problem”: interview with Patryk Labuda

Monday 19 February 2024, by [Commons](#), [LABUDA Patryk](#) (Date first published: 16 February 2024).

[Patryk Labuda](#) has a Ph.D. in international law from the Graduate Institute of International and Development Studies in Geneva. He currently works on the ‘[Memocracy](#)’ project at the Polish Academy of Sciences, where his research focuses on shifts in the global legal order and relations between the ‘Global South’ and ‘Global East’, especially Eastern Europe and Africa, in the wake of the Russo-Ukraine war.

There is a lot of discussion now about how to make Russia accountable for the crimes it did. There are certain tensions in this field. The ICC issued an arrest warrant for Russian president Vladimir Putin. At the same time, we observe that the Ukrainian government wants to create a Special Tribunal for Aggression to hold Russia accountable. The United States and other Western countries propose the creation of a ‘hybrid’ tribunal instead of the Special Tribunal for Aggression. And the Global South is skeptical about all the options. We decided to discuss these questions with Patryk. The interview will be released in two parts. In the first part, we discuss the global context and how justice for Ukraine can bring a fairer international law practice. In the second part, we detail the different types of courts that are discussed now and the reasons for the disagreements between different parties.

We often encounter skepticism about the relevance for the Global South of the Special Tribunal for Aggression to hold Russia accountable. What is the meaning of this precedent from a global perspective?

I think this is one of the more common yet misunderstood questions in the global debate over whether to establish a Special Tribunal. Ukraine’s interest is clear. Ukraine’s neighbors in Eastern Europe, most of which have experienced Russian invasions and imperialism, are also clear on why this matters for them. But what about the rest of the world? Why should this matter to you if you live in faraway Paraguay, Iraq, or Indonesia?

In theory, this question should have a simple answer. If you want to live safe from foreign invasions, it should matter to you that Russia’s aggression against Ukraine is prosecuted. Such a prosecution sets an important precedent that aggression will not be tolerated, which can, in turn, be leveraged against someone else in the future if another country attempts to invade and/or annex foreign territory.

However, a different perspective has also gained traction after 2022. Some link the quest for accountability for Ukraine to other cases of aggression, suggesting that we should only seek justice in Ukraine if other victims of aggression also get their day in court. A significant amount of time has been spent on discussions of the 2003 invasion of Iraq and to a lesser extent, cases like the 1999 Kosovo or 2011 Libya intervention, all of which raise questions about illegal interstate force (which

may or may not rise to the level of a crime of aggression). Put differently, why only Ukraine if there was no tribunal for Iraq, Kosovo, or Libya?

There is a simple and more complex answer. One way to think about this is that justice for Ukrainians should not depend on whether Iraqis also receive justice. Put differently, unless we want to accept an (international) society where one murderer is punished only if all other murderers are also punished, this is not a particularly appealing prospect for any justice system. As a result, most scholars argue that the crime of aggression in Ukraine should be prosecuted regardless of whether other recent invasions produced accountability.

However, there is another way to think about why unequal enforcement matters. Justice for Ukraine is complicated by the fact that some states that are now (nominally at least) pushing for accountability for aggression in Ukraine – especially the US and UK – were never held to account for allegations of aggression against them, which triggers accusations of hypocrisy and double standards. Why are the US and UK pushing for aggression trials of Russians if they did not support accountability for the Iraq invasion, or – in a more expansive but [unpersuasive](#) version of this argument – why does ‘the West’ not support with equal fervor justice elsewhere in the world?

Now, it is often said that these accusations of hypocrisy and double standards have been especially prominent in the so-called ‘Global South’, which – it is then also suggested – does not really support justice for Ukraine. But I think this discussion is a bit more complicated than that. Yes, some Global South actors raise these questions, but we have to distinguish between two different arguments. If by raising the question of ‘why Ukraine, but not Iraq?’ someone is also calling for accountability for Iraq and not making their support for Ukraine conditional on both being prosecuted – I think this question has merit. Put differently, yes, we should support Ukrainians, but this should not prevent us from advocating accountability elsewhere. I agree with this sentiment.

However, what is unfortunate about the invasion of Ukraine is that, in my view, an increasing number of states and people view the world in neorealist, zero-sum terms, where the ‘what about’ question is not just an appeal for solidarity with accountability claims elsewhere, but a condition of support for justice in Ukraine. Put differently, some actors, for instance, South Africa or Brazil, seem to make their support for Ukraine’s justice demands conditional on the US and/or UK also being prosecuted for their invasions of and crimes in Iraq (or Libya, etc.).

Setting aside whether all these cases – Ukraine, Iraq, Libya, Kosovo (and others) – are the same from a legal perspective, this second, more transactional approach to justice claims raises more questions than I can address in an interview. Selectivity in international criminal law (meaning: who gets prosecuted and who does not?) has always been a major problem. Still, it is not clear to me why the case of Ukraine has attracted such attention about double standards or uneven enforcement of the law. I will make two brief comments about this.

First, there seems to be a belief on the part of some that by prosecuting aggression in Ukraine, the selectivity of international law would be exacerbated rather than decreased. According to this logic, by ensuring justice for Ukrainians, we are making the world more unjust (because others have not received the same justice), rather than less unjust (because a powerful actor like Russia would be found guilty). These arguments seem to rely on the neo-realist zero-sum vision of world order, where justice for Ukraine also indirectly strengthens ‘Western power’ and should hence be opposed.

Second, and relatedly, some people, especially from non-European countries, believe Ukraine is somehow an opportunity to settle scores with ‘the West’ and especially the US. I need not explain how strange this belief is to Ukrainian readers, who know they have never been part of the West and whom the West has rarely hesitated to sacrifice in crunch moments. How much does the West really

care about Ukraine? We may soon find out yet again just how fickle a partner the Western powers are, but a revealing aspect of the post-2022 phase of the war is how poorly understood Eastern Europe's distinct history and semi-peripheral condition is. Outside our region, international relations are usually analyzed through US-centric (or increasingly Third-World-centric) lenses, which make Ukraine invisible on mental maps of the world. And it seems these kinds of 'us versus them'/'your loss is my win' arguments increasingly resonate in parts of the world that are oblivious to Eastern Europe, [the Global East](#), and its distinct problems.

One thing my research tries to do is to bring Eastern Europe and the Global East back into the conversation and show why Ukraine's fate matters elsewhere. As regards the ad hoc aggression tribunal, I suggest that most people in the world, especially from smaller and weaker nations, both from the Global South and Global East, stand to benefit from prosecutions of powerful state actors like Russia. Such trials would create a precedent that everyone can later leverage in calls for accountability elsewhere. Put differently, it matters for Taiwanese if aggression is prosecuted in Ukraine. Likewise, it matters for people in the Horn of Africa, where neo-imperial claims are making [a comeback](#), if there is an aggression precedent to draw on a few years from now. And yet this perspective has not (yet?) taken hold in these regions, where US support for Ukraine is viewed through the lens of past experiences of US interventions and/or Western European colonialism rather than the Eastern European context of Russia's neo-colonial invasion.

In the mainstream Western discourse, there is this idea that countries of the Global South are indifferent to the Russo-Ukrainian war, if not explicitly pro-Russian. How true is this, seen from the point of view of votes and decisions taken by those governments in the UN and other international fora?

I think it is an oversimplification to suggest that the 'Global South' is indifferent to Ukraine or exhibits an actual pro-Russian bias. These things are more complicated, but it is true that mainstream discourse – Western and non-Western – tends to gloss over complexity in favor of simple narratives. We need to interrogate not just these narratives but the assumptions underpinning them.

First, there is the problem of what the term 'Global South' means. I personally do not think the experiences of Latin American countries, independent for 200 years, have as much in common with African perspectives on Western European colonialism as the term 'Global South' might suggest. Conversely, the parallels between Latin America and Eastern Europe may be more illuminating.

Second, there is the question of how voting in UN collective bodies matters for understanding what states and their people 'think' about topics like Ukraine. It would also be helpful to distinguish why and how some governments refuse to break with Russia. In this regard, the decisions of current and emerging regional hegemony like India, China, or South Africa deserve more critical scrutiny than votes in the UN General Assembly by countries like the Central African Republic or Mali. To my mind, we can blame the Central African Republic for 'siding' with Russia all we want, but this just shows how little we know about that context - not to mention, this tells us very little about what most Central Africans think of Ukraine.

By the same token, I think we should be healthily skeptical of how some governments leverage 'Global South' opposition to the 'West' to cloak their self-interested decisions on Ukraine in thin moral justification. We should, of course, be critical of Western colonialism. But I am not sure how that is an excuse to look away from Russian colonialism, lest we descend into the realist, zero-sum thinking I described earlier, or superficial forms of 'victimhood Olympics', where 'my' pain overrides 'your' pain. Put bluntly, the reality is that states like India, South Africa, and Brazil are on the wrong side of history in Ukraine, and 'the West' is on the right side this time - for now, at least. No amount of appeals to 'Global South' solidarity - as justified as they may be in the abstract - can absolve

these states from their exploitation of analogies to justify what are unprincipled decisions on Ukrainian self-determination. Let me emphasize: I fully understand and respect 'Global South' resentment of Western hegemony, impunity for colonialism, epistemic erasure, and other kinds of injustice. And I support efforts to undo these historical and present wrongs. But I think people around the world need to critically interrogate how some 'Global South' actors weaponize anti-Western rhetoric for un-progressive aims, like facilitating Russian imperialism in Eastern Europe.

Third, as should be clear by now, this does not mean that these states, or their peoples, are pro-Russian in some deeper sense of the term. The problem is that we live in an increasingly multipolar world, where different poles of power are competing to maximize their self-interest. However, from a bottom-up, people-oriented perspective, we need to find a way to be critical of all these poles of power and how they relate to their surroundings rather than just critical of how poles of power relate to one another. My sense is that at least some of the critique of Western power from the Global South is about the inter-regional or polar forms of contestation rather than the pro-people forms of global solidarity.

Ukrainian public sphere is very West-centric, and sometimes this stance is explained pragmatically: we don't have time to look into other conflicts or to dream about global justice, we have a war to win, and in this, we are entirely dependent on our 'Western partners,' so we will not antagonize them in the slightest. From this cynical point of view, is there any utility for Ukraine to develop solidarity with other peripheral countries?

As should be clear from what I have said so far, this is an important but difficult question Ukrainians must face up to. It is not clear why, nor is it necessarily fair that Ukraine has been thrust into the spotlight over Western double standards or the erosion of Western hegemony. Ukraine is not a Western country, and it is disingenuous to hold Ukrainians responsible for the West's actions elsewhere.

But the question is how Ukrainians should navigate an increasingly neo-realist, zero-sum, multipolar world. One approach is to be cynically self-interested and support the West without reservations. There is some logic to this since it is probably true that unreserved support for – to take the most obvious example right now – Palestine in the UN General Assembly or before the International Court of Justice is unlikely to make any difference for South African ambivalence toward 'the West' in regard to Ukraine. Likewise, I do not see other states like India or Brazil – to say nothing of China – suddenly shifting gears because Ukraine expresses ambivalence about US policies on other continents. By contrast, the fickleness of US domestic politics does mean that even a slight sign of 'disloyalty' may be leveraged by some isolationist voices to abandon Ukraine.

But, of course, this logic just reproduces the problem that got Ukraine into this predicament in the first place. Thinking about the world in purely transactional terms has its limits. There are no easy solutions for a country like Ukraine, but I think finding a way to appeal to constituencies outside Europe and the wider 'West' gives Ukrainians a better chance of securing their long-term future. This means Ukrainians will have to show more interest and understanding for these states' and people's concerns in different spheres of life, from food security to sanctions. And I do think there has been some progress on this front in the last 20 months.

That being said, we have to be clear-eyed about just how difficult it is to build bridges between different actors in the international system when one tries to bypass Western powers. Global South actors know this problem all too well, but a vivid example of a squandered opportunity for transnational solidarity is Ukraine's quest for accountability for Russian aggression. As I explain in detail below, Ukraine's support for an international ad hoc tribunal – as opposed to a hybrid or internationalized court favoured by Western powers – channels that spirit of transnational solidarity

that would enable other victims of aggression, including from the Global South, to benefit from the [ground-breaking precedent](#) set by an international tribunal. And let's be crystal clear: Ukraine and Eastern European states have broken with the West on this issue, causing tension between Western and Eastern states. But, sadly, not only are Western states blocking an international tribunal for self-interested reasons, but too many states outside the West seem to think this discussion does not concern them. It is a missed opportunity for greater transnational solidarity, and it is not for lack of trying by Ukraine in this case.

I also want to note that I am unpersuaded by some [critiques](#) of Ukraine's embrace of Europe, lest it alienate the Global South or victims of Western imperialism. Self-reflection on the part of Eastern Europeans about their relationship to 'European civilization' is warranted and welcome, but we should not gloss over why Ukraine seeks to join Europe. Ukraine has systematically and discriminatorily been excluded from Europe for centuries - it has been Europe's [internal 'other'](#) analogous to how non-European societies have been the West's external 'other.' So, while this may seem counterintuitive to non-European audiences, given their own histories of Western imperialism, Ukrainian appeals to Europe also aim to decolonize Europe and can be [counter-hegemonic](#) in this particular context. This is the complexity of history. In the same way Ukrainians should learn more about the exploitation of non-Western societies by European empires, non-Western societies must take the time to understand Ukraine and the East's historical predicament and semi-peripherality (hopefully with support from Ukrainians). Let me be clear: appeals to 'Europe' on the part of Ukrainians do not excuse tone-deafness and exclusionary language vis-à-vis non-Western actors, but - by the same token - it makes little sense to demand that Ukraine dissociate itself from Europe or identify primarily with the Global South. To my mind, Ukraine and Eastern Europeans are both 'European' and 'southern' at the same time, though translating this into policy is difficult on some issues.

How do you think the South African genocide case at the International Court of Justice, and in general, the war in Gaza and the West's support for Israel, will affect international law?

It is hard to know for sure. International law is under stress. We have seen some of the polarized reactions to South Africa's case against Israel before the International Court of Justice, including Namibia's condemnation of Germany's decision to intervene on behalf of Israel. The rhetoric is definitely strong, but we probably need to put this into a longer-term perspective. International law has never been some kind of paradise. In fact, it is in the DNA of international law to be contested politically. Its history is littered with failures, controversies, breakthroughs, turning points, and then more of the same.

I hear some arguing that the Gaza war is a turning point or tipping point for international law. Perhaps. But it is probably not coincidental that few commentators are willing to say with much confidence what the 'new', post-Gaza international law will look like. I will not speculate about what will or will not change but one thing I am quite sure of at this stage is that there seems to be a growing awareness about the different perceptions and interpretations of international law in the global community. Some might say that many differences in perception and interpretation of specific legal issues are not new. Still, I certainly get the impression that, as far as the West or Global North are concerned, more people are paying attention to what Global South actors are saying about these issues. This is a good thing, although we shouldn't be naive to think that more dialogue will necessarily translate into mutual understanding on all issues. Nor is analyzing world affairs through a West vs Global South lens, which has almost become a mainstream trope in the media and some expert commentary, always helpful. As I mentioned, at times, this binary division of the world obscures some of the complexity in 'Western' and 'Global South' positions - while 'invisibilizing' entire swaths of the globe, like the Global East - on things like the Israel-Palestine conflict, the

Russo-Ukraine war, and international law more generally.

Another interesting aspect of the war in Gaza is how central international law has been to many debates. Apparently, the International Court of Justice's provisional measures hearings in *South Africa v. Israel* were watched by an unprecedented number of people around the world. This is no mean feat, as court proceedings are not exactly riveting affairs. So, in a strange way, this also seems to be an opportunity for international law. If law can be made central to the resolution of the Israel-Palestine conflict, the Russo-Ukraine war, and other conflicts around the world, that would be something to look forward to. Though, again, it is probably too early to tell where all this is heading.

How can we change the architecture of international law to make it more democratic - namely, to avoid the situation where critical decisions are in the hands of the imperialist superpowers? What are the perspectives for decolonization of the international justice system?

I think this question gets at a tension that I have been thinking about a lot lately, and it cannot be reduced to just imperialism and multipolarity. We see the erosion of democratic ideals around the world, including in Europe - both western and eastern - but also across the Global South, Global East, or whichever other labels we want to use. The problem is global in nature. We can have a situation where a 'democratic', majority-made international law is made and applied by states that are mainly undemocratic or imperfectly democratic. Put differently, we should be concerned if Modi's semi-democratic India (Global South), Orban's Hungary (East), or a Trump-led United States (West) are making international law. We should not romanticize any of these actors, though we need to recognize their relative power in the global order. However, what is interesting is that Ukraine's struggle against Russia, and now the Palestine-Israel conflict, are prompting difficult conversations about decolonizing the international (justice) system. I hope we can make this dialogue more inclusive and transnational in nature through initiatives like [your own](#), even if it is too early to tell where all this leads.

Commons

Patryk Labuda

[Click here](#) to subscribe to ESSF newsletters in English and/or French.

P.S.

Commons

<https://commons.com.ua/en/international-criminal-law-interview-patryk-labuda/>