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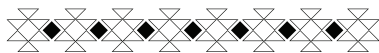
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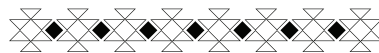
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The Failures and Futures  
of International Law:  
Perspectives for and  
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# Journal of Balkan Studies



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# Research Articles





# Assessing The Effectiveness and Adequacy of Provisional Measures in Genocide Cases: A Comparative Study

Ali Osman Karaoğlu

**Abstract:** In international law, provisional measures refer to orders directed at the parties in a pending dispute, requiring them to act or refrain from acting in a certain way to safeguard their rights until a final judgment is rendered. The vast majority of international courts are vested with the authority to issue provisional measures. As the International Court of Justice (ICJ) highlighted in the *Nuclear Tests Case*, provisional measures constitute an inherent power of the Court. Similarly, in the *Fisheries Jurisdiction Case*, the ICJ emphasized that the purpose of such measures is to preclude irreparable harm and ensure the protection of the parties' rights until the conclusion of the case. In its *LaGrand Case*, the ICJ further underscored that provisional measures are binding. However, despite their binding nature, the enforcement of provisional measures still remains problematic. Given that their implementation is generally deemed to be ensured and enforced by the Security Council, even in cases involving the prevention of genocide -a *jus cogens* norm- provisional measures have failed to meet expectations. While the enforceability of provisional measures is frequently debated, their legal capacity is less scrutinized. However, the primary duty of the Court is to issue measures capable of preventing and precluding irreparable harm. Under the Genocide Convention, the ICJ has so far dealt with four cases -Bosnia, Myanmar, Ukraine, and Gaza- where the adequacy of the provisional measures ordered so far has been subject to criticism. In cases like Bosnia, Myanmar, and Gaza, the Court's measures have been questioned for being insufficient, whereas in Ukraine, the Court's approach has been contested for misconceptualizing the issue. Moreover, in certain cases, ICJ judges argued the insufficiency of provisional measures. This study will first outline the general framework and purpose of provisional measures. Subsequently, it will provide a comparative analysis of the provisional measures issued by the ICJ in the four genocide-related cases, opening a discussion on the adequacy and effectiveness of the Court's orders.

**Keywords:** International Law, Provisional Measures, Genocide, ICJ, Adequacy



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## Introduction

The prohibition of genocide is recognized as a *jus cogens* norm, as affirmed by the work of the International Law Commission (ILC, 2022: 6). The concept of genocide, first introduced by Raphael Lemkin, was subsequently codified into a binding international treaty through the efforts of a commission that included Lemkin himself. This process culminated in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, which was entered into force in 1951 (Genocide Convention, 1948). Article 2 of the Convention enumerates acts that may constitute genocide, provided they are committed with the specific intent (*dolus specialis*). Moreover, Article 9 grants jurisdiction to the International Court of Justice (ICJ) over disputes arising from the Convention. Article 2 of the Convention defines genocide as follows: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Meanwhile, Article 3 of the Convention not only criminalizes the commission of genocidal acts enumerated in Article 2 but also penalizes conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in genocide: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. The Convention also includes a dispute resolution mechanism under Article 9: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute (Genocide Convention, 1948: art.2-9).

By January 2025, four cases have been brought before the International Court of Justice (ICJ) under the Genocide Convention: Bosnia and Herzegovina v. Serbia

and Montenegro, Gambia v. Myanmar, Ukraine v. Russia and South Africa v. Israel. In all genocide-related cases, the applicants have requested the indication of provisional measures, and in each of these four cases, the Court has granted certain provisional measures. Given that any kind of attempt to violate the prohibition of genocide results in severe humanitarian crises, it is expected that the ICJ's provisional measures will be effective. However, both in the Bosnia case which is heard before the *LaGrand* judgment, and in the subsequent Myanmar, Ukraine, and Israel cases, the Court's provisional measures have proven ineffective. One of the underlying reasons is the unresolved issue of enforcement, namely, the uncertainty surrounding the authority responsible for implementing the Court's orders. Another reason is that states have interpreted the Court's decisions as mere recommendations rather than binding orders. This outcome has been influenced by the ICJ's tendency to use a language that merely recalls obligations rather than the one that explicitly imposes specific measures. In the following sections of this study, the ICJ's authority and conditions for ordering provisional measures are first examined to lay the groundwork for the study. Subsequently, a comparative analysis of the provisional measures granted in the four genocide cases before the ICJ is conducted in detail. This allows for an assessment of the sufficiency and effectiveness of the ICJ's provisional measures in genocide cases from the first case to the most recent one.

## **Authority of International Court of Justice to Indicate Provisional Measures**

### **Conditions for Provisional Measures**

Provisional measures in international law refer to orders issued to the parties in an ongoing dispute to preserve their rights and prevent irreparable harm until a final decision is rendered (Kempen & He, 2009: 919). The International Court of Justice (ICJ) underscored this principle in its first case involving provisional measures, *Anglo-Iranian Oil Company*, emphasizing the necessity of such orders (Anglo-Iranian Oil Company, 1951: 93). Similarly, in the *Fisheries Jurisdiction* Case, the Court reiterated that the primary objective of provisional measures is to prevent irreparable harm and to safeguard the rights of the parties pending

the final judgment of the dispute (Fisheries Jurisdiction, 1972: 12-16). Given that inter-state litigation may extend over several years, loss of rights might occur in this process, which necessitates such an interim relief. In this regard, some scholars argue that the function of provisional measures is to maintain the *status quo*, while others contend that their purpose is to ensure the effectiveness of the Court's final decision (Oxman, 1987: 324-326). In the *Soci  t   Commerciale de Belgique* Case, the Permanent Court of International Justice (PCIJ) emphasized that provisional measures serve a dual function: preventing the parties from taking actions that might render the final decision ineffective and avoiding the escalation or deepening of the dispute (Electricity Company of Sofia and Bulgaria, 1939: 199). Another critical point, as noted by Wolfrum, is that the Court must refrain from granting provisional measures that would effectively predetermine the outcome of the case. ICJ should take care to ensure that provisional measures do not amount to a temporary final judgment (interim judgment) (Wolfrum, 2006: 38-40).

When human life is concerned, the function of provisional measures, namely *preventing irreparable harm*, becomes even more evident. This was explicitly recognized in the *LaGrand* and *Avena* cases, where the individuals concerned were sentenced to death, and the Court emphasized that execution would result in irreparable harm (LaGrand, 1999: 23-34; Avena, 2003: 49-55). Therefore, a request for provisional measures must inherently demonstrate a degree of *urgency*. However, the ICJ assesses the level of urgency on a case-by-case basis, considering the specific circumstances of each dispute. While urgency is not explicitly codified in the ICJ's Statute or its Rules of Procedure (Rules of Court), the Court has repeatedly affirmed in its jurisprudence that an urgency assessment is necessary (Great Belt, 1991: 23; Land and Maritima Boundary, 1996: 35). For instance, in the *LaGrand* case, Walter LaGrand's execution was scheduled for March 3, 1999, yet the requesting state submitted its application for provisional measures on March 2. Recognizing the urgent nature of the situation, the Court rendered its decision within 24 hours—an unprecedented speed in its history (Miles, 2017: 232). Conversely, in the *Arrest Warrant* case, the Court denied the request for provisional measures, reasoning that the individual subject to the arrest warrant was no longer serving as Minister of Foreign Affairs and had

significantly reduced international travel, thus concluding that the situation did not require urgency (Arrest Warrant, 2000: 72).

The provisional measures issued by the ICJ are generally referred to as 'orders'. In this sense, the ICJ's provisional measures may impose an obligation on the parties to either take specific actions or refrain from certain conduct, to cease ongoing actions, or to restore a previous state of affairs. These orders may also call on the parties to halt violations of international law. For example, in the *Tehran Hostages* case, the Court issued provisional measures requiring Iran to restore the embassy building to its previous condition and immediately release the hostages (Tehran, 1979: 21). Similarly, in the *Nicaragua* case, the Court issued an order directing the United States to immediately cease its mining activities, which were endangering the Nicaraguan ports (Nicaragua, 1984: 22). Likewise, in the *Avena* case, the Court issued provisional measures requiring the United States to fulfill its obligations under Article 36 of the Vienna Convention on Consular Relations (Avena, 2003: 19).

### Procedure for Provisional Measures

The vast majority of international courts are endowed with the authority to issue provisional measures. As indicated by the ICJ in the *Nuclear Tests* case, provisional measures are an inherent power of the Court (Nuclear Tests, 1974: 23). In the case of the ICJ, Article 41 of the Court's Statute serves as the foundational (the basic) rule for this power. According to the article 41: 1) If the Court is of the opinion that the circumstances require so, it may issue any provisional measure to safeguard the rights of each party. 2) The measures indicated must be communicated to the parties and to the Security Council prior to the final decision (ICJ Statute, 1945: art.41). Thirlway has criticized the use of the term "right" in the article, arguing that a right, when violated, does not disappear but may become more difficult to exercise. In this sense, the author suggests that instead of using the term 'safeguarding rights', an alternative term that refers to protecting either specific content of the right or exercise of the right should be used (Thirlway, 1994: 7).

An important question that arises regarding the authority to issue provisional measures is what happens to the ICJ's power to indicate provisional measures if it lacks jurisdiction over the merits of the case. This is because the ICJ can only render a judgment on the merits if it is competent to do so; otherwise, it must issue a ruling of lack of jurisdiction. In practice, the ICJ addresses this issue by conducting a *prima facie* jurisdictional examination when indicating provisional measures. In other words, when the ICJ indicates provisional measures, it determines the jurisdiction based on the available evidence, using a presumption of jurisdiction. According to the Court, if the available evidence strongly suggests that the Court has jurisdiction, it is deemed sufficient to proceed with the provisional measures (*Gambia v. Myanmar*, 2020: 16). Indeed, as reported by Oellers-Frahm, the ICJ has followed this approach in all of its provisional measures (Oellers-Frahm, 2012: 1026).

The provisions of Articles 73 to 78 of the Court's Rules of Procedure, under the heading "Interim Protection", regulate the details of the provisional measures procedure. First and foremost, Article 73 outlines how the provisional measures process is initiated by the parties: 1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made. 2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party (Rules of Court, 1978: art.73). Article 74 of the Rules of Procedure stipulates how the Court will address a request for the indication of provisional measures: 1. A request for the indication of provisional measures shall have priority over all other cases (Frowein, 2002: 55). 2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency. 3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings. 4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as

will enable any order the Court may make on the request for provisional measures to have its appropriate effects (Rules of Court, 1978: art.74).

On the other hand, Article 75 of the Rules of Procedure stipulates that the Court is not bound and restricted by the request when examining the content of the provisional measures: 1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties. 2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request. 3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts (Rules of Court, 1978: art.75). In addition, Article 76 provides that a provisional measures order may be lifted or modified by the Court: 1. At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification. 2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant. 3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject (Rules of Court, 1978: art.76). Finally, Articles 77 and 78 of the Rules of Court contain provisions regarding the implementation of provisional measures. In this regard, according to Article 77, measures taken pursuant to Articles 73 and 75, as well as decisions made under paragraph 1 of Article 76, shall be communicated by the Court to the Secretary-General for transmission to the Security Council, in accordance with paragraph 2 of Article 41 of the Statute (Rules of Court, 1978: art.77). According to Article 78, the Court may request information from the parties on the implementation of any provisional measures or any related matters (Rules of Court, 1978: art.78).

## Binding Nature of Provisional Measures

The binding nature of provisional measures has been debated, as the Statute of the ICJ and the Rules of Court do not contain a clear provision regarding the binding effect of provisional measures. Similarly, prior ICJ decisions, until the *LaGrand* case, did not issue a definitive ruling on this matter. The emphasis in earlier decisions that “states must comply with provisional measures” does not necessarily indicate binding authority. As a result, scholars have been divided on the issue of the binding nature of provisional measures. Some argue that the ICJ’s authority is discretionary and that the silence in the Statute suggests that provisional measures are not binding. In the absence of an explicit provision, to claim otherwise would interfere with States’ sovereignty. Indeed, if a provisional measure is issued in a case and the final judgment is rendered as lack of jurisdiction, binding States by a decision contrary to their consent would violate international law, sovereignty, and the principle of consent (Lauterpacht, 1966: 208; Goldsworthy, 1974: 274).

On the other hand, scholars who advocate for the binding nature of provisional measures argue that the authority to issue provisional measures is a natural consequence of judicial activity and stems from the general principles of law. Otherwise, the Court’s decision could be interpreted merely as imposing a moral obligation on the parties, which would be inconsistent with the ICJ’s legal function (Collier & Lowe, 2000: 175; Mani, 1970: 367). Although this debate may not be concluded theoretically, the ICJ, in the *LaGrand* case, made a clear ruling in its own practice, emphasizing the binding nature of provisional measures (Kammerhofer, 2003: 67). According to the Court, to assert that provisional measures are not binding would be contrary to the object and purpose of the ICJ Statute, whose function is to resolve disputes between States through “binding” decisions. Moreover, when considering the rules of interpretation under the 1969 Vienna Convention on the Law of Treaties, to interpret Article 41 of the ICJ Statute in the opposite manner would contradict the Statute’s object and purpose. The authority to issue provisional measures is essential for the Court to perform its functions effectively (LaGrand, 2001: 102).



## Implementation of Provisional Measures

An essential point regarding provisional measures is how the Court acts and responds when its provisional measures are not complied with. If provisional measures are binding, its violation must constitute a breach of international law and lead to state responsibility (Draft Articles, 2001: 2). This issue was raised in the *Bosnia* case, where Bosnia and Herzegovina requested symbolic compensation for the violation of the provisional measures. The Court, however, only issued a decision in the form of satisfaction, confirming that the respondent state had failed to comply with the provisional measures (*Bosnia v. Serbia*, 2007: 197). In this regard, the Court's primary sanction for non-compliance with provisional measures is to issue a decision in the form of satisfaction or a declaratory judgment (Iwamoto, 2012: 256-259; MacIntyre, 2012: 107).

The implementation of the Court's provisional measures has also been discussed in the context of the United Nations Security Council. Article 41, paragraph 2, of the Statute refers to the 'notification to the Security Council'. It should be noted that Article 94 of the UN Charter provides that, if a decision of the ICJ is not complied with, the other party may refer the matter to the Security Council. In this regard, the Security Council can take any measures it deems necessary for the enforcement of the decision (UN Charter, 1945: art.94). However, the term "decision" here generally refers to final judgments (Reisman, 1969: 14-15). It should be emphasized that Article 94 essentially and explicitly indicates that the final discretion lies with the Security Council. Therefore, although Article 41, paragraph 2, of the ICJ Statute refers to notification, there is no obstacle to the Security Council taking the necessary measures under Article 94 of the UN Charter in response to a violation of provisional measures that endangers peace and security.

## **Genocide Cases Before International Court of Justice and Provisional Measures**

### **Bosnia v. Serbia and Montenegro Case**

The policies developed during the Federal Yugoslavia era aimed at maintaining a multi-ethnic societal structure were weakened by nationalist rhetoric during the war, with Bosnia and Herzegovina becoming the most fragile region due to its pluralistic demographic composition. After the dissolution of Yugoslavia, Bosnia and Herzegovina, one of the federal units, declared its independence by exercising its constitutional right. However, this decision was not supported either by the Serbs, one of Bosnia's ethnic groups, or by Serbia and Montenegro, which claimed to be the successor of Yugoslavia. The 1992 independence referendum was boycotted by Bosnian Serbs, and subsequently, separatist initiatives were launched by Serb nationalists led by Radovan Karadžić, who conducted large-scale military operations against independent Bosnia and Herzegovina. Serb nationalists carried out mass violence and massacres against Bosniaks in Eastern Bosnia and other regions, following an "ethnic cleansing" strategy. The international community's inadequacy in intervening led to significant humanitarian losses, particularly during the Siege of Sarajevo and the Srebrenica genocide. The safe areas established by the United Nations, particularly Srebrenica, were unable to effectively protect civilians from attacks by Serb militias during the final stages of the war, which increased international outrage. As a result of diplomatic pressure, the parties ended the war through the 1995 Dayton Agreement. While this agreement legally guaranteed Bosnia and Herzegovina's independence and territorial integrity, it also structured and shaped the country's political system based on ethnic-based administrative divisions. Meanwhile, the humanitarian law violations caused by the war were prosecuted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993. Notably, Serb leaders like Radovan Karadžić and Ratko Mladić were convicted of genocide and other crimes (Kazansky, Musladin & Ondrejmkova, 2021: 50-64).

Bosnia and Herzegovina filed a lawsuit against Serbia and Montenegro before the ICJ during the ongoing war. Shortly after submitting the application on March 20, 1993, Bosnia and Herzegovina requested provisional measures pursuant to

Article 41 of the ICJ Statute. After hearing from the parties, the Court, in its order of April 8, 1993, indicated certain provisional measures to ensure the protection of rights under the Genocide Convention. The Court ruled the following measures: 1) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide, 2) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group, 3) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution (*Bosnia v. Serbia*, 1993: 52).

In the first ruling on provisional measures in the Bosnia case, no decision was rendered on the cessation of military actions. The Court merely reminded Serbia and Montenegro of their obligations under the Genocide Convention. No specific operation or region name, such as Srebrenica, was mentioned. In fact, there is no rule stipulating that provisional measures must be short and general in nature. The Court has the discretion to use as much detail as it desires and is not bound by the requests. Nevertheless, the Court's use of overly general language in its measures raises questions about their sufficiency. Indeed, the applicant state, citing the inadequacy of the provisional measures, requested further measures, but in its second order on 13 September 1993, the Court merely confirmed its previous ruling of 8 April 1993 (*Bosnia v. Serbia*, 1993: 61). The Court's decision to reaffirm its earlier ruling rather than providing further detailed measures was criticized by ad hoc Judge Lauterpacht. Indeed, the Court should

have both elaborated on the provisional measures and clarified the nature of these measures. While Judge Weeramantry addressed the binding nature of provisional measures in his separate opinion, the Court did not establish clear case law on this matter until the 2001 *LaGrand* case. In such a case, it is possible for states, such as Serbia and Montenegro, who are the addressees of the provisional measures, to interpret provisional measures as recommendations and act arbitrarily, especially given that Article 41 of the Statute uses the expressions “ought to be taken” and “measures suggested.” Examining the states’ practices, it is observable that the States have not effectively enforced provisional measures.

### **Gambia v. Myanmar Case**

The Rohingya genocide refers to the ongoing persecution and mass killings of the Muslim Rohingya people by the Myanmar military since 2016. This process has led to over a million Rohingyas fleeing to Bangladesh and other parts of Southeast Asia, creating one of the largest refugee crises in the world. The systematic oppression against the Rohingya people dates back at least to the 1970s and has been a long-standing policy pursued by the Myanmar government and Buddhist nationalists. In late 2016, the Myanmar military and police launched a large-scale crackdown in Rakhine State, located in the country’s northwest, during which allegations of ethnic cleansing and genocide were raised by United Nations officials. Reports published by the UN revealed widespread human rights violations, including extrajudicial executions, mass killings, gang rapes, the burning of villages, and the killing of infants (Sparling, 2019: 49-59).

On November 11, 2019, Gambia filed a lawsuit against Myanmar before the ICJ, based on *erga omnes* obligations arising from the Genocide Convention. According to Gambia, Myanmar’s actions against the Rohingya since October 2016 constitute violations of the Genocide Convention. In this regard, Gambia requested the ICJ to indicate provisional measures on the day the case was filed. On January 23, 2020, the Court indicated following provisional measures: 1) The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope

of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group; 2) The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide; 3) The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; 4) The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court (*Gambia v. Myanmar*, 2020: 86).

The provisional measures issued in the Myanmar case are strikingly similar to those in the Bosnia case. However, 27 years had passed between the two cases, during which the Court had addressed the importance and binding nature of provisional measures in the *LaGrand* case. In the Myanmar ruling, the Court did not impose the detailed and specific measures that were expected of it, nor did it move away from the generalizing language it had used in its previous decision.

### **Ukraine v. Russian Federation Case**

The Ukraine-Russia crisis, which began with the annexation of Crimea in 2014, further deepened in 2022 with Russia's "special military operation." Both Ukraine and the Western states supporting it have attempted to launch various military and legal measures to halt Russia's actions (Brunk & Hakimi, 2022: 687-697). Among these legal sanction efforts, one has led to a decision rarely seen in international law's history. Specifically, Ukraine brought the issue of alleged

genocide in Donetsk and Luhansk—one of the justifications for Russia’s military operations—before the ICJ on February 22, 2022, through a request for a negative determination. According to Ukraine, conducting military operations based on such a “false” claim and Ukraine’s rejection of it demonstrates a dispute concerning the interpretation and application of the Genocide Convention between the two states. Ukraine also requested the Court to indicate provisional measures. In its decision on March 16, 2022, the Court ruled as follows regarding provisional measures: 1) The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine, 2) The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point 1 above, 3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (*Ukraine v. Russia*, 2022: 86).

The ICJ’s decision in the Ukraine case has sparked debates. The operative part of the decision does not use the term “genocide” in any way and instead orders Russia to cease all military operations. Judges Gevorgian, Bennouna, and Xue expressed in their separate opinions that they believed the case was fundamentally about the use of force, rather than genocide. In a case where the connection to the Genocide Convention was even controversial, the Court, while asking the respondent state (Russia) to unconditionally stop all military operations, merely reminded States of its obligations under the Genocide Convention in the Bosnia and Myanmar cases. In fact, there is no evidence or UN report that Russia committed or attempted to commit genocide. The issue of genocide was not brought up in the investigation (*Situation in Ukraine*) before the International Criminal Court.

### **South Africa v. Israel Case**

The occupation of Palestine, which began with the implementation of the Balfour Declaration by the British Mandate authorities, continued with the establishment of Israel in 1948. This situation, which violates the right of the

Palestinian people to self-determination, reached a new level (turned into a more complex phase) in 1967 when East Jerusalem, the West Bank, and Gaza were occupied. Over time, Israel withdrew from some areas but continued its indirect practices of occupation. Notably, after withdrawing from Gaza in 2005, Israel imposed a blockade on Gaza, controlling it by land, air, and sea. Palestinians living under the blockade have occasionally faced Israeli attacks (Quigley, 2005: 153). Most recently, on October 7, 2023, the “Aqsa Flood” operation was launched, breaking the blockade and taking some Israeli civilians hostage. In response, Israel subjected Gaza to massive destruction from land, air, and sea, resulting in a humanitarian crisis. As the crisis deepened, on December 29, 2023, the South Africa filed a case before the ICJ, alleging that Israel’s actions violated the Genocide Convention. On the same day, a request for indication of provisional measures was made. On January 26, 2024, the Court indicated the following provisional measures: 1) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group; 2) The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above; 3) The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip; 4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip; 5) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip (South Africa v. Israel, 2024: 86).

After its initial ruling, the Court indicated a second round of provisional measures. Specifically, the following decision stands out: Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary (South Africa v. Israel, 2024: 51). ICJ emphasized that Israel should cooperate with UN institutions and refrain from obstructing humanitarian aid.

Finally, the ICJ issued its third provisional measures decision in the Gaza case on May 24, 2024. After confirming its previous two rulings, the Court issued several detailed orders and, for the first time in the Gaza case, decided to halt military operations partially. The following orders, in particular, can be highlighted: 2) The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate: (a) Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part; (b) Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance; (c) Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide (South Africa v. Israel, 2024: 57).

As previously stated, the Court could have issued all of these provisional measures in its first decision. In the Ukraine case, the ICJ demanded Russia to urgently cease its military actions, but it did not adopt the same approach in the Gaza case, where the events were classified as genocide by UN rapporteurs. This raises several questions: Is there any obstacle preventing the Court from issuing detailed and specific orders? Why does the Court adopt a conservative approach. Of course, the answers to these questions will likely remain subjective.



The reason behind this stance is not necessarily owing to one of the parties being Hamas. While it may seem that the Court could not call for the cessation of actions from Israel because it did not demand the same from Hamas, this interpretation is not entirely accurate. Since, the obligation to prevent in the Convention requires state parties to act even in cases of non-international armed conflicts. Therefore, the Court must overcome its hesitancy and adopt measures that are both effective and sufficient for the specific case at hand. Furthermore, the Court should not only take such action but also clearly state that the Security Council is authorized to enforce provisional measures. Given that the Court acknowledged the binding nature of provisional measures in the *LaGrand* case, it should now clarify how these binding measures should be enforced.

## Conclusion

When asked about the most important rule in contemporary international law, the unequivocal response would undoubtedly be the prohibition of genocide. The obligation to effectively utilize the provisional measures in pursuance of authority granted by Article 41 of the Court's founding Statute is most crucial in the context of the crime of genocide. Throughout its history, the Court has adjudicated four separate cases pertaining to the Genocide Convention. It should be noted that the failure of the Security Council to enforce the Court's rulings and their ineffectiveness is not the fault of the Court. However, the inadequacy of the provisional measures itself is indeed a shortcoming of the Court. The Court must issue provisional measures with sufficient capacity to prevent irreparable harm to the rights of the parties. The Court's decisions are interim and urgent. In this sense, while the Court is expected to be more courageous in indicating provisional measures, it has, in fact, adopted a conservative approach. This can be observed in the provisional measure decisions rendered in the four genocide cases brought before the Court.

When examining the first provisional measures decision issued by the ICJ under the Genocide Convention, in the Bosnia case, no measures were taken to halt military operations. The Court issued very general statements, ordering Serbia and Montenegro to comply with their obligations under the Genocide

Convention, which led to criticism from some of the Court's judges. During this period, since the *LaGrand* case had not yet been decided, the state concerned could have interpreted the provisional measures as mere recommendations, as the Court's Statute, specifically Article 41, leaves room for such an interpretation. Nevertheless, the Court opted not to resolve these uncertainties. 27 years later, in the Rohingya case, the Court continued its conservative approach and avoided issuing detailed and specific measures. The Ukraine case is the most contentious of the four cases, as the Court did not mention genocide at all in the operative part of its decision, yet ordered Russia to cease all military operations. This decision was criticized by the Court's own judges, with some arguing that the case was essentially about the use of force rather than genocide. The only case where the Court partially delved into the details was the Gaza case. The Court issued its orders through three separate provisional measures decisions over time, rather than addressing them all at once. However, the Court did not issue an order for Israel to cease all military operations but only partially ordered a suspension of operations in the Rafah region. The Court's cautious behavior in failing to issue adequate and effective provisional measures, particularly in such a critical issue as the prohibition of genocide, has drawn significant criticism.

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# The UN Security Council Through The Numbers: How Does The Council Maintain International Peace in Practice?

Ljupcho Stojkovski


**Abstract:** The recent major ineffectiveness or inactivity of the UN Security Council in the Russian aggression over Ukraine, Israel's wars in Gaza and Lebanon or the conflict in Sudan, has sparked renewed criticism and calls for reform of this body. The Council was envisioned to be the international community's primary authority in the maintenance of peace and security, yet too often it seems like the Council is failing in its responsibility. Thus, a question arises as to how the Council has acted in its responsibility so far in practice? How engaged the Council was overall; where did it (prefer to) take action, how long it took the Council to act, or what were the main driving factors for its (in)action, are some of the main subquestions that should be answered in this regard. Drawing on numerous different studies on the Council's engagement in various types of conflicts and crises, this work presents their main findings and interprets them in order to understand the Council as an institution in practice. Putting these studies side by side with an interpretation of the UN Charter provisions referring to the powers and responsibilities of the Council, as well as subsequent normative and other practical developments related to the (UN) security system, this work offers thoughts on how to interpret the Council's record and how to address some of its failures.

**Keywords:** UN Security Council (UNSC), UN Charter, international peace and security, armed conflicts

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## Introduction

2025 marks 80 years since the establishment of the United Nations (UN). The main purpose of the UN has been to maintain international peace and security, and, to achieve that end, to take necessary collective action in order to prevent or suppress threats and breaches to peace or acts of aggression (UN Charter, 1945). The main body that was mandated with the principal responsibility to maintain international peace and security on behalf of the international community is the Security Council (UN Charter, 1945). Thus, every time there has been (a threat of) an armed confrontation, and especially a major one, the international attention is immediately turned to this body. Unfortunately, there has been a surge of armed confrontations in recent years. According to the latest Uppsala Conflict Data Program study on conflicts and political violence, and the International Institute for Strategic Studies Armed Conflict Survey, the past three years have been the deadliest since the end of the Cold War (Davies et al., 2024; IISS, 2024). Although civil wars and armed confrontations between non-state armed actors “remain the dominant form of conflict globally”, they are increasingly being internationalized (meaning one or more States get involved in support of one or the other warring faction) and the number of state-based armed confrontations has reached the highest number recorded in 2023 (IISS, 2024: 5; Davies et al., 2024: 674).

The ongoing major conflicts – for instance, the Russian aggression in Ukraine, Israel’s recent bombardments of Gaza and Lebanon, or the wars in Sudan and Democratic Republic of Congo – where the UN Security Council has been inactive or ineffective, have sparked renewed criticism of this body and calls for its reform. Unfortunately, in the 80-year-old history of this body, there were many instances, in addition to the abovementioned, where it has not taken any action, or its action was late and/or ineffective, such as the genocides in Rwanda in 1994, and in Srebrenica in 1995, the war in Iraq from 2003 onwards, or the 14-year war in Syria that ended recently. No doubt, the Council has also exercised its responsibility successfully in some instances, like, for example, in the 2011 situation in Cote d’Ivoire. Thus, the main question that this paper will deal with is how the Council has acted in its responsibility to maintain international peace in



practice more specifically? How engaged has the Council been overall? Where did it (prefer to) take action? How long it took the Council to act? What were the main driving factors for its (in)action?, etc. The first part of the paper will briefly outline the normative framework that underpins the Council's functioning. Then, drawing on numerous different previous works on the Council's engagement in various types of conflicts and crises, the second part of this paper will present and interpret its main conclusions in order to understand the Council as an institution in practice. In the last section, a brief discussion will be provided on how to interpret the Council's record and how to address some of its failures.

## **Normative Framework of the UN Security Council**

The UN Security Council (UNSC) is the international community's recognized authority on international peace and security. Pursuant to the UN Charter, the Council has the primary responsibility to maintain international peace and security and its decisions are binding on all States (UN Charter, 1945, Articles 24, 25; ICJ, 1971). In this regard, the UNSC has powers and responsibilities concerning peaceful settlement of disputes (Chapter VI of the Charter) and, especially, in matters related to collective actions with respect to peace and armed violence (Chapter VII). Here, the Council has, firstly, according to Article 39, the power to evaluate whether a certain situation constitutes a "threat to peace, breach of the peace, or act of aggression" (UN Charter, 1945, Article 39). However, despite the word "shall" being used in this Article to describe this power of the UNSC, when looking at its *travaux préparatoires* (and the practice of the Council, as it will be outlined in the next section), it is clear that the Article does not impose an obligation on the Council to do this kind of assessment of situations that are (or could be) violations to peace (Kirsch, 2012a; Selkirk, 2003). Nor does the Article provide definitions of the three aforementioned categories of violations to peace, and the Council, in practice, favors the "threats to peace" phrase, as the most conceptually flexible out of the three (Selkirk, 2003). Thus, although the Council is limited, legally, in the exercise of its responsibilities by the Purposes and Principles of Charter (as prescribed by Art.24 of the Charter) and by international law in general (ius cogens norms, international humanitarian law, human rights law) (Orakhelashvili, 2005; Krisch, 2012b; ICTY, 1995, par.28)),

Article 39 offers flexibility and latitude to the Council's members in its implementation. When, however, the Council does decide to assess a certain situation under this Article, it can then further decide whether it will undertake certain measures, and if yes, what kind of measures. The Council can authorize measures without the use of force under Article 41, such as economic sanctions, or, if these measures "would be or have proven to be inadequate", it can authorize measures with the use of force, under Article 42 (UN Charter, 1945, Articles 41, 42). Nevertheless, much like with Article 39, the decisions whether to undertake any measures in the maintenance of international peace (even if it determines that there exists a threat to peace, breach to peace, or aggression), and what kind of measures, are political decisions left to the Council itself to decide, and there exists no obligation to undertake any (particular) measure.

To implement a Council's decision in practice, since the UN has no standing army of its own, Articles 43-50 of the UN Charter envisioned a collective security system where all UN member States would contribute to and/or assist the UN (and the Council in particular) in enforcing its decisions and would refrain from helping the State against which force is undertaken. However, in practice, this system has never worked as envisioned, and the Council has been relying on UN peacekeeping missions, regional organizations or "coalitions of willing" States to carry out its decisions.

Finally, pursuant to Article 27 of the UN Charter, the decisions of the Council for matters on peace and security (most often in the form of 'resolutions') must be adopted by at least nine votes out of the fifteen members of the Council (with each member having one vote). Among these votes, there must be the "concurring votes" of all five permanent members (UN Charter, 1945, Article 27). In other words, each of the five permanent members (P5) has a veto power that is not restrained specifically in the scope or manner of its employment.

## **UNSC Through the Numbers**

Before we analyze the Security Council and its functioning, we need to outline the environment in which it operates and for which it exists. The characteristics of war and warfare today are not the same as those in the middle of the last

century when the Council was designed. Firstly, from being predominantly interstate, as they were in the early and mid-20th century, conflicts today are primarily internal. Pettersson and Wallensteen's research shows that in 2014, for example, there was only one interstate conflict (between India and Pakistan) that resulted in fewer than 50 victims (Pettersson & Wallensteen, 2015: 537). The remaining 39 conflicts in 2014 were internal, and 13 of them became internationalized, that is, one or more states became involved in a particular conflict with their troops on one of the sides in that conflict. Similarly, in 2023 there were only two such interstate conflicts (Davies et al., 2024). In fact, the last time there were three or more interstate conflicts annually was in 1988 (Davies et al., 2024). Thus, internal or non-state conflicts are the dominant type of armed violence, especially after the Cold War, but these have been increasingly internationalized (Davies et al., 2024; Rustad, 2024; IIIS, 2024).

Secondly, as it was mentioned in the introduction, although the number of interstate conflicts is on the decline, the first three years of this decade have been the deadliest since the end of Cold War, with the exception of 1994 and the Rwandan genocide (Davies et al., 2024; Rustad, 2024). The number of state-based armed conflicts (armed confrontations over government/territory where at least one party is a State and the confrontation results in at least 25 but below 1000 battle-related deaths) is on the rise as well in the past decade. Between 2000 and 2013, the annual average of these confrontations ranged between 31 and 39, and since 2015 it has risen to at least 50 such conflicts annually, peaking in 2023 with 59 (Davies et al., 2024; Rustad, 2024). The number of wars (armed confrontations resulting in a minimum of 1000 battle-related deaths) has been increasing as well, peaking at 13 wars in 2014, and in 2023 reaching 9 such confrontations (Davies et al., 2024; Rustad, 2024).

As for the location of conflicts around the world, with the exception of Europe and America after the early 1990s, and Europe in 2014 with the conflict in Ukraine, they show some consistency, with Africa, followed by Asia and the Middle East being at the "top" of this ranking. (Pettersson & Wallensteen, 2015; Davies et al., 2024; Rustad, 2024). In terms of the number of victims since the

Cold War, conflicts in Africa dominate as well. (Pettersson & Wallensteen, 2015; Davies et al., 2024; Rustad, 2024; IHS, 2024).

## **Scope of Security Council Activity**

One of the most important statistics that should be presented at the very beginning is regarding the scope of work of the Security Council. Namely, almost all the data that explain or describe the behavior of the Council focus only on those situations in which the Council did decide to take action. Therefore, the key to getting the whole picture is to first see how active the Security Council actually is, and in how many situations the Council did not take any action.

The Council's record in this regard is not at all commendable. Even during the Cold War, some of the most important and bloodiest conflicts of this period – Afghanistan, Mozambique, Burma, Sudan, Uganda, Vietnam – were not even on the Security Council's agenda (Wallensteen & Johansson, 2016). If this is easily explainable, given the ideological and bloc division that prevailed at that time, then a similar trend after the Cold War points to more serious problems. Thus, out of 44 civil wars in the period 1989-2006, which, as we saw at the beginning of this section, are the most common type of conflict after the Cold War, the Security Council got 'engaged' (i.e. adopted a decision) in 27 of them. So, for 17 situations of civil wars (39%), no action was taken by the Council (Cockayne et al. 2010). Of these 44 wars, 24 began after the Cold War, and the Council became involved in two-thirds of them. Even more striking is the fact that for the period 1989-2012, the Security Council did not adopt any resolutions on 10 of the 25 deadliest conflicts in this period (Wallensteen & Johansson, 2016). Furthermore, of the 84 countries that experienced an armed conflict in the post-Cold War period of 1989-2019, "only 43 appeared in formal UNSC deliberations" (Lundgren & Klamberg, 2023: 958). If, in addition to the Security Council, we add the involvement of other UN bodies (e.g. the Secretary General), according to Wallensteen and Johansson (2016: 51), in the period after the Cold War, "the Council and the UN [more broadly] in various ways were involved in about half of all ongoing armed conflicts from a security perspective."

Similar conclusions about the frequency of UNSC's involvement in situations involving international peace and security can be drawn if we observe the activity of the UNSC while exercising its Responsibility to Protect (RtoP) populations from mass atrocities. Out of fourteen RtoP cases from 2005 to 2018, the Council took (effective) action in eight (60%) while in six (40%) of them it was inactive or blocked.<sup>1</sup> Thus, what is important at the outset to be emphasized is that most of the statistics that describe the functioning of the Council (and that will follow in this paper as well) derive only from situations in which the Council took action, and these account for about half to two-thirds of all crises and conflicts in the world.

This initial conclusion should be borne in mind, especially when presenting the most common statistics related to the work of the Council. Namely, its increased activity after the end of the Cold War, measured by the increased number of meetings and resolutions adopted, as well as the decreased casting of the veto by P5. The Council has more than doubled the total number of (public and private) meetings for the shorter period after the Cold War (7.431 meetings for 34 years, from 1990 to 2024) than during that period (3.080 meetings for 43 years, 1946-1989) (Wallenstein & Johansson, 2016; Sievers & Daws, 2014; United Nations Security Council). Of the total of 2,767 resolutions adopted from 1946-2024, 646 were adopted by 1989, and since then until the end of 2024 as many as 2.121 resolutions have been adopted (Ibid). Although with the increasingly frequent discussion of general security topics and the adoption of so-called "thematic resolutions", not all of these 2.121 resolutions are dedicated to specific conflicts, the fact remains that there is a several-times-increase in comparison to the Cold War. In this regard, the increased activity and cooperation of the Security Council in maintaining international peace is even more evident, if we compare the resolutions that refer to Chapter VII of the Charter. Of the 1.002 resolutions that invoked Chapter VII from its inception until 2024, only 22 were adopted during the first 43 years, while 880 were adopted after the Cold War (Ibid; United Nations (a)). This trend of increased activity and cooperation in the Council after

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1 PhD research on RtoP cases by the author. The cases where the UNSC took action were: Ivory Coast, Mali, Libya, Burundi, DR Congo, Sudan (Darfur), South Sudan and Central African Republic, while it did not take (effective) action were: Myanmar, Yemen, North Korea, Sri Lanka, Kenya and Syria.

the Cold War is also confirmed by the decreasing use of the veto by the five permanent members. During the Cold War, 232 vetoes were cast, blocking 192 draft resolutions (sometimes more than one veto was cast on a single resolution), and since then until 2024, 82 vetoes have been cast, preventing the adoption of 65 draft resolutions (Dag Hammarskjöld; Wallensteen & Johansson, 2016; Sievers & Daws, 2014; United Nations Security Council; United Nations (a)).<sup>2</sup>

Not only has the UNSC been meeting and adopting decisions more often, the number of peace missions authorized by the UNSC has also been increasing after the Cold War. During the Cold War, only 18 peacekeeping missions were authorized, while since 1990, 53 such missions have been authorized, out of which, currently, 11 such missions are active (United Nations (b); UN Peacekeeping (a); UN Peacekeeping (b)). Additionally, the Security Council has often authorized military operations that were not under the direct command and control of the UN. For the period 1950-2007, for example, 27 such operations were authorized (Roberts, 2016).

Thus, while all of the above shows that the Security Council is indeed more engaged and active after the Cold War, it should not be forgotten that its overall scope has not changed as much throughout this period, and the Council is still active in 50 to 60% of all ongoing conflicts.

### Where does the Council get involved?

Mindful of the initial statistics that the Council's increased activity does not cover all possible conflict hotspots, in order to obtain a more precise picture of this increase, a more detailed scrutiny is needed. It is necessary to provide answers (or at least indications), firstly, about where the Council's activity has been focused? This question can be answered from the perspective of the geographical location to which a particular resolution refers, or from the perspective of the characteristics of the conflicts in which the Council was involved in distinction to those in which it was not involved.

<sup>2</sup> The statistics for vetoes from 1946-2024, cast at public and private meetings for which records are kept are as follows: USSR (Russia) 153 vetoes (114 during the Cold War, 39 after it), USA 91 vetoes (67 during, and 24 after), Great Britain 30 vetoes (30 during, 0 after), China, 21 vetoes (3 during and 18 after), and France 18 vetoes (18 during, 0 after).

From a geographical perspective, the African continent dominates the agenda and resolutions of the Council. This fact was prevailing during the Cold War as well as after its end, and is even more established when it comes to resolutions adopted under Chapter VII. Thus, of all resolutions adopted after 1990 until 2014, 40% refer to Africa, while of all resolutions under Chapter VII, 50% refer to Africa (Wallenstein & Johansson, 2016). Similarly, out of 48 decisions adopted by the Council in 2024, for instance, 24 concerned (conflicts in) Africa, and out of the 24 resolutions under Chapter VII, 16 concerned the African continent (United Nations Security Council). During the Cold War, and in the first decade afterwards, both Europe and America had a high place on the agenda of the Security Council too. However, such regional statistics can give a misleading impression. Namely, during the Cold War, out of 81 resolutions dedicated to Europe, 80 were related to the Cyprus issue (Wallenstein & Johansson, 2016). At the beginning of the 90s, Europe was also in focus and most of all resolutions were related to the wars in the former Yugoslavia (Cockayne et al. 2010). The impression is similar about Haiti and the American continent. For the period 1993-2012, 48 resolutions were adopted that referred to the Americas, of which 39 were dedicated to Haiti (Wallenstein & Johansson, 2016). In this regional overview, it is also interesting to note that Asia, despite often ranking rather high in terms of the number of conflicts (e.g. due to conflicts in Afghanistan, Pakistan, Myanmar, etc.), is rarely on the formal agenda and in the Council's resolutions.<sup>3</sup>

Observed from the angle of the properties of the conflicts/crises in which the Security Council was (not) involved, the 17 (out of a total of 44) civil wars in which the Council did not adopt any resolution for the period 1989-2006, have 19% higher "national capacities"<sup>4</sup> than those 27 where it adopted some resolution. More specifically, the Council is not inclined to adopt resolutions in conflicts in countries with larger populations, in countries that have larger armies, that spend more on military purposes and have higher energy consumption,

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3 This is due to many factors such as the prevailing normative views of many of the countries of this region (including China) that oppose any interference from outside without the consent of the sitting government even though there might be (involvement by that government in) a war and/or massive human rights violations happening in that country.

4 Under "national capacities", used by the Correlates of War project, which is composed of several variables: energy consumption, iron and steel production, military spending, military personnel, total population and urban population of a country. See Cockayne et al., 2010.

and is more often engaged in countries with autocratic rather than democratic political systems. In terms of the economic development of a country, research shows that it is not a significant factor as the Council has engaged almost equally in underdeveloped and developed countries (Cockayne et al. 2010).

Concerning the question of where UN peacekeeping missions are headed, similarly to the engagement of the Council, we can give two types of answers – according to the geographical location of the countries and according to their characteristics. Of the 60 past peacekeeping missions authorized, 26 have been deployed on the territory of Africa (United Nations Peacekeeping (c)), and since 2000, 70% of UN troops have been deployed in Africa (Wallenstein & Johansson, 2016). However, if we take into account the ratio of troop deployments to the number of conflicts in a particular region, the figures show a regional bias. Namely, according to Gilligan and Stedman's research comparing missions after the Cold War until 2003, there is a much greater likelihood that the UN will send a mission to Europe and Latin America before doing so in Africa (Gilligan & Stedman, 2003). What is much more interesting is that, according to the same research, Africa is not the most marginalized region in terms of need and corresponding Council's action, but Asia (Ibid). As possible explanations for this, the authors point to the unwillingness of Asian states to consent to the deployment of a UN mission on their territory and the underdeveloped regional organizational structure and culture of traditional understanding of sovereignty (ASEAN is not as developed and pro-foreign intervention as, for example, NATO, the EU, and even the AU and ECOWAS) (Ibid).

Regarding the characteristics of the countries or conflicts where the UN deploys troops, Gilligan and Stedman highlight the following: the likelihood of the UN sending troops increases as the number of victims of the conflict and the duration of the conflict increase; the UN is less likely to send troops to a civil war in countries with large armies; there is no evidence that the UN sends troops more often to non-democratic regimes as opposed to democracies, that it intervenes more in countries with high primary commodity exports, that it intervenes more in former colonies of permanent UN states, or that it is more likely to send troops once there is some kind of peace agreement (although this may



be due to several factors) (Gilligan & Stedman, 2003). The authors explain such results as “an attempt to balance the dictates of power and concern for principles” and therefore interpret them as both good and bad at the same time (Ibid). Additionally, some authors also investigate the patterns of characteristics of UN missions that have already been deployed somewhere, and point out that deployed UN troops primarily focus on violence directed against civilians and on confrontations between authorities and non-state actors (and not between non-state versus non-state actors), are primarily located around populated areas, around places with surfaced-based resources, with a developed transportation network, and around state borders (Townsen & Reeder, 2014).

### **When does the Council get involved?**

Now that we have some idea about where the Security Council's activity is directed to, we can turn to the question of when the Council becomes active, that is, how long it takes the Council to adopt the first resolution in a certain crisis. In the history of the UN, in addition to the conflicts/crises in which the Security Council has not been involved, there are many examples where the Security Council got involved too late. Some of the most obvious are the Iran-Iraq War (1980-1988) in which, after half a million to one million victims and twice as many displaced persons, the Council adopted the first resolution with a Chapter VII reference in 1988. Then, there is the twenty-year civil war in Sudan that claimed 1 million lives and displaced about 5 million inhabitants, for which the Council adopted the first resolution only in 1996. Similarly, the adoption of the first Chapter VII resolution on Afghanistan was in 1999, although the country had been in a state of war since 1978 (Wallenstein & Johansson, 2016).

The International Peace Institute's study of civil wars from 1989 to 2006 indicates that it took different amounts of time for the Security Council to adopt the first resolution in a particular civil war during this period, and this depended on the location of the war. According to the study, for civil wars in Africa, it took 7 years on average before the Security Council adopted its first resolution. For wars in the Americas, it took 12 years before the first resolution, while for those in Asia, it took as long as 15 years. The situation was radically different for civil wars in Europe, where the Security Council adopted the first resolution after

only 6 months from the start of the wars (Cockayne et al. 2010). One explanation for the Council's rather late reaction on a general level, according to the study's authors, is that a large number of these civil wars had already begun before 1989, and the Security Council generally does not show a tendency to deal with "old" issues, i.e. issues that are a remnant of the Cold War. The authors point out that in civil wars that began after 1989, the time for reaction and adoption of a resolution by the Council is shorter. As for the discrepancy by region, the possible explanations vary. Conflicts in Europe are culturally, economically and geographically closer to three of the permanent members of the Security Council (France, Great Britain and the USA) and very often five to six of the 15 member states in the Council are from Europe. In contrast, the slower and decreased engagement in conflicts in America is explained primarily by the reluctance of Latin American countries to internationalize wars in their countries, while in Asia by the principled position of a large number of countries in this region (and above all China) for non-interference in the internal affairs of countries (Cockayne et al. 2010).

### **What kind of measures does the Council adopt?**

The next aspect of the Security Council's activity that needs to be considered answers the question of what the Council's activity consists of, that is, what kind of measures it adopts and when it gets involved? Typical of the Council's resolutions after the Cold War is the innovation of the solutions contained in them, such as the creation of safe havens, ad hoc tribunals, or so-called "smart" or "targeted" sanctions (as opposed to the former comprehensive ones). Over time, the resolutions have become much more complex. For example, in Resolution 2227 (2016), which is 15 pages long, 20 different tasks are included for the MONUSCO mission in the DRC, and in Resolution 2274 (2016) for Afghanistan, there are 10 tasks on 20 pages (Security Council Report, 2016). This is also confirmed by the resolutions relating to civil wars, in which in 1989 the Security Council issued an average of one demand to the parties to the conflict, and in the early 2000s an average of 4.5 demands (Cockayne et al. 2010).

But what exactly is contained in these resolutions? In terms of the demands imposed on the parties to civil wars, the Council has focused on measures of

coercive military action (22%), but also on internal political relations and governance (29%), cooperation with the UN (26%) and external relations (12%), as well as humanitarian issues (11%) (Cockayne et al. 2010). The trend, however, in this area, probably after the failures in state-building in the 1990s, indicates a reduced focus on the internal affairs of states at the expense of their external relations. Certainly, some of the operational paragraphs and sometimes entire resolutions also contain purely administrative requests (such as the appointment of judges for ad hoc tribunals). However, two statistical data in this category point to other significant implications. Firstly, 44% of all demands deal with calling the parties to the conflict to adhere to an already concluded agreement (peace agreement, ceasefire, preliminary framework agreement, etc.). Secondly, at the beginning of the 1990s, the Council most often issued such demands during the civil war, while since then, especially after 2002, the trend has changed and most of the demands have been issued after the end of the wars (Cockayne et al. 2010). These two data cumulatively, in combination with the data on the conflicts' properties where the UNSC does (not) get involved in, point to the conclusion by former UN Secretary-Generals B.B. Galli and Kofi Annan (Ghali, 1995, par.77; Annan, 1997, par.109) that "the UN is no longer in the enforcement business", (Weiss, 2015: 56, 57) and that increasingly, both the UN and the Council are committed to post-conflict management.

### **What are the effects of the measures the Council adopts?**

The next question that arises is what are the effects of Security Council decisions? In terms of civil wars from 1989 to 2006, those conflicts in which the Security Council adopted resolutions ended on average 5 years earlier than those in which it did not adopt a single resolution. Moreover, in these conflicts the number of direct casualties was almost 9% lower per conflict than in those where the Council did not adopt a resolution (and there were 16% fewer casualties from battles on the ground) (Cockayne et al. 2010). The shortcoming of the statistical data presented in this manner is, of course, that they do not take into account the specifics of the particular conflict and the circumstances outside the Council that could influence the results. Hence, it is clear that it is impossible to draw any causality or correlation in this relationship. On the contrary, as

the International Peace Institute study itself indicates, it is even unclear what is the cause and what is the consequence of this relationship – whether the Security Council, with its engagement, contributed to their faster completion or whether the Council got involved in these crisis situations because they were “easier”, that is, because they possess such characteristics and have the prospect of a faster completion. Additionally, even if these effects can be attributed to the Council’s activity, it is certainly not only due to the adoption of a resolution, but also due to the (successful) implementation of the measures in that resolution. Finally, viewing the issue from a binary perspective – is there an effect or not after the end of the war – does not give the whole picture of the problem and also loses sight of the various intangible effects of the Council’s work, such as reputational costs to (the member states of) the Security Council, sending positive signals to those who adhere to what has been agreed and negative signals to those who (would) violate it, providing informal motivation for participation in the peace process to parties that hesitate to do so, reducing the domestic political costs for implementing a decision of the Security Council or the (peace) agreement in place, etc. (Ibid).

Regarding UN peacekeeping operations (UNPKO), Hoeffler (2014) concludes, based on the summary of several studies that consider this issue, that peacekeeping missions are effective. However, as the author herself emphasizes, all these studies may suffer from selection bias. Thus, if the UN is, for instance, “more likely to send peace-keepers to easier situations, we would observe a positive association of UNPKOs with longer durations of peace, but this positive association could not be interpreted as causal. Alternatively, the UN may send peace-keepers to more difficult situations, thus underestimating the effectiveness of peace-keeping. In either case, the deployment decision would be based on an estimate of the risk of conflict (in which case UNPKOs are endogenous), making it difficult to disentangle causal effects.” (Ibid: 85).

## Discussion

In sum, from all that was presented above, one can conclude that although the Council has become much more active after the Cold War the scope of its activity is not comprehensive enough and covers only half-to-two-thirds of all crises in the world. The UNSC is selective in its involvement, preferring conflicts which are not in their peak, and situations and regions where it has support (or at least does not have the opposition) of major powers, local authorities and regional organizations. The Council very often gets involved too late in a crisis, and is also frequently ineffective in maintaining international peace and security. Thus, the principal impression about the Security Council's record is that the only thing that is consistent about this body is its record of inconsistency (Hehir, 2013). The trajectory of the Security Council's action (not only regarding RtoP cases, but in general) "has been characterized by a preponderance of inertia punctuated by aberrant flashes of resolve and timely action, impelled by the rare confluence of interests and humanitarian need" (Ibid: 137). This is why, for instance, in conflicts such as the Russian aggression in Ukraine or Israel's war in Gaza, where there is an opposition of (at least) one major power, the Council ends up being selective or ineffective. On the other hand, when there isn't such an opposition but rather there is support for the Council's engagement and an agreement about the broader geopolitical and normative considerations among Council's members, such as during the 1990 Iraq occupation of Kuwait, the Council gets involved, in a timely manner, and is effective.

But ought this inconsistency, tardiness and inactivity/ineffectiveness to be expected, having in mind the normative framework which governs the Council, or is the Council failing, underachieving in its responsibility? This raises the broader question of what kind of institution the Council was designed to be? For those who considered the Council to be designed as a Concert of big powers (Bosco, 2009; Bosco, 2014) or a system of "selective security" (Roberts & Zaum 2008; Roberts, 2016) the UNSC's record in practice is as it should be expected. A Concert of big powers is a rudimentary form of collective security where major powers are the most important players, where all decisions rest on an agreement between them, but, at the same time, the system offers them flexibility in

the decision-making and in protecting their own interests. Therefore, it should not be expected that the record of such a body is to be on a scale of a body representing an ideal system of collective security where the reaction is mandatory and automatic. Similarly, a system of selective security rest on the idea that there is not only one body that is responsible for maintaining the security system in place, and some degree of selectivity in its decision-making process is included in the design of that body and such selectivity is good for practice.

Nevertheless, while the Council certainly was not designed to be a system of (ideal) collective security (meaning, to react “automatically” when there erupts or threatens to erupt a crisis or an armed conflict), it is much more than a system of selective security or a Concert of major powers. There are several main arguments in support of this reasoning. Firstly, the main objective that inspired the creation of the UN and which the Council is tasked to achieve, is to “save succeeding generations from the scourge of war”. In this regard, the veto power of P5 and the flexibility of the Council were designed and intended to be used for the better fulfilment of this goal, not as an backdoor for inaction or the pursuance of major powers interests. Even State’s right of self-defense and the power of regional organizations to act for international peace are also connected to the actions by the UNSC and not completely independent from it, as a sign of its lack of power, which further shows that the UNSC was envisioned to be the international authority expected to maintain international peace. Additionally, the broader normative developments which includes, *inter alia*, human rights, international humanitarian law and international criminal law, and which constitute the normative framework in which the Council operates has significantly got bigger and wider in the eight decades following the UNSC inception , and accordingly, there are much bigger expectations that the Council should deliver on. Related to this, there has also been a shift in understandings of the phrase “international peace” to include not only “interstate” but also internal situations, and not only the absence of war, but a “positive peace” (which means that the root causes of a situation and the links to human rights, rule of law and sustainable development should be taken into consideration).

All of things mentioned above point to the conclusion that the Council should operate in practice far better than it has – more often, faster, more efficient and more effective .<sup>5</sup> In fact, if this is how the UNSC was intended to function in practice, there would not have been so many calls for its reform, dating back virtually from its inception. In this regard, one of the latest such calls, and even an affirmation by all UN member States that a reform of the Council is needed to address some of its shortcomings, “as a matter of priority and without delay”, was made in the Pact for the Future, that the UN adopted last year at the Summit of the Future (Pact for the Future, 2024, Action 40). The Pact even talks about the potential introduction of a “review clause” in order “to ensure that the Security Council continues over time to deliver on its mandate and remains fit for purpose” (Ibid, Action 39(h)), which also implies that the Council has not (sometimes) delivered in practice as it was intended and could be better. Yet, while the main section dedicated to Council reform (Action 39) is a comprehensive one, and includes improvements of its representativeness, its working methods and the use of the veto, the main focus seems to be on the need to enlarge the Council. This type of reform is certainly needed, but it will probably not make the Security Council function substantially more in line with its responsibilities. Reform of the working methods, and especially the (use of the) veto of the P5 are needed even more so, in order for the Council to uphold its mandate even better.<sup>6</sup>

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5 See more about this in See Ljupcho Stojkovski, “Collective Security, Selective Security, Concert or Something Else? What Kind of Institution is the UN Security Council?” in Tolga Sakman (ed.), “Securitized World Order and New Security Spaces”, Nobel Akademik Yayincilik, 2024, pp.225-238.

6 See more about this in Ljupcho Stojkovski, “Some Perspectives on the UN Security Council Reform Proposals”, Iustinianus Primus Law Review, vol.14, is.1, 2023, and the works referenced there.

## Conclusion

This paper attempted to scrutinize how the UN Security Council has acted in practice in its eighty-year-old existence - how engaged the Council has been, where and in what situations it is (preferring to) take action, how responsive it is, and what are the effects of its engagement. Drawing on numerous different studies on the Council's engagement in various types of conflicts and crises, this work presented their main findings and interpreted them in order to understand the Council as an institution in practice. Putting these studies side by side with an interpretation of the UN Charter provisions referring to the powers and responsibilities of the Council, as well as subsequent normative and other practical developments related to the (UN) security system, the work also offered some thoughts on how to interpret the Council's record and how to address some of its failures. Thus, it is noticeable that - by looking at its powers and limitations as enshrined in the UN Charter (particularly Articles 27 and 39) - the Council was not designed to act immediately and in every possible conflict, and, as a political body, it was granted vast flexibility in performing its responsibility to maintain international peace and security. Yet, viewed in light of the UN security system as a whole, and especially the transformation of the nature of warfare and the normative developments, the Council should have a better record - be more responsive, more engaged, less unjustifiably selective, and more substantially involved - than it has been in practice so far. Thus, as it was affirmed in the Pact for the Future, urgent reform is needed of this body. However, beyond any institutional reform (especially if such reforms never materialize, which is a real possibility), what is needed is for the (permanent) members to govern international security matters (for the collective good) and not only to understand and exercise the politics in the UNSC as an opportunity to protect, preserve and promote their interests and those of their allies.



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# Selective Justice? Empirically Testing for Double Standards in the ICC's Palestine and Ukraine Investigations

Hasan Basri Bülbul

**Abstract:** Despite its proclaimed dedication to universal justice, the International Criminal Court has long been accused of double standards in its administration of justice. To evaluate the veracity of these claims, this study conducts a comparative empirical analysis of ICC prosecutorial practice, examining procedural and discursive patterns across two contemporary investigations to gauge the institution's consistency across different geopolitical contexts.

Through quantitative and qualitative analysis of prosecutorial timelines, resource allocation, field presence, and official communications, this research documents significant disparities in how the Ukraine and Palestine situations are treated by the Office of the Prosecutor. The empirical findings reveal substantial variations in prosecutorial urgency, resource deployment, and rhetorical framing. Discourse analysis of official statements further reveals systematic variations in the sequencing and characterisation of victims and perpetrators through linguistic choices, particularly in ways that disadvantage Palestinian parties.

The inconsistencies identified risk fostering a perception of a two-tiered system, even as the institution takes politically costly steps to uphold its neutrality, thereby challenging the Court's legitimacy and undermining its claim to impartiality. The findings ultimately suggest that the problem may be more nuanced than a simple "double standard" accusation, pointing instead to more subtle, yet significant, asymmetries in the administration of justice.

**Keywords:** International Criminal Court, Office of the Prosecutor, Double Standards, Palestine, Ukraine

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## Introduction

In the contemporary architecture of international criminal justice, the International Criminal Court (ICC) proclaims to stand as the institutional embodiment of a promise: that accountability for grave crimes recognizes no hierarchies of power or geography (Rome Statute, Preamble). Yet, the Court has been accused of double standards and selective prosecution since its inception. From excessively targeting African nationals to refraining from investigating nationals of great powers for so long, the Court has had the unenviable position of being accused of simultaneously doing too much, and not enough (Stahn, 2017).

In fact, the scholarly debate surrounding these criticisms has formed around several arguments that challenge both the Court's legitimacy and effectiveness. Chief amongst these is the ICC's perceived geographical bias, with scholars documenting the Court's disproportionate focus on African states and nationals (Ssenyonjo, 2013; Murithi, 2013). This prompted coordinated resistance from the African Union, including threats of mass withdrawal from the Rome Statute (Keppler, 2012). While some scholars defend this geographical concentration as reflecting the reality of where mass atrocities occur and state capacity is weakest (Waddel and Clark, 2008), the empirical reality remains that the overwhelming majority of ICC investigations have focused on African situations.

Beyond geographical bias, the second line of criticism accuses the ICC of being inscribed within broader frameworks of neocolonial interferences, serving as a tool of Western hegemony by other means, namely, juridical interventions. (Krever, 2016). Drawing on the Third World Approaches to International Law (TWAIL), Reynolds and Xavier (2016) argue that the Court, once widely supported by African states during its establishment, ultimately came to reproduce the colonial architecture of international law through its institutional design and practice. For example, the Prosecutor's revelation that a senior Western diplomat warned him that the Court was originally 'built for Africa and thugs like Putin'. ("ICC Just for Africans and Putin", 2024), suggests that a neocolonial mindset continues to underlie the expected targets for international justice. Mégret argues that the Court's record famously confirms this insofar that it has overwhelmingly targeted the weakest actors that include citizens of African

nations and members of non-state actors (Mégret, 2016). This critique further extends to epistemic Eurocentrism, with scholars such as Clark (2009) and Tallgren (2015) examining how the Court's reliance on Western legal traditions, interpretative frameworks and narrative shapes its understanding of justice and accountability.

The third angle of criticism focuses on prosecutorial selectivity and political influence. Schabas (2009) has extensively discussed instances of "selective justice", arguing that the Prosecutor's discretionary powers facilitate politically motivated decision-making. This encompasses both positive selectivity (the decision to investigate certain situations), and negative selectivity (the decision to refrain from investigating others), particularly regarding Western states and their allies (Nouwen and Werner, 2010; Kersten, 2022). The structural constraints fueled by jurisdictional limitations and Security Council referral powers further compound these concerns about selective enforcement (Goldsmith and Krasner, 2003).

Despite the prevalence of these criticisms, the existing scholarship reveals a notable methodological gap. While theoretical analyses of the ICC's limitations abound, few studies have attempted a systematic and empirical testing of these claims. While Hillebrecht (2016) and Simmons and Danner (2010) represent notable exceptions in employing quantitative methods throughout discussion of the ICC, comprehensive empirical analysis of prosecutorial discourse, case management practices, and institutional consistency across different situations remains limited.

This paper therefore shifts focus to the Court's practices and the discourse of its Prosecutor, seeking to empirically appraise the Court's consistency in its administration of justice across different situations. To do so, it undertakes a comparative analysis between a number of situations currently under investigation by the ICC, chief amongst them being the situation in Ukraine, and the situation in Palestine.

The paper proceeds in six main sections. Presenting the methodology of the work in the following section, we analyse the material differences in case treatment between Ukraine and Palestine, examining variables such as investigative

pace, prosecutorial resources deployed, and procedural milestones achieved. This is followed by a discourse analysis of Prosecutor Karim Khan's official published statements, scrutinizing variations in rhetorical framing and linguistic choices, when addressing Palestinians versus Israelis, further juxtaposed with his discourse on the Ukraine situation. Building on these, we next appraise the validity of the critiques by analysing our findings. This comparative approach allows us to move beyond abstract debates about the Court's legitimacy toward an evidence-based assessment of how justice is operationalised, and potentially compromised. The final section summarises the findings, testing the empirical validity of the criticisms outlined previously.

## **Methodology**

The research design combines quantitative analysis of procedural metrics with qualitative critical discourse analysis to assess the Court's consistency. First, we undertake a quantitative assessment of procedural dimensions including temporal progression, resource allocation, and institutional engagement patterns. Second, a qualitative discourse analysis of prosecutorial rhetoric to identify potential disparities in legal and moral framing. Here, legal frames are understood to describe language which refers to legal instruments, doctrine, standards, principles, procedures, and texts. Conversely, moral frames are characterized by evocative language related to affect, superlatives, or emotions.

## **Scope and Case Selection**

The selection of Ukraine and Palestine as the two main comparative cases is methodologically predicated on several reasons. At the time of writing, the Palestine and Ukraine conflicts are in full-swing, with the ICC investigating crimes committed in both situations. Western States, particularly the United States, supported the ICC in its endeavour to investigate Russian crimes in Ukraine. Conversely, they have historically been hostile to the Court whenever it has attempted to extend its judicial power to investigate Israeli actions in Palestine (Clancy and Falk, 2021: 64), leading to accusations of double standards against them. These accusations have also extended to the policy and practice of the ICC and its prosecutors.

These cases have become symbolic for the Court as they have, one way or another, come to represent the divide between Western-aligned states and those resisting or challenging Western influence. As Sadat and Hueseman observe, the Court ‘will lose the support of the West if it fails in Ukraine. If it succeeds in Ukraine and fails in Palestine, however, or in many of the other pressing situations now under investigation or examination, it may retain the support of Western States but will lose the support of African and Latin American States’ (Sadat and Hueseman, 2024: 8). Still, as we present further in the Disclaimer and Limitations section, some argue that focusing on Ukraine as evidence of Eurocentric bias in international criminal law is misguided (Labuda, 2023).

Despite the self-evident differences between both situations, this study considers that the comparison between Ukraine and Palestine conflicts remains relevant and holds the potential to produce valid observations about prosecutorial consistency. Both situations involve active ICC investigations under the same Prosecutor, Karim Khan. Meanwhile, the temporal scope reflects the distinct chronological realities of each situation’s engagement with the Court while ensuring overall coherence. For Ukraine, the analysis encompasses February 2022 to September 2024, beginning with the Russian invasion on February 24, 2022, and the Prosecutor’s immediate response, extending through the most recent prosecutorial statements available at the time of analysis. For Palestine, the timeframe spans March 2021 to November 2024, commencing with the formal opening of investigations and concluding with the issuance of arrest warrants. While this creates temporal asymmetry, it is methodologically justified as it captures equivalent phases of prosecutorial engagement rather than artificially aligned calendar periods. The overlapping period from March 2022 to September 2024 provides a two-and-a-half-year window during which both investigations operated simultaneously, allowing for a more direct comparison of approaches under similar institutional conditions.

## **Data Set and Sources**

The study draws primarily on official ICC documentation and prosecutorial statements. For the procedural analysis, data sources include official ICC press

releases, prosecutorial statements, travel schedules and field visit reports, and budget documents detailing financial allocations to different situations.

For the discourse analysis, the corpus includes official statements by Prosecutor Karim Khan specifically related to both situations. The Ukraine corpus includes fourteen statements issued between February 2022 and September 2024, spanning the initiation of investigations through multiple arrest warrant applications. The Palestine corpus consists of five official statements, and two media pieces, following the October 7th attacks and subsequent Israeli military operations in Gaza.

Secondary sources also support the primary documentation and include academic analyses of ICC practice and prosecutorial decision-making; reports from human rights organisations monitoring both conflicts; expert commentary on ICC resource allocation and procedural practices; and media coverage providing additional context for prosecutorial activities and institutional responses.

### **Analytical Framework**

The first section will attempt to track the ICC's progress in each situation while keeping an eye for inconsistencies in three main areas: the temporal progression of investigations, the frequency and nature of prosecutorial field visits, and the institutional budgetary allocation to each situation. While these procedural elements might appear purely technical in nature, they fundamentally shape access to justice for affected communities and determine the pace at which accountability mechanisms unfold.

The second section undertakes a comparative critical discourse analysis of Prosecutor Khan's official statements related to these two conflicts. The discourse analysis undertaken seeks to identify two different themes within the official pronouncements, including:

- how events are chronologically framed, and which actors are foregrounded in the sequencing of perpetrators and victims;
- and the deployment of legal versus moral language and the degree to which victims are humanised within the tone of the language used.



This comparative analysis aims to gauge whether the Prosecutor's rhetoric maintains the expected judicial impartiality, or if it subtly mirrors the broader political double standards observed in the international community's responses to these crises. The divergent global reactions to Russian actions in Ukraine versus Israeli actions in Palestine, where Western states have often championed robust measures against the former while offering political and material support to the latter, serve as important context. These geopolitical alignments, we submit, risk influencing not only state behavior, but also find purchase in the discursive practices of international institutions like the ICC. By dissecting the Prosecutor's language, we seek to understand how, and to what extent, the promise of universal justice is upheld or undermined by the ICC.

### **Disclaimers and Limitations**

In light of the structural limitations inherent to any empirical analysis, as well as the inevitably limited scope required for this study, some disclaimers must be formulated at this stage of the research. At the outset, we note that this paper does not seek to engage in a repudiation of the Court, nor detract from the value of the investigations performed by the Office of the Prosecutor. Rather, given the challenges and impediments faced by the latter (including, most recently, in the form of direct sanctions against its staff) ("Imposing Sanctions", 2025), this research attempts to critically engage with the Court's consistency while remaining cognizant of the obstacles it faces.

Second, there are the limitations inherent to any comparative analysis involving paired examples. While Ukraine and Palestine provide opportune case studies, they are far from being identical situations. Each conflict reflects a different historical context and different crimes, as well as potential challenges. Ukraine is a conventional interstate armed conflict with relatively clear territorial boundaries and state-to-state dynamics, while Palestine involves a prolonged occupation over contested statehood, asymmetric warfare, as well as a context of decades of conflict. The timelines for each conflict also differ substantially, Ukraine's investigation having begun during an active war benefitting from immediate international attention, while Palestine's formal investigation commenced only after years of preliminary examination and protracted conflict.

These discrepancies between both cases could be argued to justify different prosecutorial approaches, resource allocations, and investigative timelines. For example, security conditions in Ukraine may facilitate field visits in ways that the blockade on Gaza does not allow. As such, while individual irregularities may be insufficient to draw a definitive conclusion, the cumulative weight of these observed disparities form the basis of our assessment of institutional consistency.

Nonetheless, we acknowledge that some scholars, like Labuda, argue that the comparison does not stand, as he contends that Ukraine benefited from no ‘special regime’, ‘Eurocentric bias’, or ‘racial preference’ in the processes before the ICC, emphasizing the insufficient amount of attention and support given to Ukraine during the Russian invasion of Crimea in 2014, especially compared to the full-scale attacks in 2022 (Labuda, 2023: 1102). Further, he proposes that Ukraine’s place in the world is not necessarily the Global North. It falls in a liminal position ‘between Europe and Asia, the East and West, and the Global North and South. It is neither part of the core or the periphery’ (Labuda, 2023: 1110).

We do not challenge the claim that Ukraine is not regarded as a ‘proper’ Western European country, nor do we seek to engage in this debate (Lewicki, 2023). Rather, the issue at stake is a major perceived threat to the Eurocentric world order. The European Parliament characterised the Russian attacks as ‘the most outrageous act of aggression ... in Europe since 1945’ (“European Parliament Resolution”, 2023) while the NATO Secretary General, Jens Stoltenberg stated that they are ‘the largest attempted annexation of European territory by force since the Second World War.’ (“Press point”, 2022). Therefore, the Russian invasion of Ukraine in 2022 has been profoundly presented by Western powers and scholars as being the most significant threat to the international legal order established after World War II, which is why it received more (Brunk and Hakimi, 2022). However, this does not negate the possibility that Ukraine may have received special treatment.

Indeed, with this dominant Western narrative at the time, what emerged was a large-scale response by Western powers, ranging from cultural resistance (“Russia banned from Eurovision”, 2022) to military support against Russia (“US

military aid", 2023), coupled with sanctions. Almost all international institutions and adjudication mechanisms have been triggered against Russia under a framework of lawfare. Our understanding is that the substantial support extended by Western powers to Ukraine is not mainly driven by the racial profile of Ukrainians or any special status attributed to them, but rather in the potential consequences of Russian aggression for the Western powers themselves; namely, the risk of the end of the global Western hegemony and the post-1945 international order they established (Pattison, 2022). This also accounts for the disparity in the level of support provided to Ukrainians by Western powers in 2014 and 2022, as the threat perceived by Western states in 2022 was significantly more severe. Thus, Europe was united against Russia, aiming to utilize nearly all mechanisms that international law may offer.

Labuda further emphasizes the state-centric nature of international law to explain the unprecedented attention to the case of Ukraine: 'At the end of the day, the main reason for a seemingly united and unprecedented response to Russian crimes in Ukraine seems to be the inter-state nature of the invasion and associated crimes' (Labuda, 2023: 1105). However, this risks being overly reductionist, as it falls short of explaining the geopolitical alliances behind these actions. It does not account, for example, for the more limited support provided to Ukraine in 2014, 'although Russia's violations were the same in Crimea,' in his own words (Labuda, 2023: 1102). Moreover, it is no secret that Western powers would support their allies even when they themselves are the aggressors against a sovereign state. This could not be more evident than in the recent example where Israel attacked Iran without any evidence of an imminent armed attack by Iran against Israel (Haque, 2025). Yet, most Western powers urged Iran to refrain from using force in response, emphasizing 'Israel's right to defend itself' ("G7 Leaders' Statement, 2025). Therefore, the increased attention to crimes committed by Russia in Ukraine cannot be explained by the state-centric nature of international law, but rather by prevailing geopolitical alliances.

Another limitation worth mentioning is that our study examines a specific timeline of ICC practice under one Prosecutor's tenure. While this provides consistency for comparative purposes, it limits our ability to draw broader conclusions

about institutional patterns. For instance, different prosecutors may approach similar situations differently, and what we observe may very well reflect personal rather than institutional characteristics. As has been argued in relation to the tenure of former Prosecutor Fatou Bensouda, and her role in reducing the speed with which the Palestinian situation has been treated, the individual discretion and strategic vision of the Prosecutor undeniably shapes the direction of the Office (Heller, 2024).

That said, it is also true that the prosecutorial statements which we target in our discourse analysis represent only one dimension of the Court's communication. These official statements and the language employed within them may reflect broad diplomatic calculation rather than underlying institutional attitudes, and the public statements may deliberately obscure more complex internal deliberations. Nevertheless, these communications are the primary method through which the Court and the Prosecutor's Office convey their legal and political posture to the international community. As such, they are, for all intents and purposes, the official narrative of the institution presenting the authoritative account of its work, making them a legitimate subject for analysis.

The same reflection applies to this study's reliance on publicly available information, especially to assess the practices of an institution that operates with a high level of confidentiality. The internal deliberations of the Prosecutor's Office and the Court, for example, remain impenetrable to this analysis. The same is valid for official budget allocation figures, or internal pressures which may complicate the issuance or application of warrants. Nonetheless, this constraint is one which applies to all quantitative studies attempting to appraise public discourse and public practice from a public institution.

## Practical Differences in Case Treatment: Ukraine vs. Palestine

### Speed of the Processes

The temporal progression of investigations and the urgency with which they are dealt are a cornerstone of good administration of justice in legal systems worldwide. Article 14(3)(c) of the International Covenant on Civil and Political Rights enshrines the right to be tried ‘without undue delay’, while Article 6(1) of the European Convention on Human Rights guarantees trial ‘within a reasonable time’. The Inter-American Convention on Human Rights similarly mandates trial ‘within a reasonable time’ in Article 8(1), and the African Charter on Human and Peoples’ Rights affirms the right to be tried ‘within a reasonable time’ in Article 7(1)(d). This normative standard even constitutes a critical metric in the ICC commitment to its own statutory principles, featuring prominently in its foundational documents. Article 64(2) of the Rome Statute explicitly requires that the Trial Chamber ‘ensure that a trial is fair and expeditious,’ while Article 64(3)(a) mandates that procedures be adopted to ‘facilitate the fair and expeditious conduct of proceedings.’ This emphasis on expeditiousness within the Court’s founding document establishes a normative expectation of prompt justice.

At first glance, the speed of the Prosecutor’s engagement with the situation in Ukraine appears to satisfy the aforementioned standards of expeditiousness. Only four days after the Russian invasion of Ukraine on 24 February 2022, Prosecutor Karim Khan *proprio motu* announced that he would start an investigation. True to his word, Khan opened the investigation on 2 March 2022, just six days after the Russian attacks began. The Prosecutor’s swift response to the Ukrainian case is all the more impressive, when compared to the average delays usually taken by the Court.

In 2018, the State of Palestine referred the situation to the Court, requesting an investigation. Just before the end of her term, Prosecutor Fatou Bensouda announced that she had started an investigation into Palestine in 2021. Despite the decades-old allegations and referral by a state party, the Prosecutor spent three

years to only announce the start of the investigation of international crimes in the Palestinian territories committed by Israeli occupation forces.

Figure 1 - ICC Investigation Timelines: From First Referral to Investigation Opening

<b>Situation</b>	<b>Date of First State Referral</b>	<b>Date Investigation Opened</b>	<b>Duration Between Referral &amp; Investigation</b>
Uganda	January 29, 2004	July 29, 2004	6 months
Democratic Republic of Congo	March 19, 2004	June 23, 2004	3 months, 4 days
Central African Republic I	December 21, 2004	May 22, 2007	2 years, 5 months, 1 day
Mali	July 13, 2012	January 16, 2013	6 months, 3 days
Central African Republic II	May 30, 2014	September 24, 2014	3 months, 25 days
Palestine	May 22, 2018	March 3, 2021	2 years, 9 months, 9 days
Venezuela I	September 27, 2018	November 3, 2021	3 years, 1 month, 7 days
Venezuela II	February 13, 2020	<i>Investigation not opened</i>	N/A
Ukraine	March 1, 2022	March 2, 2022	1 day

A similar, though not exactly identical trend can be identified with the speed with which arrest warrants are issued. The first arrest warrant in the Ukraine case against Russian individuals was requested by the Prosecutor on 22 February 2023, one year after the beginning of investigations. In one month, the ICC Pre-Trial Chamber II issued arrest warrants (“Situation in Ukraine”, 2023). However, in the case of Palestine, before the 7<sup>th</sup> of October, the Prosecutor had not taken any meaningful steps to hold perpetrators accountable, nor did he

identify any suspects during the process (Mariniello, 2024). The first arrest warrant in the case was requested by the Prosecutor on 20 May 2024 against three Palestinians and two Israelis, three years after the beginning of investigations and six years after the referral of the State of Palestine. The arrest warrants in the Palestine investigation were issued by the ICC Pre-Trial Chamber I on 21 November 2024. Unlike the one-month period in the case of Ukraine, it took six months for the Court to issue the arrest warrants in the Palestine situation.

## Budget

The allocation of financial resources and investigative personnel is a fundamental indicator of institutional prioritisation within international criminal justice mechanisms (Wiebelhaus-Brahm and Ainley, 2023). While the ICC operates under budgetary constraints that necessitate difficult choices about resource distribution, examining patterns of financial allocation across different situations provides insight into operational priorities.

The ICC's financial framework consists of assessed contributions from States Parties, with the Prosecutor maintaining discretion over the internal distribution of resources across active investigations. Available public information from the Assembly of States Parties (ASP) budget documents, prosecutorial statements, and expert assessments reveals significant disparities in resource prioritisation.

In 2023, the Prosecutor allocated approximately 944,100 euros to the Palestine investigation. This amount represents the lowest budget among all active investigations and merely one-fifth of the 4,499,800 euros allocated to Ukraine (Mariniello, 2024). This stark contrast in financial commitment exists despite the Palestine investigation's longer duration and comparable complexity.

The disparity in resource allocation extends beyond pure financial metrics to include investigative personnel deployment. When addressing resource distribution in 2023, Prosecutor Khan acknowledged that the Palestine investigation was underfunded and under-resourced, a condition he attributed to the general underfunding of the Court (Nashed, 2023).

## Number and Nature of the Visits

The frequency, duration, and substantive focus of prosecutorial field visits represent another metric to assess operational consistency in the Court's approach to different situations. Field presence serves multiple essential functions in international criminal investigations. It enables direct evidence collection, facilitates victim and witness engagement, demonstrates institutional commitment to affected communities, and enhances contextual understanding of the crimes under investigation. The prosecutorial field presence between the Ukraine and Palestine situations, therefore, merits careful examination as a potential indicator of institutional engagement.

Since the commencement of the Ukrainian investigation in March 2022, Prosecutor Khan has conducted six field visits to Ukraine within a three-year period. These visits involved extensive engagement with victims, civil society organisations, and government officials, demonstrating a continuous commitment to on-site investigation and evidence gathering. In contrast, throughout the four years following the initiation of the Palestine investigation in 2021, the Prosecutor conducted only a single visit to Palestinian territories. This solitary visit occurred after October 7th, 2023, and took place only when Israeli victims invited Khan to visit Israel.

The qualitative aspects of this visit raise additional questions about symbolic and substantive parity. The Prosecutor's engagement in the West Bank appeared peripheral to his primary focus on Israeli territories, where he devoted significantly more time, particularly to locations of the October 7th attacks. (Mariniello, 2024) Notably absent from his itinerary were visits to illegal settlements in the West Bank (sites of alleged crimes within the Court's jurisdiction) and Israel did not allow him to access Gaza, where the most severe and widespread alleged crimes were occurring. (Mariniello, 2024) It was reported that the Prosecutor allocated merely ten minutes to hear Palestinian victims' testimonies (ultimately stretched to one hour), a timeframe strikingly disproportionate to the extensive engagement afforded to Israeli victims (Nashed and Al Tahhan, 2023). Khan's office has not provided an explanation for this differential treatment.



## **Discursive Disparities in Prosecutorial Rhetoric**

### **Sequencing Perpetrators and Victims**

One central element in the Prosecutor's discursive framing is the way in which events are temporally sequenced. In other words, which actors are foregrounded as initiators of violence and which are presented as victims. The analysis herewith suggests that the narrative differs substantively in the presentations of the Ukraine and Palestine situations.

The first stage of discursive choices appears in the framing and sequencing of violence. In the Ukraine situation, an initial veneer of impartiality, evident in early 2022 references "all sides conducting hostilities" ("Statement of ICC Prosecutor", 25 February 2022; "Statement of ICC Prosecutor", 2 March 2022) and crimes "committed by any party to the conflict" ("Statement of ICC Prosecutor", 28 February 2022), progressively gives way to an almost exclusive focus on Russian actions and accountability.

By 2023 and 2024, particularly in the statements accompanying arrest warrant applications, the discourse makes no balancing effort whatsoever, centering overwhelmingly on alleged Russian culpability. As Khan stated on June 25, 2024: 'On the basis of evidence collected and analysed by my Office pursuant to its independent investigations, the Pre-Trial Chamber has confirmed that there are reasonable grounds to believe that Mr Shoigu and General Gerasimov bear individual criminal responsibility...' No equivalent scrutiny of Ukrainian conduct appears in any of the fourteen statements analysed, despite formal references to investigating "all sides." This shift suggests that while initial investigations might have formally considered all parties, the public discourse evolved to heavily emphasize accountability for one side only.

On the other hand, even though the Prosecutor investigates both parties in the Israel-Palestine conflict, there is a consistent pattern in which Palestinians are presented first in any sequence. In the Prosecutor's Cairo statement, he first addressed the "attacks carried out on the 7th of October by Hamas and other terror groups", followed by references to "violence inflicted by Israel on Gaza" ("Statement of ICC Prosecutor", 30 October 2023). This chronological and

thematic sequencing never changes. For instance, when announcing his request for arrest warrants, crimes attributed to Palestinian individuals were detailed before those attributed to Israeli officials. Even in general statements, such as his concern for “international crimes occurring in Israel, Gaza and the West Bank” (“Statement of ICC Prosecutor”, 20 May 2024), Israel is mentioned first, implicitly centering the October 7th events as the primary point of reference.

The discourse surrounding the Palestine situation also reveals a consistent pattern of prioritising Israeli victims. When addressing the Palestine/Israel investigation, Prosecutor Khan invariably begins by detailing the suffering of Israeli victims of the October 7th attacks before subsequently addressing Palestinian victims. This fixed order of presentation, maintained across multiple statements (“Statement of ICC Prosecutor”, 30 October 2023; 3 December 2023; 20 May 2024) (“Interview with Karim Khan”, 20 November 2023) subtly implies a hierarchy of victimhood and establishes the October 7th attacks as the primary catalyst for subsequent events, with no attempt to contextualise the broader conflict in the context of occupation. The choice of which historical moment marks the ‘beginning’ of the prosecutorial narrative, and which actors’ experiences are prioritised in that narrative, fundamentally shapes public understanding and perceived victimhood and culpability.

### **The tone of the Language: Legal or Moral Language**

The Prosecutor’s choice of language, whether leaning towards legal or moral registers, and the degree to which victims are humanised, is another illustration of the divergences in discourse between the two situations.

Throughout his statements on Ukraine, strong moral language consistently condemns Russian actions. His pronouncements describe ‘deeply troubling developments’ (“Statement of ICC Prosecutor”, 11 March 2022), assert that ‘we cannot allow children to be treated as if they are the spoils of war’ (“Statement by Prosecutor”, 17 March 2023), and warn that ‘those who believe they can use untrammelled power to abuse the vulnerable should know we are united in holding them to account’ (“ICC Prosecutor”, 13 September 2024).

Ukrainian victims are extensively humanised through detailed, emotionally resonant narratives. Khan recounts his observations of 'Individuals in Borodianka completely non-scripted walking around without any supervision, surrounded, sitting around a blackened cattle in very, very cold temperatures because that is their current existence' ("Statement by Prosecutor", 27 April 2022; "Statement by Prosecutor" 16 March 2022). He shares his meeting with 'Nurses who were impacted by the missile strike as they stayed behind to finish the dialysis treatments being provided to children' and their colleague who, 'as she sought to provide the children on the intensive care ward with the support they need, as she struggled to save lives, was killed in the missile strike' ("ICC Prosecutor", 13 September 2024). This vivid humanisation is a characteristic of his Ukraine discourse.

In the Palestine investigation, a similar level of profound sympathy and emotive language is expressed when speaking of Israeli victims of October 7th. For instance, Khan states, 'Speaking with survivors, I heard how the love within a family, the deepest bonds between a parent and a child, were contorted to inflict unfathomable pain through calculated cruelty and extreme callousness.' ("Statement of ICC Prosecutor", 20 May 2024). The use of such an emotional and humanising language is a norm when the subjects are the Israeli victims.

However, his tone becomes more subdued when discussing Palestinian victims. In Khan's statement from Ramallah, he first details his encounter with Israeli survivors, he volunteers the following: 'Yesterday, I met Israeli survivors, Israeli family members that have endured so much loss, the horrors of hostage taking and the insecurity of the unknown about where they are and what has happened. And today, I've also spoken to individuals that have lost their families, loved ones, children, wives, parents in the rubble of Gaza' ("ICC Prosecutor", 6 December 2023). Tersely acknowledging the Palestinians' loss, he refrains from adding the same level of sympathy afforded to Israeli and Ukrainian victims, and shifts to broader points about the rule of law and accountability in international law. Although there are instances where he demonstrates some degree of sympathy for Palestinians, it does not appear as consistently as in the case of Israeli victims (Khan, 10 November 2023).

This disparity in tone extends to the description of violence and of the alleged crimes committed by each party. When referring to the actions perpetrated by Palestinians, he frequently employs additional moral qualifiers to illustrate the seriousness of the crimes. He uses the words ‘atrocities’ (Khan, 10 November 2023), ‘shocking the conscience of humanity’ (“ICC Prosecutor”, 3 December 2023), ‘horror’ (Khan, 10 November 2023), ‘unconscionable crimes’ (“Statement of ICC Prosecutor”, 20 May 2024) ‘the hatred and the cruelty’ (“Statement of ICC Prosecutor”, 30 October 2023), ‘calculated cruelty’ (ICC Prosecutor, 3 December 2023) ‘terror’ (“ICC Prosecutor”, 3 December 2023) among others. No such language is identified when describing Israeli violence.

Indeed, at first glance, it appears that the moral weight and evocative descriptions of suffering in the Prosecutor’s statements which are so prominent in the Ukraine context and for Israeli victims are less consistently applied to Palestinian suffering or Israeli transgressions. This will be further verified at a later stage in the analysis.

## **Empirical Findings: Testing the Critique through Data**

The ambition of this study’s empirical examination, far from simply reiterating the habitual criticisms leveled against the Court, is to provide a practical basis upon which the ICC’s prosecutors’ performance can be assessed. What emerges ultimately is not a simplistic indictment of institutional bias, or facile accusations of double standards, but rather more nuanced picture of how procedural and discursive inconsistencies are reproduced within the supposedly neutral framework of international justice. Overall, the findings suggest variability in the standards of institutional responsiveness, that can be attributed to donor priorities, political pressures, as well as reproduced traditional narratives.

### **Procedural Disparities: Institutional Bias or Structural Constraints?**

The quantitative analysis of the prosecutorial timelines arguably provides the strongest empirical support for claims of unequal treatment. The speed of the ICC’s response in the Ukraine situation is particularly striking. Indeed, following the referrals received from thirty-six State Parties on March 1st, 2022, the

Prosecutor opened a formal investigation on March 2nd, a mere single day later. This unprecedented six-day progression from invasion to formal investigation presents a clear exception when compared to the remainder of ICC cases, where the delay between state referral and investigation typically spans multiple years.

Since the Court's inception, preliminary examination phases (the period between initial engagement and formal investigation) have ranged from being as brief as three months for the Democratic Republic of Congo (March to June 2004) to as lengthy as seventeen years for Colombia (2004-2021, ultimately closed without investigation). The average duration for preliminary examination falls between three and five years, with situations like Uganda taking eight months, Central African Republic taking approximately three years, and Afghanistan taking fourteen years before an investigation was authorized. Against this baseline, Ukraine's near-instantaneous progression, represents an exceptional outlier. Such an expedited response, however, did not appear in any stage of the Palestine investigation.

Moving beyond investigation opening to subsequent stages, analysis of the historical trends suggests that delays and systematic inconsistencies can also be identified for these situations when measuring the time between investigation opening to warrant request. For example, Ukraine's eleven-month progression between investigation and request of warrants exceeds the Court's historical median of approximately twenty months, alongside Uganda (eleven months) and CAR (twelve months). Though the Ukrainian delay falls short of the fastest delay in the Court's history (Libya, in just three months), it clearly surpasses the Palestinian timeline, requiring thirty-eight months. Similarly, the Pre-Trial Chamber's response time reveals a pattern of case-specific delays rather than necessarily systematic mistreatment. For instance, the Chamber has consistently issued warrants within one to three months for Uganda, DRC, Darfur, Libya, and Ukraine, the latter not being an exception. The warrants against Putin and Lvova-Beleva were requested on 22 February 2023, and issued less than a month later, on 17 March 2023. Nevertheless, the Palestinian warrants required six months of deliberation, making it among the slowest chamber review processes on record.

Indeed, while not all of the treatment afforded to the Ukraine situation manifests exceptional speediness, it remains true that the haste with which the investigation was opened, and the delay of each stage of the Palestinian treatment, suggest that the Court's commitment to expeditious justice is applied inconsistently across situations. These patterns of inconsistent treatment echo the criticisms previously identified in the academic debate, alleging a practice of prosecutorial selectivity by the Court.

These timelines disparities become even more significant when considered alongside external political interference. Though this is not attributable to the institution itself, the origin of the investigations, and the number of referrals underscore the influence of political will and external pressure on the Court's responsiveness. Ukraine's speedy referral to the ICC by three-dozen state parties comes in hard contrast with the sole self-referral made by Palestine for its own situation, three years before a formal investigation was opened. This illustrates the discrepant results between the immediate, collective state-led action, and the singular, self-initiated referral which led to protracted delays.

On the other hand, even though the Office of the Prosecutor ultimately takes action to proceed with the investigation, the interventions of the Pre-Trial Chambers have further obstructed a timely response to the serious crimes committed in Palestine. For instance, when Fatou Bensouda sought clarification in 2019 on the scope of the jurisdiction of the Court from Pre-trial Chamber I, the Chamber decided to open the floor for *amicus curiae*. Then the Court received hundreds of thousands of pages of documents for review, which eventually resulted in a significant loss of time. At the end of the day, the Chamber ruled that the Court has jurisdiction over the crimes committed in Palestine.

Similarly, soon after Karim Khan requested arrest warrants in 2024 against Israeli individuals, the United Kingdom made a submission claiming that the Court does not have jurisdiction based on the Oslo Accords. This was criticised by scholars as "yet another attempt" by Western states to shield Israeli crimes from judicial review and maintain Israeli impunity. (Nessa, 2024; Henderson, 2024) Nevertheless, the Pre-Trial Chamber I found no rush; it decided again to open the floor for another round of *amicus curiae* submissions, causing further

delays in the process. It must be noted that these repeated *amicus curiae* submissions were partly attributed by the Prosecutor to be a form of external interference, and the cause of delay. As experts warned, the Court could and should have proceeded to decide itself on its own jurisdiction with no need to involve *amicus curiae* submissions again (Haque, 2024).

Beyond procedural timelines, the allocation of resources also reveals a similar trend. At first glance, for example, the budgetary disparity allocated to each situation would also appear to initially confirm claims about the existence of a two-tiered system, and recall the criticisms of broader structural issues with the ICC's financing architecture which have been the source of wide academic debate.

The resource disparity becomes evident when the Prosecutor established a "Trust Fund for Advanced Technology and Specialized Capacity" ("Statement of ICC Prosecutor", 28 March 2022) that primarily benefited the Ukraine investigation through voluntary contributions from States Parties. The Office of the Prosecutor's unprecedented mobilisation of resources for the Ukraine investigation, with the deployment of 42 investigators, establishes its largest field office. No comparable supplementary funding initiative and deployment, however, was established for the Palestine investigation, despite repeated calls from UN Special Rapporteurs and human rights organisations to dedicate more resources to it. (32 UN Experts, 2023) (Cohn, 2022).

While the Rome Statute permits voluntary contributions under Article 116, critics have suggested that these donor preferences drive prosecutorial priorities, creating an informal two-tier system (Arinze-Onyia, 2022). Illustrations of this phenomenon exist for both situations at hand, as the voluntary contributions to the Trust Fund were explicitly linked by Western States to funding the Ukraine investigation (Amnesty International, 2022), whereas the Belgian donation of 5 million euros was clearly addressed for the Palestine investigation ("Belgium provides 5m funding", 2023). In this way, these specific contributions demonstrate how voluntary funding mechanisms inevitably reflect geopolitical alignments rather than legal imperatives. As mentioned, this practice has already been the subject of critique, with scholars like Ford noting that financial constraints ultimately determine the administration of justice (Ford, 2023), and the

Coalition for the International Criminal Court noting that this risks exacerbating “perceptions of politicization in the Court’s work” and can be seen as prioritising some victims over others (“Coalition for the ICC”, 2022).

The establishment of the Trust Fund as well as the budget allocation for Ukraine both appear to disproportionately benefit the latter and compromise prosecutorial independence. Upon further examination, the Prosecutor’s assertion that voluntary contributions are not earmarked for specific investigative activities, and his own admission that Palestine’s case was underfunded when accepting the Belgian contribution suggests that the overall outcome was not one of deliberate neglect. Ultimately, these results challenge simplistic narratives about Western bias, as Belgium’s contribution for Palestine suggests that claims of donor discrimination are not necessarily unilateral or one-sided.

Nevertheless, in addition to these resource disparities, the deployment of investigators *en masse* to Ukraine compared to the weak field presence in Palestine similarly suggests uneven prioritisation. According to the statements, country visits in the former are uncontroversially characterized as having engagement with victims, officials, and the establishment of a country office. Inversely, the sole visit in Palestine featured limited engagement with Palestinian victims compared to Israeli counterparts.

This disparity in access becomes particularly significant in light of documented efforts by Palestinian human rights organisations to secure prosecutorial visits for years prior to October 2023 (Meloni, 2023). Despite these persistent requests, the Prosecutor remained unresponsive until an invitation was extended by Israeli victims, suggesting reactive rather than proactive engagement with the situation. The institutional prioritisation implied by this pattern prompted several prominent Palestinian human rights organisations, including Al Haq, the Palestinian Centre for Human Rights, and Al Mezan, to decline meeting with the Prosecutor during his West Bank visit, explicitly citing their long-ignored requests for engagement as the basis for their protest (“Palestinian rights groups”, 2023).

Further, it also confirms that these visits, far from simply being symbolic showings to placate the public, are actually valued initiatives considered by on-the-ground stakeholders to be indicative of institutional commitment. In this vein,



the allocation of ten minutes to Palestinian testimonies compared to extensive engagement from Israeli victims suggests a variance in institutional responsiveness that cannot be explained by structural constraints or security challenges alone.

While many of these inconsistencies can be chalked up to the limitations imposed by the occupying power in Gaza, and the continued blockade at the time of writing which impede the fulfilment of visits and investigative abilities, the accumulation of such factors reinforces the impression of more reticent engagement by the Office. This accumulation of inconsistencies across procedural dimensions, including the timeline, resource allocation, and field engagement, suggest systematic differences in treatment that extend beyond any case-specific constraints or variables.

This study certainly recognizes that individual variations could be explained by factors such as accessibility of terrain and state cooperation, but in this case, the consistent pattern of expedited treatment for Ukraine, when compared to the delays faced by Palestine, suggests that the Court's commitment to equitable justice is applied unevenly. Furthermore, the influence of collective state mobilisation, voluntary funding mechanisms, and degrees of prosecutorial responsiveness all point to potentially institutional vulnerabilities that compromise the principle of equal treatment. These patterns, while admittedly not absolute, establish a quantitative foundation for examining whether such inconsistencies are reflected in the institution's public discourse. That is the object of our upcoming section focused on narrative framing and prosecutorial rhetoric.

### **Discursive Divides: Colonial Echoes?**

The procedural and resource inconsistencies highlighted in the previous sections do not occur in a vacuum, but rather they are subtly carried by distinct discursive choices. As demonstrated below, the adoption of a specific narrative regarding the sequence of events, the selective application of moral language, and the presentation of a "terror" vocabulary, collectively risk reproducing the colonial legacy of international law.

The consistent sequencing in the Palestine context, which casts Palestinian actions as the primary instigator and Israeli actions as responsive, is particularly noteworthy. As Aydogan reminds us, questions of international responsibility require engagement with the ‘continuous tale’ and the ‘historical continuum’ rather than the selective isolation of events divorced from their colonial and structural antecedents (Aydogan, 2024). While the October 7th attacks were undeniably significant, this narrative tends to de-emphasize the broader, decades-long context of occupation and alleged antecedent crimes. It also contrasts sharply with the Ukraine discourse, where the 2014 Russian actions are consistently invoked as the foundational context, effectively framing the subsequent full-scale invasion as an escalation of pre-existing aggression, rather than an isolated event.

This imbalance in the sequence of violence is further amplified by a difference in the tone used to describe each side. Describing the actions attributed to Palestinian perpetrators, Khan employs moral qualifiers that do not correspond to crimes in the Rome Statute: “atrocities”, “calculated cruelty” “unconscionable”, “hatred”, “horror”, and “terror”. In contrast, Israeli violence is never labelled with such a moral condemnation. When addressing alleged Israeli crimes, Khan’s language reverts to a more technical, legalistic tone, often framed as calls for compliance with international law rather than explicit moral condemnations. For instance, in his October 30, 2023 article, after detailing the “calculated cruelty” of October 7th, he presented Israeli actions as follows: ‘I also stressed that it is critical that all parties comply with international humanitarian law. In Gaza, I have seen a lot of destruction... We are also investigating any crimes allegedly committed in Gaza.’

The Prosecutor further emphasizes the existence of lawyers employed in the Israeli military: ‘Israel has trained lawyers who advise commanders and a robust system intended to ensure compliance with international humanitarian law’ (ICC Prosecutor, 3 December 2023). This reference attributes a certain level of presumption of legality to Israeli activities since it implies that all military operations are conducted following a genuine and rigorous review by independent and impartial international lawyers. As Lavinia Parsi observes in her recent work

*Fabricated Legality*, 'in front of equally apparent violations of international criminal law, the hegemonic power is treated as a peer, while the oppressed indigenous is not offered the right to prove themselves not guilty, but rather silenced in a dehumanizing assumption of guilt and inherent evil' (Parsi, 2024: 29).

Such a difference in tone is problematic as it reinforces the hegemonic narrative of the Western world that delegitimises the struggle of the oppressed and colonised. In early modern times, international law was regarded as an exclusive tool for the 'civilised' European nations. Non-Europeans were labelled as uncivilised, primitive, inherently violent, and incapable of self-governance or forming political structures. As a result, they were excluded as actors in international law and subjected to governance and subordinated (Anghie, 2005: 55). This justified genocidal violence against the colonised people on many occasions (Gurmendi Dunkelberg, 2025: 3).

The Prosecutor's characterisation of violence by Palestinians and Israelis risks reproducing this narrative. The way the Palestinian violence is framed by the Prosecutor contributes to the Israeli narrative portraying them as barbarous people who deserve to be disciplined through almost unlimited violence. As Samour and Tzouvala put it, the ongoing Israeli violence in Palestine can be explained 'if we acknowledge the purchase of narratives and imaginaries that treat Arabs and/or Muslims and other racialized people as inherently violent, "human animals", as permanent threats to 'Western values' and lives (Samour and Tzouvala, 2023).

In particular, the 'terror' narrative employed by the ICC Prosecutor closely mirrors Western portrayals of Palestinian resistance for political purposes (Florijančič, 2025). The term is politically charged, and its use is a political choice rather than a legal necessity. As Aboufoul clarifies, 'the Rome Statute does not recognize "terrorism" as a crime and 'legally speaking, this term has no place at the ICC'(Murphy, 2023). Again, this narrative casts Palestinians outside the bounds of civilisation, depicts them as 'savages', (Mutua, 2001) and therefore creates a discursive foundation for the notion that Palestinians deserve the violence inflicted upon them. This effectively puts them outside the protection of law (Mégret, 2006).

While the Prosecutor commendably resisted the pressures by seeking warrants against Israeli leaders, his simultaneous adoption of dehumanising language in certain situations demonstrates how insidiously these colonial narratives persist, even within the institutions proclaiming to ensure universal justice. It suggests that even when the Court attempts to challenge impunity at the highest levels, it can struggle to escape the narratives that distinguish between victims worthy of law, and victims worthy of moral condemnation.

This linguistic imbalance appears to confirm the criticism that the Court maintains a hierarchy of suffering and culpability. Indeed, these pronouncements are not merely neutral expressions of legal developments, but performative acts that construct narratives, frame victimhood and perpetration, and signal institutional priorities. The application of different rhetorical standards to different conflicts, particularly those involving Western allies versus those involving non-Western actors, threatens to further undermine its own perceived impartiality, and inadvertently reproduce colonial patterns in which violence by Western-aligned powers is framed as rational, legal, and regrettable, while violence by non-Western or non-aligned actors is framed as emotional, moral, and condemnable.

## Conclusion

This study sought to determine whether the decades-old accusations of double standards against the ICC could be tested through empirical analysis. In an attempt to move beyond theoretical critiques, this comparative study of the Ukraine and Palestine situations sought to ground the debate in the procedural and discursive practices of the Office of the Prosecutor. The findings reflect an image that is more complicated than a simple narrative of bias, while still confirming the existence of inconsistencies in the application of international justice.

That is to say, the evidence does not suggest that the ICC operates on a crude binary, where one case receives pristine treatment while others are neglected. Instead, the double standards manifest, at times, in more subtle forms. Ukraine, for instance, occasionally receives exceptional treatment, most notably in the speed with which its investigation was opened, or the number of investigators

deployed. The remainder of the treatment, such as the timeline for the issuance of arrest warrants aligns with a more standard (though, still relatively efficient) administration of justice.

Palestine, in contrast, has been characterized by consistently unfavorable treatment across virtually every metric: the third-longest delay from referral to investigation, and one of the longest from investigation to warrant application, the lowest initial budgetary allocation, as well as a reactive terse field visit.

Ultimately, the most consistent double standard lies in the realm of discourse, where the Office's language constructs two different realities. For Ukraine, the narrative is morally unambiguous aggression. In Palestine, the narrative used decontextualizes violence, de-emphasizes Palestinian victimhood, and features language that echoes the colonial vocabulary of savage versus civilized subjects. This is where the critique of the ICC reproducing neocolonial frameworks can find its strongest empirical footing, as none of these differences can be explained by legal or factual distinctions between the conflicts.

Still, this bleak picture is complicated by the Prosecutor's willingness to seek arrest warrants despite a powerful campaign of intimidation and immense political pressure, including direct threats of sanctions, all of which led to his temporary removal from the role ("ICC prosecutor steps aside", 2025). This dedication to issue the warrants despite the controversies generated suggests that the overall image is not black or white, but rather that neocolonial discourse can emerge even in well-intentioned contexts.

This paper's methodological approach, which combined quantitative analysis with qualitative discourse analysis underscores the value of such empirical studies for the legal field. It demonstrates that critiques of international law do not need to remain in the realm of theory, but can move to concrete assessments of how justice is performed and administered.

At the risk of ending on a grim conclusion, the issuance of sanctions against ICC judges as well as the Office of the Prosecutor, and the temporary suspension of Karim Khan at the time of writing are the source of great concern for any enthusiastic supporters of equal justice. In truth, the author of this paper debated

whether to publish this critique at all, both fearing that levying criticism against a Prosecutor at the very moment he faced unprecedented attacks for attempting to take a principled stand to administer justice would be counterproductive.

Ultimately, however, this research was pursued not as an indictment, but as an attempt to point out, through evidence-based analysis, the gaps that need to be closed for the ICC to come closer to its universalist aspirations. The Court's greatest defense against external accusation is its own impartiality. The inconsistencies identified in this paper, especially those revealing colonial echoes in its discourse, are vulnerabilities that should be considered by proponents of the Court if they wish to insulate it from criticism.

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# The Controlled Disorder as a USA Transitional Strategy toward Multipolarity

Admir Mulaosmanović

**Abstract:** This paper attempts to show the deliberate and systematic actions of the world superpower (USA) in creating a state of controlled chaos. The reason for such an approach lies in the inevitable change in global relations in which the superpower must define its new position and prepare for the near future in which it no longer has a dominant role. This discourse can be used to analyze the reasons for the war in Ukraine, as well as the reasons for the rise in tensions on the great dividing line between East and West. Considering that the established global order is slowly disappearing, and the emerging new multipolar world is increasingly showing signs of strength and vitality, all this opens the door to a general rethinking of future relations. The already disavowed international law and unclear international order are a factor in increasing insecurity throughout the world, while the double standards that have become a basic feature of the Western democracies speak of the serious problems that global politics has fallen into. Additionally, American militarism intertwined with concept of inalienable rights hardly works as universal value anymore. "America first", Trump's slogan, can and should be understood in this sense as a return to the isolationist policy, but also to exploit all the opportunities that brings the benefits to US, and not as a necessary call for remaining in the position of a superpower.

**Keywords:** Multipolarity, Chaos Theory, International order, USA

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## Introduction

The collapse of liberal internationalism, as a promise and concept of promotion of democracy and a “rules based international order” happen very quickly. Failures in liberal trademarks such as military intervention and nation-building, primarily in Afghanistan, Syria and Libya proved that liberal internationalism’s collapse has accelerated, but also the decline of Washington’s global power is factual too.

Although it is still more acceptable than Russian autocracy or “socialism with Chinese characteristics for the new era” over decades, it lost power and credibility. Although the foundation of liberalism is rooted in aim to protect life even in foreign, non-liberal, undemocratic environment, it has become a battle over values in which liberalism must prevail. This predominance of ideology over life and humanity, most of all, has been lately demonstrated in Gaza after October 2023, when Western governments officially and almost unequivocally supported Zionist genocidal campaign.

The emergence of polycentrism in the global affairs also affects the whole Balkans. The idea that the entire European continent, due to the visible loss of its global position, can be a space of polar non-belonging, is gaining its proponents. Unstable governments in Bulgaria as well as the growth of autocratic sentiments in Romania, Serbia and most Central European countries contribute to strong socio-political movements in this European space. As successful as the Euro-Atlantic integrations have been in the last thirty years, so many questions have popped up over the heads of many about the future.

Of course, the possible emergence of non-polarity in Europe depends on the political choices of the main protagonists, and future development will depend on the evolution of the role of the US at the global and European level, the ability of the EU to overcome the current crisis and the stronger development of forms of international action.

This would not necessarily mean non-polarity. A stronger European presence within NATO and less dependence on the US could be one of the solutions. The current tensions over Trump’s goal to take over Greenland and impose high

taxes on EU countries are the beginning of a serious reconsideration of the future relations between the EU and the US. In this regard, despite the chaos that arose between the EU and Russia after February 24, 2022, the announcement that EU countries could start buying more gas and oil from Moscow again speaks for itself.

The main conclusion of this discussion is, therefore, the need to face the reality of new international relations and, based on those relations, to define new general international standards. Otherwise, the state of tension and rejection of redefinition will lead to further deepening of the conflict with more serious consequences.

Deep global problems are dramatically changing relations of world great powers. On the other side, their real aims and intentions are still covered by the mist of current geopolitical processes. The idea that global actors are in the process of repositioning themselves within the order rather than advocating a fundamentally different project organizing international relations also makes sense (Alcaro, 2018: 166). But, this, too, is an additional argument to the inevitable change in the global politics.

The new global realities such as the shortage of food, lack of energy sources or lack of ambiguous efficiency of the United Nations (UN), have a strong impact on humankind. "War for medical equipment" and battle for vaccines during pandemic Covid-19, have directed nations toward an anxiety on how it will look like when the most fundamental needs such as food stuff become a tool in geopolitical arena. Indeed, for certain period of time food, as appeared in Ukrainian grain case, became a geopolitical tool in 2022, and again in the mid-2023.

At the first place, the crisis of liberal hegemony i.e., dictatorship of liberal paradigm causes these changes by allowing hectic positioning of the world powers for the projected future order (Mulaosmanovic, 2024: 251). China was strongly convinced about it in 2016 when Brexit happened and Trump, as bearer of isolationist policy instead of liberal universalism, became the US President. While the liberal order has been remarkably successful in certain ways, as Colgan (2019: 85). Argued, it has also become self-defeating due to deepening economic

inequality and policies that stemming from this, and partly due to the missteps of complacent elites, so that 2016 shook many supporters of liberalism.

Pursuit for liberal hegemony, as a main characteristic of the US foreign policy during Cold War period inevitably started to pale (Doshi, 2021: 307). Partial revitalization of NATO and Western unity due to war in Ukraine stopped some of the tendencies within the developed Northwest, but time-consuming geopolitical battle already creates cracks in that communality. On the other side, economic and financial flows are threatening to end the hegemony of US dollar as a global currency what also could have deep impact on Western alliances.

## Theoretical Framework

The theoretical framework of the paper is based on a somewhat different way of thinking about reality as such. Namely, due to the initial thought of the current feverish transition process that brings about a change in the general paradigm but also a strong redefinition of the world order, chaos theory and the theory of ontological uncertainty are intertwined and form the backbone of the text. Although chaos theory comes from the field of natural sciences, it has also had its application in social sciences, especially in the context of business strategy and the issue of the evolution of complex organizational relationships and organizational control of joint actions. At the end of the 20<sup>th</sup> century, it was seriously analyzed and written about by (social) scientists gathered at the Fernand Braudel Center (Ekeland, Prigogine, Birken), citing the growth of its importance in the future.

Chaos theory, which suggests that new, more complex organizational forms will appear more often, also seems adequate in studying the current “mutation” of the world order, i.e. it can be one of the attempts to explain the state of the international order in which we find ourselves (Levy, 1994: 171). The ability of this theory to demonstrate how a simple set of deterministic relationships can produce patterned but unpredictable outcomes is not limiting. Since chaotic systems do not return to the same state while outcomes, despite their unpredictability, are bounded and form patterns, it can be used to understand the behavior of certain agents.



The key point here, since chaotic systems are deterministic and have a determining equation that governs their behavior, is the behavior of the agent (US) who understands that he is in a state of chaos and that he has the opportunity to extract the necessary benefits from it. In the language of theory, US is an equation that has the tools to govern the behavior of the system. The question of the system, its behavior, survival or redefinition, therefore, is paramount in the behavior of a global power. In conditions of relative equilibrium, subsystem (ethnicities, races, politics, economics, agencies, businesses, churches, institutions could all constitute subsystems and all are interacting with one another while their interactions constitute even more subsystems) small differences do not affect the prevailing state of general equilibrium. However, in turbulent states that are far from equilibrium, there are conditions of exceptional sensitivity and potential adaptation due to the imbalance and influence of these sometimes-small differences. A random combination of subsystems can become so powerful as to disrupt order and equilibrium. At this moment ("singular moment" or "bifurcation point") it is impossible to determine in advance in which direction the change will take: whether the system will collapse or become a new, more differentiated higher level of order and balance (Seiter, 1995: 85).

But there are positive and negative feedback loops as a mechanism that maintains balance. Seiter is arguing (1995: 86) that "Under acceptable conditions, society constitutes a dynamic mix of balanced negative and positive feedback loops. In times of relative stability, the positive loops are held in check by the negative, and taken together they constitute those seemingly insignificant subsystems (...) All possible subsystems and their permutations are engaged with one another in a seething, boiling, cauldron of activity teeming with possibilities". The idea of the article is, therefore, that America has the possibility of relative control of feedback loops in a complex and at the breaking point "global society".

The logic of imperial decline, which is a kind of companion of highly developed societies, is a constant reminder of the inevitability of change in which those who are higher will descend to lower ranks (James, 2014: 38). It is precisely this

understanding of one's own position and concern for the "level and strength of possible decline" that opens up space for securing one's future position, not only in the physical sense but also in the ontological sense. The lessons of history serve precisely to understand possible scenarios and how to make them as acceptable as possible.

In this regard, the thinking of Brent Stephens was also used, who introduced the concepts of the Retreat Doctrine into the polemic about American isolationism, such as foreign policy freelancers (in the context of current international relations, they can be understood as states or even non-state actors who behave unpredictably, autonomously and independently) but also suprasystematic unpredictability. Suprasystemic unpredictability, which is both the cause and the main characteristic of the coming global disruption, overwhelms our systems and damages the reference points by which we usually consider the world. (Stephens, 2014:144). Suprasystemic unpredictability in this work is umbilically connected to chaos theory. It is possible to imagine that Donald Trump and everything he represents is precisely suprasystemic unpredictability or as its face.

Ontological in/security, on the other hand, would be a common characteristic of global powers that found themselves in tense confrontation in wider world areas. Ontological security, as Krasnodebska (2021: 137) argues, is rooted in a stable and consistent set of narratives about oneself and one's environment, which constitute the ways of orientation, through which an individual makes sense of the world. After Giddens' groundbreaking work in 1991 (*Modernity and Self-Identity: Self and Society in the Late Modern Age*), this subdiscipline within IR theory emerged as a valuable explanatory framework.

The conditions of globalization have certainly led to anxieties and identity crises, which have led to an increased likelihood of conflict and violent action. Globalization has also liberated collective traumas and ethnic conflicts, while migrations have opened up a large space for security and identity analyses. All of this has played an important role in explaining how global and regional actors have reacted to the post-Cold War unipolar hegemony and its end. Actors, as interpreted by Kinnval and Mitzen (2017:4), are considered ontologically secure when they feel that they have a sense of biographical continuity and wholeness

that is supported and recognized in and through their relationships with others. When the relationships and understandings upon which actors rely are destabilized, on the other hand, ontological security is threatened, and the result can be anxiety, paralysis, or violence. Globalization and the hegemony of liberalism have led to such difficult experiences all over the world.

While Russia and China perceived globalization, among other things, as an ontological threat and accordingly built mechanisms and even took aggressive steps to protect it, the EU and the US also felt a similar insecurity. Both due to the strengthening of authoritarianism in the East, which began to spill over into the liberal world, opening space for populist and right-wing forces, and due to the loss of one's own credibility, the protection of "European values" and "our way of life" (especially after 9/11/2001, reaching its peak with Trump) has jumped to the top of the political agenda.

The great financial crisis of 2008 also opened up big topics between the strongest actors of the international order. Narratives are activated as well as concepts that are imagined as their results (Russian world, Turkish world, Let's make America great again, Socialism with Chinese Characteristics for a New Era, etc.). The brilliant conclusion drawn by Stephens (2014: 167–168) back in 2014 still resonates and testifies to the deep awareness of many in USA about the coming change. It also testifies about understanding that it is an open process with a number of unknowns. It, at the end deals with the possibility of predicting future steps, that is, the control of the already mentioned feedback loops.

Yet as the American retreat becomes increasingly noticeable, adversaries sense a strategic opening to revise regional, and global, order in a way that's more to their liking. And our allies are forced to consider their security options in ways they haven't for many years, comfortable as they were under the U.S. security umbrella. This creates a geopolitical environment that is less predictable, less manageable, and potentially more violent. To compound the problem, non-state actors are increasingly capable of using limited means to profoundly alter the international security landscape. And the very concept of "state" is in many places collapsing

Ultimately, international relations are the study of interpretations. The hermeneutics of international relations reveals the possibility of multiple interpretations and it is not possible to single out the version of the most authentic interpretation that can explain international politics. (Putra, 2023: 10.) Therefore, no existing theory can explain everything completely because interpretations will continue to develop and multiply. In a complex globalized world, at a time when the supporting elements of the international order are breaking, this perspective is a brick in the wall that can remain but also be changed due to own porosity.

## **The Market Crises**

Economic flows after 2008 have increasingly become a means of manipulation and pressure on the entire global system. No matter how tense the claim of former Greek Finance Minister Varoufakis about the end of capitalism (at least as we know it) and the beginning of the era of technofeudalism may seem, with the second term of Donald Trump, this matter is also taking shape, especially due to the role of Elon Musk (Head of the Department of Government Efficiency/DOGE) in the new US administration.

Hypothesis that capitalism is dead (its dynamics no longer govern our economies) and it has been replaced by fundamentally different technofeudalism mainly based on two developments – the manner in which Western governments and central banks responded to the 2008 great financial crisis and the privatisation of the internet by America's and China's Big Tech (Varoufakis, 2023: 8-9).

Indeed, the privatization of the internet by Big Tech companies in the United States and China has had profound effects on the global market, reshaping industries, economies, and geopolitical dynamics. Google, Amazon, Meta, Apple, and Microsoft have become global leaders in search, e-commerce, social media, hardware, and cloud computing so their dominance has allowed them to set global standards for technology, data governance, and digital services. Chinese Companies like Alibaba, Tencent, Baidu, and Huawei have expanded their influence too, particularly in Asia, Africa, and other emerging markets. They

dominate e-commerce, mobile payments and telecommunications infrastructure, often using state support, which provokes strong reactions from Western countries due to serious economic imbalances.

It is quite clear that the privatization of the internet has led to oligopolistic control, with US and Chinese firms capturing the majority of global market share in key sectors. This argument put forward by Varoufakis not only “holds water” but also proves to be stronger as time goes by. These companies often set *de facto* standards for technology (e.g., 5G, AI, cloud computing), forcing other countries to align with their ecosystems while that success has led to significant wealth accumulation, exacerbating global economic inequality.

This process has created a double-edged sword for the global market. While it has fostered innovation, economic growth and connectivity, it has also led to market concentration, geopolitical tensions and inequality. The continued growth of the influence of these tech giants faces the challenge of balancing innovation with regulation, competition and equality in the digital age by governments of many countries as well as international organizations.

The segment that talks about the impact of the privatization of the Internet is perhaps best described and concluded by Varoufakis (2023: 88) with the following statements.

But the technologies that spawned cloud capital have proved more revolutionary than any of their predecessors. Through them, cloud capital has developed capacities that previous types of capital goods never had. It has become at once an attention-holder, a desire manufacturer, a driver of proletarian labour (of cloud proles), an elicitor of massive free labour (from cloud serfs) and, to boot, the creator of totally privatised digital transaction spaces (cloud fiefs like amazon.com) in which neither buyers nor sellers enjoy any of the options they would in normal markets. As a result, its owners – the cloudalists – have acquired the ability to do that which the Edisons, the Westinghouses and the Fords never could: to turn themselves into a revolutionary class actively displacing the capitalists from the top of society’s pecking order. In the process, the cloudalists – some consciously, others unthinkingly

– have changed everything that previous varieties of capitalism had taught us to take for granted: the idea of what constitutes a commodity, the ideal of the autonomous individual, the ownership of identity, the propagation of culture, the context of politics, the nature of the state, the texture of geopolitics.

## **New Approach**

More significant strategic shifts started to occur in 2019. Specifically, in early August, the United States officially withdrew from the Intermediate-Range Nuclear Forces Treaty, an agreement with the Russian Federation that limited the types of weapon systems that participating countries could use. All of this made the already difficult and tense situation in Ukraine and the Black Sea region even more complicated and challenging. After the COVID-19 pandemic, it became evident that relations between NATO and Russia were increasingly deteriorating and Russia's renewed strike in February 2022 brought the world to the brink of nuclear war. Even Europeans started to question their own position toward Americanization.

Pluralism was given up in favor of hegemonic liberalism, an “era of imitation” started. The core tenet of the imposed model of imitation, as Schultze said (2020: 27), was very simple – adopting the Western model would speed up the process of institutional democratization and economic, social, and cultural modernization. Therefore, phrases such as democratization, Europeanisation, and membership in the European and transatlantic communities were the catch words of the process, albeit overshadowed by assimilation to Americanism. The emancipation from imitation is leading to the inevitable overthrow of today's quasi-unipolarity because that system, and more and more states are freely expressing their views in such manner, is fully satisfactory only to the United States (Dale Walton, 2007: 103).

Nevertheless, the 21<sup>st</sup> Century has brought a series of new opportunities to the rising powers, but also difficulties to the global authority (USA). Strategic withdrawal under the pressure of “imperial overstretch” led US foreign policy to new

concept, emergence of Anglo-Saxon alliance and treatment of EU as a partner suitable for role of keeper of US interests toward Eurasian powers.

Such a development is not promising for the EU, but could be pleasant for the US. The increased geopolitical game between different integration initiatives should not result in a coherent political unification, but surely it is not something that West, liberal democracies, should cheer up. There are no key benefits from it for liberal order. Instead of political unification, multipolarity emerges as a disharmony, period in which new axial poles are going to be created with their own worldviews and values. It is precisely in this disharmony that the goals of the USA can be seen. And this is actually what Dale Walton prescribed (2007, 104):

Washington should have two central foreign policy goals in the next two decades. First, it must strive to bring about the development of a healthy multipolar system in which it remains the world's greatest single power. Second, it must seek to ensure that it does not become a victim of the Revolution in Strategic Perspective, failing to adapt to the changing character of the international order. The first task is the easier of the two, as a healthy multipolar system appears to be developing even without significant American guidance.

Controlled chaos actually offers them the possibility of minimal investment in regions where until recently they gave a lot of resources. By leaving them in the intermediate space with the already established levers of dependence on Washington, the future US rulers have room to maintain its own hegemonic model through isolationist policy.

As a successor of previous Soviet Union, Russia had to deal with economic instability and loss of position not only at the global level but also among former allies. Russian strategists logically saw the consolidation of American power at the end of 20<sup>th</sup> Century and the expansion of NATO as part of Washington's grand plan to "surround" Russia. But surrounding was not a goal, rather it is a tool for further disintegration of Russia what former US vice president Dick Cheney (2001-2009) explicitly confirmed (Norton, 2022).

After the collapse of the Soviet Union between the Baltic and Black Seas (former communist countries and the region where Iron Curtain was established between East and the West), a continuous chain of NATO member states was established, Moscow could no longer count on being able to extend its military power to the Adriatic Sea too. Indeed, the situation in Southeast Europe was/is linked to the Russian-US confrontation in the Caucasus and Central Asia. To all of that Russia has reacted with intensified efforts to regain an influential position in global politics.

Considering the main competitors, the USA, Russia, China and the EU, it would be important to theoretically define a unifying position for all of them. Ontological in/security (OST) would be a common characteristic of these global powers that have found themselves in tense confrontation in wider world areas. Ontological security, as Krasnodebska (2021: 137) argued, is rooted in a stable and consistent set of narratives about oneself and one's environment, which constitute modes of orientation, by which an individual makes sense of the world. Following Giddens' groundbreaking work from 1991 (*Modernity and Self-Identity: Self and Society in the Late Modern Age*) the subdiscipline within IR theory emerged as a valuable explanatory framework.

It is not necessary, as is claimed, that actors are more prone to anxiety and identity crises under conditions of globalization, which makes violence and conflict more likely, nor that the collective traumas, ethnic conflicts, securitization of migration, and prevailing discourses of terror, liberated by globalization, open up space for the analysis of ontological security (Kinvall and Mitzen, 2017: 5). All of this of course plays an important role, but in this context it is more significant how actors reacted to the post-Cold War unipolar hegemony and its end.

While Russia and China experienced globalization, among other things, as an ontological threat and accordingly built mechanisms and even took aggressive steps towards protection, the EU and the USA also felt insecurity. Both because of the strengthening of authoritarianism in the East, which began to spill over into the liberal world, opening up space for populist and right-wing forces, and because of the loss of own credibility, the protection of "European values" and "our way of life" jumped to the top of the political agenda.



Given that the great financial crisis of 2008 also opened up major topics between the strongest actors of the international order, as Subotić (2016: 611.) says, precisely in times of major crises and threats to multiple state securities (physical, social, as well as ontological), narratives are selectively activated to provide a cognitive bridge between policy change that addresses the challenge of physical security (for example, secession of territory), while at the same time preserving the ontological security of the state.

## The Beginnings

In January 21, 2007, during a joint press conference with German Chancellor Angela Merkel in Sochi, after discussion on world order and particularly the case of Kosovo, Russian President Putin said that, in his opinion, it was “more about non-compliance with the basic principles of international law”. The Russian president, referring to Yalta conference, reminded how the great powers “divided the world” after the Second World War. “Now those who feel like Cold War winners want to divide the world to their will”, he said. However, Russia will not accept “decisions being imposed on it”. In fact, Russia was already determined to be very active in future crises (President of Russia, 2007a). Soon the cases of Ukraine and Syria made this clear too.

Putin’s speech at 43<sup>rd</sup> Munich Security Conference in 2007 when he directly stressed that the unipolar model is not only unacceptable but also impossible in today’s world also is a milestone in the beginning of the global order erosion: *“Today we are witnessing an almost uncontained hyper use of force – military force – in international relations, force that is plunging the world into an abyss of permanent conflicts. As a result, we do not have sufficient strength to find a comprehensive solution to any one of these conflicts. Finding a political settlement also becomes impossible”*, he added leaving no space for Russian position in the future (President of Russia, 2007b).

Diplomatic debates over Kosovo’s status led Putin to repeatedly announce that he would recognize the independence of seceded areas in the former Soviet republics if the West insists on Kosovo’s independence. South Ossetia and Abkhazia in Georgia, Nagorno-Karabakh in Azerbaijan and Transnistria in Moldova

were mentioned. After a brief military intervention in Georgia in the summer of 2008, Moscow has fulfilled its announcements regarding the secessionist areas of its southern neighbor.

However, due to the recognition of South Ossetia and Abkhazia, the credibility of Moscow's frequent assurances about the necessity of strict adherence to international law was lost. After the war in Georgia, Russia's position on Kosovo could no longer be interpreted as principled because Moscow itself deviated from the norms of international law in the Caucasus. Russia has responded to such criticism by pointing out that Russia's actions in the Caucasus are only a "mirror" of the Western way of acting.

China on the other hand was very focused on its own goals. Consecutive strategies of displacement were created to confront US influence and dominance. Second strategy (2008–2016), had more serious goals related to wider region - it sought to build the foundation for Chinese regional hegemony (Doshi, 2021: 157). Launched after the Global Financial Crisis in 2008 it led Beijing to see US power as diminished and emboldened. Surely it helped Beijing to take more confident approach. With the invocation of "great changes unseen in a century" following Brexit, Trump-Biden traumatic mandates, and the coronavirus pandemic, China already launched a third phase, one that expands its blunting and building efforts worldwide to displace the United States as the global leader (Doshi, 2021: 304).

### **Russian Invasion of Ukraine**

These approaches by Russia and China give a fruitful insight into the multipolar future of global politics. This kind of understanding and interpretation should certainly question the Russian invasion of Ukraine and what it brings to global politics. Russia is imposing its concerns about Ukrainian aim toward NATO membership since 2008. It was the most important reason to support former Ukrainian President Yanukovich (2010-2014) who was against Ukraine's Nato accession and acted pro-Russian role.

Political turmoil in Ukraine finished by successful integration of NATO aspirations in Ukrainian Constitution (2019) followed by Brussels Summit (June

2021), when NATO leaders reiterated the decision that Ukraine would become a member of the Alliance. In that same period Ukraine and NATO forces launched joint naval drills in the Black Sea (Sea Breeze 2021) what signaled Moscow that strong reaction is needed. It was the “red line” issue for Russia (“Black Sea Drills”, 2021).

An expansion of NATO’s presence in Ukraine, especially the deployment of any long-range missiles capable of striking Russian cities or defense systems is seen as a biggest threat. More than that, through development of crisis, Russia is probably trying to make Ukraine a turning point and provide even stronger support in Central and Eastern European countries by creating a wide buffer zone between East and the West. It is not without importance that states in that belt are former communist countries. Whether that means the beginning of a new Cold War, creation of new Iron Curtain, is less important. What is more significant is Russia’s aspiration to raise its own stake as a global stakeholder.

Joint appearance of China and Russia certainly speaks of the inevitability of re-defining the international order. Proponents of Yalta 2.0 are increasingly loud in advocating it while those problems are piling up. In addition to processes that carry tension and conflict, the multipolar world is still trying to figure out solutions that will ensure peace. That peace, it is clear, cannot be achieved by maintaining the ideological and cultural supremacy of the West. True acceptance of diversity will be a precondition for overcoming the crisis, which means that different socio-political arrangements, cultural patterns, and traditions will not be disregarded from the position of liberal hegemony. It must be accepted as such.

It seems that China would like to achieve a balance of power. For that purpose, main tool China uses is geoeconomics, the use of economic instruments (from trade and investment policy to sanctions, cyberattacks, and foreign aid) to achieve geopolitical goals. This geoeconomic strategy harkens back to Sun Tzu’s maxim: “Ultimate excellence lies not in winning every battle, but in defeating the enemy without ever fighting.”

Ukrainian crisis is a sign of new reality, the path to new world, the emergence of new global politics and the continuity of same old problems – how world will be ruled and who is going to be in charge. All that is happening in the Sahel region

in Africa, aggressive attacks by new US Administration on Panama Chanel, Greenland and Canada, and then in the area of Palestine and Israel, are an additional argument to this position.

The Ukrainian model, as a Pentagon pilot project at the time of the great debate about the Two-War Strategy, offered the United States valuable insights. For approximately 20 billion dollars, the United States has so far managed to help Ukrainian forces defend their territory and thus decimate the Russian army, its second most formidable military opponent. The full cost of the war to the United States is slightly higher, as it includes humanitarian aid to Ukraine and the cost of an additional 20,000 troops in Europe to bolster deterrence on NATO's eastern flank. Even the total of \$100 billion allocated by Congress is not much because Ukraine provides a model for what could look like a reasonably cost-effective way to fight another conflict in the future.

And here, in fact, the strategic determination of the USA, which dominantly wants to get as many proxies as possible in a wider area, is quite clearly shown. In addition to cost savings, the Ukrainian model also offers strategic flexibility. American policymakers should avoid direct American military intervention for several reasons, as a large-scale conventional conflict would almost certainly be a bloody affair, while building capabilities for indirect combat at the very least provides another positive option for Washington (Cohen, 2023).

Recently, the growing importance of small and medium-sized countries has been undeniable. Global powers will have to listen to them and to please them. As Ongur-Zengin (2016) rightly argues: "Wannabe hegemons (...) are those countries whose rise into the position of international decision-makers is seen as threatening to the status quo. That said, their unique material capabilities in regard to production, demographics, etc., make them important agents for the continuation of the world order". But it is to discontinuation also.

The Hungarian case in EU and Orban's "wayward son policy" is good example of it. Mexican rejection to participate in Summit of Americas which (the beginning of June 2022) is next significant case. President Andrés Manuel López Obrador was very clear that he cannot support President Biden's decision not to invite Nicaragua, Venezuela, and Cuba (Spetalnick and Graham, 2022). Both are

witnessing simple fact; redefinition of powers position has started, and it will last for a certain period.

To reach balance within the region (geopolitical body) and in second step to establish balance among regions will create huge space for different types of negotiations and agreements. Along with the geoeconomics the role of diplomacy has to be increased. Anglo-Saxon world initiated these processes by creation of AUKUS, Russian Orthodox Pan-Slavism for 21st Century is ongoing process under concept of Russian World and its variants, and Chinese positioning in Eastern Hemisphere as a main power, especially in Indian Ocean (The White House, 2022).

The formation of AUKUS (Australia, the United Kingdom and the United States) in response to China's rise was factual evidence, primarily for Europeans, that the focus had changed and that the time was coming for new types of alliances. On the other hand, the strengthening of NATO in the north by accepting Finland and Sweden should give the US a somewhat more relaxed position ("Colonel Lawrence Wilkerson", 2023).

Technofeudalism plays a major role in this, deepening already existing sources of instability and transforming them into new existential threats. The hyperinflation and cost-of-living crises that followed the pandemic cannot be properly understood outside the context of technofeudalism. (Varoufakis, 2023: 119.)

The combination of the birth of the Post-Columbian Epoch and the resulting return of multipolarity, and the ongoing and multiple technological revolutions, has created profound instability in the international system and, as Dale Walton (2007: 102) says, the quasi-unipolar system has already largely disintegrated, considering the international debate prior to the 2003 invasion of Iraq to be the "beginning of the end" of unipolarity.

European security, in this regard, has become more vulnerable. New developments have put the European Union in front of a series of political debates but also upheavals. Migrant crisis (2015) and Brexit (2016) were a strong call to Europeans to start thinking more seriously about their own military power. Old French idea (President De Gaulle) about European Forces drove President

Macron to support a joint European military project once again in 2017, while German Chancellor Merkel, in her address to the European Parliament in November 2018, said “we need to work on a vision of establishing a European army” (General Secretariat of the Council [GSOC], 2010).

## **What about global order?**

The current state of the international order is characterized by a complex interplay of cooperation, competition and fragmentation. It is shaped by changing power dynamics, geopolitical rivalries, and the challenges of globalization, technological advances, and transnational issues such as climate change, pandemics, and economic inequality. Some of the mentioned things can also be understood as megatrends that indicate fundamental changes in the international order.

Megatrends (French historian Fernand Braudel calls them conjunctures) often take decades to establish themselves and prove robust in the face of shocks or setbacks. They permeate all societies and areas of life, and last for several decades. Megatrends often develop their full impact and penetrating power only in their interaction (Stormy Mildner et al., 2023: 5). This Braudelian attitude is actually very significant for understanding the coming profound transformation that the current cycles and trends will produce. The question for the most of actors in international arena is not what kind of the world of tomorrow will be, grey or bright, but how to secure position and lesser dependency.

From 2014, Belarus, Ukraine, and Moldova are defined as an Intermediary Space sharing about three thousand kilometers of common borders with the EU and NATO and about two thousand five hundred kilometers with Russia, making their geopolitical exposure undeniable. Positioned within the strategic triangle of Russia, a less unified EU, and NATO led by the USA, it was concluded that due to the “centuries-long subordination of the Intermediary Space, today common characteristics inherent to this area emerge: unclear identities, deficits in democratic practices, a complicated, prolonged, and unfinished transition, economic lag, demographic problems - all of which favor the strategic ‘conquest’ of the Intermediary Space by the Kremlin” (Kuko and Kurečić, 2014: 7-28).

After what happened in Ukraine in 2014, especially with the start of the war in February 2022, regardless of the reasons the authors used, this conclusion has only gained strength. The whole Southeastern Europe region, is also not immune to impulses coming from the Eurasian space. The attempt of the NATO alliance to move its border to the Dnieper River, with serious opposition to the policies of the US and the UK, first by Hungary, and then by Slovakia, led to a series of political processes in this part of Europe (pro-Russian sentiments are on the rise in Bulgaria).

Taking all this into account, and especially with the increasing Turkish dissatisfaction with the attitude of Western partners towards Ankara, the question arises about the strategic goals of the Alliance, i.e., whether they are sufficiently profiled. The withdrawal from Afghanistan indicated the U.S. understanding that they were still faced with a great burden (imperial overstretch), but it also raised questions about the behavior of the former sole superpower in other areas.

Probably inspired by this example (imperial overstretch), the RAND Corporation has developed a report suggesting areas in which Russia can be stretched to make it more vulnerable and less dangerous. (Dobbins et al., 2019) They also delved into history and found such measures in the policies of US Presidents Jimmy Carter and Ronald Reagan, which included a massive strengthening of the US defense, the launch of the Strategic Defense Initiative (Star Wars), deployment of intermediate-range nuclear missiles in Europe, assistance to anti-Soviet resistance in Afghanistan, intensification of anti-Soviet rhetoric (the so-called “evil empire”), and support for dissidents in the Soviet Union and its satellite states. It is hard to imagine that the authors believed that Russia had not learned its lessons, but in the proposed scenario, one can see recent US political actions and obvious failures in this regard (It is fundamentally about predicting that Russia’s greatest vulnerability is its economy, which is relatively small and highly dependent on energy exports, and that this will completely weaken it).

The context opens up a big topic of a multipolar world and a new order. Things can go to the extent that even the entire European continent, due to a visible loss of position globally, can be problematized as a space of polar non-belonging

(which would mean rejecting the American security umbrella, advocated by French statesman De Gaulle and more recently). Hiski Haukkala has addressed this and stated that the possible appearance of non-polarity in Europe depends on the political choices of the main protagonists and that non-polarity in Europe is not inevitable. The future development will depend on the evolution of the role of the US globally and in Europe, the EU's ability to overcome the current crisis and develop stronger forms of international action, and the future conflict between Russia and the West (Haukkala, 2021: 381-399).

What is missing is a strong theoretical stance that would pave the way for the emerging world. We are witnessing a great fear, as it has always been in the past, of the unknown, so the recent world seems to us a good refuge to which we should return. However, it is evident that the creators of that world of yesterday have also left it and embarked on the adventure of building new positions and tools for preserving them.

The US foreign policy elite, which has long held a bipartisan consensus that global engagement is in America's long-term interest, has been torn between different opinions and is showing serious cracks in recent years. Liberal internationalists want to use the residual strength of the United States to co-opt rising powers to act as responsible stakeholders in maintaining global stability and the core institutions, regimes, and practices of the liberal order, while nationalists, on the other hand, embrace multipolarity and advocate for a complete normalization of American foreign policy, in which the country should abandon any pretense of leading the world and instead use its military and economic advantage to aggressively pursue 'better deals' than those in which it is currently supposedly engaged (Alcaro, 2018:154-5). Trump, especially at the beginning of his second term in the office, is doing just that; better deals are in his focus. How much it correlates with the two key goals of America's new isolationism is difficult to say at the moment, but it is not easy to dismiss the thought that it fits very well into the projected scheme.



## Conclusion

It is quite clear from the above that the Liberal International Order led by the US is collapsing, and the US from being a global superpower is increasingly taking an isolationist stance, as seen in policies such as “America First”.

Among other things, failed military interventions (e.g. Afghanistan, Syria, Libya) led to serious questioning of American power, both in Washington and in other parts of the world, which opened up space for the rise and greater visibility of advocates of multipolarity. The last decades shows that the global order is indeed changing (especially after 2016) and is moving from unipolarity (US dominance) to multipolarity, while China is already a power that has the capacity to structurally defy the hegemony of the West. While China uses geo-economic strategies to supplant the US as a global leader, Russia is slowly asserting its influence in Eastern Europe and Central Asia. The BRICS led by these two countries is quickly becoming attractive to many, and the expansion of this organization has become a matter of prestige.

The second, probably more important issue is related to liberalism as such. The credibility of the liberal order has been weakened by double standards, economic inequality, and the prioritization of ideology over human life. The West's support for Israel in its genocidal campaign in Gaza has deepened great distrust not only among Muslim countries but also among many around the world and even within the EU. Europe, on the other hand, is facing increasing vulnerability due to the strategic withdrawal of the US and the rise of autocratic sentiments in Eastern Europe. NATO expansion and the war in Ukraine have increased tensions, but European dependence on the US for security has been called into question. In such a game, the EU is currently losing hard because its dependence on the US has extended to the energy sector, but the question is how things will develop when Brussels realizes that distancing itself from Washington is the key to Europe's positioning and more successful operation in a multipolar world.

The war in Ukraine, as a manifestation of this multipolar struggle, with Russia seeking to prevent NATO expansion and establish a buffer zone while the US is interested in precious natural materials and political influence in Kiev, is only

an indication of future relations. The US and its allies (primarily the UK) are creating a state of “controlled chaos” in order to maintain influence in regions where they do not want to invest much but would like to gain a lot. This strategy of exploiting existing dependencies through minimal investment allows the US to maintain its hegemonic model. The whole process has also led to very serious changes in the economic model. The privatization of the Internet by American and Chinese technology giants has led to oligopolistic control, exacerbating global economic inequality. The rise of “technofeudalism” (a term coined by Varoufakis) has transformed capitalism, with technology companies (e.g. Google, Amazon, Alibaba) becoming dominant forces in the global economy.

These relations and especially the ongoing conflicts (one could say even since September 11, 2001) have left serious consequences for international institutions such as the United Nations, which are losing their effectiveness, and international law is increasingly being ignored. It is precisely the lack of clear international standards and the rise of double standards that contribute to global insecurity, and the fact that things must change was indicated as early as 2007.

As Smirnova et al. (2023: 253) have emphasized, deepening cooperation with the countries of Asia, Africa and Latin America, as well as increasing confrontation with the West, were natural consequences of Putin’s speech at the Munich Security Conference. This was also accompanied by the growth of foreign trade between Russia and the BRICS countries, which can be considered an external indicator of the formation of independent and complementary economies, so that Putin’s political discourse had a decisive influence on foreign policy in 2008-2024.

The global community must acknowledge the reality of a multipolar world and work to establish new international standards that reflect this new balance of power. Therefore, redefining global norms that will respect diversity is necessary to avoid further conflict and instability. Diplomatic efforts should take precedence over military interventions to resolve conflicts and establish long-term stability. It is good that small and medium-sized countries are given a stronger voice in global decision-making because it is through them that the above can be achieved, and a more balanced international order would be ensured.

The EU, as a necessary pole in a multipolar world, also have to overcome its internal crises and take a more proactive role in global affairs. Reducing its dependence on the US by developing a stronger, more unified military and political presence within NATO should be one of the first steps on this path.

It is certain that the US accepts the inevitability of multipolarity and focuses on maintaining its influence through dubious partnerships rather than unilateral domination. Avoiding direct military intervention and instead focusing on indirect strategies (e.g., proxies) to achieve its geopolitical goals, as seen in the Ukrainian model, could be a meaningful approach in the future.

International institutions such as the UN, if they are to continue to have a reason for existing, must be reformed to better respond to contemporary challenges. Clearer international legal standards are needed to reduce double standards and restore trust in global governance. Addressing economic and social inequalities, as well as regulating the position of big technology companies, by governments and international organizations is essential to ensuring fair competition and reducing geopolitical tensions.

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# By Any Other Name: Expressive Implications of Reconceptualizing an International Crime as Another through the Examples of Ecocide and Aggression

Vera Piovesan

**Abstract:** The progressive development of international criminal law is part of a long tradition. International criminal norms have evolved in a process focused on expanding the protection of the underlying values of the system and its anti-impunity agenda. This has also implied the strategic classification of ambiguous underlying acts under different crimes depending on prosecutorial or institutional considerations. However, this article observes a different recent trend in academic discourse, in which an international crime is fully reconceptualized as another in order to overcome jurisdictional limitations. Ecocide and aggression are identified as the primary examples emerging in legal literature. In the case of the former, the reconceptualization proposals have been met with support by the International Criminal Court itself. In the case of aggression, the proposals remain very marginal in legal discourse. This article examines this trend through the lens of expressivism, thus exploring its promises and perils in terms of communicative impact, and it argues that such reconceptualization conveys some problematic messages that warrant further analysis.

**Keywords:** International Criminal Law, Aggression; Ecocide, Expressivism

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## Introduction

In recent years, an observable trend has emerged in the literature calling for the reconceptualization of international crimes as different, separate ones. Reviewing academic legal discourse, this article identifies two prominent examples, ecocide and aggression. In both instances, the main driver appears to be pragmatic urgency. In other words, when limits to the exercise of the jurisdiction by the International Criminal Court (ICC) are present and the violations are in need of urgent redress, suggestions have been made to reconceptualize each crime, or some or all of its constitutive elements, as another, one which does not face the same limits to prosecution. Indeed, while starting from different stages of development and acceptance -- ecocide is not yet an international crime, while aggression very much is -- both face severe obstacles to prosecution. Whether this approach will be successful is yet to be decided, but recent developments in relation to environmental crime suggest that such reconceptualization might genuinely provide a way forward in the development of international criminal law.

On a practical level, the trend is nothing new. Since its inception, international criminal law has been reactionary in nature, growing through practice (Nouwen, 2016: 738) and shaped by demands of justice that followed some of the vilest examples of criminal behaviour in modern history. It follows that the discipline has developed in a piecemeal fashion, in line with what could be reasonably achieved in *ex-post facto* tribunals limited as to the crimes that could be charged, the defendants that could be prosecuted, and the evidence that could be collected. Therefore, a pragmatic attitude is very much part of the “genetic code,” so to speak, of international criminal law. It seems only logical that, even in the present day, the discipline would demonstrate a similar spirit when faced with limitations.

However, such a significant process of strategic classification, almost amounting to “crime-shopping,” might also hide some negative effects. Therefore, an evaluation at a more theoretical level is warranted. It has been observed that the employment of the criminal law, and as a result punishment, amounts to an ‘intuitive-moralistic’ response to violations of fundamental human rights and



rules (Tallgren, 2002: 564). Accordingly, it has been shown that the origins of the international criminal justice project were largely based on faith for the overarching purpose of the system regardless of evidentiary support that the application of criminal law would be effective or efficient (Stahn, 2012: 255) but is increasingly criticized in light of its actual record and impact. This essay examines this journey and, in particular, the role of ‘faith’ and ‘fact’ in the treatment and assessment of international criminal courts, through four core themes (‘effectiveness’, ‘fairness’, ‘fact-finding’, and ‘legacy’). In the same vein, other commentators have highlighted that international criminal law is grounded in idealism, persuading itself of a (potentially exaggerated) impact of its activity (Dana, 2013: 110; Koller, 2008). To achieve its (sometimes only hoped) impact, the idealist project is grounded in the performativity of the international criminal trial and the effect that this will have on its audiences. This aspect and interpretation of international criminal law’s operativity is encapsulated in expressivism. Expressivism therefore offers an apt framework within which to read the trend and examine its potential benefits and drawbacks. In this light, this analysis suggests that reconceptualization, pursued for pragmatic reasons, may signal deeper structural challenges within international criminal law, which cannot be resolved solely through jurisdictional expansion, but require broader reflection on the system’s coherence and capacity.

This article will first acknowledge the piecemeal evolution of international criminal norms. In part 2, it will recall how international crimes and their underlying offences have been interpreted expansively. In part 3, it will focus on the full reconceptualization of an international crime as another and offer examples of literature that, for one reason or another, proposes subsuming one crime into another. Finally, in part 4, it will introduce the framework of expressivism and use it to read the examples set in part 3. It will conclude that, when anti-impunity is the name of the game, the consequences envisaged through such reconceptualization proposals may seem not only theoretically welcome as a natural evolution of the discipline, but also practically urgent. However, when interrogating what the effects communicated by this trend are, some shadowy aspects are also identified in terms of the direction of stigmatization, which should be considered further.

## **Brief Introductory Remarks on the Evolving Nature of International Criminal Norms**

Since its very inception, the progress of international criminal law has rested on an evolving understanding of its constituent norms, the perimeters of which have been constructed through time. This evolution has affected every aspect of the construction of an international crime for the purposes of prosecution.

It is a well-known fact the underlying conducts of mass atrocity crimes replicate ordinary offences under national law. It is the context in which an underlying act, or – most often -- a series of acts, take place that modulates the nature of the offence and converts its juridical label into an international crime (Akhavan, 2012: 30). Depending on the crime, the context may amount to different sets of events, ranging from armed conflict or attacks targeting the civilian population to concerted efforts to exterminate a group (Stahn, 2019: 22). The extent and specific modalities in which each context constitutes a legal ingredient of international crimes varies, and so too vary the opinions on the level and kind of planning that each requires to be a crime (see e.g. Schabas, 2008). However, it remains that the exceptional odiousness of an international crime inhabits this aspect of the crime rather than the underlying acts themselves – which, to be sure, are deplorable all the same.

As a result, it is not a new phenomenon that the variable geometry with which underlying offences coalesce under each of the contexts will constitute distinct international crimes, or potentially multiple international crimes resting on the same set of underlying offences (on the practice of cumulative charges, see illustratively Majola, 2015; Sácouto, 2011). After all, significant overlap among the offences is due to their conceptual development. For instance, crimes against humanity were *ab origine* meant to ensure that offences against civilians not covered by war crimes were still criminalized (Luban, 2004: 93), thus rendering the overlap inescapable.

The decision to prefer an interpretation of the underlying offences at hand over another will be chiefly based on the evidence available, but may also be dependent on further policy considerations that account for the highly divisive circumstances and the fragile contexts of mass atrocities (Mettraux, 2006: 315 ff).

At the ICC, for example, the Office of the Prosecutor (OTP) can exercise a significant amount of discretion in selecting the charges (see Badagard & Klamberg, 2016). To clarify its decision-making process, under then-Chief Prosecutor Fatou Besouda, a 'Policy paper on case selection and prioritization' (2016, update under review in 2025) was published, which states: 'Consistent with regulation 34(2) of the Regulations of the Office of the Prosecutor, the charges chosen will constitute, whenever possible, a representative sample of the main types of victimisation and of the communities which have been affected by the crimes in that situation' (para. 45). More broadly, the Policy Paper situates the choices regarding the selection of charges within the anti-impunity agenda of the ICC (para. 46).

When it comes to classifying facts as crimes, a further problem has historically arisen as it pertains to the availability of a suitable vocabulary to describe the facts as indictable offences. While the issue is not unique to the international legal arena, the classification of underlying acts into the criminal categories in this field has been more challenging than in its domestic counterparts. Very famously, despite the fact that images of the Holocaust are the first to be conjured in the minds of many at the mention of genocide, the offence as such was not within the jurisdiction of the International Military Tribunal at Nuremberg (IMT) (Robinson et al., 2024: 194). By the time of the operation of the Tribunal, the notion had barely entered international legal discourse. Indeed, the term itself had just been coined (Lemkin, 1944: 79) and, while it was used in the indictment and in prosecutorial discourse (Schabas, 2009: 17), it did not formally feature as an offence.

The issue of vocabulary is not the only one relevant to classification. At other times, in fact, it was the interpretation of the overall circumstances and effects of the underlying offence that expanded the meaning of existing vocabulary. An example of this emerged in relation to the evolution of the offence of rape. Despite the lack of a provision to this effect in the Charter of the International Military Tribunal for the Far East (IMTFE), rape was nonetheless prosecuted in that context. The novelty was incorporated in the law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) but only limitedly to crimes

against humanity. It is in the case-law that rape was deemed to also potentially constitute a war crime (see McDonald, 2001: 474ff). Similarly, in the case against Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda (ICTR) (para. 731), the Trial Chamber recognized for the first time that the underlying offence of rape could constitute genocide when committed 'with the specific intent to destroy, in whole or in part, a particular group [the Tutsi], targeted as such' (MacKinnon, 2006: 942).

While some would argue that not all exercises of judicial creativity are virtuous in light of the potential lack of compliance with the principle of legality (Swart, 2010: 485), these contributions to the progressive development of international criminal law have propelled forward the field of international criminal justice and established a legacy that far exceeds the activity of the tribunals themselves (see Darcy & Powderly, 2010).

It is clear from this brief overview that the theoretical conceptualization and practical characterization of offences have always been part and parcel of the development of international criminal law. What if, though, an international crime is subsumed into another? If a crime in its totality, and not only some of its constitutive offences, is conceptualized as another, would that lead to potentially more complicated consequences? A recent trend in the literature is suggesting going in this direction. The reasons, broadly speaking, appear to be mostly ones of expediency, chiefly to circumvent limitations of jurisdiction at the ICC. Two examples will be presented below, ecocide and aggression, to exemplify the trend and its promises.

## **Conceptualizing an International Crime as Another: Two Sets of Examples**

Based on an overview of current academic discourse, the idea that a full reconceptualization should occur has emerged most clearly in the cases of ecocide and aggression.

To be sure, plentiful examples can be found of the classification of ambiguous underlying acts to comply with limited jurisdiction. One example would be the situation in Bangladesh/Myanmar, where the ICC has found that it can exercise

its jurisdiction over crimes whose conduct is only partially committed in the territory of a state party (ICC-01/19-27, para. 42ff). However, the crucial distinction is that no abstract reconceptualization of the crime at hand, which could potentially be genocide in Myanmar (see Van Schaack, 2019), is underway. Instead, the decision is much more modest: the Court asserts its own jurisdiction over those parts of the overall conducts of individuals in Myanmar which spill over onto the territory of a state party, which in this specific case allegedly amount to crimes against humanity of deportation and persecution in the territory of Bangladesh.

The discourse surrounding ecocide and aggression, however, goes further. It suggests that a clearly identifiable crime whose prosecution is impossible or unviable may be entirely rethought as another, thus reframing its underlying acts as amounting to an entirely different crime not because they are ambiguous but because such reframing is the only viable option for prosecution at a certain point in time. Each crime presents distinct challenges that have led to their reconceptualization. Indeed, ecocide is not yet unequivocally recognized as a crime under international law, and it is not one of the core crimes within the material jurisdiction of the ICC. By contrast, aggression is a recognized crime under international law. Yet, the ability of the ICC to prosecute it is severely hampered by restrictive jurisdictional rules. Below, the challenges leading to the process of reconceptualization in the literature are described.

## **The Example of Ecocide**

One example of the trend to conceptualize one crime as another is that of ecocide. As the first of two examples, ecocide sits at the intersection of urging judicial creativity in the pursuit of a desired goal and full reconceptualization under another international crime.

Ecocide entered public discourse in the 1970s when the term was coined by Arthur Galston to describe the defoliation effects of the massive use of Agent Orange in the Vietnam War (see Zierler, 2011; O'Brien, 2021). Soon thereafter calls followed for the criminalization of ecocide (see Falk, 1973). Such calls have become more insistent with time, as both the literature and the public at large

became increasingly preoccupied with intentional environmental destruction (see, illustratively, Berat, 1993 - discussing a proposal for a crime of 'geocide'; Gray, 1996). Afterwards, scholars have started assessing the issue and questioning what role global criminal law (see Cho, 2000) or the newly established ICC could plausibly play in the prosecution of ecocide (see Weinstein, 1995), in particular as it related to the already existing (albeit circumscribed) prohibition applicable in wartime (see Drumbly, 2009; Lawrence & Heller, 2007; Lopez, 2007). The possibility of inclusion of a separate fifth crime of ecocide within the material jurisdiction of the ICC has garnered a lot of attention (see for example Higgins et al., 2013; Smith, 2013; Taggart, 2014; Greene, 2019) and critical engagement has boomed in recent years (see Cusato & Jones, 2024; Gillett, 2024; Minkova, 2023, 2024). This trajectory has culminated in the June 2021 drafting of the 'Legal Definition of Ecocide. Commentary and Core Text' prepared by an Independent Expert Panel, convened by the Stop Ecocide Foundation, which explicitly hopes that 'the proposed definition might serve as the basis of consideration for an amendment to the Rome Statute of the International Criminal Court' (p. 2). The Panel defines ecocide as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.' An official call to include the crime in the Statute followed in 2024 (See Sterio, 2024: 229)

However, the prospect of the introduction of a separate crime of ecocide in international law is still far from realization. Alternative proposals have therefore emerged, suggesting the reconceptualization of the entire concept of ecocide or of specific acts of environmental destruction as one of the existing crimes.

In a recent article on the potentiality of prosecuting mass deforestation as a crime against humanity, Martini and others explore the possibility of using Articles 7(1)(h) and (k) on persecution and 'other inhumane acts' as a challenging but viable option (see Martini et al., 2023). In a daring reframing, Lauren Eichler maintains that 'the destruction of nonhuman animals, land, water, and other nonhuman beings constitute forms of genocide according to Indigenous metaphysics' (Eichler, 2020: 104). Flipping the script on other critiques on current

definitions of environmental harm as excessively anthropocentric, Eichler demonstrates that it is the very notion of genocide to be excessively anthropocentric to begin with. Other work has drawn attention to the intricacy of genocidal acts and environmental harm intrinsically embedded in economic development and extractivism (see, e.g., Crook & Short, 2021; Wise, 2021).

Such conceptualizations of environmental crime are particularly topical. In a trend that was partially preceded in the 2016 Policy Paper on Case Selection and Prioritisation, the OTP issued a 'Draft Policy on Environmental Crimes under the Rome Statute' on 18 December 2024. Despite explicit jurisdiction over environmental harm being limited to Article(2)(b)(iv), the war crime of '[i]ntentionally launching an attack in the knowledge that such attack will cause [...] long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,' the OTP confirms that 'there are numerous provisions in the Statute that are equally applicable to attacks against the natural environment and against humans' (para. 4). Avenues of accountability for environmental harm are then located in each of the mass atrocity crimes within the jurisdiction of the ICC. This Policy Paper is a clear signal that the reconceptualization of offences of environmental harm, amounting to what is generally understood as ecocide in scholarly, activist, and civil society circles, is not only possible but desirable. It must be noted however that the limits of the jurisdiction of the ICC as it stands exist and will necessarily impact those prosecutions, possibly falling short of some of the highest expectations of ecocide proponents.

## **The Example of the Crime of Aggression**

Another example of reconceptualization of an international crime as another has garnered a lot of traction in recent years, that of the crime of aggression. The crime is said to be in need of reconceptualization because of distinct reasons from those at the basis of ecocide. Indeed, aggression is already squarely a crime under international law. The prohibition of the use of force (see Pobjie, 2024) and the criminalization of its most serious violations as aggression are part of customary international law (see Dinstein, 2018; McDougall, 2021), have

been enshrined in UN documents (1974 UNGA Resolution 3314), and have been prosecuted at the international level (IMT, IMTFE). Most importantly, aggression is a crime within the jurisdiction of the ICC as per article 8*bis*.

However, the history of the inclusion of aggression in the Rome Statute is notoriously complicated. While the offence was included in the list of offences in article 5 already at the time of adoption of the Rome Statute in 1998 (Robinson et al., 2024: 187), a definition was agreed upon at a much later date during the Review Conference in Kampala in 2010, with the decision on activation of ICC jurisdiction over the crime following in 2017 (Robinson et al., 2024: 288). As a result, the Court only has temporal jurisdiction on the crime of aggression since its formal activation on 17 July 2018 (Kress, 2018: 15). In addition, as part of the negotiations of such a complex and politicized issue, special jurisdiction rules apply to the crime. Of particular relevance is article 15*bis*(5) which excludes from the jurisdiction of the Court any crime of aggression involving a non-State Party regardless of its role as aggressor or victim (McDougall, 2021: 256), unless the situation is referred by the Security Council per article 15*ter* in which case no comparable limitation is present.

Faced with a set-up featuring significant jurisdictional limitations and animated by the desire to ‘narrow the impunity gap’ (Ferencz, 2015: 195), a small number of scholars made suggestions to reconceptualize the crime of aggression as a crime against humanity (see e.g. Ventura & Gillett, 2013). The proposals have not been met with nearly as much institutional support as ecocide has. Yet, they are on the whole imaginative ways of reading existing law. Benjamin Ferencz, for example, focused on the massive losses of life that often follow an act of aggression and suggested prosecuting it as a crime against humanity under article 7(1)(k). In his analysis, the reframing would fall squarely within the trend of humanization of humanitarian law (see Meron, 2000, 2006) that has progressively emerged in international law over the last century (Ferencz, 2015: 196-197). Yet, at the time, the idea failed to garner wide support, with some advising against ‘compromis[ing] the authoritativeness and credibility of the ICC in the interest of expediency’ (Tan, 2013: 164).



Spurred by the Russian invasion of Ukraine (UNGA Resolution, A/RES/ES-11/1; see also Grzebyk, 2023; McDougall, 2022), multiple alternatives have been advanced in the literature, including the proposal to establish an ad hoc tribunal to try aggression (see, *inter alia*, Dannenbaum, 2022). Concurrently, the idea of finding alternative ways to criminalize an act of aggression within ICC law has reemerged and taken firmer contours in the last two years. The option to try aggression as a crime against humanity of ‘other inhumane acts’ under article 7(1) (k) of the Rome Statute resurfaced, albeit with different rationales. It has been suggested, for example, that aggression should be framed as a violation of a people’s right to self-determination (Pinzauti & Pizzuti, 2023: 1062). A completely different take has been offered by Frederic Mégret. Instead of ‘shoehorning’ aggression as a listed underlying act of crimes against humanity, he proposes that aggression as such can at times entirely overlap with an attack as understood in crimes against humanity (Mégret, 2023: 479). In such a way, the reconceptualization of aggression is not just done expediently to provide a practical solution for a current problem. Instead, it offers alternative ways of understanding what aggression and crime against humanity are and offers potential pathways for conceptualizing one crime as another.

## **Reading the Reconceptualization of an International Crime as Another in Light of Expressivism: Perils and Promises**

### **The Notion of Expressivism**

Expressivism can be articulated in multiple ways. Often, in recent times, recourse to it has been had in order to justify the enterprise of international criminal justice (Sander, 2019: 852). However, expressivism is also a tool to describe the activity of international criminal justice institutions, to show what they promote and disavow (Sloane, 2007: 71). Such description is possible once the focus is put on the communicative function of trials (Sander, 2018: 200; see also Stahn, 2020). Such function hinges on the notion that law, much like all and any actions, ‘carry meanings’ (Sunstein, 1996: 2021). Resulting punishment becomes therefore a ‘device for the expression of attitudes of resentment and indignation, and

of judgments of disapproval and reprobation' (Feinberg, 1965: 400). In this sense, punishment is understood as an effective tool 'to strengthen faith in the rule of law' (Drumbl, 2007a: 12). In this sense, international criminal law – constituted by its norms, institutions, and related activity in trial and punishment -- contributes to a 'norm-nurturing process' (Amann, 2002: 120) establishing itself as the provider of socio-pedagogical goals. Indeed, trials are a 'ritual performance that takes place in view of the public' (Wringle, 2016: 57), and as such contribute to the nurturing of liberal values in a given society (Osiel, 1997: 2). In this sense, they do not just 'invoke incentives' but 'change norms' (Fisher, 2012: 59) in the pursuit of an intergenerational pedagogical goal (Drumbl, 2007b: 1182). After all, it matters a lot what international criminal law stands for. If we isolate the role of the ICC, with the constraints posed on it by its limited resources, no more than a few 'illustrative' cases will be carried out (deGuzman, 2012: 315). It follows that the significance of the messages it sends is amplified.

## Promises and Perils

In accordance with expressive theory, the communicative impact of the law, its norms, and its institutions is fundamental to understanding its role in society. Ascribing the label of international crime to wrongdoing will undoubtedly influence how the actions are perceived, inviting reprobation and legitimizing abhorrence toward them. In an example concerning terrorism as an international crime, Mark Drumbl states that such characterization will effectively 'cast the wrongdoing as a violation of universal norms and of global trust' rather than isolating it as an offence merely toward the affected population (Drumbl, 2007b: 1175). Another example that has received attention is the contours of what gets to be defined as genocide. An increasingly powerful strand of literature has questioned the design of the contours of what we call genocide (See Gurmendi Dunkelberg, 2025). At the same time, however, moving within the perimeters of black letter law, and preserving the meaning of the norm, is also considered an important way to protect the status of the norm (Amann, 2002: 95).

The expansion of criminal categories inevitably entails both positive and negative consequences in an expressive sense. But what happens when this

expansion amounts to a full reconceptualization like the one suggested in the examples in section 3? The examples certainly represent a similar trend but are not the same. The legitimacy and prospects of each trend are not equal.

There are many reasons to be optimistic about the prospects of folding ecocide, or constitutive conducts, under an existing international crime. In its recent Draft Policy on environmental crime, the OTP acknowledges, in a quasi-apologetic tone, the limitations of the jurisdiction of the Court (para. 5). Indeed, it commits to centring environmental harm in the crimes within its jurisdiction as a way to rectify the neglect that such harm has faced so far (p. 3). A sceptical voice might be quick to quip that, if successful, the strategy might have the paradoxical effect of reducing the perception of urgency that surrounds the push for the adoption of a standalone crime of ecocide. At the same time, a pragmatic approach would suggest that, when the stakes are as high as anti-impunity for international crime, a viable compromise is preferable to utopic hope.

The more critical literature surrounding ecocide has mostly concerned the standalone crime. For example, Eliana Cusato and Emily Jones have suggested resisting the instinct of criminalization. In their view, the more pressing issue is identifying and rectifying the extractive and capitalist logic that undergird environmental harm to begin with (Cusato & Jones, 2024: 61). However, this critique would remain true also of the conceptualization of certain underlying conducts as another crime. So too would the critique that underlines the deeply anthropocentric nature intrinsic in contemporary understandings of ecocide (see Minkova, 2023; Winter, 2024). This risk would become even more present in the reconceptualization scenario.

Indeed, the process of stigmatization through reconceptualization sits in an awkward position: on the one hand, it might be the missing link toward a proper inclusion of environmental values as legitimate protected interests in international criminal law – namely, not as an extension or manifestation of global security or human suffering, but as valid in and of themselves. On the other hand, it might contribute to a narrative of environmental harm that stigmatizes some and legitimizes all other.

Fraught with even more issues is the potential reconceptualization of aggression under an international crime. As seen in section 3(b), every suggestion of the conceptualization of aggression as another crime has been directed by pragmatic reasons, with the exception of Mégret's work. In his article, he is careful not to 'portray aggression for what it is not' which would come at a much too high 'expressive cost' (Mégret, 2023: 478). In other words, in his proposal, aggression is reconceptualized into another crime, because, under certain circumstances, it is indeed another crime. Furthermore, in a generous reading of other proposals too, conducts are multifaceted and multi-purpose and therefore may warrant focusing on different underlying harms (such as those to people, central to crimes against humanity, rather than merely peace and security).

However, on an expressive level, the mere fact that these proposals have been revitalized in relation to the Russian invasion of Ukraine make the 'shoehorning' peril hard to look past. Indeed, while accountability in the short term aligns well with international criminal law's anti-impunity mindset (see Sander, 2020), it is hard to imagine that commentators would be suggesting to fold aggression under another international crime if an instance of aggression were to happen in the near future that was fully within the jurisdiction of the Court. This suggests that reconceptualization, when driven by short-term expediency, might not align with the conceptual integrity and systemic coherence of international criminal justice. Unlike the recognition of rape as a war crime and as genocide, discussed in section 2 – where previously overlooked conduct was incorporated in such a way that conceptually reinforced and expanded the existing legal framework –, the reconceptualization trend may reflect deeper structural shortcomings. It may indicate that the system, and in particular the ICC, as currently designed, is fundamentally ill-equipped to respond to certain forms of harm, thus calling for a more comprehensive reflection on the ICC's capacity to fulfil its mandate.

All in all, the reconceptualization of ecocide and aggression follow different trajectories, as the level of the stigmatization and its acknowledgement in international criminal law is different for each. However, the two examples show a trend that might materialize in the future. This brief analysis has shown that,

from an expressive point of view, both positive and negative outcomes may follow.

## Conclusion

The evolution of international criminal law has historically been characterized by gradual adaptation and strategic legal development in response to emerging global challenges. This article has identified a recent shift within academic discourse: the reconceptualization of one international crime as another. While this has appeared as a pragmatic strategy to navigate around jurisdictional limits, it also raises complex questions about the coherence and expressive function of international criminal law.

The reconceptualization of ecocide has gained increasing traction, even receiving cautious support from the ICC. In contrast, efforts to reframe aggression remain on the margins. Both examples reflect a growing sense of urgency, where the desire for short-term accountability pushes legal categories to their interpretive boundaries. Through the lens of expressivism, however, these efforts are not without risk. Strategic reclassification, while potentially advancing short-term accountability goals, may undermine the conceptual clarity and authority of international criminal law. This article has argued that such reconceptualizations, though potentially useful in specific contexts, may signal deeper structural limitations within the international criminal justice framework. It is suggested that addressing these limitations will require a broader re-evaluation of the system's normative coherence and institutional capacity.

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