

Russian Aggression and the War in Ukraine

An Introduction

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On 24 February 2022, armed forces of the Russian Federation invaded Ukraine in a steep escalation of the still ongoing so-called Russo-Ukrainian War, with its origins reaching back to the occupation of the Crimea in 2014 and arguably even earlier. The impact of the recent attack, whose geographical reach extends far beyond the immediate war zone to encapsulate large parts of Europe, concerns the movement of refugees, the supply of food to the African continent, the global energy sector, and also international criminal justice. Once again, the development of international criminal law is being driven by conflict, violence, and mass atrocity. And indeed, subsequent to a much-debated phase often referred to as a 'crisis', in which international criminal justice in general and the International Criminal Court (ICC) in particular was subject to rather fundamental criticism regarding prosecutorial choices, the Russian invasion of Ukraine seems to have re-vitalized the idea of international criminal justice. Public and media interest in international criminal law expertise is substantial, the call for international criminal law proceedings loud, and states have been eager to provide the competent institutions, at the international as well as national level, with additional resources.

Notwithstanding continuing fighting on Ukrainian territory, war crimes trials are already taking place before Ukrainian courts. An arguably unprecedented joint effort of evidence collection is under way, bringing together ICC investigators, domestic law enforcement agencies, a Eurojust joint investigation team, and several third states conducting (structural) investigations. In addition, civil society and (data) journalists are conducting their own (e-)evidence collection efforts. Given the limited jurisdiction of not only the ICC but also of many states over the crime of aggression, there is also an intensive debate about the establishment of a special tribunal for the crime of aggression.

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Responses show how far international criminal law has come in the last decades, internationally and domestically. But at the same time the conflict reveals once again the shortcomings and asymmetries of the so-called 'Rome System of Justice', restricted not only to but in particular pertaining to the crime of aggression, with the ICC's limited jurisdictional regime and immunities before domestic courts leaving a huge accountability gap — and maybe even its ineffectiveness, as it could not prevent the aggression and the atrocities in the first place.

Nevertheless, the language of international criminal law and justice is ubiquitous, providing the 'grammar' upon which the broader political and public discourse is also based. This seems to be true even for the aggressor state. The claim of the crime of genocide was used – or rather abused — by Russia as a justification for the invasion, to which Ukraine responded with proceedings before the International Court of Justice. Russia is talking about 'Nuremberg style trials' against Ukrainian soldiers. On the other hand, criminal proceedings for the crimes under international law committed by Russians are seen to be without alternative. But what does it mean for 'ICL jargon' to have become the common language, the *lingua franca* of the conflict? Could it be argued that there is too much focus on international criminal law? Is it too early to discuss alternative mechanisms of transitional justice? Does the peace/justice debate need to be revisited yet again?

With this symposium, we assembled a set of interventions, concise comment pieces, written by leading scholars and practitioners in the field. The authors reflect upon the Russian invasion of Ukraine and the ongoing war. They present and debate some of these issues, situating them within the context of broader developments, and discussing both what they reveal about the current state of international criminal law and justice, and what they mean for its future development.

The symposium starts with a contribution by Iryna Marchuk,¹ who analyses the investigation and prosecution efforts of alleged war crimes and the crime of aggression conducted by Ukrainian authorities as well as the first war crimes trials before Ukrainian courts. She provides a brief context to the domestic prosecution of atrocity crimes prior to Russia's full-scale invasion, summarizes key findings of the first war crimes verdicts rendered by Ukrainian district courts, and evaluates the application of international humanitarian law by the Ukrainian judiciary, the progress that has been made, and problems that continue to persist. Finally, the Ukrainian domestic efforts are situated within the larger context of closing the impunity gap for atrocity crimes against a backdrop of a broader discussion of transitional justice in Ukraine.

Ilya Nuzov² analyses the function of Russia's memory laws justifying the aggression against Ukraine. More generally he explains that the last two

1 I. Marchuk, 'Domestic Accountability Efforts in Response to the Russia-Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine', in this issue of the *Journal*.

2 I. Nuzov, 'Legislating Propaganda: Russia's Memory Laws Justify Aggression Against Ukraine', in this issue of the *Journal*.

decades have seen a shift from victim-centred memory laws to state-centred laws that protect the state's honour and reputation. He then argues that due to the relationship between identity-building and collective memory, the use of the most nefarious types of memory laws, that exculpate the state from earlier crimes, has enabled Russia to amplify its propaganda around Ukraine's so-called 'denazification', justifying its aggression against Ukraine.

Next, Sergey Sayapin³ looks at mainstream legal and political discourse on international criminal law in Russia. He concludes that Russia's continued use of force against Ukraine since 2014 has ended any debate and reduced international criminal law to a propaganda tool, an approach that will, arguably, reinforce Russia's isolation.

Alexa Koenig⁴ looks at the collaboration in evidence collection and the digital documentation of international crimes in Ukraine. She explains the shift in evidence collection, from legally mandated investigators focused on interviewing witnesses and gathering and preserving physical and documentary evidence to abundant digital data collection, storage, processing, analysis, and presentation, by a dispersed network of individuals and organizations representing a broad array of disciplines. Finally, she discusses some of the weaknesses and strengths of this collaborative approach, and explores what these changes mean for international criminal justice more generally.

In his contribution, William Schabas⁵ reviews the claims of genocide that have been made on both sides during the armed conflict in Ukraine. He argues that these claims appear to be inconsistent with the definition of the crime, and explains that the term genocide appears to have been used in a rhetorical sense, without serious concern for the legal issues.

Tom Dannenbaum⁶ takes up the ongoing discussion about establishing a special tribunal for the crime of aggression. Given that the ICC lacks jurisdiction and domestic courts offer an uncertain alternative, he carefully explores the options as well as the arguments that speak in favour of as well as against establishing a special tribunal, also with a view to what this would entail for the future development of international criminal justice.

Next, Kai Ambos⁷ in his contribution discusses 'double standards' of the West at play in the Russo-Ukrainian War. He points to the inconsistencies in the West's approach to international (criminal) law and the position of the Global South, and calls for (greater) Western consistency.

The symposium concludes with a contribution by Sergey Vasiliev,⁸ who places the revitalization of international criminal law, spurred by the

3 S. Sayapin, 'Russian Discourse on International Criminal Law', in this issue of the *Journal*.

4 A. Koenig, 'From "Capture to Courtroom": Collaboration and the Digital Documentation of International Crimes in Ukraine', in this issue of the *Journal*.

5 W.A. Schabas, 'Genocide and Ukraine: Do Words Mean what we Choose Them to Mean?' in this issue of the *Journal*.

6 T. Dannenbaum, 'A Special Tribunal for the Crime of Aggression?', in this issue of the *Journal*.

7 K. Ambos, 'Ukraine and the Double Standards of the West', in this issue of the *Journal*.

8 S. Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice', in this issue of the *Journal*.

international community's response to the large-scale commission of core crimes in Ukraine since the February 2022 invasion, into a broader political context. He analyses how the financial and operational support the ICC's Prosecutor has received for investigating crimes committed in the Ukrainian Situation raises questions about its implications for the future development of international criminal justice.