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The Crime of Aggression: A Response to the Maryland Journal of International Law’s Symposium Keynote Address

FREDERICK MICHAEL LORENZ†

On November 3 and 4, 2022, the Maryland Journal of International Law hosted a symposium to evaluate the legal and historical roots of the international norm of outlawing aggressive war and assess how Russia and its leaders might be held accountable for aggression.¹ Panel discussions explored different subsections of the overall theme, including the difference between individual culpability and state responsibility for waging illegal war; historical and contemporary state practice, comparing the war in Ukraine to other modern conflicts; how to define the crime of aggression; and responses from the International Criminal Court (ICC) and related courts and tribunals.

The symposium included leading scholars and law professors with a broad range of experience. It provided the opportunity to engage in thoughtful discussion, consider alternative views, and expand our understanding of a difficult topic. Tom Dannenbaum, Associate Professor of International Law, The Fletcher School of Law & Diplomacy, Tufts University, provided the keynote address. His

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¹. University of Maryland Francis King Carey School of Law Annual International and Comparative Law Symposium: Aggressive War (Nov. 3–4, 2022) [hereinafter, “Aggressive War Symposium”].
presentation was perceptive and raised several important questions. Specifically: Why are we seeking to criminalize the crime of aggression? This article provides an opportunity to respond to Professor Dannenbaum and his recent article.

The situation in Ukraine is grave, with profound implications for world security. The paper will attempt to respond to Professor Dannenbaum and raise additional questions that will have to be addressed before any trial might be held. My background lies in national security, although I have been teaching IHL for more than twenty years. In my course I start with the connection between IHL and the law of armed conflict (LOAC), and the responsibilities of lawful combatants. I focus on the Jus In Bello, the means and methods of warfare, rather than the initiation of armed conflict. Crimes Against Peace and Crimes of Aggression are in a special category, fundamentally part of the Jus Ad Bellum part of international law.

In this paper I will first attempt to answer questions raised by Professor Dannenbaum at the symposium. Three justifications were provided and analyzed for the prosecution of aggressive war. I agree that we must use precision regarding the principles to be vindicated in prosecuting a crime of aggression, and I will provide my own reflections at the end of this article.

First: Does aggression entail a fundamental attack on the international legal order? The implication from many scholars seems to be that impunity for such an attack would imperil the very structure of contemporary international law. During the symposium there was much discussion of the “rules-based order” and the nature of the threat. First, we should look to one definition of a rules-based-order:

For the purposes of this project, we conceive of order as the body of rules, norms, and institutions that govern relations among the key players in the international environment. An order is a stable, structured pattern of relationships among states that involves some combination of parts, including emergent norms,

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3. Id. at 53.
5. Aggressive War Symposium, supra note 1.
rulemaking institutions, and international political organizations or regimes, among others.\textsuperscript{6}

But the rules-based-order is certainly not stable and seems to be evolving every day. The Ukraine War has ushered in a new era of international relations; the devastating violence seems unconstrained by international law. For Russia, there was no anticipation of strong Ukraine leadership and the will to fight in comparison to the numerical superiority of Russian forces.\textsuperscript{7} New weapons have reshaped the battlefield, with precision guided missiles, tanks and lethal drones supplied by the West.\textsuperscript{8} At the time of this writing, opposing forces seem to be at stalemate with no clear end in sight.\textsuperscript{9}

Professor Dannenbaum stated that “a focus on the international order opens the door for (controversial) arguments that some aggressions are more threatening to the international order than others.”\textsuperscript{10} This raises other important questions. Could there be a near bloodless crime of aggression? Russia’s annexation of Crimea in 2014 was not bloodless but massively different in the level of violence.\textsuperscript{11} Could a crime of aggression be perpetrated lawfully within the framework of international humanitarian law? This may be hard to envision, but certainly possible if the aggressive party complies fully with the responsibility to attack only military targets and avoid unnecessary civilian casualties. Of course, as pointed out by Professor

\begin{thebibliography}{9}
\bibitem{michael} Michael J. Mazarr, Miranda Priebel, Andrew Radin & Astrid Stuth Cevallos, RAND CORP., UNDERSTANDING THE CURRENT INTERNATIONAL ORDER (2016).
\bibitem{tom} Id.
\bibitem{twenty} Tom Dannenbaum, Associate Professor of International Law, The Fletcher School of Law & Diplomacy, Tufts University, Keynote Address at the University of Maryland Francis King Carey School of Law Annual International and Comparative Law Symposium: Why Accountability for Aggression Matters and the Difficulty of Getting it Right (Nov. 3, 2022).
\bibitem{turk} Twenty-one civilian casualties have been reported in Crimea but the war in Ukraine starting in February 2022 has left at least 8,006 civilians dead and 13,287 injured. Türk deplores human cost of Russia’s war against Ukraine as verified civilian casualties for last year pass 21,000, UNITED NATIONS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Feb. 21, 2022), https://www.ohchr.org/en/press-releases/2023/02/turk-deplores-human-cost-russias-war-against-ukraine-verified-civilian.
\end{thebibliography}
Dannenbaum, compliance with international humanitarian law cannot “expunge or mitigate the wrongfulness of aggression.”

It is useful here to remember the fundamental distinction between the *Jus in Bello* and the *Jus ad Bellum* as defined in International Humanitarian Law: “*Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general. … *Jus in bello* regulates the conduct of parties engaged in an armed conflict. IHL is synonymous with *jus in bello*; it seeks to minimize suffering in armed conflicts, notably by protecting and assisting all victims of armed conflict to the greatest extent possible.13

It is no accident that prosecution for aggression has not occurred since Nuremberg. Although the ICC has “activated” the crime of aggression, no practical path to accountability is currently available.14

Second: Is aggression an “umbrella crime” (one that encapsulates the war crimes and crimes against humanity committed in the conflict), or a progenitor crime (the crime without which those atrocities would not have been perpetrated)? With that framing we should conclude that accountability for aggression is necessary to comprehensively vindicate the rights of those victimized by those atrocities. During the symposium, one participant referred to aggression as the “mother of all crimes.”

There is some risk in assuming that accountability for aggression is essential to the victims. In his book Professor William Schabas describes “The Genocide Mystique” and the “ability of a genocide charge to stir debate and excite the media.”16 Schabas describes the “rhetorical power of the G-word” and the tendency of major powers to use it as a pretext for intervention.17 Today it may be useful to compare the crime of aggression to the crime of genocide when seeking accountability for Russian crimes in Ukraine. Can justice be achieved in Ukraine without a conviction for the crime of aggression? Would the victims be satisfied with anything less? Will

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17. *Id.*
the emphasis on the crime of aggression detract from prosecuting massive levels of war crimes and crimes against humanity in the same forum? Those questions need to be addressed before we set the stage for prosecution.

Third: during the symposium it was suggested that aggression is the crime with which Vladimir Putin and other Russian leaders can most directly be attributed. At the symposium, some mentioned that relying exclusively on war crimes or crimes against humanity charges could result in a situation where those most responsible would escape accountability due to the difficulty of establishing their individual connections to specific crimes. Given the clear role of such individuals in initiating the war, aggression would appear to offer a more straightforward path to accountability. During the symposium, one participant mentioned that prosecution for aggression should be a “slam-dunk.” On reflection, the case may not be so clear. And to quote Professor Dannenbaum, we need to develop a rationale “that resonates beyond the invisible college of international lawyers” and identifies the “normative imperative” driving these efforts.

Before we conclude our discussion of the normative imperative, we might consider additional questions that were not directly covered in the symposium:

What would an aggression trial look like? What defenses might be offered? In his presentation, Professor Dannenbaum also raised important questions of legitimacy and morality. I will try to address these points in the remainder of this paper.

I. WHAT WOULD AN AGGRESSION TRIAL LOOK LIKE?

Accountability for the crime of aggression has already been discussed at length, in written material and in depth at our symposium. The limits of existing mechanisms have been identified. Institutional proposals have proliferated. I will mention one option

19. Id.
20. Id.
22. Id.
from my own organization: The Public International Law and Policy Group (PILPG) has prepared draft legislation for a High War Crimes Court for Ukraine to prosecute atrocity crimes. Drawn from the Law on the High Anti-Corruption Court of Ukraine of 2019 and best practices of internationalized domestic war crimes courts around the globe, this draft law provides the template for a Ukrainian High War Crimes Court to prosecute atrocity crimes committed in Ukraine since November 2013. In addition to the major atrocity crimes, the draft includes the Crime of Aggression based upon Article 8 bis of the ICC Statute.

It is useful to compare a potential Ukrainian court with the International Tribunal for the Former Yugoslavia (ICTY). At the ICTY in 2017, General Ratko Mladić was convicted of genocide, war crimes and crimes against humanity and sentenced to life imprisonment. But the trial lasted for seven years, with four more years for the appeal. Without difficult decisions to reduce the number of witnesses and volumes of evidence, the trial would have been much longer. The ICTY charged Slobodan Milošević while he was still President of Serbia. He eventually lost power and came into the custody of the Court. Still, the trial lasted for four years, and the prosecution case alone included 295 witnesses and 5,000 exhibits. He outlived one of his judges and died in 2006 before a verdict could be rendered. Is this a case of justice delayed and justice denied? If the number of witnesses and volume of evidence had been reduced, would that have improved the prospects for accountability? The interests of justice often include difficult decisions that affect judicial efficiency and

25. Id.
28. Id.
30. Id.
31. Id.
32. Id.
33. The quote “Justice delayed is justice denied” is often attributed to William Ewart Gladstone, British Statesman, 1808-1898.
expediency. The ICTY was established while the war was still underway, and there was some hope that the Court would help bring about an end to the conflict. But the Dayton Peace Agreement was driven primarily by military and political forces, not legal factors. If President Putin or other top leaders are charged for crimes in Ukraine, and President Putin is eventually brought to trial, we can expect years of trial to reach any result. After all, many of the trials before the ICTY were still going on fifteen years after the crimes alleged.

Further, in Bosnia, an area about the size of West Virginia, three years of war produced about 97,000 deaths and one million displaced. In Ukraine, an area about the size of Texas we already have tens of thousands of deaths and more than eight million refugees. We now have documented reports of thousands of war crimes in Ukraine, on a scale even greater than Bosnia. This is not to say that crime before the ICTY was any more or less important than in Ukraine. But a trial for atrocity crimes in Ukraine will be vastly more complex and difficult.

In 2014, I visited the ICTY in The Hague with students from the University of Washington in Seattle. We interviewed the senior

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39. Nick Cunning-Bruce, The U.N. confirms civilian deaths in Ukraine have surpassed 7,000, but says the real toll is far higher, N.Y. Times (Jan. 16, 2023), https://www.nytimes.com/2023/01/16/world/europe/un-ukraine-war-civilian-deaths.html.
40. The UNHCR reported more than eight million refugees after one year. Refugees from Ukraine recorded across Europe, Ukraine Refugee Situation, https://data2.unhcr.org/en/situations/ukraine (last visited May 9, 2023).
prosecutor, an American, responsible for the Srebrenica prosecutions.\textsuperscript{42} During the discussion my students had several questions about victims’ rights, but he interrupted and said: “This is not about victims, this is about conviction and punishment.” Although he had a reputation as a highly effective prosecutor, he was clearly focused on a single element of justice, retribution. The Tribunal had other objectives, including the cessation of hostilities and contributing to the “restoration and maintenance of peace.”\textsuperscript{43} But 30 years after the Dayton Agreement was signed, Bosnia’s post-war stability remains fragile and Bosnians fear that their country is at risk of spiraling back into another war.\textsuperscript{44} The ICTY was a creature of the Security Council, driven by practical and policy considerations. The long-term impact of the ICTY is still uncertain, but justice cannot be expected to satisfy everyone affected by atrocity crimes. Focusing on punishment in the short-term, with the resources at hand, may be the most effective way forward.

II. \textbf{WHAT DEFENSES MIGHT BE OFFERED?}

Rarely has the use of force been matched by the necessary legal authority, political will, and the military capacity to achieve the intended results. The first Gulf War in 1991 is one example of the right combination of law, military means, and political ends. After receiving the necessary legal authority,\textsuperscript{45} the US led an intervention that successfully restored the territorial integrity of Kuwait.\textsuperscript{46} In other cases, the legal authority was present, but the political will and corresponding military capacity was lacking. The situation with the United Nations Protection Force in Bosnia between 1993 and 1995 is one example.\textsuperscript{47} Unfortunately, when the political will and military capacity drives the decision process, powerful countries tend to proceed with military action with questionable legal authority. And this has mostly been a Western phenomenon. Three examples are provided below: NATO in...

It first appears that the invasion of Ukraine in February 2022 was a clear case of the crime of aggression first prosecuted at Nuremberg as a crime against peace. But Russia asserted several justifications for the invasion and a close examination is warranted. Was this self-defense under Article 51 of the UN Charter? Was there evidence that the US was preparing secret bioweapons facilities in Ukraine? Was it protection of vulnerable Russian speaking populations? This section provides a review of some major military interventions planned or executed with and without United Nations Security Council (UNSC) authorization.

A. Kosovo and Serbia, 1998–99

The US and NATO intervened in Kosovo and Serbia without a UNSC resolution, and the legality of the intervention has long been questioned. NATO provided no detailed legal justification at the time, but claimed it was necessary to protect Kosovar Albanians from Serbian aggression. Russia condemned the action at the time. In 2022 in the UN Security Council, the Russian foreign minister, Sergey Lavrov, invoked the NATO bombing as justification and precedent for Russia’s moves to protect the population of the Donbass from


52. The Yugoslav Tribunal conducted an inquiry to review the NATO bombing but found that the decision to resort to force was beyond the jurisdiction of the Tribunal. See Int’l Crim. Trib. for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, U.N. Report 1.4, https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal.

As mentioned earlier, the “G” word can be just another pretext for aggression.54

B. Libya and the Responsibility to Protect (R2P), 2011

The United Nations authorized force after a reluctant Russian abstention from the vote.56 Libya today is in chaos as a result, and the intervention spelled death of the so-called UN Responsibility to Protect.57 UN General Assembly Resolution 60/1 (2005) was a well-meaning but highly impractical international effort to protect vulnerable populations from their own leaders.58 Now Russia is trying to use the R2P principle to justify its actions in Ukraine, under the theory of protecting vulnerable ethnic Russian populations in the Donbas.59

C. The US and allied invasion of Iraq, 2003

This is significant when compared to Russia’s invasion of Ukraine in 2022. The International Commission of Jurists expressed ”its deep dismay that a small number of states are poised to launch an outright illegal invasion of Iraq, which amounts to a war of aggression.” U.N. Secretary-General Kofi Annan later called the invasion “illegal” and a violation of the U.N. Charter.61

The interventions in Iraq by the US and by Russia in Ukraine were both based on a theory of preventive war and faulty assumptions

55. See Schabas, supra note 16.
58. Heads of State and Government affirmed their responsibility to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and accepted a collective responsibility to encourage and help each other uphold this commitment. They also declared their preparedness to take timely and decisive action, in accordance with the United Nations Charter and in cooperation with relevant regional organizations, when national authorities manifestly fail to protect their populations. G.A. Res. 603/1, at para. 139 (Oct. 24, 2005).
59. Putin, Presidential Address, supra note 50.
about threats to the invading power. But there were major differences: The Iraq invasion in 2003 was a short-term military success, while the Ukraine invasion began to fail at the outset. The US suffered no long-term consequences even though the invasion precipitated destruction and instability throughout the Middle East. Russia was immediately ostracized by major world powers and suffered economic sanctions and political isolation.

Could Russian leaders offer a defense on the theory that Western leaders have engaged in essentially the same type of conduct? During the symposium one of the participants answered “no” and mentioned the *tu quoque defense* (in Latin ‘you too’). This defense targets the hypocrisy of the arguer rather than the truth of the argument. But the argument has never officially been accepted in court. Yet, the defense can be extremely powerful, and certainly will be raised in any trial of Russian leaders. One article concluded that that the defense may be legally void, but “international criminal tribunals and academia must not disregard its underlying argument because of its political pertinence.”

Here it is worth mentioning the Dönitz Dilemma. Admiral Karl Dönitz was convicted at the Nuremberg Tribunal of Crimes Against Peace and multiple war crimes. But on the specific war crimes charge of ordering unrestricted submarine warfare, Dönitz was found guilty but no sentence was assessed.

In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day


64. In the years since the invasion, there have been over 4,700 U.S. and allied troop deaths and more than one hundred thousand Iraqi civilians have been killed. *Timeline Report*, supra note 62.

65. Massicot, supra note 63.

66. Aggressive War Symposium, supra note 1.

that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.\(^{68}\)

He was released after serving just ten years, lived quietly in retirement, and his funeral in 1981 drew hundreds of loyal German veterans paying respect and wearing their awards from the war.\(^{69}\)

Although the Dönhitz situation does not provide a legal basis for a defense, it is quite certain that previous conduct of Western powers will become an issue in a trial for aggression in Ukraine. Just as Slobodan Milošević played a great patriot and leader wrongfully accused, so will Putin develop that narrative if he is ever on trial. Any trial of Russian leaders will be more about politics and old grievances than traditional legal principles.

III. LEGITIMACY AND MORALITY

After a series of meetings, a panel of experts offered a proposal for creating a tribunal to try the crime of aggression through an agreement between Ukraine and the United Nations at the recommendation of the General Assembly.\(^{70}\) Unlike the PILPG proposal mentioned earlier, the tribunal would be created only to deal with the crime of aggression. This “hybrid” proposal has precedent, including the Extraordinary Chambers in the Courts of Cambodia (ECCC)\(^{71}\) (created pursuant to the recommendation of the General Assembly) and the Special Court for Sierra Leone\(^{72}\) (created pursuant to the recommendation of the Security Council, not acting under its Chapter VII authority to address threats to peace, breaches of the


peace, and acts of aggression). The General Assembly does not have the power to impose a tribunal on Ukraine (because it lacks such enforcement powers, which reside in the Security Council), but it can authorize the Secretary General to work with Ukraine to establish a tribunal to which Kyiv voluntarily consents through an international agreement.

What about legitimacy and morality? I must confess that in my teaching of IHL and LOAC, the topics are rarely discussed. My experience is based on a career in national security, not academics, and I have always focused on the means and methods of warfare from a realist perspective. For the crime of aggression, I am entering new territory. In his article, Professor Dannenbaum makes this point.

Condemning wrongdoing and expressing solidarity with victims—central functions of criminal punishment on the expressivist view—are second-personal normative acts. As such, they depend on the moral standing of the expressive agent—in criminal law, the court or tribunal that issues punishment.  

He follows with another point that goes beyond morality: under what conditions will a trial for aggression be viewed as legitimate?

In particular, the standing of any special tribunal would be fundamentally imperiled by the central involvement of any of the states that have played a key role in limiting the aggression jurisdiction of the International Criminal Court or that have otherwise sought to shield their own leaders from accountability for aggression.  

Under this standard, would the United States meet the test? If this standard had been applied at Nuremberg, would the allied powers have passed the test? In both cases, I believe the answer would be no.

The relationship between the United States and the ICC has been “rocky,” and the crime of aggression has figured prominently in that history for the past twenty years. In one article, the authors (including the former legal advisor to the US State Department) summarized the US position:

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74. Id.
The United States’ views about the role of the Security Council were well known from the outset: the Court should not exercise jurisdiction over the crime of aggression unless the Security Council had first determined that a state act of aggression has occurred. We recognized that few beyond the other permanent members of the Security Council shared this view, which some in the international community saw as designed simply to protect the permanent members from the possibility of prosecution. In fact, however, our views were anchored in the UN Charter, its negotiating history, and the special importance attached to the role of the Security Council in making determinations about whether a state has committed aggression.\(^\text{76}\)

After the fall of the Soviet Union there was a brief period when the interests of the permanent members of the Security Council coincided. The “ad-hoc” tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) were established under Chapter 7 of the UN Charter without precedent.\(^\text{77}\) Although there is no mention of courts in the UN Charter, the UNSC was able to garner the votes and create a court as a response to a threat to international peace and security.\(^\text{78}\)

The problem remains: What conditions provide a “threat to international peace and security” under Chapter 2 of the UN Charter? Who makes that determination, as well as the one for aggressive war? Despite its deficiencies, those questions are clearly left to the UNSC under the UN Charter. The international prosecution of atrocity crimes reached a high-water mark in 2014 when the ICTY was operating at peak capacity.\(^\text{79}\) But none of these prosecutions involved aggression, only traditional violations of *Jus in Bello*, including war crimes and crimes against humanity.

\(^{76}\) *Id.* at 262.


\(^{78}\) *Id.*

\(^{79}\) The ICTY indicted 161 individuals between 1993 and 2017. By some measurements, it was the most “successful” of the international tribunals. The support of the United States was a major factor in ICTY operations, in terms of financial and human resources. Clint Williamson, *The Role of the United States in International Criminal Justice*, 25 *Penn State Int’l L. Rev.* 819, 822 (2007).
The question of morality in international law has been widely discussed in the literature. Some maintain that morality should play an even greater role in the laws of war. But in my view, the morality test should not be central to our discussion. Have the US actions regarding the ICC been designed to shield its own leaders from accountability for aggression? Or have those actions reflected a rational and predictable view of the role and powers of the Security Council under the UN Charter? To me, this is a political question, and legitimacy is a subjective concept that will be too difficult to resolve. And certainly not by the invisible college of international lawyers.

The decision to identify defendants and draft charges at international tribunals, from Nuremberg through the tribunals of the 1990s, has always involved more politics than law. The International Military Tribunal at Nuremberg shielded the Allied powers from the same crimes faced by the tribunal defendants, including the firebombing of Dresden. At the Tokyo Tribunal, the Indian Judge, Radhabinod Pal, found that the conduct of the allies was just as egregious as the Japanese; he voted to acquit, but the trial went on. A careful reading of history shows that the prosecuting powers never really held the moral high ground in the atrocity trials of World War II.

IV. CONCLUSION

Complex and contradictory forces are at work in the development of accountability mechanisms for the Ukraine War. Despite the availability of new documentation and investigation mechanisms, such as video and digital files, the sheer number and scope of war crimes seems overwhelming. And despite the expansive development of international humanitarian law during the international tribunal era (between 2005 and 2015), we are left today with no suitable mechanism to deal with the crime of aggression.

83. Id.
Professor Dannenbaum raises important questions that go to the heart of the matter, why are we prosecuting the crime of aggression? Further, we must be clear on the rationale if we move forward. If an accountability mechanism is found, and the crime of aggression is charged, the trial will certainly enter a complex and lengthy phase. But there is more than adequate evidence to move ahead to investigate and prosecute the other atrocity crimes. Power and politics will be decisive factors in the pursuit of peace and justice in Ukraine.

I am in complete agreement with Professor Dannenbaum that we must make a determined effort to achieve accountability for atrocity crimes in Ukraine. The argument is not one of law, but it is based on the very practical reasons that the war must be stopped and the criminals punished. The United States has taken the lead in military and political support for Ukraine, and it will be needed to play a central role in the accountability phase. United States support for the ICTY, in personnel and resources, made a significant difference in the results. The United States is now working to strengthen international efforts to investigate and coordinate prosecutions in Ukraine. In my view, we have an imperative to move forward for Ukraine even without the moral certainty that the protagonists are without sin. This will not be an easy task, but the people of Ukraine should expect it.
