

The Push to Prosecute Russia's Vladimir Putin for the Ukraine War

One proposal, to prosecute him for the crime of aggression, harks back to Nuremberg, where Nazi officials were tried by a special tribunal after World War II. The idea is contentious.

In the mid-1940s following the Allies' World War II victory, a tribunal in Nuremberg held historic trials of Nazi officials, with a second one in Tokyo aimed at Japanese political and military leaders. The key crime in question was one for which no one had been tried before and no one has since been tried in an international setting—the crime of waging aggressive war, at the time called crimes against peace.

Some legal scholars and public figures say Russia's leaders should similarly be prosecuted for invading Ukraine. They envision a special tribunal with high-ranking defendants, Russian President Vladimir Putin chief among them. The tribunal would “signal our resolve that the crime of aggression will not be tolerated, and that we will leave no stone unturned in bringing to an end the terrible events we are now seeing,” said a March statement by several international lawyers, a former Nuremberg prosecutor and former U.K. Prime Minister Gordon Brown.

The proposal, which is backed by Ukrainian Foreign Minister Dmytro Kuleba, is part of a broader push toward accountability that is centered on three basic questions: Whom to prosecute for the violence in Ukraine, where to prosecute them and for which crimes under international law.

One effort is already under way at the International Criminal Court in The Hague, where prosecutor Karim Khan has opened an investigation encompassing potential war crimes and crimes against humanity. These offenses deal with atrocities that troops and those who command them commit during war. They potentially cover, for instance, the killing of civilians by Russian forces in the Ukrainian town of Bucha, which Mr. Khan visited last month.

The crime of aggression is about what comes before the war crimes: the invasion itself—planning it, starting it, waging it. Proponents say prosecuting Mr. Putin for war crimes at the ICC, while not impossible, would be difficult because judges need to be persuaded with evidence of a link between the Kremlin's decisions and specific brutalities in the battlefield. A crime of aggression charge, they say, would allow prosecutors to go straight to Moscow.

Aggression is a leadership crime, said Philippe Sands, a law professor at University College London and an expert on international courts and tribunals, who is part of an effort to prepare the legal texts that could facilitate a possible future tribunal for Ukraine. “It is the only one with any degree of certitude that takes us to the top table.”

The key questions, Mr. Sands said, are: **Is Russia waging a manifestly illegal war and who is responsible for the decision to go to war?** “Gathering evidence for the crime of aggression is not complex,” he said, since Russia’s large-scale attack on another state’s territory, including bombardments of Ukrainian cities by its armed forces, fit the crime’s definition.

Russia says it isn’t planning an occupation of Ukraine and that its forces are liberating Ukrainians. It says it has only hit military targets and that any civilian casualties are the fault of what it calls Ukrainian nationalists and extremists.

The next question is, where could an aggression trial take place? Not at the International Criminal Court. Although **the ICC was created with four crimes in mind—war crimes, crimes against humanity, genocide and the crime of aggression—its jurisdiction over the crime of aggression is much narrower compared with the three other crimes.** For those three crimes, the ICC can prosecute Russians because Ukraine, on whose territory the alleged atrocities are occurring, has accepted the ICC’s jurisdiction. But with the crime of aggression, Ukraine’s acceptance isn’t enough. The fact that Russia isn’t a party to the court’s founding treaty, known as the Rome Statute, prevents the ICC from moving forward with an aggression investigation.

An **exception would be if the United Nations Security Council** referred the case to the ICC, but that is a nonstarter since Russia has veto power as a permanent council member.

That is why some legal experts have floated the idea of a special or ad hoc aggression tribunal, though how it should be formed and by whom are widely debated questions. The two well-known tribunals that opened in the 1990s—one for war crimes in the former Yugoslavia and the other for the Rwandan genocide—were created by the U.N. Security Council, *a route effectively closed in the case of the war in Ukraine because of Russia’s expected veto.*

One option would be to loosely follow the model emerging from the Nuremberg tribunal, which was created by the U.S., Soviet Union, France and Britain to prosecute German defendants. A group of influential countries, including the U.S., U.K. and France for instance, could similarly join hands with Ukraine to set up a tribunal. But opponents argue a tribunal by a small clutch of countries would lack international legitimacy and could be accused of selective justice.

Kevin Jon Heller, professor of international law and security at the University of Copenhagen, says the U.S. and U.K., which invaded Iraq in 2003, shouldn’t be the ones setting up a tribunal to prosecute Russians for invading Ukraine. These states were also responsible, he said, for narrowing the ICC’s jurisdiction over the crime of aggression when countries were drafting the crime’s parameters for the Rome Statute. Otherwise, the court’s

prosecutor could have investigated Russians for aggression as he is doing for war crimes, eliminating the need for a tribunal, he said.

“The idea since Nuremberg was not to create tribunal after tribunal for specific conflicts, much less specific sides of conflicts,” Mr. Heller said.

The problem, he said, is that “we’re now retreating away from this idea that all states should be subject to the same rules and saying, ‘Now we have a really egregious example of aggression, one that clearly deserves to be prosecuted, we’re going to create a tribunal for that, but we’re not going to create a tribunal for any of the other acts of aggression that have been committed over the past 20 years.’ ”

A different model would be for a tribunal to be formed by Ukraine and an international organization, such as the U.N. The U.N. was involved in creating a special court covering Sierra Leone’s civil war and one in Cambodia to deal with Khmer Rouge atrocities. A U.N.-backed tribunal would appear more legitimate than one set up by a handful of nations, especially if it was endorsed by the U.N. General Assembly through a vote, said Jennifer Trahan, clinical professor of global affairs at New York University. But critics say winning broad support in the 193-member General Assembly will be far from easy.

Last week, the parliamentary assembly of the Council of Europe, the continent’s main human-rights organization, threw its weight behind calls for an **aggression tribunal**. Combining the other proposals, it recommended a tribunal be created by treaty between what it called like-minded countries and endorsed by the U.N. General Assembly, and should get support from organizations like itself and the European Union, it said.

No matter how a tribunal comes up, it faces the practical hurdle of getting Russian defendants in front of it. Those advocating for an aggression trial concede it isn’t likely that Mr. Putin or Russian Foreign Minister Sergei Lavrov will end up in the dock. Their counterargument: You never know. They cite the examples of Nazi leader Hermann Goering, former Serbian leader Slobodan Milosevic and former Liberian President Charles Taylor, all of whom ended up before international tribunals despite the odds. Other suspects haven’t, such as former Sudanese President Omar al-Bashir, who remains wanted since 2009 for a genocide trial at the ICC.

Ms. Trahan said even an investigation or indictment would send a powerful statement. “The opposite statement of no justice can be really harmful,” she said.

Since the war began, Ms. Trahan said, many people have wondered whether Mr. Putin would have invaded Ukraine if the global response to his 2014 annexation of Crimea had been stronger. “Because if you let Crimea go and you let Ukraine go, what are you inviting next?” Ms. Trahan said.