

REPORT

Prosecuting Putin

Bringing the Russian president to trial will be a challenge. But war crimes lawyers are raring to go.

By **Colum Lynch**, a senior staff writer at *Foreign Policy*.

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As Russian forces escalate their assault on Ukraine, the prospect that their commander in chief, Russian President Vladimir Putin, will ever stand trial for the crimes they commit may seem far-fetched. But for some international legal scholars, it is all but certain that Putin will one day be indicted for war crimes or crimes against humanity in Ukraine, charges that would turn him into an international pariah, if not a prisoner.

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“It will be inevitable that Putin will be indicted at the International Criminal Court. He is at the very top of the command chain in Russia,” said David Scheffer, director emeritus of the Center for International Human Rights at Northwestern University’s law school, who served as the first U.S. ambassador-at-large for war crimes.

Scheffer, who played a critical role during the Clinton administration in the negotiations leading to the establishment of the International Criminal Court (ICC), acknowledges that it is highly unlikely that Putin will be prosecuted in the foreseeable future, or that Russia will conduct investigations into crimes by its own soldiers in Ukraine. But he said the Russian president’s refusal to halt a military campaign that has been marked by widespread attacks on civilians exposes him to criminal charges.

“It is by omission that you would get to Putin on those atrocity crimes. Crimes of omission can be as powerful as the crimes of commission,” he

added. “He has obviously failed as top commander to stop those crimes from being committed on a daily basis. He has the power to do it.”

The question of Putin’s exposure to prosecution comes as the State Department made a formal determination Wednesday that Russian troops committed war crimes in Ukraine.

“Today, I can announce that, based on information currently available, the U.S. government assesses that members of Russia’s forces have committed war crimes in Ukraine,” U.S. Secretary of State Antony Blinken said in a statement outlining alleged Russian crimes, which includes attacks on shopping centers, apartment buildings, schools, and ambulances. “Our assessment is based on a careful review of available information from public and intelligence sources. As with any alleged crime, a court of law with jurisdiction over the crime is ultimately responsible for determining criminal guilt.”

The ability to prosecute Russian soldiers, officers, and political leaders following weeks of brutal attacks on hospitals, schools, theaters, and apartment buildings will pose a major test of the international effort to secure justice for the worst crimes. If Russian perpetrators face no charges, it would reinforce the perception, already shared by many around the globe, that the world’s biggest powers—including Russia and the United States—are basically immune from prosecution in international courts for war crimes and other atrocities, and that justice is applied only to weak countries.

The Russian shelling of Ukrainian cities, from Kyiv to Mariupol, has triggered a scramble to create institutions to collect, document, and ultimately prosecute cases of war crimes and crimes against humanity. The U.N.’s Human Rights Council and the Organization for Security and Cooperation in Europe have established missions to collect evidence of atrocities. The Hague-based ICC has opened an investigation into grave crimes in Ukraine. Foreign prosecutors, from Germany to Lithuania to Poland, are preparing to try Russian perpetrators in their courts.

Iryna Venediktova, Ukraine’s prosecutor general, oversees a team of Ukrainian prosecutors who have been trying to document atrocities inside the country, while coordinating the provision of evidence to international prosecutors, including Karim Khan, the chief prosecutor at the ICC, who recently visited Ukraine.

“The main war criminal of the 21st century is President Putin and his authorities—that they killed our people, they killed our innocent kids, that they used prohibited weapons, and we have evidence of all of this,” she said. She said she would offer Khan documentary support to prosecute the war crimes. “We can help him with our information, with our witnesses, with our victims. I will do everything to help him be successful, because if he will be successful, Ukraine will be successful.”

Russia’s crimes have been so blatant and so well documented that it will require little prosecutorial wizardry to persuade a judge of their culpability, according to experts. The litany of Russian excuses—that Ukraine is committing genocide, that Ukraine has been bombing its own people, that Ukraine and the United States have conducted dangerous biological weapons experiments—are likely to melt before a court of law. But Russia’s diplomatic influence and its veto power in the U.N. Security Council have helped prevent other potential war criminals, including Syrian leader Bashar al-Assad, from facing justice in The Hague.

Russian Foreign Minister Sergey Lavrov has acknowledged, for instance, that Russia bombed a maternity hospital in Mariupol, though he claimed that it was occupied by right-wing Ukrainian nationalists, and that all the “mothers and nurses were chased out” of the hospital before it struck. Eyewitness accounts confirming the hospital was functioning could undercut Russian claims, exposing them to charges of war crimes.

“Orwellian-speak doesn’t go down well in the courtroom,” said Scheffer, citing Lavrov’s defense of the Mariupol hospital attack. “It’s very unlikely a judge in a courtroom will take it very seriously, and it is easily rebuttable by the prosecution.”

The legal machinery being mustered against Russia has the potential to narrow the path to any sort of diplomatic offramp for Putin, complicating efforts by Ukraine or Western powers to negotiate a political settlement with the Russian leader ending the Ukrainian conflict.

It also has the power to further Putin’s political isolation, making it more difficult for him exercise his influence on the world stage.

“As a professional diplomat I am always cautious to use legal terms; if you say ‘genocide’ or ‘war crimes’ it has a lot of legal or judicial implications,” said Michel Duclos, a former French diplomat and special advisor to the

Institut Montaigne. “The word ‘war crime’ is something you have to reserve for times when you’re completely sure you have all the evidence.”

But labeling your adversary a mass murderer, he added, can have political and diplomatic benefits.

He noted that the ICC indictment of the Sudanese leader Omar al-Bashir was useful in isolating him and limiting his ability to travel to summits. In the end, the Sudanese people forced him from power. “The strategy of isolation worked,” he said.

In Washington, there is growing bipartisan support for the United States to make intelligence of war crimes available to international investigators, including the International Criminal Court.

Rep. Adam Schiff, the chair of the House Permanent Select Committee on Intelligence, and Rep. Michael Turner, the committee’s ranking member, led their committee in appealing to Avril Haines, the Director of National Intelligence, to prioritize efforts to “document and catalogue Russian actions in Ukraine that could amount to war crimes or crimes against humanity.”

“Though the possibility of accountability appears distant today, we have a responsibility to bear witness,” the lawmakers wrote.

During the course of the invasion, U.S. President Joe Biden has declared Putin a “murderous dictator” and a “pure thug,” but more importantly he has referred to him as a “war criminal,” creating an expectation that he will be held accountable for breaking the law. Other Biden administration officials have said much the same.

“Every day that Russia’s forces continue their brutal attacks, the number of innocent civilians killed and wounded, including women and children, climbs,” Blinken said Wednesday. “As of March 22, officials in besieged Mariupol said that more than 2,400 civilians had been killed in that city alone.”

Blinken said the U.S. government will “continue to track reports of war crimes and will share information we gather with allies, partners, and international institutions and organizations, as appropriate. We are committed to pursuing accountability using every tool available, including criminal prosecutions.”

The U.N.'s circumspet secretary-general, António Guterres, has all but accused the Russians of committing atrocities. "One month ago, the Russian Federation launched a massive invasion of the sovereign territory of Ukraine in violation of the U.N. Charter," Guterres said on Tuesday, citing Russian attacks on schools, shelters, and hospitals.

The end of the Cold War ushered in a new era in international justice, with an international court established in the early 1990s to prosecute those responsible for war crimes and crimes against humanity; among the first in the dock were killers from Rwanda and the former Yugoslavia. Over time, these ad hoc tribunals have fallen out of favor because of the time it takes to stand them up, the large financial cost, and the difficulty of shutting them down when their job is done.

In 1998, governments established the International Criminal Court, a permanent court charged with prosecuting the most serious crimes, including war crimes, crimes against humanity, and genocide. But the court lacks jurisdiction in some countries, like Russia and the United States, that have not ratified the treaty establishing the ICC. Ukraine has also held off on ratifying, but it did issue a formal invitation to the ICC to investigate crimes on its territory starting in November 2013. A group of 41 states also requested the ICC investigate serious crimes in Ukraine.

Todd Buchwald, a former U.S. ambassador for war crimes, said that the course of the war could determine whether or not Putin and his top allies are ever held accountable for crimes.

"Of course all this depends upon how events unfold in the future, and we don't yet know how they will unfold," he said. "But it's a mistake to think this will never happen."

Buchwald recalled sitting in a courtroom in Dakar, Senegal, where the former Chadian dictator Hissène Habré was convicted in 2016 of sexual slavery and ordering the killing of 40,000 people during his term as president of Chad from 1982 to 1990. "Imagine how hopeless this must have looked in the 1980s," he said. "But one thing led to another, people persisted, and there I was watching this man be convicted. It's a long game."

Three leaders of the Cambodian Khmer Rouge regime, which committed mass atrocities during its rule in the 1970s, were ultimately convicted of serious crimes, including crimes against humanity and genocide, in 2010 and 2018, decades after they committed their crimes. Other former leaders,

including the late Liberian President Charles Taylor and the former Serbian leader Slobodan Milosevic, were convicted of crimes during their terms and sent to jail.

Venediktova, Ukraine's prosecutor general, said her office has already documented more than 2,000 cases of war crimes less than a month into the war. There will be more.

“Putin, dictator Putin, wants to destroy all our state. He wants to kill all Ukrainians as a nation,” she said. The Russian perpetrators, she said, “are guilty in the deaths of our people.”

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