
Kluwer Arbitration Blog

Prosecuting Putin and His Cronies

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Tuesday, March 1st, 2022

International proceedings have already been [initiated](#) against Russia by Ukraine in the International Court of Justice. Other proceedings in international tribunals, including the International Criminal Court, have also been [commenced](#) as the prosecutor has opened an investigation. This post proposes that another forum, and set of international legal claims, should also be pursued: the historical origins of those claims make them uniquely appropriate for application to Putin and his cronies for their aggression against Ukraine.

At the end of World War II, after Hitler's invasions of France, Czechoslovakia, Poland and elsewhere had been rolled back, the individuals responsible for those wars were criminally prosecuted. An [international judicial tribunal](#) tried and convicted surviving Nazi leaders for, among other things, undertaking wars of aggression against neighboring European states – branding those actions violations of international criminal law. Those convicted were subject to lengthy imprisonment or capital sentences.

The Allies, including the Soviet Union, cooperated to establish this international judicial tribunal, which was first known as the International Military Tribunal. It had the approval and support of virtually all of the world community and later became known as the Nuremberg Tribunal. Detailed context and information is available within the US Holocaust Memorial Museum's [holocaust encyclopedia series](#) on the Tribunal. In sum, the Tribunal's mandate was to consider and decide charges of international criminal wrongdoing – defined in the [Tribunal's Charter](#) – against senior Nazi officials. In addition to crimes of genocide, crimes against humanity, and war crimes, the Nuremberg Charter included the crime of aggressive war. The crimes recognized by the Nuremberg Charter included participating in a conspiracy or common plan to undertake a war of aggression (as well as directly doing so).

The same rules of international law apply to Putin's war against Ukraine and the same charges can be levied against him and his cronies, and perhaps more easily so. Evidence of this emerging war and its aggressive character is recorded each day in the world's press, social media and government reports. That evidence is sufficient to both warrant and require prosecution of Putin, and his enablers, for the same international crimes of aggressive war.

In particular, [Article VI of the Nuremberg Charter](#) defined the crime of aggressive war (or “crimes against peace”), as it had developed in customary international law, as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment

of any of the foregoing.” That standard was subsequently unanimously approved by the U.N. General Assembly and incorporated into the [U.N. Charter at Article 1](#). It since has been the basis for future development of international criminal law on the subject.

The Soviet Union was not only fully supportive of the Nuremberg Charter’s provisions regarding crimes of aggressive war; it was in many respects the **leading proponent** of imposing international criminal sanctions for crimes against peace and for attaching grave penalties for such crimes. Aaron Trainin, a leading Soviet jurist, first articulated the concept of “a crime against peace” in the 1930s. He said that wars of aggression, in pursuit of “predatory goals,” made “a mockery of the principles and norms recognized by civilized humanity.” Adopting that logic, the USSR insisted that the Nuremberg Charter include crimes against peace among its provisions (successfully overcoming arguments that customary international law did not yet recognize such a crime). Likewise, in Tribunal sessions in July 1946, Soviet Judge Nikitchenko argued for devoting greater attention to the defendants’ crimes against peace because the Nazi invasions were one of the “clearest cases of aggression.” (available at: <https://bit.ly/3psy7TH> at p. 370)

Applying the standard formulated by Trainin and set out in the Charter, the Nuremberg prosecutors charged two dozen senior Nazi government officials and military officers with crimes against peace for, among other things, planning and directing the invasions of Austria, Czechoslovakia, Poland, France, Belgium, Luxembourg, the Netherlands, the Soviet Union and other European nations. In particular, two German Foreign Ministers (von Ribbentrop and von Neurath) were indicted for having planned and directed the Nazi foreign policy relating to these invasions, while several senior German military officers (Keitel, Raeder, Jodl and Doenitz) were similarly charged with respect to military preparations and actions.

The Nuremberg Tribunal convicted each of these defendants. It **declared** that:

“The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

The Tribunal traced the Nazi’s militarization, claims of rightful authority over all German-speaking people, “premeditated and carefully planned” preparations for war (noting that “planning and preparation are essential to the making of war”), brutal and unprovoked military invasions of Poland, Austria, Czechoslovakia, France and elsewhere, and violations of multiple treaties or assurances. It concluded that each of the defendants had, by participation in these actions, violated international criminal prohibitions against aggressive war. In the Tribunal’s **words**:

“the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression,

and such a war is therefore outlawed by the [Kellogg-Briand] Pact.”

The Nuremberg Tribunal’s reasoning, and the terms of the Nuremberg Charter, are almost eerily tailored to Russia’s invasion of Ukraine. The same massive military build-up, claims to natural authority over Russian-speaking territories, careful planning and preparation and brutal, unprovoked invasions (reminiscent of the attacks on Poland and the Low Countries at the outset of World War II), in plain violation of prior treaty and other commitments characterize Putin’s assault on Ukraine. Although convicting Putin, and his enablers, would require evidentiary proof, the existing record appears clearly to warrant prosecution.

The defendants in a prosecution for crimes against peace would, obviously, begin with President Putin, but also include both Foreign Minister Lavrov (holding the same position as von Ribbentrop) and senior Russian military commanders (holding positions like Keitel and Doenitz). It would be no defense in the latter cases that Putin himself was responsible for ordering the invasion. The Nuremberg Tribunal considered exactly that defense, and rejected claims that Hitler possessed supreme authority and was ultimately responsible for all military decisions; it concluded instead that wars require participation by multiple individuals, which included the Nuremberg defendants.

There is also no basis for suggestions that Putin (or others) might enjoy head of state immunity. The international crime of aggressive war applies to all persons, regardless of governmental rank. Indeed, as Article VII of the Nuremberg Charter provided, “[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

Another important question concerns the prosecution of senior corporate officers, in Russia and elsewhere, of companies that participated in the invasion of Ukraine. The Nuremberg Tribunal did not itself consider charges against officers of German companies involved in the Nazi war effort. Nonetheless, in one of its best-known decisions, the U.S. Military Tribunal in Nuremberg tried and convicted senior corporate officers of several German businesses, including IG Farben, Krupp, and Flick, who were found to have provided weapons or financial assistance for wars of aggression. In the *Krupp Tribunal’s words*, corporate officers were no less capable than governmental officials of violating international criminal law: “The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt.” Similarly, Trainin *wrote* at the time that Nazi financial and industrial figures had committed “grievous violations of the principles of international intercourse and human ethics.”

That reasoning applies equally in present circumstances. Officers of weapons suppliers who participated in supplying or resupplying Russian combat troops, or producing armaments responsible for widespread civilian casualties in Ukraine, would appear to be in little different position than the German industrialists convicted in Nuremberg. The same could potentially be true of other companies and their officers, including those engaged in cyber-attacks, logistics and supply, financing and otherwise.

Preparations for prosecutions against senior Russian political and military figures need not await apprehension of suspects. Just as the Allies in World War II began planning for prosecutions


during the War, so evidence-taking and work on the appropriate legal framework for an international tribunal ought also begin now. The International Criminal Court's prosecutor, with jurisdiction over crimes against humanity and war crimes in Ukraine (but not crimes against peace), has already [stated](#) that he is investigating Russia's actions. Similar steps can be taken with respect to crimes against peace, prosecuted before an international tribunal established by the world community. If Putin and his cronies choose, as they likely will, to be fugitives from justice, trials can be conducted in absentia. Circumstances may frustrate any apprehension or personal appearance of Putin or his cronies before an international tribunal. But they need not frustrate a judgment of the international community regarding their actions.

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