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# U.S. and Ukraine Split Over Putin's Legal Fate

BY [DAVID BRENNAN](#) ON 5/20/23 AT 3:00 AM EDT

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Ukraine is at odds with its key U.S. and European partners over a proposed tribunal to try Russian President [Vladimir Putin](#) and his top officials for the crime of aggression. This is an offense conceived during World War II and at the core of the landmark Nuremberg and Tokyo tribunals.

Ukraine is pushing for a special international tribunal established via the [United Nations](#) General Assembly. Kyiv believes this format will lend proceedings more legitimacy; create a greater international impact; and avoid troublesome conflicts with its own national constitution.

But Ukrainian officials say the U.S. and some of its most powerful allies are hesitant to set a precedent that might backfire, given their own past aggressions abroad. Instead, Western partners are proposing two "hybrid" options that would be run under Ukrainian jurisdiction, but crucially would not overturn the legal immunity enjoyed by world leaders.



A man takes a selfie in front of a placard resembling a postage stamp bearing a composite image depicting commander-in-chief of the Ukrainian armed forces Valeriy Zaluzhnyi, flashing a V-sign beside a handcuffed Russian President Vladimir Putin appearing before the judges of Hague Court, in central Kyiv on May 11, 2023. SERGEI SUPINSKY/AFP VIA GETTY IMAGES

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"They want the hybrid option, but I'm also unwavering," Andrii Smyrnov told *Newsweek*. He is the deputy head of President [Volodymyr Zelensky's](#) office responsible for negotiations with foreign partners on the special tribunal. "We do not need a tribunal just for the sake of having some kind of forum or court of justice. This makes no sense."

Ukraine's proposed "model has not yet been supported by the [United] States," Smyrnov said. "And so far, hasn't been supported by France or Germany, for that matter. And the logic of our discussions is clear to me: the United States and their allies are apprehensive of this precedent for themselves."

"My question for them is, in any kind of military mission joined by the United States and the allies, was there the goal to annex any territories? Never. Was there an objective of genocide? No. Have there been any objectives of mass killings of civilians in order to commit crimes against humanity? No. Never."

Smyrnov said foreign partners might also be uncomfortable with stripping Putin's immunity, a move that might open the door to similar proceedings against other—maybe Western—leaders. "Another point of skepticism with the Americans is that they say we have to overcome Putin's personal immunity to judge him," Smyrnov added. "Let's not be afraid of any kind of precedents."

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The State Department did not respond to *Newsweek's* emailed requests for comment in time for publication.

## **Tribunal Trouble**

The International Criminal Court is collecting evidence related to Russian war crimes in Ukraine and has also issued an arrest warrant for Putin. However, the court does not have jurisdiction to prosecute the crime of aggression. None of the U.S., Russia, or Ukraine is party to the Rome Statute that underpins the ICC.

Ukrainian officials and some of their European partners want Putin and his top officials tried and convicted of the crime of aggression. They warn that failing to do so would mean insufficient justice for brutalized Ukraine and the emboldening of other autocrats—like President [\*\*Xi Jinping\*\*](#)—who might be considering aggressive military action.

Though Ukraine's Western partners are broadly on board with the principle, they are divided on the mechanism. The U.S. has proposed an "internationalized tribunal dedicated to prosecuting the crime of aggression

against Ukraine" to be "rooted in Ukraine's judicial system" with the assistance of "international elements."

European nations, too, appear to be pursuing the "hybrid" approach. The U.K. has said it wants a court "integrated into Ukraine's national justice system with international elements." German Foreign Minister Annalena Baerbock has advocated for a tribunal "deriving its jurisdiction from Ukrainian criminal law."

But Kyiv, and supporting experts, say this is insufficient. The U.S. is proposing "a very weak tribunal that establishes none of the precedent we need, and is going to have immunities—meaning the top leaders, who were the authors of the invasion, can't be prosecuted," Jennifer Trahan, a professor at New York University's Center for Global Affairs, told *Newsweek*.



Gravediggers shovel soil into the grave of a woman as her husband and son watch on April 20, 2022 in Bucha, Ukraine. The town was the site of a variety

of Russian atrocities, for which authorities in Kyiv are now seeking to prosecute those at the top of the Kremlin hierarchy. JOHN MOORE/GETTY IMAGES

And the European hybrid "will also still have immunities and seems to be illegal under Ukraine's constitution," Trahan added.

"While these models have worked well in other situations for the prosecution of war crimes and crimes against humanity," Trahan said, "they are really defective for the prosecution of the crime of aggression because of the crime's leadership nature, international relevance and Ukraine's constitutional barriers."

Exempting Putin from prosecution under the U.S. approach, Trahan said, "would be a terrible signal to other would-be aggressors that they can commit this crime and throw their subordinates under the bus... I honestly think the Chinese government is watching, and a tepid response could potentially fuel a Chinese invasion of Taiwan. I'll put it that starkly."

The U.S. and U.K., in particular, Trahan added, are "somewhat, I think, self-interested, because there have been times when the legality of their use of force has been questioned. So, they may not be designing the best tribunal for Ukraine, or for the world, and preservation of global order. And that's really what we need."

"I call it a 'Nuremberg moment' we're entering," Trahan said. "Let's not blow it."

Anton Korynevych, Ukraine's ambassador-at-large for the establishment of the special tribunal, told *Newsweek* that establishing a truly international court "closes a very important accountability gap which currently exists in the international criminal justice system."

"There is no tribunal now in which you can try Russian highest political and military leadership for the prosecution of the crime of aggression," Korynevych said.

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"If the crime of aggression is not prosecuted, in this particular instance, when we have the biggest war of aggression in Europe since the end of World War II, it will cause big damage to the whole international legal order, and to the principles of non-use of force and non-threat of force in international relations."

Korynevych said he is still hopeful of winning over skeptics. "I don't want to speak for our U.S. friends," he said. "We appreciate the U.S.'s active position, and we are sure we'll find the solution.

"In relation to concrete options and modalities, it's quite natural and logical that different states might support different options," Korynevych added.

## **Navigating the UN**

Ukraine's proposed tribunal cannot be given legitimacy by the UN Security Council, as Russia—and likely also China—would use its permanent member veto to scupper any such effort. Instead, Kyiv wants to go through the UNGA, hoping that the broad support its cause has so far found in the body will hold up.

"This should be led through the UN General Assembly," Trahan said. "I think it would be a fallacy to see this as a European war or [NATO](#)'s war. This really is about the global order and deserves an international response."

But there is no guarantee of enough votes, especially if Ukraine pushes ahead without the full backing of the U.S. and major European powers. "Can one do it without the U.S. and powerful countries? It would be difficult, although it's not impossible," Trahan said.

"There are many states in the General Assembly. But then it does mean lining up the Central and South American vote, the African vote, the Asian vote etc," she added.

"And given certain geopolitical ties, some of those votes don't necessarily easily line up, unless states start to see the precedent this tribunal would set as one that is in their national interest—as a deterrent against all aggression in the future. This time, it was Ukraine, but next time, it could be them."

Smyrnov said a tribunal could be put into operation quickly, assuming Kyiv gathers enough support. "In May, June, even July of last year, the international community was very reluctant to sit at the negotiating table when I would start advocating and lobbying for the tribunal," he added. "Now, the visibility of this issue is not questioned by anyone."



The United Nations seal is seen in the General Assembly Hall at the United Nations on May 15, 2023 in New York City. Ukraine wants to work through the General Assembly to prosecute President Vladimir Putin for the crime of aggression. MICHAEL M. SANTIAGO/GETTY IMAGES

"We have progressed considerably, and we have advanced very much in almost all the continents," Smyrnov added. "If we create a tribunal through the UN-Ukraine option, we can launch it within a year."

Kyiv has little concern about proving its case. "It's relatively easy to prosecute for the crime of aggression," Korynevych said. "The crime of aggression is easy to prove... all the facts are on the table; all the facts are publicly available."

"We believe that really investigation and prosecution of the crime of aggression will take less time than investigation and prosecution of other international crimes."

The Ukrainian officials said they did not expect to see Putin in front of a judge, but they added that a conviction is important regardless.

"I'm convinced that Putin will be recognized as the guilty party in this aggression, but I want this to happen while he's still alive," Smyrnov said. "We cannot actually present Putin for the tribunal. But if and when he is recognized as an international criminal, dying in full isolation with that status, I think the tribunal will have fulfilled its mission."

Putin's Security Council members—all of whom publicly agreed to the disastrous invasion of Ukraine—are also on Kyiv's list, Smyrnov said. Still, he added he has little hope that international courts will shift public opinion in Russia.

"I would like to believe that something will change," Smyrnov said. "I still have this hope that they will try to cope with reality and see that their country is not just going to be isolated internationally, it's going to be rotting."