



Putin's War and International Law

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[00:00:00] Jeffery Rosen: Dear We The People friends, I have some exciting news and lots of gratitude. Thanks to your generosity we've met our goal of raising \$234,000, which will be matched dollar for dollar by the John Templeton Foundation. We've received donations from you in all 50 states, plus Washington D.C., the Northern Mariana Islands and Puerto Rico and seven countries, Canada, China, Switzerland, United Kingdom, Germany, Israel and Hungary. And 669 of you made donations to We The People.

[00:00:32] I'm so grateful for your support of our inspiring mission of learning together about the US constitution by convening such meaningful opportunities is for civil dialogue and debate. Thank you so much for signaling your support. And it's such a privilege to learn with you every week. I can't wait to share this week's episode with you. On with the show.

[00:00:54] Hello friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. As Russia continues to wage war on Ukraine and more horrifying images emerge from the streets of Bucha, a suburb of Kyiv, there are increasing calls by international leaders for war crimes prosecutions.

[00:01:34] What can be done? Does international law play a role? What is a war crime? What is a crime against humanity? What is genocide? These all crucially important questions on international law that I'm so eager to explore with you dear We The People listeners. We have the privilege of learning from two of America's and the world's great experts on international law and human rights.

[00:01:58] Philippe Sands is currently the Judith Pizar visiting professor of law at Harvard, and he is also a professor of law at University College, London, and a barrister at Matrix Chambers. He's the author of *East West Street: On the Origins of Crimes Against Humanity and Genocide*. He recently wrote an important piece for the Financial Times called Putin's use of military force is a crime of aggression. Professor Sands, thank you so much for joining.

[00:02:25] Philippe Sands: It's absolutely lovely, uh, to be with you. I am not of course, as you know, a constitutional law expert or scholar. So I'm very thrilled to extend my audience beyond my usual, uh, contrary.

[00:02:38] Jeffery Rosen: Well, we're thrilled to have you. Uh, and Ryan Goodman is the Anne and Joel Aaron Krantz professor of law at New York University School of Law. He coauthored the book, *Socializing States: Promoting Human Rights Through International Law*, and recently coauthored an op-ed in *Washington Post* called, *How the world can prosecute Putin for going to war*. Professor Goodman, it is an honor to have you on the show.

[00:03:00] Ryan Goodman: It's really an honor to be here with you. Thank you so much. Looking forward to the conversation.

[00:03:04] Jeffery Rosen: Philippe, if I may, you wrote a piece called *Putin's use of military force is a crime of aggression*. In that piece you distinguished among crimes of aggression, the targeting of civilians, which is a war crime and crimes against humanity. Tell us more about why you think that Putin may have committed all of those crimes and, and what those crimes are.

[00:03:27] Philippe Sands: Sure. So I, uh, of course observed as many did the events of, uh, late February. I was approached by the *Financial Times*. I write for them occasionally. And they asked me to do a piece on Ukraine and international law. It was very general. Uh, and I think they approached me in part because I teach international law, but also I'd written a book, *East West Street*, which one of the major characters is the City of Lviv where crimes against humanity and genocide originated as legal concepts.

[00:03:55] We may- maybe in due course come back to that. And I, I reflected on the likely direction this was going to take and focused on the crime that it seemed to me was as the Nuremberg Tribunal described it, the supreme crime, the waging of a manifestly illegal war. And that's what I focused on in the article. The article has really is its starting point 1945.

[00:04:21] I mean, for your listeners it's important to understand that it was on the 20th of November, 1945 that the four existing international crimes in international law came into being. War crimes, which describes the methods and means the conduct of warfare including the prohibition on the targeting or harm to civilians, crimes against humanity, the systematic and widespread harm or killing of individuals. Genocide is the third international crime. Destruction of groups. And then the fourth, what in '45 was called crimes against peace, today called the crime of aggression.

[00:04:58] And in the present terrible events really the war is the starting point. If the war had not been launched and was not continuing to be prosecuted, the other crimes would not have occurred. And so it seemed important for me to put the accent on that crime. And the established principles in international law that a leadership group launches a war that is manifestly illegal is at risk of investigation for the crime of aggression.

[00:05:28] It's a universal crime. Any country in theory around the world can exercise jurisdiction over it. It's also introduced into the Statute of the International Criminal Court. But the International Criminal Court doesn't have jurisdiction over this crime for various complex reasons. And I therefore thought it would be good to put into the agenda the crime of aggression and the question of how do we get accountability for that crime.

[00:05:53] Jeffery Rosen: Thank you so much for that extremely clear introduction for defining the four crimes so precisely, war crimes, crimes against humanity, genocide and crimes of aggression, and for introducing, uh, the topic. Professor Goodman Ryan, you published a model criminal indictment, uh, charging Putin with the crime of aggression using one of the narrowest definition of the crime under international law. Tell us about your indictment and why and how you believe he has committed the crime of aggression.

[00:06:24] Ryan Goodman: So, um, we decided to write up a model indictment because I think it helps focus the mind on how plausible and how strong the case is against Putin. Uh, in some sense the indictment wrote itself. Um, so we do use the definition that comes from the Rome Statute for the International Criminal Court, the treaty for the International Criminal Court, which is universally understood to be well within the confines of international law.

[00:06:54] Uh, if anything they were being very careful that they wanted to get consensus. And it's also a definition that the Russian diplomat at the time agreed was a sufficient definition of the crime of aggression. And here it's in some sense very easy to be honest, uh, to pin this on Putin because he and his speeches and the power that he is accumulated is the chief person responsible for ordering the invasion of Ukraine and the definition of what is a manifest violation of UN Charter, which is what it's required for a crime of aggression is, um, this is a textbook example.

[00:07:32] Um, it is a full scale invasion of another country for no good reason. The gravity of the effects of the invasion are enormous. You can just tell that by one indicator, the millions of refugees and the scale of the invasion. So, uh, the only question in some sense to be honest is who else [laughs] should be liable? So we just, you know, only focused on Putin, but, uh, it would also be other senior members of his command. And it could also include, uh, Belarus and the, uh, head of Belarus as well for helping stage the invasion of Ukraine.

[00:08:13] Jeffery Rosen: Thank you so much for that. Philippe, you've both begun by focusing on the crime of aggression, but you mentioned several other crimes including crimes against humanity and war crimes and genocide. Uh, when president Biden, uh, called and then reaffirmed his statement of, of Putin as a war criminal, he invoked the photographs at Buca of civilians with their hands tied behind their backs before being executed.

[00:08:39] Um, tell us about the genesis of crimes against humanity and, and war crimes of genocide. Um, at Nuremberg, you've written about their fascinating connection to Ukraine. And give us an introduction of how America including justice Robert Jackson may have influenced how these crimes became part of international law.

[00:09:01] Philippe Sands: Sure. Just to respond, uh, it's really interesting and lovely to hear Ryan. We, we don't actually know each other so well. And, uh, for your listeners, I think it's important to know that our initiatives really are, are detached. We, we have not been working together. This is, uh, one of these examples where different people in different parts of the world go off and do their own thing and then there is a point of connection.

[00:09:23] And, uh, I read with great interest and actually I have to say with much appreciation the draft indictment precisely because it really does concentrate the mind. There's... Nothing

beats a piece of paper in black and white, which allows you to say, "Okay, yes. What about this and what about that?" And particularly, uh, the interesting point that Ryan concluded with on the question of who actually won white target.

[00:09:47] I, I think it's all of the folks that he identified. But I'd add one other group in, in terms of sowing, um, a bit of mischievous concern in the minds of others. The finances, the oligarchs. Who's actually supporting this? We've had these extraordinary images, one of the rounds of the so-called peace negotiations of Roman Abramovich. The, uh, owner of Chelsea Football Club turning up apparently as a member, uh, of the Russian team.

[00:10:15] Um, in what circumstances would one of those characters actually find themselves in the frame for complicity or assistance or some other form of contribution to the direction, uh, of these war? Who's paying for this war? All these kinds of questions that some future prosecutor might in due course have to think about and that Ryan and his colleague's draft makes us think about.

[00:10:38] So to go back to 1945, it's an interesting moment and it's a very American driven moment. You mentioned Robert Jackson. He, he plays an absolutely crucial role on leave, uh, from his position as a justice of the United States Supreme Court in the spring of 1945. Um, he was I think appointed, uh, by Roosevelt and worked for Truman. Um, and he is appointed as the chief prosecutor. And the first job he has is to help draft what came to be the Charter and the Statute of Nuremberg.

[00:11:13] And it included the delicate matter of the list of crimes. Um, and, and he faced a problem. Because in the summer of 1945, there really was only one relevant international crime well established, and that was war crimes. The first one that we discussed, which goes back to the 19th century. In fact has a very significant, um, Russian element, the declaration of St. Petersburg of the 1860s probing the use of certain types of projectiles.

[00:11:43] Um, and, and Jackson would've found himself in difficulty because the horrors he was addressing went well beyond methods and means of warfare. You know, enslavement of entire populations of countries, extermination of large numbers of Jews and Poles and Roma and others. And so he asked himself the question, what do we do? And he turned to various characters in Washington largely to begin with and then, uh, abroad.

[00:12:13] And he added eventually with the British, the French and the Soviets three new international crimes as I mentioned earlier. Crimes against humanity, genocide and the crime of aggression. Crimes against humanity was an idea introduced by a, an academic at Cambridge University, Hersch Lauterpacht who had actually lived and studied in the City of Lviv amazingly enough. And it was his experiences there that caused him in 1945, um, o- on the basis really of, um, a commission by the American Jewish Committee to do work on what became the modern international law of human rights.

[00:12:50] He published a book around the time of the adoption of the United Nations Charter, which incorporated the idea of human rights for the first time into international law. And it was he who had come to know Jackson over the past three years who proposed to Robert Jackson the

idea of introducing, uh, what became Article 6C of the statute, crimes against humanity. Really the widespread mistreatment of s- individuals, human beings, civilians, and so on and so forth. And Jackson ran with the idea.

[00:13:19] And, uh, uh, there was a- also present in the United States a former Polish prosecutor called Raphael Lemkin, who was actually lodged down at Duke University. He'd been given refugee status. But he was sort of zipping up and down between Duke and, and Washington. And he had invented in the autumn of 1944 this concept of genocide. Published a book actually commissioned by the Carnegie Foundation, uh, George Finch, um, a- and chapter nine was called genocide, the destruction of groups.

[00:13:53] And he really wanted to, uh, the concept of genocide. Um, and it made its way actually not into the Nuremberg Statute, a matter for which he was very devastated. Uh, his relations with Jackson were difficult, shall we say. Uh, but into the indictment, he got the concept of genocide, the destruction of groups. And so those two crimes came to be up and running.

[00:14:15] Curiously as I discovered when I, uh, was researching what became East West Street, uh, Lemkin also was a student at the University of Lviv, although not at the same time as Lauterpacht. And that's why you can trace these two modern day crimes that seem to be on the front pages of our newspapers every day these days to the City of Lviv today in Ukraine. Although, at the time it was part of Poland.

[00:14:38] Then came the tricky question for Jackson, and he was a bit hesitant about this. What about do... What to do about the, the wa- the actual co- the waging of the war, the decision to invade Poland, the decision in '41 to extend the conflict into the Soviet Union. And he was persuaded, again, curiously by a Soviet tourist, Aaron Trainin, to include the concept of crimes against peace into the statute. This was, this was delicate, um, because waging illegal war very frankly in 1939 was not part of international law.

[00:15:12] It, it was on its way to becoming part of international law, but I think it's a, a bit of a leap. But nevertheless, it made it into the statute. And Jackson then prosecuted, uh, those three crimes. And it's really worth going for your listeners onto YouTube and just watching his extraordinary opening arguments. I mean, one of the most powerful legal speeches I have ever heard.

[00:15:35] Uh, I actually did it with my students this week at Harvard. They are riveted by those, uh, opening few minutes. It goes on a bit. But just you... Just the first four or five minutes, it's absolutely extraordinary. With, with all the force of a very fine lawyer, uh, serving justice on leave from this Supreme Court. Um, he, he was a less fine cross examiner, it might be said, and he got into real difficulty a few months later cross examining Hermann Goering.

[00:15:59] But I really do credit to him the force with which these concepts were taken. At the end of the day, uh, the judgment of Nuremberg went with crimes against peace. The crime of aggression, that became, um, the universal crime as the judges put it and crimes against humanity. But the concept of genocide fell away and only came back at the end of 1946 when

the first meeting of the general assembly recognized crimes against humanity, genocide and crimes against peace as part of established international law.

[00:16:31] And the rest really is history. There was a, a 50 year interlude. Um, R- Ryan may want to c- come in on this. Nothing much happened on crimes against humanity genocide. There was a convention adopted in '48, but no international trials until the mid '90s. And then came Yugoslavia and Rwanda. And the Security Council very largely driven by the administration of president Clinton adopted resolutions to create two new international criminal tribunals, one for Yugoslavia, one for Rwanda.

[00:17:02] And they did not have the crime of aggression, uh, in, in, within their jurisdiction, but they did have the three other crimes. And five years after that in Rome in 1998 after 50 years of negotiations, the Statute of the International Criminal Court, uh, was adopted. I mean, I could go in, uh, to much more detail. But i- i- in a nutshell, that is the modern architecture of international criminal law today.

[00:17:26] Jeffery Rosen: Absolutely fascinating. Thank you so much for all of that. Thank you for the suggestion that We The People listeners to check out Jackson's opening argument at Nuremberg. I, I had associated Jackson with the cross examination of, of, of Goering and, uh, hadn't adequately honored him for the power of the opening argument. And I can't wait to watch it and learn from it as well. Ryan, we put a lot on the table. Um, the evolution of the addition of crimes against humanity and genocide along with crimes against peace into the international law arena.

[00:17:59] What can you teach us about them? Remind us of the most important statutes in which they're now embodied, uh, which are relevant today, and tell us whether you drafted the narrowest indictment about the crimes of aggression or the crimes against peace. Do you think there might be room for charging Putin with crimes against humanity and genocide as well?

[00:18:20] Ryan Goodman: Yeah. So I, I think, um, just one piece of what Philip said to also underscore, it's such an amazing history in which the major contribution is made in part by the United States into this international lexicon but also the Soviet Union. Aaron Trainin, the Russian lawyer who creates and comes up with the idea for crime against peace is also working with, um, another, uh, Russian, uh, Andrey Vyshinsky, who becomes the deputy minister.

[00:18:50] And he's born in Odessa and gets his law degree from Kyiv University. And the two of them are instrumental in conceiving of this as an international crime and in some sense convincing the Americans to make it so at Nuremberg. And they also do it at the time that the Germans are overrunning Ukraine. So it's just a remarkable understanding of the foundations of the law that is now being applied to those f- You know, to, uh, Putin and Russia.

[00:19:24] Um, I think the other pieces that I would just add to the picture are that the International Criminal Court Statute is, you know, is finally amended 20 years later to add the crime of aggression. There is a piece of this that is important for listeners to understand, which is that the International Criminal Court has full blown jurisdiction over the situation in Ukraine for

potential war crimes, crimes against humanity and genocide but unmistakably does not have jurisdiction for aggression.

[00:19:58] And that's because of a peculiarity in that amendment. The amendment was written in such a way that has a very specific carve out. And it says that it cannot apply to the nationals of a state that is not a party. So it cannot apply to Russia even though it's taking place on the territory of Ukraine and Ukraine has consented to the International Criminal Court's jurisdiction.

[00:20:21] So the prosecutor will have to look at these other three crimes, and w- there's the open question of who exactly what will be the forum for the crime of aggression, which we can get into as well. So I do think that there is unmistakable evidence of war crimes being committed. And, uh, we could also talk about the linkage that it's not just the crimes are being committed, but those who are responsible, it links back up to Putin and the senior command. For example, the use of cluster munitions in densely populated civilian areas is obviously a matter of policy.

[00:20:56] The high commissioner for human rights just, uh, last week said that they have documented 24 cases in which, separate cases in which these munitions, which cannot just discriminate between civilians and combatants have been used in populated areas. It's a matter of policy. That policy can only come from the senior commander and the supreme commander in chief of the Russian Federation Armed Forces. It's Putin himself.

[00:21:20] Um, his spokesperson Peskov has said that he's mo- you know, all decisions rest with him in terms of the operation. So I think there's that. Um, the second one is, uh, the crime against humanity, widespread or systematic attack against civilians. So, uh, we're seeing that on our screens these days. Uh, the horrific atrocities that are emerging out of the Bucha and other areas outside of Kyiv as an example. It's a more difficult case to prove with crimes against humanity. But I think that there's a lot of evidence pointing there.

[00:21:47] Then more recently there's been discussion about genocide. I... You know, different scholars, different experts line up differently on this question at this point in the conflict. I, um, am more cautious about it. I don't know... I don't think we're there yet. Uh, there has been some "genocidal rhetoric," uh, coming out of Putin and coming out of state. Uh, but the rhetoric you'd have to in a court of law prove that it's actually directly connected to and motivating the actions.

[00:22:17] I don't think it's easy to say that from what we see in our screens. Um, there are so many different explanations for what can be going on with the Wanton destruction and atrocities. Uh, but genocide is a, has a specific intent behind it. And it must mean that you can... You have to prove that the perpetrator is trying to destroy the group in whole or in part. And, uh, that's one of the most difficult cases for any prosecutor, let alone for outside observers to be able to get into that kind of a mindset and understand if that's actually the mindset and if it's motivating the actions on the ground.

[00:22:50] Jeffery Rosen: Thank you so much for laying that out so clearly. Philip, do you agree with Ryan or not that there is unmistakable evidence of war crime, that crimes of humanity might be more difficult to prove cause they're widespread and systematic state-based attacks on

civilians and that we're not quite there yet with genocide. And lead us through your, your thoughts about the challenges of proving all those various elements.

[00:23:10] Philippe Sands: I am very broadly on the same page, um, as Ryan. And I'll, I'll just say a little bit more about that in a moment. But one tweak that I think maybe of interest to your listeners here in the United States, Ryan rightly said the crime of congression is not within the jurisdiction of the International Criminal Court. There is an interesting question about the extent International Criminal Court's jurisdiction in relation to war crimes, crimes against humanity and genocide, in relation to individuals who are nationals of states that are not parties.

[00:23:42] Now, I, I have always been of the view that if a crime within the jurisdiction, the ICC occurs on the territory of a state party. The nationality of the perpetrator or the alleged perpetrator is irrelevant. So if an American commits a genocide in the United Kingdom, in theory the ICC can exercise jurisdiction over that American because the United Kingdom is a party to the statute. But that has not been the position of successive US administrations.

[00:24:13] The position in the US has been that the ICC cannot exercise jurisdiction over any American in any circumstances because the US isn't a party to the statute. Um, and the concern of course, is Afghanistan, which has been a part of the ICC Statute since 2002. And lots of things have occurred there, which should not have occurred over which the ICC has jurisdiction. And so it's been a way to beat that off.

[00:24:37] The ICC prosecutor has made clear, and I think he's right, that he has jurisdiction over Russian nationals who've committed crimes on the territory of, uh, Ukraine. And then along comes the US Senate led by Senator Lindsay Graham. Major surprise this for many of us. Um, who proposes a resolution strongly supporting the investigation of the ICC prosecutor for crimes committed by Russians on the territory of Ukraine. Blowing a sort of hole through decades of us policy.

[00:25:12] That resolution is then adopted unanimously. Um, and it now seems that the previous administration's policy on non nationals is untenable, um, uh, rightly so. But this conflict in Ukraine has thrown up these sort of unlikely, uh, consequences in the rush to do justice. And I do wonder whether the good senators in Washington have not really thought through the consequences of what they have done with their resolution.

[00:25:41] Coming back to your question, I'm very much on the same page, uh, as Ryan. If, if one takes war crimes... I, I must say perhaps I'm getting more and more old fashioned as I get older, but I was a bit perturbed by president Biden describing president Putin as a war criminal. Uh, and the way I would've preferred to put it is it does indeed appear that war crimes are being committed on the territory of Ukraine, uh, and that they are being perpetrated it seems by Russian actors.

[00:26:10] But we just don't know the details precisely of who is doing what and why and what is happening. And it'll be better to suspend judgment on the criminal responsibility of any particular individuals, uh, before we have the full fact. That's really important today because as

may know, right now, names, images, photographs of individual perpetrators associated with Russian battalions are beginning to appear on the web.

[00:26:38] And of course, this has tremendous consequences in relation to the wellbeing of those individuals. They may or... They may be involved. They may not be involved. We just, we just don't know how systematically this is being done. So, um, y= yes, it, it does look as though war crimes are being perpetrated. But I think we need to be very careful before we ascribe criminal responsibility to particular individuals, including at the top. But I absolutely by Ryan's point that if indeed it is the case that weaponry of that kind is being used and it's being authorized from the top, then there is responsibility right at the top.

[00:27:11] Crimes against humanity, I think it's strongly arguable. They're also being perpetrated. I mean, we're seeing extraordinary images of entire tower blocks being sort of blasted to the ground with no conceivable military purpose, uh, behind it. And it being done systematically across large swaths of the territory of Ukraine. These are not isolated incidents. It's happening in North. It's happening in the East. It's happening in the South. I've had friends in Lviv tell me about attacks in Lviv and friends in Odessa talking in better attacks in Odessa.

[00:27:43] So I think we're at crimes against humanity also. And I think Ryan is right too on genocide. O- over the last few days, I probably like he have been inundated with requests. Is this a genocide? President Zelenskyy has used the term. I understand why he's used that term. The word genocide attracts attention like no other. I, I sort of regret that because my own view is a genocide is not worse than a crime against humanity. They are both terrible. And what a l- whatever label one puts on it, it is appalling.

[00:28:12] But I'm having difficulty understanding at this point, uh, again, because I'm not there because we haven't got the evidence. The proving of the intent to destroy a group in whole war in part is a notoriously difficult thing. I've actually argued a lot of genocide cases at international courts. I'm right now arguing the case for the Gambia against Myanmar on what's happening in relation to the Rohingya, uh, in Myanmar.

[00:28:37] And, you know, the Nazi days when people left around documents that said, "Oh, yes, and we're gonna destroy these to people in order to destroy the group." Those days have gone with the adoption of the laws on genocide. Leaders and others have learned to be a little bit more careful and circumspect. And so you are left as a prosecutor or as a lawyer or as a judge to infer intent from a pattern of behavior. And that is a tough thing to do.

[00:29:06] And I, I have invariably failed to persuade judges. Um, particularly if you're going for the top table. I agree entirely with the way Ryan's put it. President Putin has made statements that he should not have made that Ukrainians don't exist. They have no right to exist as a country. They don't exist as a people. Those are the kinds of statements that are consistent with the genocidal intent, but they are not as such sufficient to prove the existence of a genocidal intent on the part of president Putin.

[00:29:35] And I think, again, when it comes to Bucha, it may be that the genocidal intent was there. But we just don't know what motivated those individual, uh, acts of killing, how they

happened, why they happened, what the context was. And I think we just need to pause, hold our breath and wait for the evidence to come in.

[00:29:54] Jeffery Rosen: Well, you've both defined these four separate crimes, crimes have aggression, uh, genocide crimes against humanity and war crimes. You've agreed that the ICC, uh, may not have jurisdiction over crimes of aggression because of the way the statute is drafted. And, Ryan, in your piece, um, how the world can prosecute Putin for going to war. You know, that there is a way forward and that would involve creating a special tribunal for the punishment of crime of aggression against Ukraine inspired by the model of the Nuremberg tribunal. Tell us about that model and what the creation of that special tribunal would look like.

[00:30:34] Ryan Goodman: Sure. And, um, I just wanna go back to one piece on the International Criminal Court Statute. I thought that Philippe described it perfectly about the US, um, position in the past being opposed to the International Criminal Court exercising jurisdiction over war crimes for nationals of states that are not partying to the treaty. I just wanna add a couple other notes to that. One, some of the statements by the US in the past are head as to whether or not they say that is a legal proposition or a policy position.

[00:31:06] So that provides the Biden administration leeway. And then of course, I also fully agree that the Graham, Lindsay Graham led resolution in the Senate also provides the Biden administration greater policy space to change, uh, their position on this. And it should be noted that the press secretary for the White House has recently asked the question. And she said, "We welcome the investigation open by the ICC prosecutor."

[00:31:35] Echoing a statement made by the new US war crimes at large ambassador, uh, Beth Van Schaack. So they're well welcoming the investigation. So that's at least as a policy matter seeming to have been shifting in the direction of the International Criminal Court. Then there's the gap. And so, yeah, there are multiple avenues that are potentially available for filling the gap on the, at finding a forum for a war crime trial for the crime of aggression.

[00:32:02] And one of them is indeed a Nuremberg style special tribunal that would be created through, um, an international mechanism of an agreement between multiple states and Ukraine. And Ukraine's foreign minister has stated explicitly, uh, that he's in favor of, and his government is in favor of that approach. There are other potential approaches. And Philip is more expert in the- these than I am.

[00:32:29] But another approach is that the UN General Assembly could create through a resolution and agreement with the UN and Ukraine. There is a precedent for this with, uh, Cambodia and the Khmer Rouge trials. Uh, UN General Assembly resolution not operating through UN Security Council and the secretary general forging that agreement.

[00:32:50] Which is important for listeners to know because I see a lot of commentary out there that the UN is a dead end because the, uh, Russia exercises the Veto at the Security Council. It does not have to go through the Security Council. So that's a very plausible route. And then the third is, uh, national courts. And there are several courts and several jurisdictions I should say

that have a criminal offense for aggression that they can exercise jurisdiction. Um, that includes Ukraine itself.

[00:33:20] And it's, you know, remarkable but important to say the crime of aggression exists in the f- in the criminal code of Ukraine, Belarus and Russia as well as Poland and Lithuania who also are currently investigating Russia and Russian officials for the crime of aggression. So I think that's another potential avenue that's open at the national level.

[00:33:40] **Jeffery Rosen:** Philippe, tell us more about the options for enforcement ranging from a special tribunal created between mobile states in Ukraine, the UN General Assembly creating an agreement with Ukraine and National Court prosecution as well as other possible, uh, jurisdictional venues for prosecuting Putin.

[00:33:57] **Philippe Sands:** Sure. Well, I mean, this has unexpectedly become a part of my life in ways that I did not expect when I wrote the article in the FT. You know, you get punished for putting pen to paper [laughs]. It galvanized much more interest than I, than I expected, including from Ukrainian foreign minister who happens to be a lawyer and an international criminal lawyer. Who has even in his younger days written a paper on the famous declaration of St. James of January, 1942, when the governments of exile or various occupied European countries met in London and issued their famous declaration for the punishment of Nazi war criminals, which is what led to the Nuremberg trial.

[00:34:38] So he knows this stuff really well, and he is personally engaged, personally supportive. And you heard president Zelenskyy's word's to the Security Council, which called for the creation of what he called it a special mechanism. But it's essentially, it's essentially this. So as a consequence of all of that, what has happened? And I'll be a little discrete and careful about what I say.

[00:35:00] Ukraine and five other countries have come together on an informal basis to tease out how this could actually be done. And knowing the world of international law and all law is inherently conservative. We've tried to do it on the basis of e- established precedence. And there are, there are basically three options, um, in practical. And, and Ryan has laid them out very correctly.

[00:35:24] Firstly, obviously one option would've been the Security Council, but that's dead in the water because the Russian's simply Vito. Um, any move in that direction. Second option is an agreement between Ukraine and an international organization. Uh, it could be the UN, it could be the EU, it could be the Council of Europe. And that is the model that has been used in relation to Kosovo and Sierra Leone, um, which would create an international body, a court, a tribunal mechanism. Call it what you will. which essentially receives a delegation from Ukraine of its domestic law.

[00:36:02] Uh, uh, interestingly, um, in relation to this option, as well as the next one I'm going to mention, there are issues of constitutional law of Ukraine to consider. And there's been a couple of very interesting pieces published on this aspect. So there are domestic constitutional

issues for Ukraine like any other country in relation to this model. But that's one route that's tried and tested.

[00:36:25] And the third option is if there is no international organization that wishes to do it. And there are issues of course, with the UN because that would lead to some sort of involvement from Russia and China. There's an issue with the European Union. You've got a country like Hungary, which appears to be inching closer to support, uh, for Russia, which of course raises issues if, if you need a unanimous decision. But there are other organizations including the Council of Europe.

[00:36:49] But if that doesn't work, then the other option if there's political will is, uh, simply an agreement between Ukraine in and a number of other countries. And that is being worked on now purely on an informal basis. Can I say here that one of my hopes is that the United States, which is certainly not opposed these very informal steps, but it has not supported them either. Um, and I think we have here to raise elephant in the room.

[00:37:18] Um, I've been in touch with colleagues, uh, in, in governments and France and Britain, United States, Germany. And the message that comes back is, is, is clear. It's not that there is a constitutional problem in the laws of countries to go down this route. It's tried and tested. It's not that there aren't precedents. It's not that it can't be done. It's not even that in relation to Russia it shouldn't be done.

[00:37:45] The concern is a political concern. If you can create an ad hoc tribunal to deal with Russia today, why could you not create an ad hoc tribunal to deal with the United States or France or Britain tomorrow? And so the concern is a political concern. You would be here setting a precedent. It's one thing to go against defeated Nazi Germany in 1945. Um, and it may be another thing that is within the parameters of what's doable to go against Russia today, which is the subject of so much a program.

[00:38:21] But I think I might call it the specter of Iraq, uh, hangs very heavy. I mean, just again, to be clear, my, my view is that Iraq was a manifestly illegal war. And as you know, some in positions of authority, the deputy legal advisor at the Foreign Office in London, Elizabeth Wilmshurst, in her resignation letter called it a crime aggression. So that of course, will concentrate minds in the State Department and the Foreign Office. And the [KIG 00:38:50] will say, "By all means, let's have discussion on this, but let us tread very carefully."

[00:38:55] I understand it, but I regret it. Because I think that if in the end that of the dominant position, what you are effectively doing is giving president Putin a pass. The only way you can with any degree of certitude get to the top table as we discussed earlier is the crime of aggression. Yes, it's possible with war crimes. Yes, it's possible with crimes against humanity. Yes, it might be possible if the need arises with genocide.

[00:39:21] But prosecutors will tell you it's notoriously difficult to prove a connection between the people at the top table and events on the ground. There are many ways for them to wiggle out of it. Uh, I think it could be done on the facts of this case, but why not go for the easiest of options and deal with the crime that really is the starting point for everything? But for this war

we would not be dealing with war crimes, crimes against humanity or genocide. Why not therefore go for the crime of aggression?

[00:39:53] Jeffery Rosen: Well, you've both endorsed the creation of a special tribunal to prosecute Putin for the crime of aggression. Ryan, what, what are your response to the elephant in the room that Philippe raises, the political concern that if Russia today, what about the US or France tomorrow, the specter of Iraq and other practical obstacles and opportunities for the creation of the tribunal that you call for.

[00:40:17] Ryan Goodman: So I think that maybe this is one point in our conversation where Philippe and I might have a difference of opinion. I do think that there is a very strong case that could be made for finding Vladimir Putin criminally liable for war crimes in Ukraine, um, through the International Criminal Court. I have actually I would say great confidence [laughs] in the probability that in the coming years, it takes time. The International Criminal Court prosecutor will issue an arrest warrant for Vladimir Putin, an indictment and arrest warrant.

[00:40:55] Now, the big question has also been what's the effect of that that you can never a- truly apprehend him? So it might be ineffective in that sense, but it'll be an important moment in our history and in our time. And I think that that can be done in multiple ways. Uh, he is unlike many other potential perpetrators in the ways in which he's consolidated power. And there's a very vertical line of authority and he has complete control over the Russian state and as the Supreme commander in chief.

[00:41:21] And then just one other item to bring into or introduce for our listeners is under international law and the, and the Statute for the International Criminal Court, there is a form of liability that's called command responsibility and superior responsibility. And a commander can be held liable for their subordinates having engaged in, uh, war crimes if the commander knew or should have known about it and did nothing to suppress it. That's Vladimir Putin [laughs].

[00:41:51] You know, just to take a very specific example, all the atrocities that we see that it came out of Bucha, um, apparently according to the Ukrainian military, um, authorities, that very battalion has been very quickly redeployed back into Ukraine. There's no investigation. There's no attempt to repress or deal with the atrocities. It's, uh... So there's gonna be, uh, pieces of it like that.

[00:42:12] And also we're dealing with a country in which the- there's consent on the part of the state authorities to provide evidence. So you have these prosecutors going immediately to the crime scene, uh, in Bucha. And you have the Russian military using unencrypted communication devices and they're being intercepted time and again. So the executive director of Bellingcat testified before Congress that they have many, uh, communications from Russian soldiers back to their families at home saying that they've been given military orders to ignore the duty to care for civilians.

[00:42:47] So the- there's gonna be a wealth of information, and it's not relying on the intelligence community of certain governments to release that information that's Bellingcat. They'll fully cooperate with the International Criminal Court. So I do think there's a strong case

for that. I do agree with Philippe in terms of the diagnosis of the problem, uh, with respect to the US position being political and concerns about it reverberating back to the United States.

[00:43:09] And that's a very difficult one in terms of the trade offs. I don't think that there's, uh, as much of an appetite in the international community or there would be legitimacy for as much legitimacy for a tribunal that would focus on something in the past in terms of the Iraq conflict itself. And some people are talking about that, um, as I could retrospectively reach back that far. And I do think, and this is also maybe a potential point of disagreement.

[00:43:32] It's funny. I teach this in my courses. And when I teach in my courses to my students, I try to give them what I think is the strongest legal case for the US intervention in Iraq. And, uh, there is a case to be made in which the lawyers, uh, faithfully, uh, said that there was a UN Security Council resolution that created a cease fire after the Persian Gulf war.

[00:43:56] Then Saddam Hussein was in material breach of the cease fire. And the legal argument was that therefore it was a material breach of an agreement and you returned back to the status quo ex ante, which is back to a state of hostilities. That was the... There was a legal argument for it. It's not, uh, you know, one person who manifestly decided that they would, um, knowingly brazenly breach the UN Charter.

[00:44:18] There's, uh, many lawyers we could go back today and they would s- make, and from the US government who would say they had a legal case. Um, so I just, I do think these things are separate. And I do think this also for longer conversation could go into other ways in which the United States could try to detect its interest vis-à-vis the International Criminal Court without having to, uh, stake out implausible policy and legal positions like the International Criminal Court should not have jurisdiction, uh, when it, the perpetrators alleged perpetrators committing war crimes in a state party, uh, to the court. So, uh, some points of disagreement and ways to try to, um, figure one's way through some of the thicket that, um, Philippe rightly puts in, puts his finger on.

[00:45:03] Jeffery Rosen: Well, it's time for closing thoughts in this extremely illuminating discussion. And I'm so grateful to both of you for it. Philippe, I'll let you tie together the many strands we've been talking about as you think best. I'm interested in a theme that both of you introduced, which is the, how, how new technology changes the prosecution of these war crimes given the fact that they're being recorded on video and audio. And would be very grateful for your thoughts about what path for the prosecution of the various crimes we've been talking about, uh, you think is most likely in the years ahead.

[00:45:38] Philippe Sands: Sure. Well, it's... I've really appreciated the conversation. It's a conflict, a war that is dreadful, but it's also like no other I have been an active observer of in two senses at least that we have touched on. The first is the availability of technology. I mean, we are all watching this in real time. The ability to watch these drones or the execution of individuals almost as it's happening is obviously very disturbing, but it does provide a wealth of material of course, open to interpretation and analysis. And one needs to be careful not to jump to conclusions.

[00:46:17] It's unprecedented. And secondly, I'm not aware of any other conflict in which the language of law has been introduced so early and so extensively. Uh, you know, it's very striking. A- and I've been wondering why that is. If you start with the beginning with Mr. Putin's Telugu's statement I think on the 24th of February, he couches the entire justification in legal terms. The Ukrainians are perpetrating a genocide, which of course the international court of justice is already said is not the case.

[00:46:50] You know, binding provisional measures, order and, um, self defense. He invoked the Iraq argument. It was very interesting. And then that's been picked up by president Zelenskyy of course, who is working very closely with his foreign minister, Mr. Kuleba, who is, uh, uh, a well established international lawyer. But I've never come across that before. And I'm wondering what the consequences of all of that will be. I suppose there's...

[00:47:14] A final thought is we live in the real world. We live in a world in which the law doesn't operate and function in a vacuum. There is this thing called politics, which always cuts in. And I've been thinking a lot. And in my conversations, you know, with Mr. Kuleba and we with others, what happens in a few weeks if the Russians say, "Okay, we'll down tools. We'll stop and we've achieved our objectives and we'll find a face saving way out."

[00:47:44] But one of our conditions for that is that we must take off the table all these investigations. No review of criminality. Um, no assessment of war crimes or crimes against humanity and this nonsense about genocide, and so on and so forth. And as for the crime of aggression of course, were not gonna do that. What does president Zelenskyy do? I mean, it, it, it's really a tough call.

[00:48:07] On the, on the one hand he has to look after the wellbeing of the citizens of Ukraine and the horror that they have been through. Of course, any leader of a country is gonna want to bring that to an end as soon as they possibly can. But what does he give in return? And I'm told that this issue is already on the table in the, behind the scenes discussions between Ukraine and Russia.

[00:48:30] Ukraine doesn't have the power to bring to an end the investigations by the ICC. Uh, uh, it could bring to an end the possible establishment of an ad hoc tribunal, but it doesn't have the power to end. It can end its own investigations. It, it... But that's it. Here just I propo Ryan's point. In that context, let's assume a peace settlement and the ICC continues to investigate because it's perfectly entitled to do so. I think the politics would cut in.

[00:48:59] I find it hard in those circumstances to see an ICC prosecutor issuing an indictment against Mr. Putin if he remains in office. Different if he's gone. Which would have the effect of once again undermining if you like a fragile, delicate peace settlement. Which is why I fear that what we may well end up with in five years time is the culmination of a series of trials in the Hague of mid ranking police officers who become, if you like, you know, like a bone thrown to a dog.

[00:49:34] What Russia is prepared to do to get rid of this problem. And the top people get off scot free. And we have to deal with them for years ahead. I think that is a real prospect. And it's a

prospect that really concentrates the mind. I'm not starry-eyed about international law. You know, uh, it's a, it's an early game. It's, it's a long game. It's got decades, centuries to mellow out. Um, these issues are in the frame today, but at some point there will be political realities that will cut in and that will concentrate minds.

[00:50:08] Jeffery Rosen: The last word in this extremely important and meaningful discussion is to you, Ryan Goodman, as you look forward in five years, what do you think is the most likely path forward?

[00:50:20] Ryan Goodman: So I do think that there's a realistic prospect of criminal trials occurring both at the International Criminal Court and in different nation states. Uh, Germany, for example, which is investigating for these war crimes. In part because there have been so many Russian soldiers that have been captured already. Um, and one presumably, uh, would think that that includes, uh, military officers.

[00:50:46] And so I do think we'll see these kinds of war crimes trials. And then Philippe is, you know, focuses well on the question of but what about the people who are most responsible? I think that's the, a big question. And I also think that, um, you know, it's important to think about the diplomacy of trying to get to a peaceful resolution of this horrific conflict versus the accountability dimension.

[00:51:08] And how the- there's potential tension, but there's also potential synergies between them. Because one thing else that, um, people should think about is that even within the Rome Statute for the International Criminal Court, it is written in that the Security Council can suspend investigations or prosecutions and then renew that suspension. So it's kind of written in that there is a space for diplomacy.

[00:51:30] And you could easily imagine that if Russia wants to play ball, China and the United States and UK, uh, and France, they, they could get a deal at the UN Security Council. So there's ways in which maybe that deal is in exchange for Putin stepping down. There are other ways in which you can think about the lever that criminal accountability provides that leads to a more just and peaceful situation. But there's dynamism within the ways in which these institutions can work, I think is one of the ways to think about it.

[00:52:02] I also just think that, you know, a lot of people focus on this question of, you know, do these trials have an effect? Do they ever deter? The fact that it's a part of the equation and the negotiation shows you that they're concerned about it. Former senior US intelligence officials have said on the record that Putin had been fixated on the fate of Muammar Gaddafi and had watched the video of him again and again and again, and again.

[00:52:27] That's not a person who thinks that they're completely insulated [laughs] from accountability and, um, and the international community. That's a person who's, uh, in their mind's eye is worried about what a f- you know, the deterrent kind of effects that might take place. And the last thing I think I'd leave it with is simply, you know, coming from my sociological side of things, uh, which Jeffrey very nicely introduced, um, as part of my, uh, professional background.

[00:52:54] I think it's also just about the global norms. Um, so it's not just about deterrence, but it's what kind of global normative system do we have. And if there's not a strong institutional response to the atrocities that we see are being committed, then those norms are going to be significantly eroded. I think it's a constitutional moment for the international community to address, uh, what's on our screens every single day now, um, and the immense tragedy that's happening for the Ukrainians.

[00:53:25] Jeffery Rosen: Thank you so much, Philippe Sands and Ryan Goodman. On behalf of We The People listeners, you have taught us much about the relationship between international law and the Russian invasion and inspired all of us to learn more. Philippe, Ryan, thank you so much for joining.

[00:53:42] Ryan Goodman: Thank you.

[00:53:44] Philippe Sands: Thank you.

[00:53:48] Jeffery Rosen: Today's show was produced by Melody Rowell and engineered by Dave Stotz and Greg Scheckler. Research was provided by Kevin Closs, Ruben Aguirre, Sam Desai, and Lana Ulrich. Homework of the week, we learned so much together dear We The People friends. But I am looking forward to watching justice Jackson's opening arguments in the Nuremberg trial on YouTube. And we'll post other resources on the resource page. Please rate, review and subscribe to We The People on Apple Podcasts and recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. On behalf of the National Constitution Center with lots of gratitude, I'm Jeffrey Rosen.