

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

Online Publications

Faculty

4-8-2022

Should We Worry that the President Called Putin a “War Criminal” Out Loud?

Deborah Pearlstein

Benjamin N. Cardozo School of Law, dpearlst@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-online-pubs>



Part of the [Law Commons](#)

Recommended Citation

Pearlstein, Deborah, "Should We Worry that the President Called Putin a “War Criminal” Out Loud?" (2022). *Online Publications*. 9.

Available At <https://larc.cardozo.yu.edu/faculty-online-pubs/9>

This News Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Online Publications by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

Should We Worry that the President Called Putin a “War Criminal” Out Loud?

by [Deborah Pearlstein](#)

April 8, 2022

Commenting on the increasingly horrific images that have emerged from Bucha this week revealing the staggering brutality of Russian violence against civilians in Ukraine, President Joe Biden minced no words in his assessment of Vladimir Putin: “[He is a war criminal](#),” the president said on Monday. The statement generated a significant new round of media attention, notwithstanding the reality that it was not exactly news. The U.S. State Department had issued a [formal statement](#) in March conveying its assessment “that members of Russia’s forces have committed war crimes in Ukraine,” and the president himself had called Putin a “war criminal” weeks ago, earning [criticism](#) from [various quarters](#), following [earlier reports](#) of Russian attacks on Ukrainian civilians in Mariupol and beyond. Why, then, all the renewed fretting about a statement that at some level seems simply to summarize a moral truth that tens of millions of people around the world already find apparent?

The concerns are not without cause. For lawyers, the president’s announcement seeming to presume guilt raises worries about compromising the fairness or legitimacy of subsequent legal proceedings. For some international relations scholars and policymakers, the president’s focus on criminal justice prompts fears that the president is creating perverse incentives for Putin to stay the course, just when the world wants him most to leave. For the U.S. intelligence community, the focus may highlight strategic concerns about what otherwise classified information the Administration might be prepared to turn over to prosecutors seeking evidence of criminal accountability. For all of us worried about not just truth but accuracy in an age of relentless mis- and disinformation, the statement triggers a familiar sense of caution – what exactly about Putin’s role here does the president actually know?

The criticisms are worth taking seriously and treating separately. The president’s words matter, and these words in particular implicate a complex range of both U.S. and

international institutions and interests. But disaggregating potential worries and examining each in turn actually provides some reassurance. For as clear as it is that information has become a central weapon in this war, and as much harm as some kinds of information can do, this statement may for now be less worrisome than it appears.

Worry #1 – Compromising Criminal Justice?

In any standard domestic criminal prosecution, it would be a serious breach of longstanding norms of investigatory and prosecutorial independence for a president to assert the guilt of any individual while any investigation or prosecution was pending. Developed in part to restore the integrity of the FBI and Justice Department following revelations of political interference with law enforcement in the 1960s-70s, contemporary norms of investigatory and prosecutorial independence reflect the historical recognition that even the appearance of political involvement in law enforcement can badly undermine public faith in the fact-finding process or in the fairness of any eventual prosecution. Here, were Vladimir Putin likely to face U.S. criminal prosecution, the president's statements would have provided him already with a set of plausible grounds for calling its legitimacy into question.

Yet the odds that Vladimir Putin himself would face criminal prosecution in U.S. federal court have always been vanishingly small, for reasons all apart from the first-order practical unlikelihood that Putin will soon leave or be forced from office, and the United States (the last country on earth to which he is likely to travel) will in some post-Putin world gain physical custody sufficient to proceed with prosecution. Among many issues, while the United States has a domestic "war crimes" statute, the law as written extends federal jurisdiction only to cases involving war crimes perpetrators or victims who are nationals of the United States. The most direct "war crimes" charge is thus, as it stands, inapplicable here. There are [laudable current efforts in Congress](#) to seize this occasion to amend the law, bringing the United States more in line with its [Geneva Convention obligation](#) to search for and bring war crimes perpetrators to trial, "regardless of their nationality, before its own courts." But the absence of clearly applicable domestic law, coupled with weighty evidentiary challenges, and potentially powerful defenses like head-of-state immunity, are no doubt at least part of the reason why, notwithstanding the Attorney General's Wednesday [announcement](#) that the United States was "assisting

international efforts to identify and hold accountable those responsible for atrocities in Ukraine,” there is no indication that any actual U.S. federal criminal investigation into Putin is pending – a circumstance unlikely to change any time soon. This notably limits, for now, any normative concerns of interference from a passing presidential statement of guilt.

Indeed, as the Attorney General’s statement implicitly recognizes, any criminal case against Putin is far more likely to be brought in an international or hybrid tribunal – either the International Criminal Court (ICC), or some sort of novel, ad hoc tribunal created under a thus far undetermined kind of international mandate. Any such prosecution will face its own set of significant challenges, evidentiary and otherwise. But the president of the United States has no formal institutional control over either investigatory or prosecutorial decisions in any foreign or international jurisdiction. (While the United States, as a member of the UN Security Council, may be part of a majority of states that vote to authorize the ICC to exercise jurisdiction in a particular situation, Russia’s ability to veto any such resolution makes the operation of the UNSC-referral mechanism inconceivable so long as Putin – or a member of his circle – remains in power.) At a minimum, the absence of formal supervision significantly mitigates the risk that the president could involve himself directly in the process to ensure it yields his preferred result.

Presidents of course have tools for influencing foreign or international prosecutions all apart from direct intervention. U.S. Government opposition to criminal investigation or prosecution at least appears to have effectively [forestalled such proceedings](#) more than once – for instance, in Belgium’s attempted prosecution of former U.S. officials for alleged war crimes in Iraq, and in the ICC prosecutor’s investigation of U.S. (and other) war crimes in Afghanistan. Non-cooperation by the United States in any war crimes prosecution here could be even more consequential, if, as recent [Administration comments](#) suggest, the United States has access to information that might amount to evidence of Putin’s knowledge or even direction of his forces’ criminal behavior. Under conventional international law recognizing superior liability for war crimes, a [commander may be criminally responsible](#) for the actions of his troops if he held effective command, had some degree of knowledge that his forces were committing war crimes (more on which below), and failed to take necessary and reasonable measures to

prevent them or to punish those responsible. If this is the theory on which any war crimes case against him proceeds, evidence of Putin's degree of knowledge in this context would be indispensable to any successful prosecution.

The United States has thus far given every indication that it is [cooperating](#) with international criminal justice efforts. So long as this remains the case, the United States has an interest in avoiding any statements that Putin's eventual defenders might use as grounds, for example, for claiming that the United States is sharing intelligence selectively or withholding information that might prove exculpatory. In this sense, it would surely be better for the president to simply voice America's generally staunch support for bringing perpetrators to international criminal justice. But it would surely take more to persuade an international tribunal that any such evidentiary manipulation exists than a particular instance of presidential rhetoric, standing alone.

Worry #2 – Putting Justice Over Peace?

Beyond legal concerns, the prospect of threatening a sitting head of state with criminal accountability has resurfaced a familiar debate in international criminal justice circles – namely, whether fears of potential prosecution down the road will [deter murderous leaders](#) from ever voluntarily stepping down, or from seeking refuge in some foreign third country should their own political hold on power become unstable – prolonging conflicts once started. Without delving fully into what is now a generation-long debate, it is certainly wise to wonder what effect the fear of potential prosecution might have on Vladimir Putin's thinking.

Yet for a variety of reasons in Putin's case, it seems exceedingly unlikely that the U.S. president's especially vehement rhetoric will change his calculations in any discernible way. For one thing, the danger to Putin of prosecution – by the ICC or any of our European allies – exists wholly independent of the United States' position. The ICC opened an investigation into alleged grave breaches of the Geneva Conventions in Ukraine at the behest of [39 ICC member states](#) within days of Russia's initial invasion; the UN Human Rights Council soon thereafter created a separate [International Commission of Inquiry](#) to collect forensic evidence and document potential war crimes there; and several European states have already begun pursuing their own [domestic](#)

[criminal investigations](#) of Russian conduct under those states' universal jurisdiction laws. While it is true, as noted above, that U.S. investigative cooperation may prove important in any eventual prosecutorial success of Putin himself, the United States has already provided Ukraine billions of dollars in [direct security assistance](#) just since the start of the Biden Administration, along with, reports indicate, active and ongoing [intelligence support](#). It is inconceivable Putin had any remaining illusions by the beginning of this week about the availability to Ukraine of multiple forms of U.S. support.

In the meantime, Putin is hardly a pariah in every country in the world. On the contrary, he boasts close alliances with countries like Syria; a strategic partnership with China; and has managed to win at least abstentions or neutrality in the current conflict from dozens of countries beyond that. He is not without places to flee. Even assuming the fear of international criminal justice figures in Putin's calculations at all, it seems hard to credit the notion that Biden's "war criminal" rhetoric has altered it by much.

Worry #3 – Sacrificing Sources and Methods?

The Biden Administration's repeated statements that it is committed to supporting international criminal accountability efforts have not been accompanied by much detail about exactly what U.S. "support" might involve. As is already apparent from [open-source reporting](#) on war crimes in Ukraine, satellite imagery, intercepted communications, human witnesses, and other forms of traditional intelligence can provide valuable evidence not only of the timing and scope of atrocities, but also of the mindset of troops and commanders responsible for perpetrating them. The Biden administration's own comments have to a degree reinforced the prospect that some of the support the United States might be able to provide is information bearing on just that kind of command thinking. As U.S. National Security Adviser [Jake Sullivan](#) noted on Tuesday:

We released information even before Russia's invasion showing that Russia would engage in acts of brutality against civilians, including targeted killings of dissidents and others they deemed a threat to their occupation. And as the horrific images that have emerged from Bucha have shown, that's exactly what they have done.

The U.S. intelligence community, on the other hand, has not traditionally been associated with a culture of open sharing of information. Indeed, a [perennial controversy](#) in debates about the viability of criminal prosecutions of suspected terrorists post-9/11 has been the imperative to limit the scope of indictments or not bring charges at all if a case could not be proven without having to disclose sensitive or classified information. Beyond merely declassifying and releasing (or selectively leaking) intelligence, introducing intelligence as evidence in court proceedings generally means that the source will be seen, evaluated, and subject to challenge by the other side. Here, one might worry that the president's blunt insistence on Putin's criminal status masks a much more complex, ongoing internal debate about what information intelligence agencies are really prepared to turn over to international prosecutors in the interest of substantiating accountability.

Yet there is some reason for cautious optimism that relevant agencies on this occasion may in fact prove willing to share key information with international partners. For one thing, intelligence community cooperation with foreign and international criminal prosecutions is hardly unprecedented. On the contrary, the CIA famously provided [key forensic testimony](#) (via an agent testifying in disguise, under alias, and with an altered voice) that helped secure the conviction of men accused of orchestrating the bombing of PanAm Flight 103 over Lockerbie, Scotland. Such cases are indications that while the protection of sources and methods is invariably important, procedural accommodations or other allowances might help mitigate intelligence community concerns when the U.S. interest in advancing the legal process is sufficiently compelling.

The current circumstances may prove to be exactly such a case. Beyond the administration's (and Congress's) repeated statements of interest and support for international criminal justice, among the most striking features of the war in Ukraine thus far has been the United States' apparent recognition of the strategic power of information disclosure, as the United States and Britain have made public their assessments of real-time events in the field and inside Russian command. In addition to the active sharing of battlefield intelligence the Director of the Defense Intelligence Agency recently described to Congress as "[revolutionary](#)," the Biden Administration has leveraged what information advantages it has by quickly [declassifying and releasing](#) information aimed at spoiling Russian surprises or preemptively defusing Russian

disinformation. While information operations of various kinds have always been a part of warfare, the volume and rapidity of the current declassification systems suggest not only that the government embraces the value of such measures, but also that the U.S. intelligence bureaucracy has already shifted in ways critical to ensuring that relevant information can be collected, stored, and above all, shared within the U.S. government and with allies and investigators to help achieve accountability ends. In this context, the president's rhetoric may to some extent help reinforce a beneficial change in bureaucratic culture.

Worry #4 – Sticking to Reality-Based Rhetoric?

As hard as it can be to prove any individual fighter is guilty of committing a war crime, it is even harder to prove a civilian leader is responsible for the war crimes of those under his command. Certainly if there is evidence that Putin himself ordered particular crimes, he may be found guilty of those crimes. But it is often the case that no such direct order exists (or exists in any evidentiarily usable form), and criminal liability for commanders must instead be based on the doctrine of [command responsibility](#), noted above.

While establishing command responsibility for *military* commanders may be based on proof of the commander's actual or constructive knowledge of the underlying crimes (he knew or should have known), the Rome Statute of the ICC (which may apply directly or as legal model for some more ad hoc tribunal) imposes a [heightened standard for civilian commanders](#), requiring proof that they either knew or "consciously disregarded information that clearly indicated that the subordinates were committing or about to commit" war crimes. For those who understand that the term "war criminal" carries specific legal meaning, the president's statement implies that Putin indeed has such knowledge. If Putin has access to the same information Americans do, it seems impossible that Putin could be unaware of events. Indeed, the president himself may have access to information that makes matters especially clear. It is also possible, on the other hand, that the information Putin accesses is dramatically different from the news we see, and that the president doesn't actually know what Putin has in fact seen or "consciously disregarded" in what various accounts have depicted as Putin's current information "[bubble](#)." Should we worry that the president's "war criminal" rhetoric may be truth-ish rather than true?

As much as misinformation (information that is wrong or mistaken) and disinformation (false information that is deliberately intended to deceive) pervade the current information environment, the president's statement is a fine example of why attaching legal liability to "falsehoods" is so painfully fraught. The term "war criminal" undoubtedly today carries both technical and popular meanings. If the president meant to invoke it in its technical sense, one might fairly demand some more detailed factual support.

But if the president was using the term rhetorically, based on a popular understanding that a war criminal is, more or less, someone who's doing something especially bad in wartime, demands for proof of "conscious disregard" seems lawyerly in the extreme. Particularly where, as here, the president is speaking off the cuff, the rhetorical read seems the more likely. In informal settings, the president's word need not – and should not – be taken as those of the lawyer-in-chief. More, where, as here, the president's rhetoric seems to capture some underlying moral truth – the war Putin's forces have waged is horrifying and inhuman – insisting that every statement of condemnation likewise comply with requirements of legal accuracy is a bar we have never expected presidents to clear.

Above all, that the U.S. president's insistent rhetoric here can serve a vitally important purpose. U.S. presidential rhetoric, especially when coupled with reinforcing action, has played a central role in the development of international human rights and criminal justice since before Nuremberg was born. International criminal justice is always a heavy lift. When the alleged perpetrators report up the chain of command to a permanent member of the UN Security Council, the burden is heavier yet. The bully pulpit, the power of moral suasion – these tools may prove indispensable in making the theory of criminal accountability reality.

IMAGE: U.S. President Joe Biden talks to reporters during a news conference in the East Room of the White House on January 19, 2022 in Washington, DC. (Photo by Chip Somodevilla/Getty Images)

About the Author(s)

Deborah Pearlstein

Professor and Co-Director of the Floersheimer Center for Constitutional Democracy at Cardozo Law School. Follow her on Twitter (@DebPearlstein).