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# “COMMITTED BY MEN”: INDIVIDUAL CRIMINAL RESPONSIBILITY FOR AGGRESSION AGAINST UKRAINE

**Abstract:** The article deals with the personal scope of criminal responsibility for the crime of aggression against Ukraine. While the Kampala amendments to the Statute of the International Criminal Court have further strengthened the crime of aggression’s leadership character, they have also limited the possibility of holding individuals accountable as accomplices. Nonetheless, this article posits that there are still avenues within the current legal framework to bring key individuals involved in the aggression against Ukraine to justice. It examines different factions within the Russian leadership and the leaders of Belarus and also explores the possibility of bringing Russian propagandists to account. The article advocates for a careful selection policy that balances international and domestic systems better to serve the cause of accountability. Pursuing investigations and prosecutions against these groups should result in an outcome that reflects the extent of the criminality of Russia’s aggressive war.

**Keywords:** crime of aggression, individual criminal responsibility, international criminal law, Russia, Ukraine

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## 1. Introduction

The Russian Federation’s military assault against Ukraine is criminal. Since its initiation in February 2014, Russia’s aggressive actions have been marked with manifest illegality.<sup>1</sup> The full-scale invasion of Ukraine on 24 February 2022<sup>2</sup> and the attempted annexation of four Ukrainian regions

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1 On the occupation of Crimea and Sevastopol as an act of aggression: Grant, *Aggression against Ukraine: Territory Responsibility and International Law*.

2 “Recognizing that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in

in September of the same year<sup>3</sup> made this war one of the major challenges to European peace and security since the Second World War.

Russia's actions, taken as a whole, constitute 'an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations and therefore triggers individual criminal responsibility for the crime of aggression.'<sup>4</sup> The crime of aggression, that caused horrific consequences itself enabled the large-scale committing of other international crimes on a large scale.<sup>5</sup> Many, if not all, alleged war crimes and crimes against humanity are closely linked to aggression.<sup>6</sup>

The invasion has triggered a broad, albeit belated, international debate on the options for prosecuting 'supreme international crime.'<sup>7</sup> There is a significant surge in the desire to confront the crime of aggression and strive toward justice, even amidst the ongoing conflict.<sup>8</sup> At the center of the debate lies establishing a special tribunal to prosecute the crime of aggression (STCA) and the format that such a tribunal might take.<sup>9</sup>

Much less attention has been paid to issues of individual criminal responsibility and the selection of individuals who can be potential targets of aggression prosecutions. This insufficient interest can be explained by prevailing skepticism toward the probability of holding Russia's regime leaders accountable in the current political and legal realities. Also, a total consolidation of power in Russia by Vladimir Putin and the emergence

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decades and that urgent action is needed to save this generation from the scourge of war", UN GA Resolution of 2 March 2022. "*Aggression against Ukraine*". ES-11/1.

3 UN GA Resolution of 12 October 2022. "*Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*." ES-11/4.

4 Article 8 *bis* of the Rome Statute of the International Criminal Court. C.N.651.2010 Treaties-8.

5 Kress, Claus, *The Ukraine War and the Crime of Aggression*.

6 Conference room paper of the Independent International Commission of Inquiry on Ukraine, 29 August 202. A/HRC/52/CRP.4.

7 McDougall, "The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine".

8 As Anton Korynevych, Ukraine's ambassador at large leading the country's campaign efforts to establish a special tribunal, put it: 'If the crime of aggression is not prosecuted and investigated this time, then it will only remain in textbooks and in Ph.D. theses. It will not exist in practice.' Cited in Clancy, "The Divide Hardens on What a Special Court for the Crime of Aggression by Russia Should Look Like."

9 Dannenbaum, "A Special Tribunal for the Crime of Aggression?".

of a military dictatorship<sup>10</sup> make a discussion about individuals outside Putin’s ‘inner circle’ superfluous.

However, difficulties in achieving responsibility for aggression should never stop efforts to find the truth and identify those who are responsible for aggression. The task of legal scholars, even in seemingly hopeless situations, is to guide politicians on the content of the law and the legal avenues available. Identifying the perpetrators and, where possible, thoroughly investigating their conduct is crucial for accountability efforts.

Proper understanding and clarifying the issue of the personal scope of criminal responsibility for the crime of aggression might significantly inform ongoing debate on the legal options to investigate and prosecute this crime. Since the ICC, for the time being, is not able to proceed with the investigation in the absence of a UN Security Council referral,<sup>11</sup> there are two legal avenues to prosecute the crime of aggression against Ukraine. The first is to establish a dedicated international tribunal through a treaty or within an international organization. The second is to rely on the criminal justice systems of Ukraine or other countries, including hybrid or internationalized models.<sup>12</sup> In my opinion, both of these options should be pursued as they are not mutually exclusive and would be necessary to address the complexity of the case.

In May 2022, the Open Society Justice Initiative (OSJI) prepared a ‘model indictment’ for the crime of aggression against Vladimir Putin and seven members of his inner circle (Nikolai Patrushev, Sergei Shoigu, Sergei Naryshkin, Valentina Matviyenko, Sergei Beseda, Sergei Lavrov, and Valery Gerasimov).<sup>13</sup> The model indictment is based on the ICC Statute definition of the crime of aggression<sup>14</sup> and does not distinguish between perpetrators

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10 According to Fischer: ‘The invasion of Ukraine on 24 February 2022 has catapulted Russia from hard autocracy into dictatorship.’ Fischer, ‘Russia on the Road to Dictatorship: Internal Political Repercussions of the Attack on Ukraine,’ p. 1.

11 See Articles 15 *bis* and 15 *ter* of the ICC Statute.

12 Kress, Hobe, Nußberger, “Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System.”

13 Godston, “Model Indictment for the Crime of Aggression Committed Against Ukraine”.

14 The Rome Statute’s definition of the crime of aggression is significant not only because it reflects a wide international consensus on the crime’s definition but also because it is the common denominator in any discussion about the establishment of a special tribunal. Moreover, Russia actively participated in the negotiations that led to the adoption of the Kampala amendments and did not express any disagreement with the definition. According to the Russian representatives, they were “satisfied with the outcome of the Review Conference with regard to the definition

and accomplices. However, it remains a helpful reference point, and this paper mostly follows the same approach. That said, the model indictment is not free from flaws; it is rather superficial regarding leadership status and specific claims against specific indictees.

This paper discusses the personal scope of criminal liability for the crime of aggression against Ukraine. It seeks to answer two distinct but closely related questions. The first is who, in principle, can be individually responsible for aggression against Ukraine under international law. The second is what kind of individuals should be prioritized for investigation and prosecution.

## 2. Leadership Requirement

Aggression is, by definition, a leadership crime.<sup>15</sup> It has been a virtually axiomatic view that only civil and military state leaders can be held individually accountable for the crime of aggression.<sup>16</sup> This prevailing view has remained unchanged since Russia's invasion of Ukraine.<sup>17</sup>

The normative premise of the leadership clause is relatively simple: to limit criminal responsibility for aggression to state 'leaders' and exclude 'followers,' who cannot be held responsible for the acts of the state.<sup>18</sup> Article 8 *bis* of the Rome Statute defines the crime of aggression as the committing of an act of aggression 'by a person in a position effectively to exercise control over or to direct the political or military action of a State.'<sup>19</sup> The 'control or

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of the crime of aggression, which largely is in conformity with the relevant 1974 GA Resolution 3314." (Kuzmin, Panin, *Russia, in Crime of Aggression. Commentary*, 1264).

<sup>15</sup> McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 217-219.

<sup>16</sup> "Leadership requirement shields the ordinary soldier, who fights on the side of the aggressor and kills an enemy combatant, from the threat of being punished for a crime of aggression. By contrast, the executioner in a concentration camp may be responsible for genocide or for a crime against humanity. Several justifications have been offered in order to explain this difference. The best among them would appear to be the desire to preserve the existence of as strong a legal incentive as possible for the 'unjust warrior' to comply with the law of international armed conflict." In: Krefß, "Introduction", 9.

<sup>17</sup> The lone dissenting voice is Andrew Clapham, who proposed, *de lege ferenda*, that even ordinary soldiers can be individually responsible for waging an aggressive war. See Clapham, "Ukraine Can Change the Future of Prosecuting Crimes of Aggression".

<sup>18</sup> Hajdin, *Individual Responsibility for the Crime of Aggression*, 79.

<sup>19</sup> The ICC Elements of Crimes provide that "The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which

direct’ standard differs from the one of ‘shape or influence’, outlined by the post-WWII jurisprudence.<sup>20</sup> Significant diversity of opinion exists as to how to interpret ‘control’ and ‘direct’ requirements.<sup>21</sup>

The provisions of the ICC Statute governing the crime of aggression have never been applied in practice, and post-WWII jurisprudence provides limited assistance, as tribunals in Nuremberg and Tokyo applied crimes against peace provisions to very different circumstances. The consensus, however, is that the circle of potential defendants for the crime of aggression is extremely narrow. In the opinion of the members of the Advisory Committee on Issues of Public International Law (CAVV) of the Netherlands,

the following individuals can, in any event, be regarded as leaders: heads of government, heads of state, ministers of foreign affairs, ministers of defense, heads and deputy heads of a national security council and (senior) officers in the armed forces who are involved in planning, preparing and coordinating the act of aggression.<sup>22</sup>

To complicate matters further, the Kampala amendments restricted responsibility for complicity in the crime of aggression. Article 25(3 *bis*) of the Rome Statute states: ‘In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or direct the political or military action of a State.’ Thus, only persons in leadership positions can be held liable as accomplices. While Article 25(3 *bis*), in principle, allows complicity in the crime of aggression, leadership restriction widens the impunity gap by allowing individuals who contributed to aggression to evade responsibility by relying on subordinate status in the state hierarchy. Contrary to the general rule of international criminal law, this provision seems to provide an absolute defense of superior order in case of the crime of aggression.

When applying the leadership requirement to the aggression against Ukraine, one should bear in mind that neither Ukraine nor Russia is a state party to the ICC Statute and, consequently, the crime of aggression

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committed the act of aggression”.

20 Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”.

21 Hajdin, “The Nature of Leadership in the Crime of Aggression: The ICC’s New Concern?”, 560-566.

22 Advisory Committee on Public International Law, *Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities*, advisory report no. 40, September 12, 2022.

amendments. The fact that Russia was satisfied with the definition of the crime in the ICC Statute as reflecting customary international law does not mean international or domestic tribunals are precluded from applying a broader definition of the crime in this case.

The understanding adopted at the Kampala Review Conference underscores that amendments do not necessarily reflect the general international law.<sup>23</sup> Moreover, Article 10 of the Rome Statute explicitly highlights that its provisions shall not impede the further development of international criminal law beyond the Rome Statute.<sup>24</sup> It leaves room for a future special tribunal, should one be created, and for national courts to apply a less stringent interpretation of the leadership clause.

Domestic criminal law, especially that of the countries involved in the conflict, might also be considered.<sup>25</sup> The Russian Federation,<sup>26</sup> Ukraine,<sup>27</sup> and the Republic of Belarus<sup>28</sup> all have virtually identical definitions of the crime of aggression in their criminal codes, and none includes explicit leadership requirements. However, it would be inaccurate to say that those provisions could be applied to any individual. The personal requirement can be deduced from the definition of the crime, including state conduct and implicit reference to international law.<sup>29</sup> Nevertheless, national criminal law provisions indicate the possibility of going beyond

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23 Understanding 4: “It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.

24 Zimmermann/Freiburg-Braun, “Article 8 bis”, 690-691.

25 Article 21 ICC Statute (‘Applicable law’) emphasizes ‘the national laws of States that would normally exercise jurisdiction over the crime’.

26 Article 353 of the Criminal Code, free access from 13.12.2023: [https://www.consultant.ru/document/cons\\_doc\\_LAW\\_10699/76d05ec44f1dfdc1272245049c8da8bb66dd9198/](https://www.consultant.ru/document/cons_doc_LAW_10699/76d05ec44f1dfdc1272245049c8da8bb66dd9198/).

27 Article 437 of the Criminal Code, free access from 13.12.2023: <https://zakon.rada.gov.ua/laws/show/2341-14#n3035>.

28 Article 127 of the Criminal Code free access from 13.12.2023: <https://pravo.by/document/?guid=3871&po=hk9900275>.

29 Virtually all commentaries to the Russian Criminal Code insist on the leadership requirement (‘special subject crime’, as opposed to ‘general subject’) for Article 353 of the Code (‘Planning, preparation, initiation and waging of the aggressive war’). See, for instance: Lebedev (Ed.), *‘Kommentariy k ugolovnomu kodeksu Rossiyskoy Federatsii’* (Commentary to the Criminal Code of the Russian Federation), 374.

the strict Kampala formulation.<sup>30</sup> Regarding complicity, the criminal laws of the three countries do not contain limitations similar to those imposed by Article 25(3 *bis*); rather, they prescribe the opposite.<sup>31</sup> Any person can be held responsible for organizing, instigating, aiding, and abetting the crime of aggression.

Crime of aggression scholars go further suggesting that Central and Eastern European states’ practice on the crime of aggression might establish a regional customary norm with a broader interpretation of the personal scope of the crime. Grzebyk argues, that

if those responsible for Russian aggression are prosecuted, the personal scope of prosecution should not be limited by the leadership clause introduced in the Rome Statute, as the ICC’s provisions on the crime of aggression will not be directly applied and, in light of regional standards, they cannot be considered as binding customary law in the region.<sup>32</sup>

In this author’s view, state leaders should remain the primary focus in the prosecution of Russia’s aggression. While a flexible approach to leadership requirement may be justified in the case of full-scale military aggression involving multiple individuals, the best course of action for the international tribunal, if established, would be to apply the leadership criteria in a less stringent manner than outlined in the ICC Statute. ‘Shape or influence’ or ‘decisive influence’ standard can better suit the needs of the aggression tribunal than ‘control or direct.’ This should take into account the laws of the states involved in the conflict, as well as the unique features of this particular aggression.

It is also crucial that even if the tribunal decides to apply the formula of Article 8 bis of the Statute, it should still have the liberty to apply provisions

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30 The official number of initiated criminal cases on the crime of aggression by Ukraine (67 in 2022) indicates that the leadership clause is not taken into account (free access from 13.12.2023): <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

31 See, for instance, Article 34 of the Russian Criminal Code.

32 ‘In consequence, all those who took part in waging a war of aggression could be prosecuted, so not only commanders who prepared and started the war but also those who were involved at the later stage, in the commission of subsequent acts of aggression that formed part of a war of aggression, such as blockades of the ports, facilitation of annexation of territories or administration of territories under occupation.’ Grzebyk, “Crime of Aggression against Ukraine: The Role of Regional Customary Law”, 23.

on complicity and other modes of liability without restrictions imposed by Article 25(3 bis) of the ICC Statute. However, the prosecution of accomplices may be limited by a threshold of substantial contribution to the commission of the crime.

### 3. Defining the Leadership Circle

Russia's aggression against Ukraine has gone full circle – from preparation and planning to several stages of implementation. It dates back to February 2014, when it illegally occupied Crimea and Sevastopol. Later that year, Russia used its proxy forces in the Donbas to establish control over parts of Donetsk and Luhansk oblasts, installing puppet 'peoples' republics.' The invasion on 24 February 2022, and subsequent events have transformed the conflict into a full-scale war but did not change the character of the act of aggression itself, which at the time of its inception constituted 'a manifest violation of the Charter of the United Nations.'<sup>33</sup>

Aggression is a continuing crime, and acts of planning, preparing for, initiating, and executing the act of aggression are equally relevant to criminal responsibility.<sup>34</sup> Even if we consider its period starting from 2022, it went through several stages – a military attack on the territory of Ukraine, a blockade of ports, occupation of Ukrainian territories and their annexation based on the results of false 'referenda'. Many Russian and Belarusian state officials, military, and non-state actors associated with them were directly involved in these processes. In the following paragraphs, I will consider the key groups of Russian power elites, as well as the leaders of Belarus, from the standpoint of potential criminal responsibility for the crime of aggression.

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33 There are divergent views about whether the invasion in February-March 2014 constituted a crime of aggression: Annex to the letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary-General. Yale Club Roundtable: A Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly? 22 June 2022. New York, p.5. A/ES-11/7.

34 Hajdin, "The *Actus Reus* of the Crime of Aggression", 489–504.

#### 4. Vladimir Putin and his Inner Circle

There is no doubt that Vladimir Putin should personally be a primary target of any investigation into the crime of aggression.<sup>35</sup> His fingerprints are on everything related to the Ukraine war: Putin personally oversaw the occupation of Crimea and the war in Donbas and directed the full-scale invasion of Ukraine. His countless statements and actions reveal his premeditation to wage a war against Ukraine. He personally conceded that the purported territorial expansion resulted from the use of force. By virtue of his role, Putin effectively exercises control over Russia’s political and military actions.

Although there might be different theories about his motivations and the influences of his close advisers,<sup>36</sup> there is little doubt that Putin was the mastermind behind the aggression. Putin’s authoritarian power and dominant role in the Ukrainian campaign have created significant distance in authority between him and other members of Russia’s ruling elite. However, it would be inaccurate to view these other members of the Russian leadership merely as Putin’s ‘followers.’ In a dictatorship, it is not always clear who belongs to the ‘inner circle’ or ‘entourage’ and who has the power to influence Putin’s personal decisions. Additionally, these individuals may also play a crucial role in implementing specific stages of aggression. Therefore, determining who holds decisive influence in such a regime can be a complex question. This is the case with the auxiliary bodies of the presidency in Russia, namely the Russian presidential administration (executive office), and the Security Council. Their influence and authority evolving over time do not match constitutional formulas.<sup>37</sup> Such cases require a thorough investigation into the activities of the key individuals and their respective roles.

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35 As Einarsen and Rikhof state: “His [Putin’s] personal criminal liability for the crime of aggression against Ukraine would seem to be beyond reasonable doubt.” In: Einarsen, Rikhof, *Prosecuting the Russian Leadership for the Crime of Aggression at the International Criminal Court*, 2.

36 During the COVID-19 lockdowns, the only person who always had access to Putin was his most trusted friend Yuri Kovalchuk. Insiders believe that it was Kovalchuk who convinced Putin to invade Ukraine by launching a ‘quick military operation.’ See Zhegulyov, “Kak Putin voznenavidel Ukrainu” (“How Putin grew to hate Ukraine”).

37 “Politburo 2.0 I novaya kholodnaya voina.” (“Politburo 2.0 and the new cold war”) Minchenko consulting, 2021.

The presidential administration, defined by law as an auxiliary body to ensure the president's activities, has indeed become, in many respects, a parallel government in charge of political matters.<sup>38</sup> A number of administration officials bear significant responsibility for their activities and, most probably, their counsel to the head of state. In particular, the deputy head of presidential administration Sergei Kiriyenko, who previously served as prime minister under Boris Yeltsin, is responsible for the 'integration' of occupied Ukrainian territories. His activity includes overseeing the implementation of the sham annexation referenda and associated ideological campaigns.<sup>39</sup> Additionally, the presidential administration is primarily responsible for quelling internal dissent, which is crucial for facilitating aggression.

The Security Council, although mentioned in the Constitution, does not have the authority to make binding decisions. According to the law on security, any decisions of the Security Council must be formalized as presidential decrees. The Security Council – particularly in relation to the meetings of its permanent members – is often portrayed as a center of power.<sup>40</sup> For instance, at the now legendary meeting on 21 February 2022, the council discussed 'the situation in Ukraine,' and all members recommended that Putin recognize the independence of the Donetsk and Luhansk 'people's republics.' However, even that meeting made no formal recommendation for the use of force. Experts tend to exaggerate the Security Council's powers and real influence, but its membership indicates its influence and closeness to Putin.<sup>41</sup>

The investigation should be open to the prospect of indicting some critical personalities in Putin's inner circle and within two essential organs: the Office of the President and the Security Council. Some key personalities might qualify as 'leaders' based on informal powers, close proximity to the head of state, and functional role in implementing aggression. It is

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38 Burkhardt, "Authoritarian Presidencies: Polymorphous Power and Russia's Presidential Administration", 474-475.

39 Perstev, "Kurator vsego" ("Curator of everything").

40 According to the U.S. Department of the Treasury, 'The Security Council of the Russian Federation, chaired by President Putin and composed of members he appoints, is a key national security body in Russia that determines and executes Russia's foreign policy, including its unprovoked war of choice against Ukraine.' See "U.S. Treasury Escalates Sanctions on Russia for Its Atrocities in Ukraine," press release, April 6, 2022.

41 Stanovaya, "Kak Sovet bezopasnosti zamenil v Rossii pravitel'stvo" ("How Security Council Replaced the Government").

crucial to consider the responsibility of the other members of Putin’s elite when the risk of the dictator not being held accountable is high. It gives justice a chance if we scrutinize the actions of Russia’s dictator in the unfortunate event that he himself evades accountability.

## 5. Parliament, Government, and the Judiciary

Russia’s current political system can be characterized as a dictatorship.<sup>42</sup> Despite the constitutional provisions on the separation of powers, all three formal branches of power are de facto subordinate to the president, who appoints members of state institutions directly or through controlled parties. However, those organs still play an important role in Putin’s system, approving and implementing his decisions, including waging war against Ukraine, under the veil of formal legitimacy.<sup>43</sup>

The Russian parliament, the Federal Assembly, is consolidated on foreign policy issues. Although United Russia, Putin’s party, has an absolute majority in the State Duma and the Federation Council, members of other parliamentary parties have no choice but to support Putin’s decisions, forming a ‘patriotic majority.’

According to the Constitution, the Federation Council, the upper chamber of the parliament, authorizes the use of armed force abroad.<sup>44</sup> Twice, in 2014 and 2022, Putin was given such permission. The decision on 22 February 2022 did not specifically mention Ukraine, and the request referred to the need to defend the territories of freshly recognized ‘republics.’<sup>45</sup> Subsequently, the Duma and the Federation Council voted overwhelmingly to annex Ukrainian territories.

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42 ‘The overwhelming power of the President resulting from the extremely long term in office combined with the lack of any checks and balances such as a strong parliament, an independent judiciary, free media, and a vibrant civil society has turned the Russian Federation into a de facto dictatorship’, Resolution 2519 (2023) of the Parliamentary Assembly of the Council of Europe ‘Examining the legitimacy and legality of the ad hominem term limit waiver for the incumbent President of the Russian Federation’, para. 4.

43 “Beshenny printer voyny. Issledovaniye Nastoyashchego Vremeni o rabote Gosdumy Rossii za god voyennogo vtorzheniya v Ukrainu” (“Mad printer of war. Nastoyashcheye Vremya Review on the Work of State Duma for the year since military invasion of Ukraine”).

44 Article 102 of the Constitution of the Russian Federation.

45 Transcript of the meeting (free access from 13.12.2023): <http://council.gov.ru/events/news/133443/>.

Those votes certainly contributed to the preparation for, initiation, and waging of aggression. However, designating all its members as immediate perpetrators of the crime of aggression would be problematic for legal and practical reasons. Some members responsible for specific war lawmaking and engaged in propaganda should bear responsibility for their contribution. The chairpersons of the Russian parliament can be seen as essential participants in the aggression enterprise. They organized and oversaw ‘parliamentary approval’ of the war and the territorial grab and can be characterized as ‘leaders’ for the purposes of the crimes of aggression.

The government in the Russian constitutional system has limited political power and does not make decisions on foreign policy. Its primary role is managing the economy. It is unclear if Putin consulted with the government before invading Ukraine. However, government officials like Prime Minister Mikhail Mishustin were involved in managing the war economy and measures related to the ‘new’ territories. Mishustin has maintained a low public profile regarding the war. Two government members, Defense Minister Sergei Shoigu and Minister of Foreign Affairs Sergei Lavrov, who report to the president, not the prime minister, and who are rightly mentioned in the model indictment, can be better defined as direct Putin subordinates rather than cabinet members.<sup>46</sup>

Regarding the Russian judiciary, Putin assigned the Russian Constitutional Court to oversee the annexation of occupied territories and formally requested it to check the ‘constitutionality’ of the annexation ‘treaties.’ In March 2014, the court provided its opinion on the Crimea annexation’s conformity with the Russian Constitution.<sup>47</sup> Moreover, in 2022, it did the same for four other Ukrainian regions.<sup>48</sup> The court delivered its judgments with extraordinary swiftness in both cases, justifying the ‘constitutionality’ of the domestic procedure for accepting newly occupied territories into the Russian Federation. The chairman of the Court, Valery

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46 [Lavrov] has hence been instrumental in justifying Russia’s acts of aggression against Ukraine, including before international fora. [Lavrov] is also a Permanent Member of the Security Council,<sup>108</sup> and therefore one of the select individuals with a vote on state security decisions’: Model Indictment, para. 29.

47 Nuzov, “National Ratification of an Internationally Wrongful Act: The Decision Validating Russia’s Incorporation of Crimea: Constitutional Court of the Russian Federation Decision of 19 March 2014, No. 6-P”, 353–376.

48 Masol, “Orwellian Rulings of the Russian Constitutional Court on the Donetsk, Kherson, Luhansk and Zaporizhzhia Provinces of Ukraine”.

Zorkin, was very vocal in both cases and used extrajudicial arguments in justifying the decisions.<sup>49</sup>

The Constitutional Court does not inform the public how judges voted for specific decisions. Moreover, in 2020, the amendments to the law on the Constitutional Court eliminated the judges’ right to publish dissenting opinions. Judge Konstantin Aranovsky resigned shortly before considering the 2022 request, without citing a particular reason.<sup>50</sup> It is believed that he did not wish to participate in the proceedings; in the past, he often dissented from majority rulings, although he was part of the Crimean decision back in 2014.

It is doubtful whether Chairman Valery Zorkin and the other judges can be qualified as leaders for the crime of aggression. Their influence was significant but perhaps not ‘decisive.’ International jurisprudence is of limited assistance in assessing the judges’ role in the crime of aggression. Although Nazi judges were prosecuted in Nuremberg for their decisions, they were not indicted for crimes against peace. However, the German judicial system played no significant role in legitimating the acts of aggression committed by Germany.

Given the importance of the Constitutional Court in the mechanism of aggression<sup>51</sup> and the need to clarify the circumstances, it might be desirable to consider the role of the Constitutional Court and its chairman in the crime of aggression, including through the use of complicity provisions.

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49 “Valeriy Zorkin o reshenii KS: My ne mogli ne uchityvat’, chto zhizni lyudey byli postavleny pod katastroficheskuyu ugrozu” (“Valery Zorkin about decision of the Constitutional Court: We had to take into account the catastrophic threat to people’s lives”).

50 “Judge Known for Dissenting Opinions Resigns from Russian Constitutional Court”, *Meduza*, September 27, 2022.

51 The European Union sanctioned Valery Zorkin and other judges based on their role in the aggression against Ukraine, explaining that: “this decision [on the legality of annexations] artificially creates the image of the legitimacy of Russia’s invasion of Ukraine and is aimed at endowing those regions with features of actors of international legal relations. The Constitutional Court formally plays a decisive role in the process of accession of foreign territories to Russia. Therefore, Valeriy Dmitrovich Zorkin is responsible for, supporting or implementing actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organisations in Ukraine.” Official Journal of the European Union, L 322 I. Volume 65. December 2022, 360.

## 6. Military and Security Establishments

In situations involving the use of force, supreme military commanders always play a decisive role. An act of aggression, first and foremost, uses military force. As in other cases of large-scale military aggression, many hundred thousand military and security personnel engage in the act of aggression, and some act with knowledge and a certain degree of autonomy to superior orders.

However, with respect to military personnel, it is crucial to avoid extremes and refrain from labeling the entire aggressor army or officer corps as criminal. Such an approach will only result in selective prosecution where a few scapegoats will be held accountable. Moreover, with respect to soldiers, this view is fundamentally at odds with the reality of military draft and mobilization, particularly in authoritarian countries, which are more likely to be aggressors. In fact, many soldiers and officers of the aggressor side can be seen as victims of the crime of aggression rather than responsible perpetrators. It is worth recalling a powerful dictum of the US Military tribunal in Nuremberg in the *High Command* case, which remains relevant:

[i]nternational law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization.<sup>52</sup>

The model indictment names Sergei Shoigu, Minister of Defense, and Valery Gerasimov, Chief of General Staff, as key figures in the Russian

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<sup>52</sup> *U.S. v. von Leeb et al.*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946 – April 1949, Vol. IX (1948)*, 488.

military hierarchy.<sup>53</sup> Being immediate subordinates to Putin, the Minister of Defense and the Chief of General Staff are responsible for using armed forces and conducting military operations. The available information points to the key role of these individuals in all stages of the aggression; thus, they can be characterized as the chief architects of the war back in 2014.

The prosecution’s focus on the ‘special military operation’ rests on those accountable, namely the chief commanders of the whole operation and the naval and air force commanders. These military leaders possessed significant knowledge regarding the truths surrounding the Donbas War and the misleading justification for its commencement. Despite being informed of the reality, they purposely disseminated false information about Russia’s role in the conflict. Evidence supports their awareness of the plans of Blitzkrieg in Ukraine, as several generals near the General Staff had warned of the potential hazards preceding the invasion.<sup>54</sup>

Alongside the military, Russian special services, including the Federal Security Service (FSB) and the Service for Foreign Intelligence (SVR), were prominent engines of aggression at both the stage of deciding on the crime of aggression and the stage of its implementation, including through the annexation of territories.<sup>55</sup> The model indictment charges the head of the FSB, Alexander Bortnikov, and the chief of the SVR, Sergei Naryshkin, with committing the crime of aggression.

While the need to prosecute major military leaders, such as Shoigu and Gerasimov, is beyond doubt, priority in prosecuting members of the Russian armed forces and security agencies should be given to accusations of committing war crimes and crimes against humanity, including using the principle of command responsibility.

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53 “Sergei Shoigu is hence considered to be heavily involved in Russia’s military decision-making not only by virtue of his official role, but also in practice”: Model Indictment, para. 14.

54 “Zabyt’ o voyne kak o sposobe resheniya voprosa s Ukrainoy” (“Forget about War as a Means to Solve the Ukraine Question”). Interview with General Leonid Ivashov, *Novaya Gazeta*, 14 February 2022. Khodaryonok, “Prognozy krovozhadnykh politologov” (“Forecasts of Bloodthirsty Politologists”), *Nezavisimaya Gazeta*, 3 February 2022.

55 Watling, Danylyuk, Reynolds, *Preliminary Lessons from Russia’s Unconventional Operations During the Russo-Ukrainian War, February 2022–February 2023*. Royal United Services Institute for Defence and Security Studies, Special Report, 29 March 2023.

## 7. Propagandists

The role of the Russian state propaganda in the aggression against Ukraine is particularly significant. The media have been complicit in creating and maintaining an aggressive imperialistic mindset for years, if not decades, and particularly since 2014 toward Ukraine. Specifically, propaganda presented Ukraine as ‘not a real state’ and repeatedly accused the Ukrainian government of being ‘Nazi’ filled with ‘Nazi collaborators,’ effectively waging a war of extermination against Donbas’ ‘predominantly Russian’ population. The Russian state media, especially television, were dominated by extreme statements based on pure emotions, exploiting racism and homophobia. Many propaganda statements calling for the annihilation of the Ukrainian nation<sup>56</sup> and the killing of Ukrainians could be raised as grounds for prosecution, as direct and public incitement to commit genocide.<sup>57</sup>

In the weeks and months leading up to Russia’s full-scale invasion, pro-Kremlin media employed false and misleading narratives to justify military action against Ukraine, mask the Kremlin’s operational planning, and deny any responsibility for the coming attack.<sup>58</sup> Collectively, these narratives served as Vladimir Putin’s *casus belli* to engage in a war of aggression against Ukraine.

The Russian regime has had absolute control over the media since Putin’s rise to power. Putin has used censorship, intimidation, and corruption to build a media empire, the central part of which is state television. The media monopolized by Putin’s regime has created a parallel information reality for a large part of Russia’s population. Propagandists not only transmitted the statements of Putin and other leaders but also manufactured and disseminated the war narratives, creating a plausible justification and public support for the war. The leading Russian propagandists have significantly impacted the aggression and its implementation.

Russia’s propaganda regime is a massive enterprise that requires thorough examination, especially regarding its hierarchy and the chain of command. However, even high-ranking individuals, like the heads of state TV channels, would likely fall short of the leadership test. The high leadership

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56 Apt, “Russia’s Eliminationist Rhetoric Against Ukraine: A Collection”.

57 Kalikh, *Incitement to genocide against Ukrainians in Russian and Belarusian propaganda. Experience in documentation and systematization.*

58 Carvin (ed.), *Narrative Warfare: How the Kremlin and Russian News Outlets Justified a War of Aggression Against Ukraine.*

threshold is particularly difficult for propagandists to reach. More promising is the application to them of the rules on aiding and abetting and, possibly, incitement to the crime of aggression. Incitement is currently not a mode of liability available under the Rome Statute; however, it is punishable as a separate offense under the Russian, Belarusian, and Ukrainian criminal codes, which provide for the responsibility for ‘public calls for the aggressive war.’<sup>59</sup>

Omitting the propagandists from the list of those held accountable would be regrettable, given their key role.<sup>60</sup> Investigation and prosecution of propagandists for the crime of aggression is also crucial as it could provide evidence for other investigations and trials.

## 8. Leaders of Belarus

The United Nations General Assembly’s definition of aggression includes allowing the use of territory at the disposal of a third state to attack another state. This is precisely what was undertaken by the Republic of Belarus. Russian armed forces crossed the Belarusian–Ukrainian border at dawn on 24 February 2022. Many missile attacks were launched from the territory of Belarus. In subsequent months, many other actions of Belarusian officials can be qualified as complicit in the aggression.<sup>61</sup>

Belarusian dictator Alexander Lukashenka made multiple claims acknowledging his state’s assistance to the act of aggression against Ukraine. With Prigozhin’s mutiny on 24 June 2023, the Security Council of Belarus, headed by Alexander Lukashenka, issued the following statement:

Belarus has been and remains an ally of Russia, fully sharing the goals and objectives of the special military operation. This is a problematic, forced, and

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59 See, for instance Article 354 of Russian Criminal Code.

60 Aron Trainin, a leading Soviet jurist who made significant contributions to the prosecution of crimes against peace in Nuremberg, had asserted that while aggression was clearly criminal under international law, propaganda inciting to aggression was also an international crime: “In the interests of the struggle for peace, the penalty for crime must fall not only on those guilty of carrying out aggression, but also on those who try to fan the flame of war, who prepare aggression. Activities preparing the ground for aggression must comprise [...] the provoking of international conflicts by all kinds of means; the propaganda of aggression.” Trainin, *‘Hitlerite Responsibility under Criminal Law’*, 37.

61 Reetz, “Belarus is Complicit in Russia’s War of Aggression”.

justified mission to protect the Russian people in Donbas. This is an ongoing fight for the future of the Slavic world.<sup>62</sup>

Although Belarusian action fully satisfies the state conduct element of the crime of aggression, its contribution to the aggression remains limited. Belarusian territory was mainly used for the attacks in the direction of Kyiv. It has contributed to civilian and military casualties and facilitated the alleged commission of war crimes and crimes against humanity. The alleged acts of looting involved the use of Belarusian territory and the Belarusian postal services. New credible reports also suggest the participation of Belarusian state organs in the ‘resettlement’ of Ukrainian children from the occupied territory.

It should be noted that Lukashenka meets the leadership requirement outlined in the Rome Statute as he has control over Belarusian political and military actions, including the decision to allow the use of its territory. Additionally, it is important to acknowledge that Russia and Belarus are military allies. During the 2022 invasion, Lukashenka held the ceremonial position of head of the Union State of Russia and Belarus. It is also worth remembering that the invasion was preceded by military drills in Belarus to concentrate troops for the subsequent invasion.

Lukashenka has left little doubt that he understood the wrongfulness of his actions. Lukashenka himself acknowledges the use of Belarusian territory; he has tried to justify the invasion from Belarusian territory by the immediate danger of Ukraine’s attack. However, the attack on Kyiv could not be explained in any way by the interests of protecting the ‘population of Donbas’ or Belarus. Lukashenka’s ridiculous explanations that ‘an attack was being prepared on Belarus’ only confirm the aggressive nature of the Belarusian dictator’s actions. When attacked by Russia, Ukraine had no capacity to threaten Belarus.

The role of the Belarusian regime in the aggression against Ukraine should be legally assessed. Lukashenka was mentioned in the Parliamentary Assembly of the Council of Europe (PACE) Resolution, calling for establishing a special tribunal for the crime of aggression. Later, the European Parliament appealed to the ICC Prosecutor to initiate an arrest warrant against the Belarusian dictator, highlighting Lukashenka’s role

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62 Ministry of Foreign Affairs of the Republic of Belarus, “Statement by the Security Council of the Republic of Belarus,” June 24, 2023.

in the aggression. However, the involvement of the Belarusian regime and its members requires further research and investigation. Senior leaders such as military commanders should be considered at least accomplices in the crime of aggression. As a person in a leadership position, Aleksandr Lukashenka might be regarded as a perpetrator of the crime of aggression should the allowance of territory for the Russian armed forces be regarded as an act of aggression.

## Conclusions

Identifying and prosecuting the individuals responsible for the most egregious aggression committed since World War II is essential for delivering justice to millions of victims and is a necessary precondition for any sustainable peace and reconciliation once the conflict comes to an end.<sup>63</sup> The judicial determination of individual guilt of those who planned, prepared, initiated, and waged the war of aggression will help to address the root causes of state criminality, counter extremist narratives, and create a balanced and verified historical record.<sup>64</sup>

Following a preliminary assessment, it is clear that government officials of Russia and Belarus are responsible for their involvement in perpetrating and facilitating acts of aggression; their acts constitute a basis for their individual criminal responsibility. The leadership requirement, firmly embedded in international law on the crime of aggression, seriously limits this circle of potential suspects. However, the scale and duration of aggression, and the level of individual involvement in criminal conduct justify a less stringent approach to the application of the leadership clause.

The enormous task of investigating the colossal enterprise of Russia's aggression bears significant risks of failure that can be overcome by establishing an effective international mechanism, an international special tribunal for the crime of aggression. Such a tribunal can help reconcile

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63 As the International Military Tribunal in Nuremberg stated in its judgment: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” The dictum was made with respect to the crimes against peace. *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, 223.

64 See more critical assessment of reconciliatory potential of aggression trials: Grzebyk, “Key Risks and Difficulties of Aggression Trials”, 277-279.

the strict legal restrictions resulting from the Kampala compromise with the needs of affected states and the specificity of the conflict.

National proceedings in Ukraine, Russia, and other states might complement the work of the special tribunal. This can be undertaken by applying national criminal law provisions on the crime of aggression to a broader range of responsible individuals, as well as addressing other crimes, such as war crimes, that have been committed during the aggression or incitement for aggressive war. By combining international and domestic justice, a comprehensive accountability system can potentially be established for those who played a decisive role in the war of aggression. To ensure success, the investigation and prosecution strategy must accurately represent the full extent of the criminality of aggression.

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