

THE CRIME OF AGGRESSION: NONGOVERNMENTAL ACTORS IN THE RUSSIA–UKRAINE ARMED CONFLICT

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ABSTRACT

Since the crime of aggression was incorporated into the Rome Statute of the International Criminal Court, there has been uncertainty regarding its scope. Essentially, it is a crime perpetrated by political and military leaders. However, with the emergence of scenarios where its applicability and scope are open to debate, this study aims to investigate the possibility of designating nongovernmental actors as active perpetrators of this crime. Accordingly, the study focuses on the international dimension inherent in the crime of aggression, as well as explores the historical treatment of this crime, the procedural rules regarding jurisdiction, and the situation between the Russian Federation and Ukraine amid the new political tensions. Finally, it offers legal conclusions on the feasibility of regarding nongovernmental actors as active perpetrators of the crime of aggression within the international legal framework by closely examining the doctrine that may broaden the understanding of this crime.

RESUMEN

Desde la incorporación del crimen de agresión al Estatuto de Roma de la Corte Penal Internacional, ha existido incertidumbre en cuanto al alcance de este ilícito internacional. En esencia, se trata de un crimen cuyos sujetos activos son líderes políticos y militares. Sin embargo, a medida que han surgido escenarios donde su aplicabilidad y alcance son discutibles, el presente texto tiene como objetivo analizar la posibilidad de considerar a actores no gubernamentales como sujetos activos de este crimen. Para este propósito, se analizará la dimensión internacional inherente al crimen de agresión. Asimismo, se abordará brevemente el tratamiento histórico que ha recibido este crimen, las reglas procedimentales sobre competencia y se estudiará el caso de la situación entre la Federación Rusa y Ucrania en medio de las nuevas tensiones políticas. Finalmente, se presentarán algunas conclusiones de carácter jurídico respecto a la viabilidad de considerar a actores no gubernamentales como sujetos activos del crimen de agresión en el ordenamiento jurídico internacional. Con este fin, se examinará detenidamente la doctrina que podría permitir entender un alcance más amplio del crimen de agresión.

KEY WORDS: Aggression, Rome Statute, nongovernmental actors, criminal responsibility.

PALABRAS CLAVE: Agresión, Estatuto de Roma, actores no gubernamentales, responsabilidad penal.

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INTRODUCTION

1. Elements of the Crime of Aggression

This study delves into the key aspects of the crime of aggression, focusing specifically on the feasibility of attributing responsibility to private actors. To this end, it: a) analyzes certain elements of this crime; b) explores the applicable factual assumptions arising from Articles 8 and 25 of the Rome Statute; and c) reviews relevant cases that may provide support to the proposed hypothesis, drawing from the investigative authority of the International Criminal Court Prosecutor's Office. The objective of this final point is of particular significance, as to date, there have been no convictions regarding the crime of aggression that advance the standards of interpretation and scope of its constitutive elements.

2. The components of the crime of aggression in contemporary international law

Based on the consensus achieved regarding the elements defining the crime of aggression during the Assembly of States Parties (Legal Tools, 2015), it is crucial to outline its significance within the proposed framework outlined in the draft resolution.

First, the text establishes the essential requirement of an actor who has planned, prepared, or initiated an act of aggression. In this regard, the actor must have been in a position to control or direct both the political and military action of the state that committed the crime. In addition, one of the acts defined as aggression must have been committed (Sayapin, 2014, p. 257). Furthermore, the perpetrator of the crime must have full knowledge of the factual circumstances that establish the incompatibility of the use of armed force with the provisions of the United Nations Charter. Additionally, the characteristics, gravity, and scale of the alleged incident must amount to a manifest violation of the UN Charter, as the perpetrator must be aware that such actions constitute a breach of the provisions of said instrument. In addition to these formal elements, it is stipulated that the responsibility for this crime applies exclusively to political or military leaders, as stated by the Coalition for the International Criminal Court (n.d.). However, in practice, this restriction has not been fully observed.

Consequently, it can be noted that the elements of the crime require specific conditions and are interdependent (Salmón & Bazay, 2011). These conditions demonstrate a deep dependence on each other to support the factual scenario outlined in Article 8 *bis* and can be represented as follows:

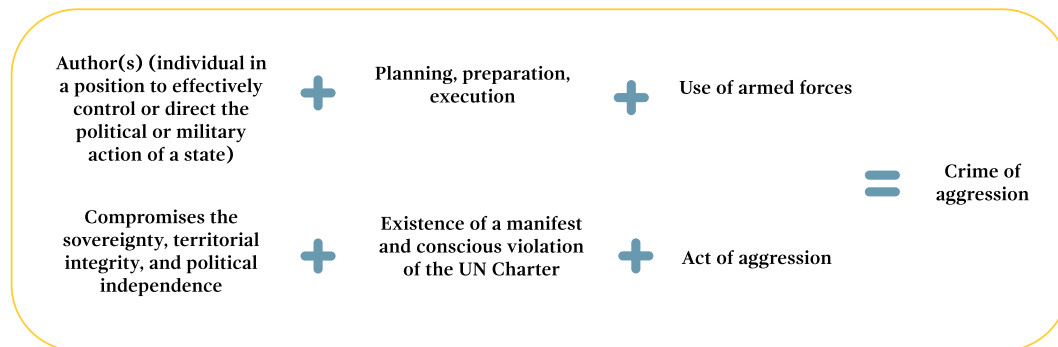


Figure 1. Elements of the “Crime of aggression.” **Source:** (Legal Tools, 2015; Sayapin, 2014; Salmon and Bazay, 2011). Created by the author.

3. Acts of aggression

Before analyzing the various manifestations of authorship concerning the capacity to control or direct the actions of a state, it is crucial to examine what has been defined as acts of aggression in accordance with Articles 15 and 16 of the Rome Statute. The rationale behind this approach is rooted in procedural rules, which are under the authority of the Security Council; consequently, the possibility of investigating private actors will depend on it in cases involving permanent members (Sayapin, 2014, p. 307).

The general rule underlying the factual assumptions of Article 8 *bis*, paragraph 2 of the Rome Statute is the attack of one state against another. At the same time, Articles 15 *bis* and 15 *ter* of the Rome Statute establish explicit avenues for exercising jurisdiction over the crime of aggression, specifically: 1) Referral by a state, *proprio motu*; 2) Referral by the Security Council. In particular, Article 15 *bis*, paragraphs 6, 7, and 8 provide the possibility for the prosecutor’s office to initiate an investigation without a prior determination from the Security Council. After six months have elapsed since the prosecutor’s office notification to the UN Secretary General of the situation before the ICC to initiate a preliminary investigation, and without a pronouncement from the Security Council or its refusal or request

for suspension of the investigation, the initiation of the process can proceed (Sayapin, 2014, p. 307).

In her article “Revisiting the Role of the Security Council Concerning the International Criminal Court’s Crime of Aggression” (2019), Jennifer Trahan highlights these premises as one of the mechanisms the Security Council has to deter situations of aggression in political contexts involving certain states. In support of these arguments, Trahan cites the events in Crimea as an example, specifically referring to acts involving the use of armed forces against Ukrainian vessels in 2018. However, this situation did not result in any accusation or investigation by the International Criminal Court (Trahan, 2019, p. 4).

According to Trahan (2019, p. 5), the deterrent power inherent in the Security Council’s veto can be applied to private actors in terms of authorship and capacity. Therefore, she argues for the politicization of the “rule of law” within procedures tied to the UN Security Council, as demonstrated by the Darfur case. In line with this perspective, Andreas Paulus (2009) questions the delineation of acts defined as aggression in the United Nations General Assembly Resolution 3314 of 1974. Paulus argues that this resolution was not crafted to support criminal law; rather, its aim was to validate the actions of the UN Security Council regarding the act of aggression under Chapter VII (Durango, 2014).

4. Individual criminal responsibility

To explore private actors’ potential authorship and capacity in the crime of aggression, it is necessary to jointly analyze the elements that constitute this offense. The perpetrator’s authorship should be construed in relation to their capacity and involvement in the planning, preparation, execution, or instigation of the crime (Salmón & Bazay, 2011, p. 40). In other words, the conduct of the perpetrator should be assessed in accordance with the provisions of Article 25 of the Rome Statute, which addresses individual criminal responsibility.

Paragraph 3 *bis* of Article 25 establishes the forms of authorship applicable to individuals in a position to effectively control or direct the political or military action of a state (International Criminal Court, 2010). As stipulated in Article 25, individual criminal responsibility applies to those who:

1. Commit the crime themselves, with another individual, or through another person, whether or not that person is criminally responsible.
2. Order, propose, or induce the commission of said crime, whether it is completed or attempted.
3. Participate in some capacity in the commission or attempted commission of the crime, whether as accomplices, accessories, or by facilitating the crime through the provision of necessary means (International Criminal Court, 2010).

These clauses are structured to allow for the identification of direct authorship through the governing verbs, “commit” and “order.” Furthermore, indirect criminal responsibility is observable in the other governing verbs, including “conduct,” “propose,” “induce,” “facilitate,” and “supply.”

The orders described may encompass the capacity for control or direction, which in turn become *sine qua non* for the configuration of the crime of aggression. Following the same logic, the outcomes of the conditions of the typical act of planning, preparing, initiating, or executing are subsumed under the extended forms of participation contained, firstly, in Article 25 and, moreover, in the capacity for control and direction.

Article 8 *bis*, paragraph 1, introduces a conditional conjunction when, for the purpose of subsuming the governing verbs in question, it pertains to the capacity to control or direct the political or military actions of a state.

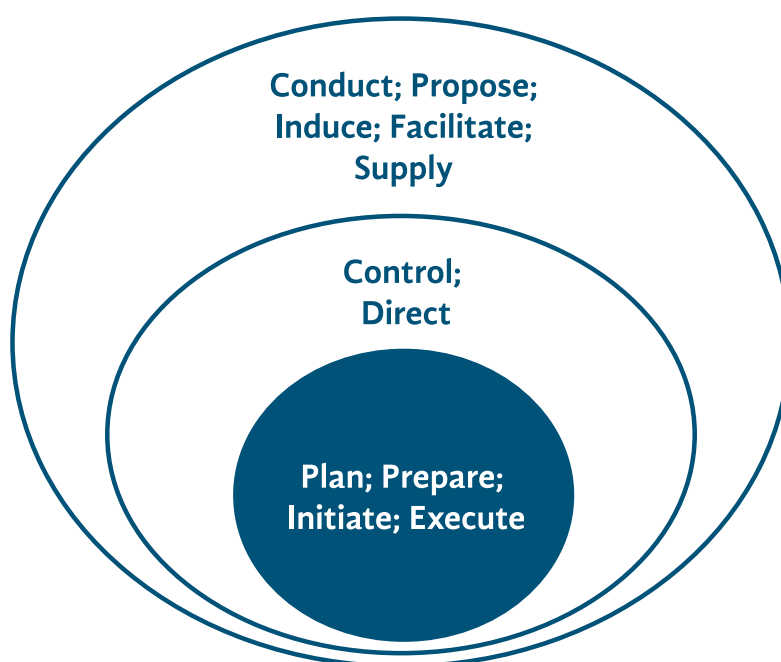


Figure 2. Subsumption spheres of behavior. Created by the author.

In this context, understanding the multitude of governing verbs in the crime of aggression can be interpreted within the sphere of individual criminal responsibility. Hence, whenever there is the capacity to control or direct the political or military action of a state, the verbs “plan,” “prepare,” “initiate,” and “execute” are interpreted within the framework of the previously mentioned forms of authorship and participation.

5. Non-state actors as qualified subjects.

Based on the analysis in the preceding subsection, two entities emerge as potential subjects for individual responsibility under the international framework. First is the figure of mercenaries and the regulations that have emerged in response to phenomena associated with contemporary conflicts (Fallah, 2006, p. 600). However, private and commercial interests have evolved, leading private entities to become providers of specialized services such as military skills, tactical leadership in combat operations, strategic planning, intelligence, operational support, logistics, training, and troop assistance (Singer, 2008, p. 8). These new conflict dynamics and the emergence of non-state actors have led the North Atlantic Treaty Organization (NATO) to refer to these emerging forms of aggression as “hybrid wars.”

Both mercenaries and private security firms could be subject to liability. However, to determine individual criminal responsibility according to the terms of the International Criminal Court, it is necessary to analyze the scope of the behaviors examined in the previous subsection, focusing on the perpetrators of the crime. In terms of mercenaries and their definition in international law, the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (1989) defines them as any person who:

1. A mercenary is any person who:

Is **specially recruited** locally or abroad in order **to fight in an armed conflict**.

Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of **similar rank and functions in the armed forces of that party [...]**

2. A mercenary is also any person who, in any other situation:

a. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

Overthrowing a government or otherwise undermining the constitutional order of a state; or

Undermining the territorial integrity of a state.

b. Is motivated to take part therein essentially by the desire for significant private gain and **is prompted by** the promise or payment of material compensation. (United Nations General Assembly, 1989)

Thus, it can be understood that, for example, under Article 1.1, subparagraph a), if a person is hired to engage in combat in an armed conflict and, due to their training and skills, has the ability to direct or facilitate behaviors that, by their nature, grant them the capacity to determine the political or military course of a state, planning or preparing acts related to the armed conflict, the inclusion of the mercenary figure is objective in

the face of the crime of aggression. At the same time, subparagraph b) of the same article raises a fundamental issue: the degree and functions of the armed forces of a party in conflict. If the provision provided by a mercenary to the contracting party is of an intangible nature (information gathered in operations within the conflict), in degrees and functions similar to those who have the capacity to determine the political or military course of a state, the planning and preparation of an act of aggression would classify the mercenary as a special qualified subject within the crime of aggression. Therefore, the qualification would depend, in each case, on analyzing the military structure and functions of the members of the armed forces of the party within the conflict.

Regarding paragraph two of the cited article, the purposes served by the mercenary are vital to understand their conduct as part of the crime of aggression. The United Nations Charter establishes as a commitment undertaken by member states the refraining from resorting to threats or the use of force against the territorial integrity or political independence of any state (Article 2, paragraph 6), the violation of which could be understood as a blatant violation of the charter (Herdocia, n.d., p. 13). It is clear, therefore, that the condition that defines a person as a mercenary (engaging in acts aimed at overthrowing a government or undermining the territorial integrity of a state) is one that constitutes a blatant violation of the UN Charter (Article 2, paragraph 6), and moreover, it is a constitutive element of the crime of aggression (Article 8 *bis*, numeral 1). It can be concluded that these coincidences are not random if the goal is to hold certain non-state actors individually accountable.

The second focus of inquiry is private military companies or entities, commonly referred to as “private security firms.” A preliminary examination can be found in the convention regulating mercenaries (1989), particularly in Article 1, paragraph 2, subparagraph b. Given that the incitement to participate in acts related to the conducting of hostilities in an armed conflict for the purpose of material gain can originate from both state and private capital, a new debate emerges regarding the responsibility of nongovernmental actors. Accordingly, Article 2 of the convention establishes that anyone who recruits, uses, finances, or trains mercenaries commits a crime (International Convention..., 1989).

The status of private security firms serves diverse purposes, contingent upon their relationship with the contracting party. The profit or reward derived from their involvement in scenarios requiring technical support, logistical assistance, and intelligence provision has, in some cases, led to the normalization of their demand and the outsourcing of services (McFate, 2019, p. 20).

In such a complex scenario, considering that individual criminal responsibility, over which the International Criminal Court has jurisdiction, does not extend to legal entities, the question arises: Who assumes responsibility when certain acts, classified as aggression, are carried out through companies?

International criminal jurisprudence continues to evolve, demanding a less restrictive interpretation regarding individuals who may be liable for international crimes, with the goal of safeguarding victims (Silva, 2011, p. 152). The International Criminal Tribunal for Rwanda emphasized the lack of precise indications regarding the need for a qualified subject as the perpetrator of crimes, affirming that even a civilian can sustain or contribute to widespread or systematic attacks against a population. Moreover, the tribunal underscored that the connection between the armed conflict and the committed crimes implies the perpetrator's affiliation or membership in a structure or organization, which is an established fact derived from the crime (Silva, 2011, p. 154).

If, as Hernández Campos (1998) suggests in "The International Criminal Court: Foundations and characteristics," international criminal law implies the impossibility of holding legal entities individually accountable because they lack the capacity to commit a crime through action or omission, then extended forms of authorship and participation may be examined to ascertain the extent within non-state structures, thereby determining individual criminal responsibility (p. 445).

In the specific case of companies implicated in alleged responsibility for activities such as strategic planning, providing intelligence, or operational and logistical support, these can be understood within certain lines of jurisprudence regarding the functional control over the act (Kinsey, 2021, p. 13). Doctrine has labeled this phenomenon as "joint criminal enterprise,"

serving as a foundational concept to endorse the idea that individuals committing crimes may be utilized by intervening leaders merely as “instruments” for their commission (Olásolo, 2013, p. 104). The concept of the instrumentalization of a third party, developed in the appeals judgments in the Brdanin (para. 412) and Krajisnik (paras. 220, 225, 226, 714) cases of the International Criminal Tribunal for the former Yugoslavia, aligns with the separate opinion in the 2006 judgment in the Gacumbitsi case, where Judge Schomburg interpreted the scope of the commission of a crime and who falls under the functional control over the act (Olásolo, 2013, p. 105).

Under the same criteria, it is possible to understand the operational structure of a private security firm. Upon exploring the question raised by Kenny Gluck, director of operations for Médecins Sans Frontières-Holland, regarding the potential liability of shareholders (Singer, 2018, p. 7), it is observed that, in principle, the reviewed lines of jurisprudence would not attribute responsibility to these actors. This is unless the acquisition of shares in a company involved in operations during an armed conflict is undertaken by a natural person with the direct intention of using the company and its operators as an “instrument” (functional control of the act) to carry out an act of aggression. This scenario implies enormous complexity in procedural terms to demonstrate such intent (Kinsey, 2021, p. 14).

However, injecting capital to finance technical and logistical support services, providing intelligence, field operations, or strategic planning are just a few of the ways in which one can participate in a conflict as a non-state actor. If the elements analyzed within the crime of aggression are carried out by the operators themselves in the field, ordered or approved by those who hold managerial positions within the private security firm, responsibility exists within the boundaries of the exercise of functional control of the act. For instance, if private intermediaries serve as contractual agents to train, organize, and finance organized “irregular” groups with the intention of intervening in another state, the response in terms of resource redirection and offensives by the affected state could establish the standard of functional control by a private actor. This hypothetical scenario can be illustrated as follows:

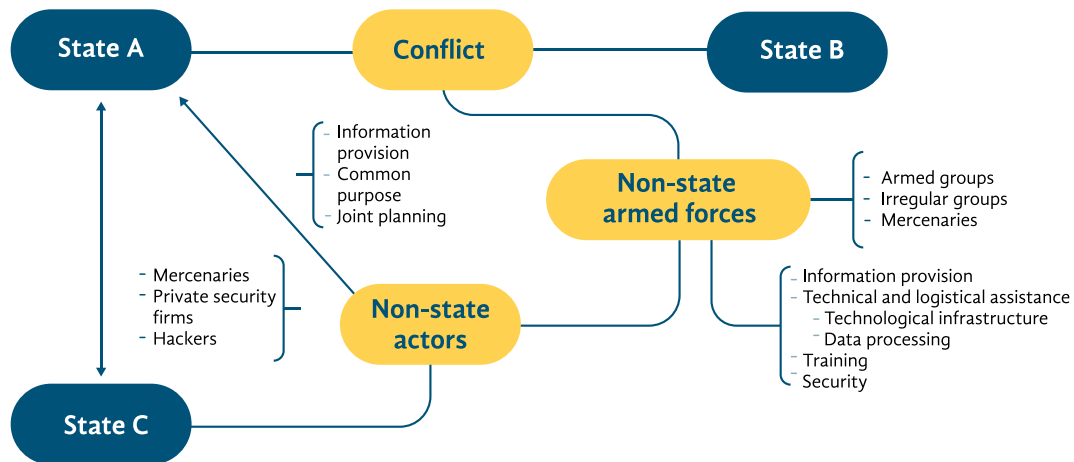


Figure 3. Dynamics of relationships between actors. Created by the author.

The diagram in Figure 3 enables the dual nature of the situations in which mercenaries are involved to be highlighted. Ignoring the possibility of describing the role of a mercenary who works both alongside a state under a joint criminal enterprise and with armed gangs or irregular groups (as per Article 8 *bis*, paragraph 2, subparagraph g of the Rome Statute) would limit the scope of the hypothesis maintained from the outset, which posits that companies are used as fronts for the private operations of mercenaries (Kinsey, 2021, p. 14).

The scenario outlined via the interpretation of the elements of the crime allows for expanding the scope of the crime of aggression to include actors that have not been previously considered by the Coalition for the International Criminal Court (n.d.). The evidence and assumptions presented in this section suggest a possibility whose treatment will be delineated in each case according to established parameters.

The analysis conducted in this subsection has been presented as a theoretical proposal, serving as a prelude for the case study that will be addressed next. The aim is to underscore certain contingencies, events, and limitations associated with all that has been examined up to this point.

6. Case study: Conflict between the Russian Federation and Ukraine

The crime of aggression will now be analyzed through the contemporary conflict between two states: Russia and Ukraine. To this end, the historical context will only be addressed to the extent necessary to contextualize the conflict analyzed in relation to the main topic. Additionally, the current dynamics in which conflicts between states unfold will be explored, such as cyber warfare, corporate and political mercenarism, and sanctions between states, among others. The objective is to identify a standpoint that allows for the examination of various perspectives concerning the potential classification of non-state actors as perpetrators of the crime of aggression.

In her work “Origins of the Ukrainian Conflict,” Lucía Byllk Paraschnuck (2018) summarizes the major reasons underlying the contemporary conflict between Ukraine and Russia. While acknowledging and analyzing various historical periods and stages (both of cooperation and friendly relations, as well as cultural differences and conflicts), she identifies one of the main causes as follows:

It is crucial to underscore its potential and, consequently, the economic and geostrategic interests it generates. Ukraine is arguably the crown jewel and for quite a few reasons. First, the significance of Ukraine being the largest country in Europe, with a population of 46 million people, strategically positioned between Russia and the European Union cannot be overlooked. Situated in the heart of Europe, Halford Mackinder refers to Ukraine as the “pivot area,” indicating it “lay at the center of the world island, stretching from the Volga to the Yangtze.” This positioning renders it simultaneously fortunate and unfortunate. (Byllk, 2018, p. 16)

Additionally, she points out that the Ukrainian territory is traversed by an extensive network of gas pipelines through which half of the gas Russia sells to European countries passes. In her book *Ukraine between Russia and the West: Chronicle of a conflict* (2014, p. 10), author Ana Lázaro acknowledges and agrees with the importance of the fertility of Ukrainian lands, known as chernozem. This not only makes Ukraine one of the largest producers of cereals globally but also underscores its dependence on Russian air and military equipment (p. 17).

According to ABC Internacional, in 2014, the annexation of Crimea by Russia led to, within the framework of the hybrid war unleashed by the Kremlin against Kiev, the emergence of the private military company ChVK Wagner (Mañueco, 2022). This company has been recognized by the Council of the European Union for its interventions and activities in Ukraine, Syria, Libya, the Central African Republic, Sudan, and Mozambique (PESC Decision, 2021/2197). While it is not the only private military company whose operations have been highlighted over time, the breadth of functions and the wide discretionary spectrum under which it operates can be emphasized, as shown in the following figure:



Figure 4. Analytical framework. Source: (Arnold T, 2020)

Sergey Sukhankin examined the organization of the Wagner Group, addressing various aspects including its leader, Dmitry Utkin, and the training tactics provided at its main center in Molmino, Krasnodar Krai, as well as at decentralized locations. Furthermore, he analyzed aspects related to weaponry and equipment, ranging from light weapons to BM21 rocket launchers and D30 cannons, as well as financial management and resource distribution in “establishment of order” operations, among other aspects.

It remains to mention the last of the relevant actors for the analysis of the first scenario involving nongovernmental actors. During the Crimean independence crisis, pro-Russian separatist forces in regions such as Donetsk and Luhansk were key actors (BBC News Mundo, 2022). Substituting the variables in the scenario in Figure 3 of the previous subsection with the elements of the case study, we can observe a seamless fit with the dynamics previously described. Accordingly, the scenario can be configured as follows:

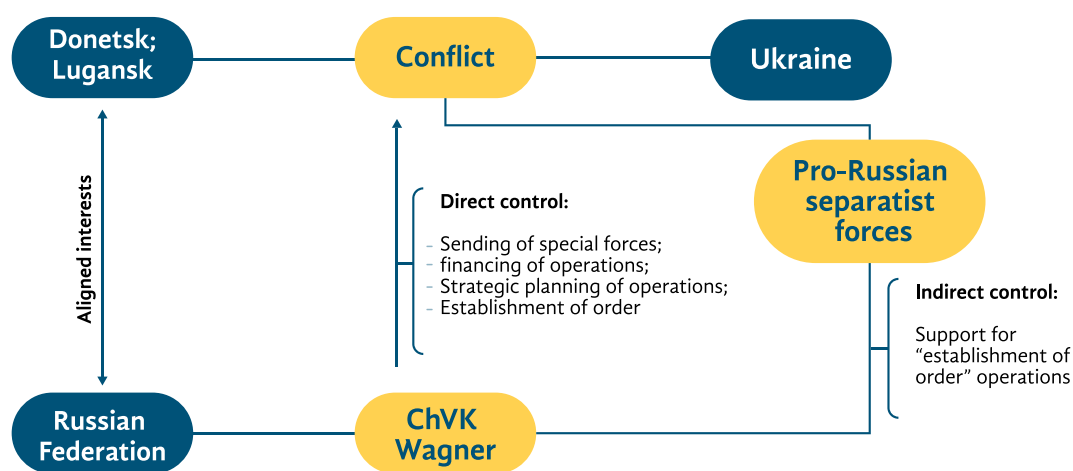


Figure 5. Analytical framework of the actors in the Russian–Ukrainian conflict. Created by the author.

Based on the gathered information, there exist nongovernmental groups whose influence can result in an act of aggression. It is important to clarify that while the self-proclaimed Donetsk and Luhansk Peoples Republics are not recognized as states in the strictest sense, Vladimir Putin’s recognition of their independence is enough to interpret the crime of aggression, either in terms of annexation or according to the “overall control test” criteria.

CONCLUSIONS

In analyzing the elements of the crime, concerning the capacity to control or direct the political or military sphere of a state, the Wagner Group, through incursions of direct or indirect control, exercises functional control over the situation, prompting offensive responses from the Ukrainian state. Furthermore, it is evident that the use of force compromises the sovereignty, territorial integrity, and political independence of both Ukraine and the Donetsk and Luhansk Peoples Republics, given that the Wagner Group

holds a “leadership” role in directing or controlling the actions of a state (Salmon & Bazay, 2011). It is also conceivable to interpret the planning and preparation as preparatory acts carried out by the Wagner Group with the aim of *de facto* annexing Ukrainian territory for the Russian Federation.

Likewise, if the dispatch of armed bands, irregular groups, or mercenaries by a state (Russia) to carry out acts of armed force against another state (Ukraine) is done through the private military company in question, it, either by itself or through other groups, could be held responsible for committing a crime of aggression, under the terms already examined through the operational mechanisms of the Wagner Group (Rana, 2022). Certainly, such actions should be understood in accordance with the individual criminal responsibility outlined in Article 25, paragraph 3, subparagraph a of the Rome Statute, as they involve actions carried out via the conduct of others.

Particularly, in this conflict framework, cyberwarfare emerges as a method of conducting hostilities. The low threshold under which it operates is a subject of debate, and there are contrasting opinions regarding its scope in the crime of aggression (Trahan, 2022). Nevertheless, there may be cases in which individual criminal responsibility extends to non-state actors, such as hackers or private security firms.

Attacks on technological infrastructure, databases, and IT personnel accounts are examples of how a state’s sovereignty can be compromised. The phases described by Mohan Gazula (2017), which include reconnaissance, firmware replacement, attack, obfuscation, and cleanup, illustrate the demonstrated capacity in attacks against the security of the Ukrainian state in 2015 (p. 35). It is worth noting that these attacks, particularly those involving obfuscation and cleanup through malware, were again reported during the tensions between Ukraine and Russia in February 2022 (Lyngaas, S. 2022). The specificity of these attacks fits within the possibility of perpetration either directly or through others, in accordance with Article 25 of the Rome Statute, as well as in the mode of collaboration. Likewise, as per the same article, preparatory actions such as reconnaissance and system mapping can be considered key steps in the execution of the typical act. Therefore, these forms of individual criminal responsibility must be interpreted within the framework of Article 8 *bis*.

Indeed, the elements of “severity” and “scale” in the attacks on Ukraine are subordinate to the understanding of these as a manifest violation of the UN Charter, necessary to establish the factual assumptions of the crime of aggression. However, we cannot overlook that the circumstances in which the conflict unfolds are highly unlikely to be judicialized and condemned as a crime of aggression, given the procedural rules that grant Russia the ability to veto a draft resolution qualifying the acts as aggression.

Despite the challenges posed in prosecuting a crime of aggression against non-state actors linked to Russia, the examination of this case demonstrates the potential for pursuing such crimes outside the scope of the UN Security Council’s interests.

Finally, it is important to highlight the relevance of this case study, as it illustrates the political and military control that certain private actors have to influence acts that could be classified as “aggression.”

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