

Scientific
Journal of
**Applied
Social and
Clinical
Science**

**INTERNATIONAL
CRIMINAL LIABILITY
FOR WAR CRIMES
COMMITTED BY
A MERCENARY IN
UKRAINIAN TERRITORY**

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Abstract: This research examines Criminal Responsibility in the international context of war crimes committed by mercenaries in Ukraine. The overall objective is to understand which behaviors fall under war crimes and which international norms contemplate these crimes. The aim is to elucidate international criminal accountability, considering that the belligerent countries Russia and Ukraine are not signatories to the Rome Statute and within this perspective, who would be responsible for the commission of a war crime committed by a mercenary in Ukraine? State? Rulers? Mercenary Leader? What is the penalty for the Brazilian mercenary? The method used was bibliographical research through doctrine, treaties and international conventions and journalistic reports on the subject. It was found that as long as the agent's involvement in the practice of war crimes is proven, be it the State, ruler, mercenary or mercenary leader, all will be held accountable in the international criminal sphere.

Keywords: War in Ukraine. Mercenaries. war crimes.

INTRODUCTION

On February 23, 2022, the President of Russia Vladimir Putin began the invasion of Ukraine on the grounds of “denazifying” the opposing country, it turns out that there were already precedents for conflicts, including the Crimean crisis, conflicts in Donbass, and Ukraine’s rapprochement with the West, facts that were certainly decisive for the war to starticle.

In this sphere is the figure of the mercenary who, historically, arose from the needs of belligerent States to make feasible – in a state of conflict – the business of war (flow of military intelligence and military operational information; sensitive information data in areas where the State has the intention of imposing governmental structures and ideas)

with a view to using the strategy of exchanging the responsibility of the “Regular Army” – Officially recognized by the State – to private war companies, to groups of individuals easily recruited under lucrative agreements.

Besides, with the advent of internet advertising and social media, it helps that recruitment advertisements offered by companies spread more easily, attracting foreign individuals willing to fight in wars and causes of other countries in exchange for financial advantages.

Through the presence of these agents, the meaning of war has changed, becoming an opportunity to make a profit, a change that directly interferes in the conduct of these conflicts, where countries transfer violence to private companies or paramilitary structures, with mercenaries as the main agents..

The intervention of these companies called Private Military Companies (CMPs) are present in several places around the world, among which we can mention Iraq, Haiti, Ukraine, Colombia, etc.

In this conflicting context, would there be the possibility of criminal accountability at the international level for war crimes committed by mercenaries in Ukraine? On whom would these responsibilities fall? State? Ruler? Or mercenary leader? What would be the penalty for the Brazilian mercenary? Pertinent questions that will be answered during the course of the work.

THE MERCENARY BEFORE INTERNATIONAL LAW

There was a legal definition of mercenary, through the diplomatic conference on the reaffirmation and development of the International Law applicable to armed conflicts, the additional protocol I of the Geneva Conventions (ICRC, 1077, article47) was adopted, and it brings the characteristics of this agent:

“A mercenary means any person:

- a) who has been specially recruited, locally or abroad, in order to fight in an armed conflict;
- b) who, in fact, takes a direct part in hostilities;
- c) who takes part in hostilities motivated essentially by the desire to obtain personal gain, and in fact has actually been promised, by or on behalf of a Party to the conflict, a material retribution considerably higher than that promised or paid to the combatants of the same rank and similar functions in the Armed Forces of that Party;
- d) who is not a national of a Party to the conflict or resident in a territory controlled by a Party to the conflict;
- e) who is not a member of the Armed Forces of a Party to the conflict; It is
- f) who has not been sent on an official mission as a member of its Armed Forces by a State that is not a Party to the conflict.

In 1989, the UN created the ‘International Convention against the Recruitment, Use, Financing and Training of Mercenaries’, with the aim of making clear the illegality of this type of “hiring”. (UN, 1989).

“In this sense, despite the existence of rules that exclude mercenaries from specific protection in the context of armed conflicts (as a combatant) and advocate against their use, the intimate relationship between the employment of mercenaries and the privatization of armed conflicts is noted., making the questioning grow, nowadays, around the need to restrict the use of the second insofar as the expansion of the contracting of military services by States, by paramilitary groups, by large corporations, etc “. (GUEDES, 2017, p. 24-25)

Therefore, despite all legislative efforts to curb the presence and performance of

mercenaries in wars and the illegalities surrounding this issue, recruitment continues to occur through companies (CMPs) that sell their services or the mercenaries themselves negotiate the value corresponding to provision of service, with headquarters inside or outside their country of origin to fight in an armed conflict, this agent participates directly in the hostilities, with the objective of obtaining personal advantage, starting to fight in favor of one of the parties in conflict, upon receipt of remuneration, generally higher than that received by regular army combatants, therefore, these are men hired to carry out military service in another country. Many of them have experience in other wars and are highly specialized.

DEFINITION OF WAR CRIMES

The international norms that define the behaviors that qualify as war crimes are the Geneva Conventions of 1949, and the Rome Statute of 1998. The Rome Statute in its article 5 contemplates four types of more serious crimes, which affect the international community: the crime of genocide, crimes against humanity, war crimes, crimes of aggression.

War crimes are the broadest and cover a list of illegalities, among which: the practice of homicides, torture, attacks on the civilian population, deprivation of a fair and impartial trial, among others.

The elements of evidence admitted for the purposes of proving and setting up the aforementioned crimes are provided for in article 69 of the Rome Statute, among which: oral testimony of witnesses, video and audio recording, documents and written transcripts, and through technologies that make it possible, through the use of satellite images, to determine the moment in which the attack occurred, and try to reconstruct the facts through Geolocation.

It urges to emphasize the relevance of the theme from a legal perspective, as these companies (CMPs) that intermediate the hiring of mercenaries and agents hired individually, are not committed to ethics, Human Rights or the precepts that govern International Law. They only submit to the determinations of the company or to their own interests and that of the person who hired them. Therefore, obtaining personal and economic advantages takes precedence over commitment to ethics, respect for human rights and the dignity of the human person and the principles of International Law.

The performance of mercenaries generate ills in all countries where they “provide their services”, in the present work we emphasize the Ukrainian Territory, object of this study, because in these actions, sometimes, abuses occur in certain orders, such as mistreatment, violations of human rights, civilians and prisoners of war.

The fact is that from the moment that extensive violations of human rights occur within a given territory, the well-being and protection of the rights of victims transcends the idea of sovereignty and restoring dignity, alleviating the suffering and wounds generated through violations, ceases to be of the exclusive interest of the Ukrainian State and becomes of interest to the international community.

According to John Vicent (1986), when he brings the approach of international society, in the solidarity view, with regard to the violation of human rights:

“Human rights take precedence over sovereign rights, as human beings existed long before the idea of state sovereignty. In this respect, there is at least a right and probably also a duty for states to intervene to alleviate extreme cases of human suffering within a country”.

Considering the precedence of human rights over sovereign rights demonstrates that it is a duty of states to seek international criminal accountability for war crimes committed by mercenaries in Ukraine, who would bear these responsibilities? State? Ruler? Or mercenary leader? What would be the penalty for the Brazilian mercenary? Pertinent questions that will be answered during the course of the work.

Another point to be considered is whether the actions of the Head of State, or by another agent who is directly or indirectly acting in favor of the Ukrainian State, are present in the elements that configure the commission of a war crime and what would be the perspective of applying the penalty and international criminal responsibility?

Unfortunately, we have precedents of wars in which, although there were extensive violations of human rights that affected civilians and prisoners of war, most of them did not have convictions or lawsuits against mercenaries, since the companies that intermediated these hirings, with the intention of making their legal accountability, they kept changing their name and location. And there have also been cases of States protecting the criminal, or hindering the investigations of the International Criminal Court (ICC) through repeated acts of non-cooperation.

Assuming that if there is an injury to the right or interest of one Subject of International Law to another, the legal mechanism of accountability comes into being.

THE PERFORMANCE OF THE INTERNATIONAL CRIMINAL COURT IN COUNTRIES NOT SIGNATORIES OF THE ROME STATUTES

Russia and Ukraine are not among the 123 States Parties to the International Criminal Court (ICC), and are therefore not signatories

to the Rome Statute, but Ukraine has accepted its jurisdiction. It means that the ICC can investigate certain crimes that occur in the country. In this vein, there are already two ongoing proceedings, one referring to disputes between States before the International Court of Justice (ICJ), and another to determine individual criminal responsibility for the commission of war crimes against humanity before the ICC.

There was an interim decision of the International Court of Justice (ICJ) declaring that there was no legal basis for the invasion of Russia. Because the existence of an alleged genocide is not enough to authorize one country to invade another, and mentions the UN Charter that contemplates peaceful solutions to disputes between countries. The International Criminal Court, which tries people and not states, has launched an investigation into crimes against humanity and war crimes, at the request of Ukraine and 41 States parties to the ICC.

The Human Rights Council also ordered an investigation, and in the event of an eventual conviction by said Council, it would have a moral effect before the General Assembly of the United Nations and consequently in the Security Council.

Furthermore, according to information available on the website of the Council of the European Union, since 2014 the EU had imposed some sanctioning measures on Russia to the detriment of the annexation of Crimea and the non-application of the Minsk agreements. In total, considering the previous individual sanctions, imposed after the annexation of Crimea in 2014, the EU sanctioned 108 entities and 1026 people, including Russian President Vladimir Putin and oligarchs linked to the Kremlin.

In the Ukrainian context regarding the commission of war crimes by mercenaries, International Law is used, through its

principles and institutes, analysis of the Rome Statute, Geneva Conventions, UN Charter, Draft Convention on State Responsibility for Acts crimes, other doctrines and related international legislation, for the implementation of mechanisms for criminal accountability of mercenaries who committed war crimes. This vast material of International Law available, makes the present work viable.

As for the analysis of war crimes committed by mercenaries in Ukrainian territory and the perspective of international criminal accountability to determine who would be responsible for this: State? Ruler or Mercenary Leader? And in the case of a war crime committed by a Brazilian mercenary, what would be the penalty to be applied?

As inserted in Articles 1 and 2 of the draft Convention on the Responsibility of States for Unlawful Acts, every internationally wrongful act by a State entails its international responsibility. Such conduct may consist of an act or omission.

“The presence of three elements is required: the unlawful act, the imputability and the damage. There is no responsibility of the State before its peers if international law has not been infringed. The unlawful act thus constitutes an action or omission likely to violate a conventional norm, a customary obligation or a principle of international law.” AMARAL JUNIOR. (2012, p.117)

The State, as a subject of international law, must comply with its international duties, if it commits war crimes, it will suffer the appropriate legal measures, must be held accountable, and may suffer sanctions, including: military, diplomatic, economic measures in more extreme measures of punishment and may lose the status of Subject of International Law. Possessing the International Court of Justice (ICJ) jurisdictional competence to seek a peaceful solution in the dispute between States that

accept and its jurisdiction that is the case of Russia and Ukraine.

“The advisory opinion has no binding force, that is, it does not oblige UN bodies, but tends to be observed for its moral force. In contrast, the decisions issued by the ICJ in the exercise of its contentious role are final and binding on the States in dispute. If one of the parties fails to comply with the decision of the ICJ, the winning State may appeal to the UN Security Council, which, if it deems necessary, will take measures to demand compliance with the decision”. (Article 94 of the UN Charter).

It so happens that the execution of ICJ decisions can be compromised by the nature of the Security Council, which does not take technical-juridical decisions, like the ICJ; but rather politico-military. Therefore, any decision by the Security Council will depend on the political will of its members, especially its permanent members. Even the Council has the prerogative to ask the ICC prosecutor to investigate and prosecute suspected war crimes, however, considering that Russia is a permanent member of the Security Council of the United Nations, it has voting and veto power, would certainly veto the investigations against you. So that sanctions can be applied to Russia if it does not comply with the decision of the International Court of Justice, must the UN Security Council demand that Russia, in the case of the War in Ukraine specifically, have no voting or veto power due to its partiality and direct participation in the conflict.

According to the commandment inserted in article 4 of the Rome Statute, which deals with the possibility or not of trying a citizen of a country that is not a State Party, in this perspective, it could not punish individuals from countries that are not signatories to the Rome Statute (mercenary, mercenary leader and ruler).

However, although Russia and Ukraine are not signatories to the Rome Statute, there is a possibility for the ICC to judge individuals from these countries through a special agreement (article 4th Rome Statute), exercising its attributions through its universal jurisdiction applying the customary law in the territory of any State Party or any other State. Observing the principle of complementarity and subsidiary nature of the Court before national jurisdictions, except for cases in which, within the national jurisdictional scope of that State, they are unable to pass judgment or are unwilling to do so.

In line with this understanding, Jankov teaches:

“The Rome Statute has a multilateral character and, therefore, the more ratifications, the easier the acceptance of the idea of a universal jurisdiction becomes. “One can speak of the constitution of customary law applicable even to states that have not ratified the statute”. (JANKOV, 2009, p.238)

The International Criminal Court (ICC) holds responsible individuals who are citizens of countries, who commit war crimes and can be tried by the ICC, for being subjects of International Law. The basis of this institute is found in article 6 of the Nuremberg Tribunal. However, the Rome Statute also contemplates in its article 25.

The fact that the ruler and mercenary leader originate from countries that are not signatories to the Rome Statute does not remove their status as Individuals of Public International Law, a condition that entails the possibility of being held internationally responsible. Even having committed a war crime, they can be tried and prosecuted by the ICC, due to the Principle of International Criminal Responsibility of individuals.

This principle uses the criterion of dismissal of the official position, the Statute being equally applied without distinction, heads of State or authority that exercise official positions have their immunities removed.

Corroborating this understanding, Fernanda Nepomuceno teaches:

“The ICC must therefore prosecute any person responsible for the commission of fundamental crimes, regardless of where they were committed and the office or position held, be it a private soldier, commander, minister of defense, prime minister, president or king”. (SOUZA, 2005, p.105).

“In view of the above, it is clear that the regime of responsibility defined by the Rome Statute is universal, individual and full, as it allows the Court to intervene to judge people that national courts have not been able to do so”. (SOUZA, 2005).

It urges to emphasize that the International Criminal Court does not carry out judgments in absentia, the defendant needs to be present, from the moment the arrest warrant is issued, the criminal action is suspended until the accused is arrested and handed over to the court.

FINAL CONSIDERATIONS

Therefore, for individuals responsible for war crimes to be convicted and tried, they must first be brought to court. Once the arrest warrant is issued by the ICC, this capture would have to rely on the collaboration of the States Parties, which have an obligation to cooperate, in theory they would have to arrest the accused individual who was in their territory.

As for the penalty applied to a Brazilian mercenary who commits a war crime, since Brazil has been a signatory to the ICC since July 20, 2002, as a State Party it submits

itself to the jurisdiction of the Rome Statute, which works as a complementary body, but does not replace the jurisdiction national criminal law, Brazil must prosecute through internal courts, and if it does not, it must extradite the person responsible so that he responds before the international criminal jurisdiction.

“However, the Rome Statute has binding force only between the States Parties, given that it is not a supranational body, but an international one. It cannot, therefore, be considered as a substitute for national criminal jurisdiction, but only as a complementary body, that is, as an extension of the aforementioned jurisdiction”. (JANKOV, 2009)

Through the studies carried out, based on doctrine, principles, treaties and international legislation, which made it possible to conclude that as long as the agent’s involvement in the practice of war crimes is proven, be it the State, ruler, mercenary leader or mercenary, all will be held accountable in the international criminal sphere.

As for individuals who have committed war crimes, they will be tried and prosecuted a priori before national criminal jurisdiction, but if this is not possible, they will be tried before international jurisdiction (International Criminal Court).

Regarding and Criminal Responsibility for war crimes committed by the offending State, it will be held responsible through sanctions: military, diplomatic and economic measures, including the possibility of losing the condition of subject of International Law.

In line with this understanding, Dinh:

“In the same way, we can consider that the existence of a “serious violation” results in partial “transparency” of the State, in the sense that, in parallel with the international responsibility of the State that committed the crime, the criminal and personal responsibility of the persons who ordered

or executed it can be investigated even if they acted as representatives of the State, including as “heads of State”. (DINH, Nguyen Quoc, op. cit., p. 818).

Corroborating this understanding, Pessoa teaches:

“These principles are: whoever commits a crime under International Law is responsible for it and is subject to punishment; the absence of a penalty for an act that International Law qualifies as a crime does not exempt its author from responsibility; heads of state or responsible government officials are not exempt from responsibility for acts that constitute crimes; the fact that someone acted in obedience to the Government or a superior does not exempt him from responsibility

under international law, provided that the person morally has the possibility of choice; anyone accused of a crime is entitled to due process; redefines crimes against peace, war and humanity in the same way as the London Charter does; complicity in carrying out one of the listed crimes is a crime under international law”. (PESSOA, 1969, p. 143-144).

The absence of a penalty provision for an act considered by international law as a crime does not exempt the author or accomplice from responsibility, even those who claim to have acted in obedience to the government or hierarchical superior or heads of state will all be regularly prosecuted and held accountable for the criminal acts committed.

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