Collective Responsibility for the Creation of Foreseeable Risk in the Protection of Ukraine's Sovereignty and Territorial Integrity

Vyacheslav Tuliakov

Doctor of Legal Sciences, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Judge ad hoc of the European Court of Human Rights, Professor at the Department of Criminal Law, National University "Odesa Law Academy"

Abstract

Russia's full-scale armed aggression against Ukraine has transformed the protection of sovereignty and territorial integrity from a largely doctrinal problem into a practical test of the entire system of constitutional and international legal guarantees. This article develops and critically examines a proposed doctrine of collective responsibility for the creation of foreseeable risk, applied to the operation of Russia's "shadow fleet" - a multilevel network of state organs, state enterprises, private operators, shipowners, insurers, financial intermediaries and flag states that jointly sustains the war economy. The proposal reframes the object of legal assessment: rather than assessing only a completed wrongful act, it directs attention to the prior process of consciously constructing a system of heightened, foreseeable risk, and correspondingly extends the content of the due diligence obligation. This article situates the proposal within the general law of state responsibility (ARSIWA, the "effective control" test of Nicaragua and Bosnia Genocide) and then subjects its extension to individual criminal responsibility to critical scrutiny from three angles: the doctrine of complicity in international criminal law, the structure of the crime of aggression, and the theory of endangerment offences. It argues that Article 25(3)(d) of the Rome Statute (participation in a group acting with a common purpose) is the closest available doctrinal bridge for the network structure described, but that it still requires a predicate offence and cannot ground liability for "participation in a system" as such. It further argues that the leadership clause (Article 8bis(1)) structurally excludes shipowners, insurers and flag states from liability for aggression itself, confining their possible responsibility to complicity in war crimes or environmental crimes. Finally, it shows that shifting the object of assessment to risk-creation imports, without an existing legal basis, the continental doctrine of concrete endangerment offences (konkrete Gefährdungsdelikte) into a body of law built entirely on result crimes, and proposes that codification through the optional annexes of the 2023 Ljubljana–The Hague Convention offers the most realistic pathway, notwithstanding that instrument's own stalled ratification and its exposure to the same legitimation pressures currently directed at the International Criminal Court.

Keywords: collective responsibility; foreseeable risk; due diligence; state responsibility; ARSIWA; complicity; joint criminal enterprise; common purpose; crime of aggression; leadership clause; endangerment offences; shadow fleet; Special Tribunal for the Crime of Aggression; Ljubljana–The Hague Convention.

1. Introduction

Russia's full-scale armed aggression against Ukraine has turned the protection of independence, sovereignty and territorial integrity from a predominantly doctrinal problem into a practical test of the entire system of constitutional and international legal guarantees. The duty of the state to protect sovereignty and territorial integrity as a core function of the constitutional order, together with the inviolability of the territory within its existing borders, forms the constitutional-legal core of this protection. At the same time, discharging this duty under conditions of hybrid warfare, the involvement of non-state and quasi-state actors, and the economic infrastructure of aggression (sanctions evasion, the "shadow fleet," private paramilitary structures) requires moving beyond the classical bilateral model of "wrongdoing state – injured state" and reconceptualising the very object of international legal assessment: from a completed wrongful act to the process of consciously constructing a system of heightened risk.

On this basis, I propose a doctrinal position on collective responsibility for the creation of foreseeable risk: the object of international legal assessment should be not only the fact of harm already caused, but also the prior process of its conscious construction through the formation of a heightened-risk system by interconnected collective actors. The object to which the concept is applied is the functioning of the Russian "shadow fleet": a multilevel network of state organs, state-owned enterprises, private operators, shipowners, insurance structures, financial intermediaries and flag states, whose coordinated activity sustains the continuity of the aggressor state's military logistics. On this basis, I propose extending the content of the due diligence principle beyond a state's direct actions to the very process by which it creates infrastructure of heightened international legal risk, and expanding the circle of subjects of individual and collective responsibility beyond the aggressor state to affiliated operators, shipowners and financial intermediaries.

2. The Constitutional and International-Legal Framework

The constitutional dimension of the protection of sovereignty is realised primarily through the entrenchment of the inviolability of Ukraine's territory, the prohibition on altering it without an all-Ukrainian referendum, and the institution of martial law, which allows the temporary restriction of certain constitutional rights for the purpose of repelling aggression (Constitution of Ukraine, 1996). Purely domestic constitutional instruments, however, are insufficient where the source of the threat is transnational and networked in character and forms well before the direct use of force; hence the growing importance of combining the constitutional and international legal levels of protection into a single system of response to contemporary security challenges.

At the international level, the basic institutional foundation for a collective response to threats to peace remains Chapter VII of the UN Charter, which empowers the Security Council to determine the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39), to apply non-forcible measures of coercion (Article 41) and, where these prove inadequate, to authorise the use of force (Article 42) (Charter of the United Nations, 1945). The practice of the veto exercised by a permanent member of the Security Council that is simultaneously the aggressor state, however, forecloses this mechanism with respect to the Russian Federation, compelling doctrine and practice to search for additional models of responsibility outside the institutional apparatus of the United Nations.

The general law of state responsibility, as codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), supplies one such additional model. The classical construction of "wrongful act – state responsibility" becomes more complex where wrongful conduct is carried out by formally private or quasi-state actors. In this context, Articles 4, 5, 8 and 11 of ARSIWA form a graduated set of attribution bases: the conduct of state organs (Art. 4); the conduct of entities exercising elements of governmental authority (Art. 5); the conduct of private persons or groups acting on the instructions of, or under the direction or control of, a state (Art. 8); and a state's acknowledgment and adoption of non-state conduct as its own (Art. 11) (International Law Commission, 2001). The practice of the International Court of Justice in Nicaragua (1986) and Bosnia Genocide (2007) developed the "effective control" test, stricter than the "overall control" test applied by the ICTY in Tadić, which directly bounds the possible attribution of the conduct of non-state armed formations to a patron state (ICJ, 1986, 2007). This has direct relevance for characterising the activity of the private paramilitary structure "Wagner" as that of a de facto organ of the Russian Federation, on the basis of a sufficient combination of indicators of effective control and adoption of conduct under Article 11 ARSIWA.

3. Extending Due Diligence to Infrastructure-Creation: The Shadow Fleet

Contemporary practice of aggression, however, reveals less obvious forms of collective involvement in violations of Ukraine's sovereignty and territorial integrity that do not fit within an exclusively military paradigm, most notably, the Russian Federation's use of a so-called "shadow fleet" to evade sanctions and sustain the logistics of its war economy. Characterising such infrastructure exclusively through the prism of sanctions or maritime law is inadequate: it leaves out of account the genuinely collective character of the creation of danger, common to the economic underpinning of aggression against Ukraine's sovereignty.

It is accordingly appropriate to extend the concept of the responsibility of collective actors, previously developed in the context of criminal law theory (Tuliakov, 2025), to these newer forms of hybrid aggression. Where the traditional model of international responsibility takes a discrete internationally wrongful act as its central object of legal assessment, the proposed concept requires the analysis of a considerably broader process: the conscious formation of a heightened-risk system by interconnected collective actors, whose combined activity creates the conditions for harm to international peace, security, the sovereignty of states and the natural environment. The object of legal assessment thus becomes not merely the completed wrongful act, but the sustained process of organising, maintaining and operating infrastructure that objectively generates foreseeable risks, where adverse consequences follow logically from the very model of organisation of the activity in question.

The "shadow fleet" illustrates this dynamic well. Its operation cannot be reduced to sanctions evasion or the concealment of vessels' beneficial owners; it is, in fact, a complex, multilevel system comprising state organs, state enterprises, private operators, nominal shipowners, technical management companies, insurance structures, financial intermediaries, flag states, port administrations and other actors, whose activity sustains the continuous functioning of maritime logistics in the aggressor state's interest. It is the sum of their coordinated or complementary actions that forms a collective mechanism for the creation of international legal risk, one that cannot be adequately assessed solely through the responsibility of a single state or a single legal entity. The events of July 2026 in the Sea of Azov, in which Ukrainian unmanned systems forces targeted primarily the oil tankers of the "shadow fleet" supplying fuel logistics to Russian military groupings (with roughly 70–80 per cent of vessels struck being tankers, alongside dry cargo ships, ferries, tugs and engineering vessels performing military-support functions) illustrate the deep integration of civilian transport infrastructure into the conduct of war, together with the attendant risk of large-scale environmental harm.

On this basis, I propose supplementing the due diligence principle with a further doctrinal element: an obligation on states not to create or sustain infrastructure whose operation objectively generates foreseeable risks of large-scale violation of other states' sovereignty, of international security, or of transboundary environmental harm. This shifts the central object of legal assessment from the fact of harm already caused to the process of consciously constructing a system of heightened, foreseeable risk, combining an expanded reading of due diligence with an authorial concept of the responsibility of collective actors, and opening a path toward a unified interdisciplinary model of collective responsibility for the creation of foreseeable risk.

4. The Limits of Extension to Individual Criminal Responsibility

At the level of individual criminal responsibility of natural persons, however, the proposed concept encounters a series of structural and doctrinal barriers that must be addressed if the proposal is to be operationalised rather than remain declaratory.

First, the concept as stated operates with the apparatus of the law of state responsibility (ARSIWA, the attribution criteria, the "effective control" test in Nicaragua and Bosnia Genocide), while implicitly invoking individual criminal responsibility through the claim that the circle of subjects of sanctions and criminal enforcement should be expanded. These are two legally autonomous regimes, with different objects and different standards of proof, and they must be kept distinct if the proposal is to be operationalised rather than merely declaratory: an expanded due diligence obligation fits organically within the first regime, whereas its projection onto the individual responsibility of shadow-fleet operators requires separate justification through the doctrine of complicity, rather than an automatic extrapolation of ARSIWA categories.

Second, of the four modes of participation under Article 25(3) of the Rome Statute: commission, inducing, aiding and abetting, and contribution to a group acting with a common purpose under subparagraph (d), - it is the last, genetically connected to the joint criminal enterprise (JCE) doctrine developed by the ICTY, that most closely corresponds to the structure of the multilevel shadow-fleet network, in which each actor makes a functionally distinct but coordinated contribution to a shared outcome. This makes common purpose liability the most realistic channel for the criminal-law operationalisation of the proposed model. It must be noted, however, that the ICC's own jurisprudence has treated Article 25(3)(d) cautiously: the Lubanga Pre-Trial Chamber expressly declined to found co-perpetration liability under Article

25(3)(a) on a JCE-type subjective approach, characterising subparagraph (d) instead as a residual, subsidiary form of accessory liability rather than a full transplant of JCE (ICC, Lubanga, Pre-Trial Chamber I, 2007; Ohlin, 2011). Like the other modes of participation, this residual liability still requires attachment to a specific predicate crime, committed or attempted; the doctrine of complicity does not recognise free-standing responsibility for "participation in a system" as such, detached from an individualised criminal act. This significantly narrows the criminal-law operationalisation of the model relative to its state-responsibility variant.

5. The Leadership Clause as a Structural Barrier for Aggression

Third, the crime of aggression has the narrowest circle of possible perpetrators among the core international crimes. Article 8bis(1) of the Rome Statute, and the corresponding provisions of the Statute of the Special Tribunal for the Crime of Aggression against Ukraine, confine criminal responsibility to a person "in a position effectively to exercise control over or to direct the political or military action of a State" - the so-called leadership clause, whose customary status and Nuremberg lineage from the "shape or influence" standard of the High Command case to the "control or direct" standard adopted at the Kampala Review Conference of 2010) has been extensively documented (Hajdin, 2017, 2021, 2022). Shipowners, insurers, vessel operators and flag states structurally fall outside this definition regardless of the scale of their actual contribution to sustaining aggression.

Their possible responsibility, therefore, cannot be characterised as complicity in the crime of aggression itself; it must instead be addressed separately, as participation in the war crimes or environmental crimes attendant on aggression, where the leadership clause does not apply. Conflating these two planes within a single concept risks tension with the principle of nullum crimen sine lege (Article 22 of the Rome Statute), since neither the Rome Statute nor the Statute of the Special Tribunal criminalises "infrastructure risk-creation" as an independent offence, and an expansive interpretation of the existing leadership-limited offence would amount to exactly the kind of analogical extension that Article 22(2) forbids.

6. Endangerment Offences: A Doctrine Without a Legal Basis in International Criminal Law

Fourth, the proposed reorientation of assessment away from consequences and toward the process of risk-system creation, independent of whether harm materialises, imports (in substance) the continental doctrine of concrete endangerment offences (konkrete Gefährdungsdelikte), which international criminal law does not currently recognise de lege lata. The entire existing architecture of the core international crimes is built on the model of result crimes (Erfolgsdelikte): genocide requires the actual killing or serious harm; war crimes under Article 8 require an actual attack or harm to protected persons or objects; and the crime of aggression under Article 8bis(2) requires the commission of a specific "act of aggression" which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter.

At the level of state responsibility, preventive logic of this kind is already partly institutionalised through positive obligations to prevent harm (ICJ, Bosnia Genocide, 2007;

and, in the environmental sphere, the precautionary and preventive due diligence obligations recognised in ICJ and ITLOS jurisprudence). At the level of individual criminal responsibility of natural persons, by contrast, formalising such a "delict of systemic risk-creation" requires a separate treaty-based act of criminalisation; an expansive reading of the existing offences would run counter to the prohibition on analogy in criminal law.

7. The Legitimation Context: The Attack on the ICC and the Special Tribunal for Aggression

The political-legal and legitimation context also bears materially on the prospects for codifying and applying the proposed model. In July 2026, Secretary of State Marco Rubio announced an initiative to "dismantle" the International Criminal Court, framed as a response to ICC arrest warrants connected to the Middle East conflict; this is a radicalised continuation of a long-standing line of American scepticism toward the Court (the American Servicemembers' Protection Act of 2002; sanctions against ICC officials in the Afghanistan matter in 2020). Because the United States never ratified the Rome Statute, the legally available toolkit is confined to indirect leverage (financial pressure, sanctions on Court officials, and diplomatic pressure on third states over the execution of warrants) rather than the dissolution of the institution itself, which would require the consensus, or a qualified majority, of the Assembly of States Parties.

This campaign has demonstrated the limits of the effectiveness of a universal model of international criminal justice in the face of a great-power sovereignty counter-narrative, even though the legal capacity to "liquidate" a treaty-based court was absent. Against this background, the Special Tribunal for the Crime of Aggression against Ukraine (STA), which rests on Ukraine's own sovereign right to prosecute a crime committed on its territory and on the coalition support of thirty-six states organised through the Council of Europe's Enlarged Partial Agreement, appears structurally less exposed to a symmetric attack, though it carries its own vulnerabilities, notably the immunity of the sitting "troika" of top Russian leadership and dependence on international financing, including the ambiguous position of the current U.S. administration.

For the proposed concept, this means that extending individual responsibility for the creation of risk infrastructure is realistically more likely to advance through coalition-based rather than universal mechanisms, since it is precisely the coalition model of legitimation that currently displays greater resilience to delegitimation pressure.

8. A Realistic Pathway to Codification: The Ljubljana–The Hague Convention

The most pragmatic path toward legalising an endangerment delict at the level of individual criminal responsibility is not an expansive reading of Article 8bis of the Rome Statute, but the optional mechanism of Annexes A–H of the 2023 Ljubljana–The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes, which already allows states parties to extend the treaty's subject-matter scope to new categories of crime (Ljubljana–The Hague MLA Convention, 2023).

The Convention was adopted at Ljubljana on 26 May 2023 and opened for signature at The Hague on 14 February 2024; forty states had signed it by the close of the signature period on 14 February 2025. Entry into force requires only three ratifications, accessions, acceptances or approvals, taking effect three months after the third instrument is deposited a considerably lower threshold than the sixty ratifications required for the Rome Statute. The realised trajectory, however, has been one of stagnation: by mid-2025, ratification progress had stalled and the states party remained dominated by European ICC states parties, reproducing precisely the geographic and political configuration for which the ICC is criticised.

Because the core group promoting the Convention (Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia) and its predominantly European ratifying states substantially overlap with the states that support the ICC and the Special Tribunal, any systemic erosion of trust in the ICC through the American pressure campaign indirectly undermines the Convention's reputational capital as well, reinforcing its perception as an instrument of a narrow European club rather than a genuinely universal mechanism. The Convention's substantive scope is, moreover, confined to genocide, crimes against humanity and war crimes (Article 5); the crime of aggression: the subject matter of the Special Tribunal's mandate, is not among the core offences, so the Convention is directly useful to Ukraine chiefly as a mutual-legal-assistance instrument for war crimes and environmental crimes, not as a direct legal basis for cooperation specifically on aggression, absent an optional extension through the annexes.

9. Conclusion

The proposed concept of collective responsibility for the creation of foreseeable risk is a doctrinally valuable and practically timely contribution to the development of the law of state responsibility, fully adequate to characterising the conduct of the aggressor state and its affiliated structures at the level of inter-state relations, and particularly apt in the context of protecting Ukraine's sovereignty and territorial integrity. Its extension to the individual criminal responsibility of natural persons requires a clear separation of three planes: the attribution of conduct to the state; complicity in specific crimes, constrained by the absence of a leadership clause for offences other than aggression; and a hypothetical free-standing endangerment delict not currently codified de lege lata.

The most realistic path toward operationalisation is not an expansive interpretation of the existing offences, but treaty-based codification through the extension of the Ljubljana–The Hague Convention's subject-matter scope (a mechanism structurally aligned with the coalition, rather than universal), model of legitimation that currently shows greater resilience under systemic pressure on the architecture of international criminal justice. The central innovation of this approach is the shift of the object of international legal assessment from the fact of harm caused to the process of consciously constructing a system of heightened, foreseeable risk, combining an expanded reading of due diligence with an authorial concept of the responsibility of collective actors, and opening prospects for a unified, interdisciplinary model of collective responsibility for the creation of foreseeable risk in the context of the defence of Ukraine's sovereignty.

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