Exploring the International Humanitarian Law Status of Foreign Fighters in the Ukrainian International Legion of Territorial Defence

S Bosch*

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Shanon Bosch

Affiliation

Edith Cowan University, Perth Australia
University of Kwa-Zulu Natal, South Africa

Email

s.bosch@ecu.edu.au

Date Submitted

23 August 2022

Date Revised

18 April 2024

Date Accepted

18 April 2024

Date Published

1 July 2024

Guest Editor

Prof G Viljoen

Journal Editor

Prof C Rautenbach

How to cite this contribution

Bosch S "Exploring the International Humanitarian Law Status of Foreign Fighters in the Ukrainian International Legion of Territorial Defence" *PER / PELJ* 2024(27) - DOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a14600

DOI
http://dx.doi.org/10.17159/1727-3781/2024/v27i0a14600

Abstract

This paper explores the international humanitarian law classification which applies to foreign fighters that have been enlisted in the Ukrainian International Legion of Territorial Defence pursuant to the Russian invasion of Ukraine in 2022. The paper explains the legal rights, obligations and consequences which attach to mercenary, combatant and prisoner of war status; and explores how these foreign members of the Ukrainian International Legion of Territorial Defence fit into this legal landscape. This paper challenges the legality of Russia's decision to classify these individuals as mercenaries. The paper supports the argument that these foreign members of the Ukrainian International Legion of Territorial Defence are entitled to combatant status including full combatant immunity from prosecution upon capture. The paper explores the prisoner of war rights and protections which these individuals should be afforded upon capture and details their denial. The paper re-iterates the international humanitarian law fair trial guarantees which are activated when combatants fall into enemy hands and questions the procedural legality of the trials being conducted in the self-proclaimed Donetsk People's Republic and Russia.

Keywords

Mercenaries; combatants; prisoner of war; International Legion of Territorial Defence; Ukraine; Russia.

.....

1 Introduction

On 28 February 2022, following the Russian invasion of Ukraine,[1] President Volodymyr Zelensky appealed to foreign nationals wishing to assist Ukraine defensively against Russia's armed invasion to join the International Legion of Territorial Defence (ILTG).[2] Presidential Decree No 248, which dated back to June 2016, already made it possible for non-Ukrainian citizens to enlist in the Ukrainian Armed Forces and provide voluntary contract-based military service.[3] Zelensky signed into law a decree which afforded a visa exemption for foreign nationals who intended to join the Ukrainian International Legion of Territorial Defence, and Ukraine's various global diplomatic missions were instructed to help facilitate the sign-up process.[4] The call was met with a flurry of interest from foreign nationals eager to come to the aid of Ukraine. By March 2022 there were already twenty thousand foreign fighters from fifty-two countries, including Belarus, Georgia, Croatia, France, Canada and the United States, who had enlisted in the Ukrainian International Legion of Territorial Defence.[5] Some of these foreign fighters were former military personnel, while others came with no prior combat training. Germany, Denmark and Latvia permitted their citizens to join the Ukrainian International Legion of Territorial Defence, while the United States, Australia and South Korea warned their nationals that there might be international legal consequences to getting involved in an armed conflict in another State.[6]

It is not disputed that the armed conflict and partial occupation by Russia of Ukraine is international in character. Consequently, all four *Geneva Conventions* and *Additional Protocol I*, which both Ukraine and Russia have ratified, come into effect. Almost immediately Russia labelled these foreign fighters mercenaries, and the spokesperson for the Russian Defence Ministry declared that these foreign fighters would not be accorded combatant or the consequent prisoner of war (POW) status if they were captured by Russian armed forces.[7] Instead Russia threatened that these

---

* Shannon Bosch. BA (Hons) LLB (UKZN) LLM (Cambridge) PhD (UKZN). Associate Professor of Law at Edith Cowan University, Western Australia and Honorary Research Fellow at the University of Kwa-Zulu Natal, South Africa. Email: s.bosch@ecu.edu.au. ORCiD: https://orcid.org/0000-0002-5255-4414.

1 Francovich *The Spokesman* 1.

1 Francovich *The Spokesman* 1.

2 President of Ukraine 2022 https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213.

3 Traldi 2022 https://www.lawfaremedia.org/article/soldiers-not-soldiers-fortune.

4 Radio Free Europe 2023 https://www.rferl.org/a/five-foreign-nationals-tried-absentia-russia-ukraine-/32426240.html.

5 Ditrichová and Bílková 2022 https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/.

6 Ewe *Times* 1.

7 Wright *New Yorker* 1.

foreign fighters would face criminal prosecution and imprisonment in Russia if they were captured.

Early in 2022 the first foreign fighters fell into enemy hands. Aiden Aslin, Shaun Pinner (both United Kingdom nationals) and Brahim Saadoune (a Moroccan citizen) negotiated their surrender to Russian forces. The Russian government paraded them on Russian State television and announced their capture and criminal prosecution. The three foreign fighters reported being subject to abusive and inhumane treatment, including being beaten, electrocuted, starved, intimidated, videoed for political and diplomatic leverage, and denied legal or embassy access. They were transferred, in violation of Article 12 of the *Third Geneva Convention*, to the self-proclaimed Donetsk People's Republic which remains internationally recognised as part of Ukraine. There they were charged with a variety of offences including being part of the Russian-declared terrorist group (the Azoc battalion),[8] with being a mercenary,[9] and with seizing or retaining power by force.[10] After a three-day trial conducted behind closed doors before a Russian-proxy court in the Donetsk Peoples Republic, all three were sentenced to death. Their treatment, trial and sentences were widely condemned in the international media. The trial process and the harsh sentences were criticised as being staged in order to pressurise Western powers to advocate a prisoner exchange for captured Russian soldiers who are facing prosecution in Ukraine.

The European Court of Human Rights (ECHR) issued a Rule 39 order for interim measures against Russia in order to protect the detainee's convention rights under Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the *European Convention on Human Rights*. The ECHR requested that Russia ensure that the death penalty imposed on Aslin, Pinner and Saadoune not be carried out, and that they receive all necessary medical assistance and appropriate detention conditions.

In an eleventh-hour prisoner exchange mediated by Saudi Crown Prince Mohammed bin Salman, Aslin, Pinner and Saadoune, together with seven other foreign ILTG members, were sent back to their respective countries late in September 2022.[11] In May 2023 Russia transferred the cases of the other seven to a Russian military court and is intent on putting these foreign fighters (from the United Kingdom, Croatia, Sweden and the United States) on trial *in absentia*.[12]

---

8 Roth and Sinmaz *The Guardian* 1.

9 Anon *The Guardian* 1.

10 Hill-Cawthorne 2023 https://www.justiceinfo.net/en/102044-ukraine-why-show-trial-british-pows-violates-geneva-conventions.html.

11 Duncan *The National News* 1.

12 Koroleva 2023 https://www.justiceinfo.net/en/122197-day-defence-azov-rostov-on-

In this paper, I will propose an answer to this critical (in this case life and death) question: How does international humanitarian law classify foreign members of the Ukrainian International Legion of Territorial Defence? I will begin by explaining why it is incorrect to immediately classify them as mercenaries. I will defend the claim that they are legally entitled to combatant status and the attendant combatant immunity from prosecution upon capture. I will clarify their claims to prisoner of war status and the associated rights and protections which international humanitarian law afford those with prisoner of war status upon capture and explore how those rights were denied in this case. Lastly, I look at what international humanitarian law rights and protections should be afforded foreign members of the Ukrainian International Legion of Territorial Defence if they face trial pursuant to capture.

2 Foreign members of the Ukrainian International Legion of Territorial Defence are not by definition mercenaries

International humanitarian law is built on the notion that individuals who find themselves in an armed conflict are identified as either participants (combatants) or non-participants (civilians). Combatants are authorised by their State to participate directly in the hostilities. Combatant status brings with it the right to engage in hostilities with full immunity from prosecution, provided the combatant has not violated the laws of armed conflict.

For these foreign members of the Ukrainian International Legion of Territorial Defence that were detained in Russia, everything pivots upon their legal classification under international humanitarian law. Their international humanitarian law status determines what they are permitted to do in the conflict zone once they enlist in the Ukrainian International Legion of Territorial Defence. Their classification governs what rights, privileges and protections they should be afforded upon capture. Ultimately their classification as mercenaries is what exposed them to prosecution, a death sentence and the threat of execution. The case of Aiden Aslin, Shaun Pinner and Brahim Saadoune demonstrates, quite literally, that one's classification under international humanitarian law can be a matter of life or death.

The Russian Defence Ministry did not hesitate to label these foreign members of the Ukrainian International Legion of Territorial Defence as mercenaries. Mercenarism, or what was referred to as privateering in the 1856 Paris Declaration, was and still is strictly prohibited under international law.[13] The consequences for mercenarism are severe. Mercenaries have no claim to combatant status and are denied combatant immunity from

don-military-court.html.

13 Solis *Law of Armed Conflict* 197; Bosch 2009 *CILSA* 360-361.

prosecution and the associated prisoner of war protections, which legitimate combatants enjoy upon capture.[14]

States like Ukraine who are signatory to the *United Nations Mercenaries Convention,* which entered into force on 20 October 2001, are obligated to prohibit and prosecute those involved in the recruitment, use, financing or training of mercenaries. They must establish jurisdiction on their territory and over their nationals, to prohibit, prosecute and punish those that do engage in the serious offence of mercenarism.[15] While Russia is not a signatory to the *United Nations Mercenary Convention*, the Russian criminal code prohibits mercenary armies in Article 359.

While the consequences for mercenarism are severe, it is not enough for Russia to simply label these foreign Ukrainian International Legion of Territorial Defence members as mercenaries. Russia has to show that they fulfil the international humanitarian law definition of a mercenary. This definition, set out in *Additional Protocol I* Article 47, is reiterated with slight variations in the two treaties that criminalise mercenarism (the *United Nations Mercenary Convention* and the *Organisation of African Unity Mercenary Convention*) and is held by the International Committee for the Red Cross to have attained customary international law status.[16] The definition sets out six specific conditions which have to be fulfilled concurrently.[17] Those conditions require that the individual would have to:

> (a) be specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) in fact, take a direct part in the hostilities;
>
> (c) be 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 ranks and functions in the armed forces of that party;
>
> (d) be neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
>
> (e) be not a member of the armed forces of a party to the conflict; and
>
> (f) not have been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

---

14 Article 47 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1979) (AP I).

15 Articles 2, 3, 5 and 9 of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (1989) (*UN Mercenary Convention*).

16 Henckaerts and Doswald-Beck *Customary International Humanitarian Law* rule 108.

17 Bosch 2007 *African Security Review* 34.

It is true that these foreign members of the Ukrainian International Legion of Territorial Defence are being specially recruited locally or abroad to participate in the hostilities (fulfilling conditions a and b). For the most part the foreign Ukrainian International Legion of Territorial Defence members are not Ukrainian or Russian nationals (fulfilling condition d), although some of these individuals have been resident in Ukraine and have Ukrainian spouses. While many have experience serving in their own State's armed forces, they are individual volunteers and are not on official duty from their own State (fulfilling condition f).

Their mercenary status hinges on satisfying conditions c and e, addressing motivation for private gain (set out in c above) and any link they can show to the Ukrainian armed forces (condition e above). On the question of motivation, the United Nations Working Group on Mercenaries does not believe that these foreign Ukrainian International Legion of Territorial Defence recruits have been motivated to join the Ukrainian International Legion of Territorial Defence solely by the desire for private gain or material compensation substantially in excess of that promised or paid to Ukrainian combatants of similar ranks and functions.[18] Foreign recruits are paid the same as Ukrainian soldiers, and some have even been forced to secure their own funding to purchase equipment.[19]

That leaves only the issue of their membership of the armed forces (condition c). In 2014 Ukraine's Ministry of Defence established thirty foreign volunteer battalions, and within the first year 1000 foreign national had joined the Armed Forces of Ukraine.[20] On 10 June 2016 the Ukrainian president approved Regulation No 248 on Military Service in the Armed Forces by Foreigners and Stateless People, which allowed foreigners to volunteer in the Territorial Defence Forces of Ukraine.[21] Analysts estimate that between 1000 to 3000 foreign nationals are active in the Ukrainian International Legion of Territorial Defence.[22] Having enlisting in Ukraine's volunteer battalions these foreign members of the Ukrainian International Legion of Territorial Defence are now fully incorporated as members of the armed forces of the State of Ukraine.[23] This incorporation or employment automatically shields them the individuals from mercenary status.[24] Aslin, Pinner and Saadoune had all lived in Ukraine for several years prior to the

18 UN *Report of the Working Group.*

19 Marshall *Reuters* 1.

20 Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

21 President of Ukraine 2022 https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213.

22 Stein *The Washington Post* 1.

23 Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

24 Maogoto and Sheehy 2006 *Adel L Rev* 250.

invasion, and together with Gustafsson, Prebeg and Harding they could all produce signed contracts of their membership of the Ukrainian Armed Forces or marine corps pre-dating the 2022 invasion.[25] Aslin, had posted pictures of his being sworn into the Ukrainian armed forces on his twitter account, and also holds dual Ukraninan and British nationality[26]

In short it seems highly unlikely, if not impossible, for these foreign nationals who enlist in the Ukrainian International Legion of Territorial Defence to fulfil all six requirements of the international humanitarian law definition of a mercenary set out in *Additional Protocol I.* Given that an individual needs to fulfil all six criteria simultaneously the definition has been criticised for being impractical. In many instances, as is the case here, the label mercenary is misused and legally inaccurate.

Where does that leave these foreign members of the Ukrainian International Legion of Territorial Defence when they are captured while participating directly in hostilities? Under international humanitarian law if there is any doubt about participants' status, they are presumed to be civilians until they have their international humanitarian law combatant status determined by an independent tribunal established by the detaining power.[27] Instead these foreign nationals were summarily denied prisoner of war status without the detaining power convening a *Geneva Conventions III* Article 5 tribunal to establish their claims to combatant status. This is where we turn next, to ascertain whether they indeed had a claim to combatant status under international humanitarian law.

3 Foreign members of the ILTG are protected as combatants under international humanitarian law

Recognised subjects of international law, like the State of Ukraine, are entitled to bestow combatant status on their armed forces. Once combatant status is bestowed these individuals are permitted to participate directly in hostilities without personal liability, because they act not for themselves but as agents of the State.[28] Their participation in hostilities, even when they kill enemy combatants, does not attract criminal prosecution for their belligerent acts provided they observe the laws of war.[29] Any breaches in their observance of international humanitarian law will not strip them of their

25 Koroleva 2023 https://www.justiceinfo.net/en/122197-day-defence-azov-rostov-on-don-military-court.html.
26 Roth and Sinmaz *The Guardian* 1.
27 Article 50(1) of AP 1.
28 Kidane 2010 *Denv J Int'l L & Pol'y* 381.
29 Zachary 2005 *Israel L Rev* 380.

combatant status, but it may expose them to prosecution before a military court martial.[30]

With so much riding on one's classification in situations of an international armed conflict it is important to ascertain whether these foreigners who volunteered to join the Ukrainian International Legion of Territorial Defence enjoy full combatant status as members of the armed forces of the State of Ukraine. Their international humanitarian law status will determine whether they are authorised to participate directly in the hostilities with complete combatant immunity, or whether they might face criminal prosecution for their unauthorised participation in the hostilities. A State's domestic regulation determines who can acquire this membership of the armed forces. Individuals' nationality is irrelevant when it comes to determining combatant status. It is their membership of the armed forces (and their being thereby subject to command responsibility) that clothes them with combatant status and combatant immunity for their actions. Combatant status also makes them a legitimate military target. It is important that, as a legitimate military target, combatants (at a minimum) carry their weapons openly during and in preparation for any military engagement. It is only when they resign their membership, surrender, or are given prisoner of war status upon capture, that that this risk is removed and they enjoy immunity from attack.

Ukrainian domestic legislation was amended through Law No 2389 on 17 March 2015 to make it possible for foreign nationals to enlists in the Ukrainian armed forces at the same rate of remuneration as a Ukrainian of equal rank.[31] According to a presidential decree (No 248) in 2016 "foreigners, legally present on the territory of Ukraine, can be accepted for military service on contract with the Armed Forces of Ukraine on a voluntary basis."[32] This domestic legislation has now placed these volunteers under the command responsibility of the Armed Forces of Ukraine, which means that they fulfil the *Additional Protocol I* Article 43 definition of a combatant, a protocol to which both Russia and Ukraine are parties.[33] As members of the Ukrainian armed forces these foreign nationals who enlist in the Ukrainian International Legion of Territorial Defence are therefore lawful combatants. Their nationality, or what motivated them to join the Ukrainian International Legion of Territorial Defence, does not impact on their

30 Pilloud, Sandoz and Zimmermann *ICRC Commentary* 511; Bosch *Combatant Status of Non-State Actors* 25.

31 Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

32 Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

33 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.

determination of their lawful combatant status under international humanitarian law.[34]

Aslin, Pinner and Saadoune, as fully incorporated members of the Armed Forces of Ukraine, were part of the official armed forces of the party to a conflict, and hence enjoyed full combatant rights and privileges. Russia attempted to bypass this reality by declaring that the Azov Battalion was a criminal group. Ukraine maintain that the Azov Battalion has been fully integrated into the Ukrainian armed forces, which affords their members full combatant status and prisoner of war privileges on capture.[35]

Subjecting Aslin, Pinner and Saadoune to criminal prosecution for their mere participation in hostilities violates their rights under international humanitarian law that flows from their combatant status. Russia can, however, prosecute all combatants (foreign or Ukrainian) where there is evidence that they have committed war crimes. That said, any prosecution would need to observe the fundamental guarantees enshrined in Article 75 of *Additional Protocol I.*

4 Foreign members of the Ukrainian International Legion of Territorial Defence are entitled to the full range of prisoner of war protections

Foreign nationals, once formally incorporated into the Ukrainian International Legion of Territorial Defence, are clothed with combatant status which cannot be forfeited.[36] All combatants, including these foreign members of the Ukrainian International Legion of Territorial Defence, enjoy full presumptive secondary prisoner of war status if they are injured, they surrender or they are captured while participating in hostilities.[37] This prisoner of war status begins from the time of capture and continues until the combatant is repatriated, and during this time the extensive guarantees set out in *Geneva Convention III* dictate how the prisoners of war are to be treated. The aim of prisoner of war detention is to prevent these combatants from re-joining the hostilities, until they can be repatriated. Their detention does not expose them to prosecution at the hand of the enemy as they have combatant immunity from prosecution, provided they have observed the laws of war. If they have acted in breach of the laws of war they risk forfeiting

34 Ditrichová and Bílková 2022 https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/.

35 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.

36 Cowling and Bosch 2009 *CILSA* 30.

37 Solis *Law of Armed Conflict* 197; Ipsen "Combatants and Non-Combatants" 95-96; Arts 4A(1-3) and (6) of *Geneva Convention Relative to the Treatment of Prisoners of War* (1949) (GC III); Arts 43 and 44(1) or AP I.

their prisoner of war status[38] and might face criminal prosecution or court martial.

One area of international humanitarian law that might prove controversial for these foreign combatants is their legal obligation to distinguish themselves from the civilian population. Combatants are continuing legitimate military targets, wherever they are located and even when off duty. As such, combatants are obliged under international humanitarian law to overtly distinguish themselves from the civilian population, who are immune from attack.[39] The failure by a combatant to observe the principle of distinction, intentionally feigning protected civilian status to gain an advantage over the opposing forces, is considered perfidious. Perfidious activities are not protected by combatant immunity and attract serious sanctions, including the forfeiture of prisoner of war status and prosecution on grounds of perfidy.[40] Consequently, state practice has been to clothe combatants with a distinctive uniform or insignia.[41]

In 1977 *Additional Protocol I* Article 44(3) proposed a new approach to the generally accepted practice of uniforms as an indicator of combatant status. Cognisant of the realities of modern warfare and the difficulty that the principle of distinction presents in the modern age Article 44(3) proposed that combatants need not wear a military uniform to avoid a charge of perfidy, provided they carry their arms openly in preparation for and during an attack.[42] Some States argued that lowering the threshold of distinction undermined the fundamental premise of international humanitarian law and did not reflect customary international law. Other States maintained that that this article pertained only to occupied territories and wars of national liberation.[43] Rogers[44] maintained that even regular uniformed combatants could engage the opposition provided they met these more "relaxed standards of combatancy", provided that when distinction was essential to parity it would be unequivocal through the open carrying of arms.[45]

This provision introduced a temporal aspect to the enquiry used to determine if a captured belligerent was entitled to prisoner of war status

38 Article 44(4) of AP I.

39 Article 48 of AP I; Jensen "Direct Participation in Hostilities" 2020-28; Rogers 2004 *YIHL* 11; Kalshoven and Zegveld *Constraints on the Waging of War* 86.

40 Cowling and Bosch 2009 *CILSA* 30.

41 Article 44(7) of AP I; Bosch *Combatant Status of Non-State Actors* 26, 48; Pfanner 2004 *IRRC* 94, 104.

42 Cowling and Bosch 2009 *CILSA* 22.

43 Dworkin 2006 http://www.crimesofwar.org/print/onnews/iraq-guerilla-print.html; Pilloud, Sandoz and Zimmermann *ICRC Commentary* 522; Ipsen "Combatants and Non-Combatants" 91.

44 Rogers 2004 *YIHL* 12.

45 Goldman and Tittemore *Unprivileged Combatants* 19; Bothe, Partsch and Solf *New Rules* 253.

under *Additional Protocol I* Article 44(5).[46] If combatants carry out an unprotected attack (not in uniform and not displaying their weapons openly) and are captured, they forfeit their prisoner of war status. This position is supported by State practice, evidenced by jurisprudence, and is recognised under customary international law (rule 106). However, if they avoid capture at the time they will not later forfeit their prisoner of war status if captured.[47] They can, however, be tried later for failing to distinguish themselves as combatants under *Additional Protocol I* Article 44 (3). Combatants who fail to observe the principle of distinction and fall into enemy hands during that period can face criminal prosecution in the detaining power's domestic courts for their perfidious actions. Moreover, liability to observe the principle of distinction is transferred up the chain of command, such that commanders who do not court martial their troops for a violation of the principle of distinction can find themselves being held personally liable under *Additional Protocol I* Articles 86 and 87.

States party to an international armed conflict are expected under *Geneva Convention III* Article 17 to furnish all combatants under their jurisdiction with identity cards confirming that they are eligible for prisoner of war status. *Geneva Convention III* Article 5 mandates that where there is any doubt as to detainees' status they shall be clothed with presumptive combatant status until that status has been determined by a competent tribunal. *Additional Protocol I* Article 45(1) establishes a presumption in favour of POW status for anyone falling into enemy hands who "claims that status, appears entitled thereto, or his party claims it for him". *Additional Protocol I* Article 45(2) now affords such individuals a legal right to have a judicial tribunal adjudicate their right to claim prisoner of war status.[48]

To determine whether Aslin, Pinner and Saadoune might have forfeited their prisoner of war status at the time of their capture we need to ascertain whether they observed the principle of distinction at the time of their capture. It must be stated at this juncture that camouflage is not prohibited. The issue is whether they were dressed with the intention to mislead the opposition that they were civilians.[49] If they wore a uniform or distinctive emblem, or at a minimum carried their weapons openly in preparation for and during any attacks, they will enjoy full prisoner of war status upon capture.

There are conflicting accounts as to whether these foreign nationals who enlisted in the Ukrainian International Legion of Territorial Defence were issued with official Ukrainian identification cards or military uniforms. Some

46 Pilloud, Sandoz and Zimmermann *ICRC Commentary* 522.
47 Watkin 2005 https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf 33.
48 Rogers 2004 *YIHL* 27.
49 Dinstein *Conduct of Hostilities* 38.

reports say that camouflage uniforms were issued,[50] while others state that fighters who arrived without "body armour, helmets and other equipment" were struggling to source them in Ukraine.[51] It appears that many are issued distinctive insignias to attach to their camouflage fatigues.[52] Irrespective of their clothing, provided they carried their weapons openly prior to and during all engagements their presumptive combatant status persists and they enjoy full prisoner of war privileges upon capture.[53] If the tribunal finds that they do not enjoy combatant status they will revert to civilian status and they will be denied prisoner of war privileges.

Russia as the detaining power bears the burden to justify any denial of POW status to combatants who fall into enemy hands. All members of the Ukrainian International Legion of Territorial Defence would qualify as prisoners of war under Article 4(A)(1) of the *Third Geneva Convention*, which refers to "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." There is no indication that an Article 5 status determination tribunal was established prior to the trial of Aslin, Pinner and Saadoune in the Donetsk Peoples Republic.[54]

5 The rights of foreign members of the ILTG to claim the fair trial guarantees enshrined in international humanitarian law

Even if Russia could argue successfully that the Aslin, Pinner and Saadoune forfeited their prisoner of war status, they are not left completely unprotected. *Additional Protocol I* Article 44(4), guarantees that even once one's prisoner of war status is forfeited, the due process procedural and substantive protections afforded to prisoners of war under *Geneva Conventions III* common Article 3 and *Additional Protocol I* Article 75 still applies. Together these provide a safety net catalogue of fair trial guarantees to ensure the humane treatment of all detainees,[55] when they do not benefit from a more favourable treatment under one of the *Geneva Conventions*.[56] Included in these guarantees are the rights of due process and fair trial by "an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure."[57] Under

50 Francovich *The Spokesman* 1.
51 Marshall *Reuters* 1.
52 Francovich *The Spokesman* 1.
53 Bosch *Combatant Status of Non-State Actors* 48.
54 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.
55 Aldrich 1981 *AJIL* 783.
56 Ditrichová and Bílková 2022 https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/.
57 Article 84 of GC III.

Additional Protocol I Article 75 all detainees (irrespective of whether they have prisoner of war status or not) cannot be subjected to "murder, torture, corporal punishment, mutilation, and outrages against personal dignity."[58] Under human rights law there is also variety of non-derogable rights, including the prohibition against torture, arbitrary deprivation of life, improperly conducted or inadequate criminal proceedings, and other similar fundamental rights.[59] The treatment of all the detained must be in line with the basic rights of accused persons recognised under international law. This requirement is especially pertinent when a conviction carries the possibility of a death sentence. All detainees are to be afforded the same level of fair treatment and subject to the same court's jurisdiction, pursuant to the principle of assimilation - that is the same equivalent treatment as is afforded to Russia's own armed forces (Article 102).[60] All detainees (suspected mercenary or not) have the right to be visited by the inspection team of the International Red Cross and to communicate with their State.

In the case of Aslin, Pinner and Saadoune much has been made of the lack of fairness, independence and impartiality of the court that conducted this trial in the Donetsk Peoples Republic. They were held incommunicado and denied the right to communicate with their State or the International Committee of the Red Cross. The court failed to hold public hearings and neither the International Committee for the Red Cross nor the protecting powers was invited to attend the trial as per *Geneva Convention III* Article 105.[61] The accused person's right not to be compelled to testify or make a confession was violated. The right enshrined under Article 101 to have a death sentence officially communicated to the protecting power or the International Committee for the Red Cross, and for its execution to be delayed for six months for any appeals to be lodged, was not formalised through the correct channels.[62] It was the Russian State media that reported the death sentences that had been imposed by the Donetsk Peoples Republic tribunal. The United Nations has also highlighted the fact that subjecting individuals who should be afforded prisoner of war status to these sorts of sham judicial proceedings is in fact a war crime in and of itself.[63] That is all very worrying, but the heart of the issue is that aside from the quality of the judicial process it was a violation of Article 43 *Additional*

58 Traldi 2022 https://www.lawfaremedia.org/article/soldiers-not-soldiers-fortune.
59 Article 4(2) of the *International Covenant on Civil and Political Rights* (1966).
60 Abraham 2004 *SALJ* 844; Bosch *Combatant Status of Non-State Actors* 4.
61 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.
62 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.
63 UN 2022 https://news.un.org/en/story/2022/06/1120102.

Protocol I to prosecute these combatants, who should have enjoyed full prisoner of war privileges, for their mere participation in hostilities.[64]

6 Conclusion

Widespread international legal and moral outrage has been expressed in response to the sham trials and the resultant death sentences handed down in the self-proclaimed Donetsk Peoples Republic to the Aslin, Pinner and Saadoune, who surrendered to Russia in 2022.

According to the Ukrainian Regulation (No 248) on Military Service in the Armed Forces by Foreigners and Stateless People, foreigners like Aslin, Pinner and Saadoune have the right to volunteer to join Ukraine's Armed Forces. This regulation precludes them and other foreign nationals from satisfying the definition of a mercenary in *Additional Protocol I*.

Since Ukrainian domestic legislation allows foreigners to join the Armed Forces of Ukraine, these volunteers are under its responsible command. This means that they fulfil the first of the conditions for combatant status. The fact that they are not nationals of Ukraine is "widely considered to be irrelevant when it comes to determining combatant or prisoner of war status."[65] Moreover, they do not need to wear an Armed Forces of Ukraine uniform provided they at a minimum carry their weapons openly in preparation for and during an attack. They will enjoy combatant status and the legal authorisation to participate directly in hostilities with full combatant immunity provided they observe the laws of war.

Once it is determined that Aslin, Pinner and Saadoune meet the requirements for combatant status, their prisoner of war status is guaranteed.[66] However, it can be forfeited if they fail to observe the principle of distinction in preparation for and during an attack and are captured.[67] At the very minimum this requires that they carry their armaments openly when "engaged in an attack or in a military operation preparatory to an attack."[68]

With full combatant immunity and prisoner of war status, these foreign fighters cannot be subject to criminal prosecution for their participation in the hostilities, provided they observe the laws of war. If, however, there is evidence that they have breached international humanitarian law they

64 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/.

65 Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/.

66 Pfanner 2004 *IRRC* 120.

67 Bosch *Combatant Status of Non-State Actors* 42.

68 Cowling and Bosch 2009 *CILSA* 30.

nevertheless enjoy the fair trial guarantees which are set out in the *Geneva Convention III* and *Additional Protocol I*.[69]

The United Nations has condemned Russian attempts to initiate show prosecutions in the Donetsk Peoples Republic against foreign fighters like Aslin, Pinner and Saadoune. Such prosecutions and those threatened *in absentia* against Andrew Harding; Dylan Healy, Andrew Hill (United Kingdom); Vjekoslav Prebeg (Croatia); Mathias Gustafsson (Sweden); and two Unites States military veterans, Alex Drueke and Andy Huynh, are contrary to Articles 43 and 44 of *Additional Protocol I* and amount to war crimes. They should attract international criminal prosecution.[70]

Bibliography

Literature

Abraham 2004 *SALJ*
Abraham G "Essential Liberty Versus Temporary Safety: The Guantanamo Bay Internees and Combatant Status" 2004 *SALJ* 829-850

Aldrich 1981 *AJIL*
Aldrich G "New Life for the Laws of War" 1981 *AJIL* 764-783

Anon *The Guardian*
Anon "Five Face Trial on Mercenary Charges in Separatist Controlled Ukraine" *The Guardian* (15 August 2022) 1

Bosch 2007 *African Security Review*
Bosch S "Private Security Contractors and International Humanitarian Law: A Skirmish for Recognition in International Armed Conflicts" 2007 *African Security Review* 34-52

Bosch 2009 *CILSA*
Bosch S "Private Security Contractors and State Responsibility: Are States Exempt from Responsibility for Violations of Humanitarian Law Perpetrated by Private Security Contractors?" 2009 *CILSA* 353-382

Bosch *Combatant Status of Non-State Actors*
Bosch S *The Combatant Status of Non-State Actors in International Armed Conflicts, in Light of the Notion of Direct Participation in Hostilities* (PhD-thesis University of KwaZulu-Natal 2012)

69 Abraham 2004 *SALJ* 845.

70 Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/; UN 2022 https://news.un.org/en/story/2022/06/1120102.

Bothe, Partsch and Solf *New Rules*
Bothe M, Partsch KJ and Solf W *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Leiden 1982)

Cowling and Bosch 2009 *CILSA*
Cowling M and Bosch S "Combatant Status at Guantanamo Bay: International Humanitarian Law Detained Incommunicado" 2009 *CILSA* 1-35

Dinstein *Conduct of Hostilities*
Dinstein Y *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press Cambridge 2004)

Duncan *The National News*
Duncan G "Aiden Aslin and Shaun Pinner Released from Russian Danger Zone by the Skin of their Teeth" *The National News* (22 September 2022) 1

Ewe *Times*
Ewe H "South Korea is Prosecuting its Citizens that Went to Fight in Ukraine. Here's Why" *Times* (17 August 2023) 1

Francovich *The Spokesman*
Francovich E "Fighting Another Country's War, Two Spokane-Area Men Join Flood of Foreign Fighters in Ukraine" *The Spokesman* (15 May 2022) 1

Goldman and Tittemore *Unprivileged Combatants*
Goldman R and Tittemore B *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law* (American Society of International Law Washington DC 2002)

Henckaerts and Doswald-Beck *Customary International Humanitarian Law*
Henckaerts JM and Doswald-Beck L (eds) *Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press Cambridge 2005)

Ipsen "Combatants and Non-Combatants"
Ipsen K "Combatants and Non-Combatants" in Fleck D (ed) *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press Oxford 2008) 79-118

Jensen "Direct Participation in Hostilities"
Jensen ET "Direct Participation in Hostilities" in Banks WC (ed) *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press New York 2011) ebook

Kalshoven and Zegveld *Constraints on the Waging of War*
Kalshoven F and Zegveld L *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 4th ed (Cambridge University Press Cambridge 2011)

Kidane 2010 *Denv J Int'l L & Pol'y*
Kidane W "The Status of Private Military Contractors under International Humanitarian Law" 2010 *Denv J Int'l L & Pol'y* 361-419

Maogoto and Sheehy 2006 *Adel L Rev*
Maogoto JM and Sheehy B "Contemporary Private Military Firms under International Law: An Unregulated 'Gold Rush'" 2006 *Adel L Rev* 245-269

Marshall *Reuters*
Marshall A "For Foreign Fighters, Ukraine Offers Purpose, Camaraderie and a Cause" *Reuters* (7 March 2022) 1

Pilloud, Sandoz and Zimmermann *ICRC Commentary*
Pilloud C, Sandoz Y and Zimmermann B *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (Martinus Nijhoff Leiden 1987)

Pfanner 2004 *IRRC*
Pfanner T "Military Uniforms and the Law of War" 2004 *IRRC* 93-124

Roth and Sinmaz *The Guardian*
Roth A and Sinmaz E "Britons Sentenced to Death after 'Show Trial' in Russian-Occupied Ukraine" *The Guardian* (10 June 2022) 1

Rogers 2004 *YIHL*
Rogers APV "Unequal Combat and the Law of War" 2004 *YIHL* 3-23

Solis *Law of Armed Conflict*
Solis G *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press Cambridge 2010)

Stein *The Washington Post*
Stein J "Democracy Defenders and Rambo Wannabes: Ukraine's Volunteer Foreign Fighters" *The Washington Post* (18 January 2023) 1

UN *Report of the Working Group*
United Nations *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on its Mission to Ukraine* (UN Geneva 2016)

Wright *New Yorker*
Wright R "Will Mercenaries and Foreign Fighters Change the Course of Ukraine's War?" *New Yorker* (5 April 2022) 1

Zachary 2005 *Israel L Rev*
Zachary S "Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?" 2005 *Israel L Rev* 378-417

Legislation

Draft Law of Ukraine on Amending Certain Legislative Acts of Ukraine on Military Service in the Armed Forces of Ukraine by Foreigners and Stateless Persons No 2389 of 17 March 2015

Presidential Decree of Ukraine on Military Service in the Armed Forces by Foreigners and Stateless People No 248 of 10 June 2016

International instruments

European Convention on Human Rights (1950)

Geneva Convention Relative to the Treatment of Prisoners of War (1949) (GC III)

International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) (*United Nations Mercenary Convention*)

International Covenant on Civil and Political Rights (1966)

OAU Convention for the Elimination of Mercenarism in Africa (1977) (*OAU Mercenary Convention)*

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1979) (AP I)

Internet sources

Ditrichová and Bílková 2022 https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/
Ditrichová P and Bílková V 2022 *Status of Foreign Fighters in the Ukrainian Foreign Legion* https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/ accessed 15 January 2024

Dworkin 2006 http://www.crimesofwar.org/print/onnews/iraq-guerilla-print.html
Dworkin A 2006 *Guerilla War, Deadly Deception, and Urban Combat* http://www.crimesofwar.org/print/onnews/iraq-guerilla-print.html accessed 8 June 2022

Hill-Cawthorne 2022 https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/

Hill-Cawthorne L 2022 *The Prosecution of British Fighters by Pro-Russian Separatists in Ukraine* https://www.ejiltalk.org/the-prosecution-of-british-fighters-by-pro-russian-separatists-in-ukraine/ accessed 1 February 2024

Hill-Cawthorne 2022 https://www.justiceinfo.net/en/102044-ukraine-why-show-trial-british-pows-violates-geneva-conventions.html
Hill-Cawthorne L 2022 *Ukraine: Why the 'Show Trial' of British POWs Violates Geneva Conventions* https://www.justiceinfo.net/en/102044-ukraine-why-show-trial-british-pows-violates-geneva-conventions.html accessed 19 October 2023

Koroleva 2023 https://www.justiceinfo.net/en/122197-day-defence-azov-rostov-on-don-military-court.html
Koroleva M 2023 *A Day of Defence for the 'Azov' in Rostov-on-Don Military Court* https://www.justiceinfo.net/en/122197-day-defence-azov-rostov-on-don-military-court.html accessed 4 February 2024

Nuzov 2022 https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/
Nuzov I 2022 *Mercenary or Combatant? Ukraine's International Legion of Territorial Defence under International Humanitarian Law* https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/ accessed 2 June 2022

President of Ukraine 2022 https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213
President of Ukraine 2022 *Appeal to Foreign Citizens to Help Ukraine in Fighting against Russia's Aggression* https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213 accessed 19 May 2022

Radio Free Europe 2023 https://www.rferl.org/a/five-foreign-nationals-tried-absentia-russia-ukraine-/32426240.html
Radio Free Europe 2023 *Five Foreign Nationals to be Tried in Absentia in Russia for Joining Ukrainian Armed Forces* https://www.rferl.org/a/five-foreign-nationals-tried-absentia-russia-ukraine-/32426240.html accessed 5 February 2023

Traldi 2022 https://www.lawfaremedia.org/article/soldiers-not-soldiers-fortune
Traldi A 2022 *Soldiers, Not Soldiers of Fortune* https://www.lawfaremedia.org/article/soldiers-not-soldiers-fortune accessed 15 January 2024

UN 2022 https://news.un.org/en/story/2022/06/1120102
United Nations 2022 Death Sentence for Ukraine Foreign Fighters is a War Crime: UN Rights Office https://news.un.org/en/story/2022/06/1120102 accessed 4 February 2023

Watkin 2005 https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf
Watkin K 2005 *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy* https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf accessed 13 April 2024

List of Abbreviations

Adel L Rev	Adelaide Law Review
AJIL	American Journal of International Law
AP	Additional Protocol
CILSA	Comparative and International Law Journal of South Africa
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
ECHR	European Court of Human Rights
GC	Geneva Conventions
ICRC	International Committee of the Red Cross
ILTG	International Legion of Territorial Defence
IRRC	International Review of the Red Cross
Israel L Rev	Israel Law Review
OAU	Organisation of African Unity
POW	prisoner of war
SALJ	South African Law Journal
UN	United Nations
YIHL	Yearbook of International Humanitarian Law