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THE LEGAL STATUS OF ALIEN COMBATANTS IN THE UKRAINIAN ARMED FORCES WITHIN THE CONTEXT OF THE INTERNATIONAL JUDICIAL REALITY

Abstract. *The decision by the Council of Europe to terminate the Russian Federation's membership of the Council of Europe on 16 March 2022 makes the issue of legal certainty for aliens actively participating in the war in Ukraine as part of the Ukrainian Armed Forces completely unpredictable. The academic literature and the case law of the European Court of Human Rights in the field of the legal status of alien combatants is limited, and the International Criminal Court has not completed any cases on this topic. This article addresses the principle of case law and, above all, the principle of legality with regard to aliens and their active participation in the armed forces of Ukraine. This issue has become central since the Russian Federation may or may not grant these persons the status of prisoner of war according to the Third Geneva Convention, relating to Protocol I, or may characterise them as criminal offenders or terrorists.*

Keywords: *aliens, combatants, mercenaries, prisoners of war, war, armed conflict, terrorists*

316

Introduction

On 9 June 2022, two Britons and a Moroccan were sentenced to death by a Russian proxy court in eastern Ukraine.¹ They were combatants in the International Legion of Territorial Defence of Ukraine (ILTDU), captured while fighting for Ukraine.

The convictions issued by this court illustrate the conflict that can arise within one principle of legality while tending to respect fundamental human rights and freedoms. When political leaders order courts to harm the population, the principle of legality *weighs its weight*. It is expected that courts

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¹ "Ukraine war: Britons Aiden Aslin and Shaun Pinner sentenced to death", BBC, 9 June 2022. Accessible at <https://www.bbc.com/news/uk-61745556>, 25. 2. 2023.

follow the principle of legality, and that court decisions express the highest degree of certainty and fairness of judgments (Pepinsky, 1973; Freitas, 2019; Torroja, 2016). The Third Geneva Convention, 1949, and its Additional Protocol I, 1977, defined internationally and legally who can be a prisoner of war and who is a mercenary. The two countries involved in this war, Russia and Ukraine, have ratified both documents and thus there should be no doubt as to whether the persons sentenced to death were soldiers or mercenaries. However, the said death sentence does not reflect this fact.

This article examines how courts interpret legal norms in their judgments and consequently influence legal reality. The added value of the article and its contribution to the literature not only lies in polemics concerning the legal status of those participating in the war; its main added value is that there are no relevant academic works in the literature dealing with this topic. The article is an original academic contribution on a topic that thus far has not been treated in a way whereby the judgments of the courts are the core of the academic *centre of gravity*.

The Canadian *Postmedia* stated that so many Canadians are fighting in Ukraine that they have their own battalion (“Canadian-Ukrainian Brigade”)² (Carment and Belo, 2022). An article published in the *Toronto Star* highlighted an international dilemma, not only of international law but also of international relations; namely, whether certain persons hold the status of mercenaries or combatants.³ It is a historically known concept that the formation of certain armed forces have included soldiers – combatants – who were not citizens of the state in whose armed forces they were fighting.

Following the launch of the invasion of Ukraine by the Russian Federation on 24 February 2022, the term “Ukrainian foreign legion” has gained widespread traction.

The Ukrainian Armed Forces (UAF) includes a territorial defence into which the ILTDU is incorporated. Under international law, combatants who are part of the ILTDU and are captured by hostile forces, in this case the Russian military, are guaranteed by Ukraine that the rules of the Third Geneva Convention relating to prisoners of war of 1949 will apply to them. They should therefore be granted the status of prisoners of war, along with all the rights and obligations that such status entails under the Third Geneva Convention (Esgain and Solf, 1963). However, a statement by a spokesperson of the Russian Defence Ministry claimed that in line with international

² “Exclusive: So many Canadian fighters in Ukraine, they have their own battalion, source says”, *The National Post*, 9 March 2022. Accessible at <https://nationalpost.com/news/world/exclusive-so-many-canadian-fighters-in-ukraine-they-have-their-own-battalion-source-says>, 8. 3. 2023.

³ “Why it may matter that Russia is calling Canadians fighting in Ukraine ‘mercenaries’”, *Toronto Star*, 3 May 2022. Accessible at <https://www.thestar.com/news/world/2022/05/03/russia-launches-criminal-probe-of-75-foreign-mercenaries-in-ukraine-including-canadians.html>, 8. 3. 2023.

law prisoner of war status would not be granted to fighters of the ILTDU if they were captured on Ukrainian territory and, instead, would primarily be treated as perpetrators of criminal offences and brought before a court.⁴

This official position of the Russian Federation could hold fatal consequences for Ukraine, the Russian Federation, all the states involved and, notably, for persons directly involved in this war.

The Grand Chamber of the European Court of Human Rights (ECHR) has completed very few cases directly related to the issues addressed in this article, and not a single one at the International Criminal Court – La Cour pénale internationale (ICC – CPI). Without appropriate case law, it is currently almost impossible to operate effectively and efficiently in the *field* in conditions of war as a nationally institutionalised form of extreme human violence. Thus, without the operationalisation of legal theory in practice (Simpson, 2000), as reflected in court judgments, the requirements under the principle of the foreseeability of law cannot be fully met. In this particular case, this refers to judgments by the ECHR.

The bureaucratic sense does not require a special explanation since it only involves the written coordination of relevant orders by higher commands and, ultimately, political decisions. This article addresses the actual state of responsibility in greater detail, not only because this issue was highlighted by the International Criminal Tribunal for former Yugoslavia (ICTY) in several judgments (clearly including in the *Kordić-Čerkez* case, where the court took a clear and unambiguous position on what in practice constitutes command responsibility in the field),⁵ but chiefly given that this article aims to contribute to the fundamental principles of criminal legislation and the judiciary in general, i.e., to foreseeability and the lowest possible probability of incorrect interpretation or misleading information. In the war underway in Ukraine since 24 February 2022, incorrect interpretations and misleading information have gained in unprecedented momentum and scale in modern history. This is a reason that this article explains the various statuses of persons, i.e., those of aliens, combatants and mercenaries (Wolfe, 1951; Lohr, 2003; Fallah, 2006; Sullivan, 2006).

Expressing official positions relating to whether a state will (or will not) grant certain rights prescribed by international law can bring irreparable consequences. When a person is not granted the status of prisoner of war, and that decision is made on a purely political basis, without a prior public and international procedure of suspending a particular international treaty or part thereof, we enter into a completely lawless and unforeseeable area, an area of anarchy ruled by no government, or only by those with the

⁴ Accessible at <https://tass.com/politics/1416131>, 1. 3. 2023.

⁵ ICTY, 28 February 2001, *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-T, No. 368.

greatest capacity to employ kinetic energy. The international community must be aware and constantly emphasise that the war in Ukraine is not a “humanitarian intervention” like in Kosovo (Wheeler, 2001).

This article explains the inclusion and exclusion of international criminal law while taking the international and European judicial systems into account. It is argued that even if the courts have clear and unambiguous political instructions on how to judge, such a conflict between legality and a political decision weakens not only the country of the court, but the entire population in which the court exercises its authority. In this article, support is presented for the theory that international law and legal norms derived from key court decisions are and will be valid even after the war ends, regardless of which side wins. If the courts continue to give priority to political orientations rather than law and common law, there will not only be obvious violations of human rights and freedoms, but in this case, irreparable consequences. While the mentioned death sentences have already been pronounced, fortunately they have not yet been carried out. Another purpose of this article in relation to the citation of court judgments is to show that, because war is about extremes, including completely unnecessary loss of life, it is essential in such cases to write down the facts and new knowledge in a logical way in theory or in an argumentative manner.

Understanding the impact of a state of peace and a state of war on criminal law and judicial systems

Declaring a state of war or a state of peace is a political decision, not a military one (Hillmer and Lagassé, 2016). The declaration of martial law or implementation of any military operation, with the emphasis that despite all the military activity, it is not a state of war, is crucial for establishing the actual situation (Russett, 1995). The official state position, whether it is a war or something else (a ‘special military operation’), affects whether the Geneva Conventions (GC) will be applied, especially from the perspective of victim protection and, perhaps even more importantly, whether the Hague *jus in bello* conventions will be applied.

The set or choice of appropriate military tactics, techniques and procedures (hereinafter: TTP) entails greater or lesser destruction due to their operation. In any case, the envisaged TTP clash with the principle of proportionality, which is directly related to the official state of the armed conflict.

Specifically referring to the current happenings in Ukraine, in the event the Russian Federation were to declare a state of war in the entire area in which it is operating in Ukraine, one of Russia’s biggest problems would be compliance with Protocol I (1977) to the GC (1949); namely, the basis of Article 48 and especially Article 52, which stipulates what may be a military

objective (goal) and hence a legitimate target of military action. The official Russian status of 'special military operation', from the ostensible Russian point of view, represents much looser rules, and this fact is a truly great problem for the international community that it will need to somehow solve if it wants to preserve the foundations of the legitimacy of international law. Possible paths to a solution in this respect are indicated at the end of the article.

Ukraine has declared a state of war. It was attacked in the form of a military invasion by Russia, which has not declared a war within the area of the internationally recognised borders of the Russian Federation. In this case, the Russian Federation is behaving as expected, as a country that is highly centralised and an extraordinary user of propaganda (Belo, 2020). Ukraine was unable to prevent the above, despite its efforts and even the adoption of a law that at least tried to mitigate Russia's tendencies (Carment, Nikolko and Belo, 2018), and also the actions of the international community (Carment, Nikolko and Belo, 2019).

The judicial systems of modern states are prepared *de jure* for such situations. Whether they are also prepared *de facto*, however, becomes clear over time (Byrne and Weir, 2004). Experience with regard to the correctness of European decisions of the recent past does not speak in favour of European decision-making, at least not in terms of timeliness. In Europe, things are simply done too slowly.

The ICTY and ECHR broke, and continue to break, ground in this field, as if the lessons of the Nuremberg Trials or the Tokyo Trials of 1946 have been forgotten or unwittingly pushed into oblivion. While the ICTY's judgments concerned war crimes in the territory of Yugoslavia, the judgment of the ECHR⁶ opened a completely new field of understanding the operationalisation and actual implementation of legal norms on European soil.

The ICTY judgments –

*The wording of the common Article 2 of the GC demonstrates that it is not necessary for all the parties to the conflict to recognise the existence of a state of war, or even to have broken all diplomatic relations, for a conflict to be characterised as international. The traditional notion of international law, according to which the state of war automatically implies the break of diplomatic relations, cannot legitimately be used as an argument to justify the refusal to characterise a conflict as international.*⁷

⁶ ECHR, 17 May 2020, *Case of Kononov v Latvia*, Application No. 36376/04. The only conviction of an Allied soldier for crimes committed during the Second World War to be concluded and finally decided.

⁷ ICTY, 25 June 1999, *The Prosecutor v. Zlatko Aleksovski*, No. IT-95-14/1-T, Paragraph 3 (Dissenting opinion of judge Rodrigues, presiding judge of the trial chamber. Accessible at <https://www.google.com/>

A similar assertion –

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts. This rule implies a distinction between the individuals who compose the ‘armed force’ of a State and its other ‘ressortissants’. A definition of the term ‘armed force’ is, therefore, necessary. (ECHR, 17/5/2010, Case of Kononov v Latvia, Application No. 36376/04, p. 80),

proved a state of war even though war had not been officially declared, or a declaration of war had been continuously denied by an involved state, much like what the Russian Federation is doing today. The Russian Federation only acknowledges the state and conduct of a “Russian special military operation” in Ukraine.⁸

Following a declaration of a state of war, the Hague Conventions begin to apply as operational rules.⁹ Which TTP a military will employ, including in battle, seems a purely technical question. The United Nations implemented the Rules of Engagement (Boddens-Hosang, 2020) for operational use, providing guidelines on how and with which means to employ military force, based on a previously agreed political decision taking account of a legal analysis of what is explicitly allowed in a given situation from a legal perspective, and of a military component answering the question of the strategic, operational and tactical activities of armed forces or, in short, of the use of specifically defined TTP.

Since the national judicial systems of modern states have endorsed the rule of law, the states abide by international law. However, it is a state of war that actually reveals to what degree a national judiciary will follow international law in the actual implementation of law in nature and in the real world (the finality and enforceability of legal acts – judgments, decisions, orders etc.).

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⁸ Accessible at <https://tass.com/pressreview/1410663>, 22. 2. 2023. *Special Military Operation – Demilitarization and Denazification of Ukraine*. Accessible at <https://ria.ru/20220224/obyasnenie-1774869469.html>, 22. 2. 2023.

⁹ *The Hague Conventions and Declarations since 1899*.

Decisions of international courts and the point at which a war crime also constitutes a criminal offence

The ICTY was established to prosecute those responsible for serious violations of international humanitarian law in the territory of Yugoslavia. It should be stressed that for the purposes of this article the establishment of a tribunal does not in itself constitute a legal solution from the point of view of crime, criminal legislation, or the judiciary. The ICTY had an extremely difficult task as a full-blown war had engulfed parts of Europe (Yugoslavia). Further, given the political experience of refusing international recognition of the independence and sovereignty of newly established states, with a few exceptions, its chances of success were slim since international politics was not keen to recognise new states. To describe the factual situation, one must also highlight the complete military and diplomatic failure on the part of the international community to intervene in the form of international missions in Yugoslav territory.

Due to its extreme importance and an attempt to introduce new case-law with regard to war crimes, the decision needs to be stated: A similar development occurred at the ECHR: Kononov was acquitted at the first stage of the ECHR proceedings (by four votes against three).

In the light of the foregoing, the Court considers that the applicant could not reasonably have foreseen on 27 May 1944 that his acts amounted to a war crime under the jus in bello applicable at the time. There was, therefore, no plausible legal basis in international law on which to convict him of such an offence. Even supposing that the applicant has committed one or more offences under the general domestic law, their prosecution has long since become statute barred. Accordingly, domestic law could not serve as the basis for his conviction either (p. 148).¹⁰ There has consequently been a violation of Article 7 of the Convention (p. 149)¹¹

and it was the Grand Chamber of the ECHR which ruled (by 14 votes to 3) that there had been no violation of Article 7 of the European Convention on Human Rights (ECHR), as will be discussed below.

The key issue was not to determine whether a certain act in itself involved all the elements of crime in order for it to be treated, as early as in the pre-trial procedure, as a reasonable, evidence-based suspicion of the commission of a criminal offence, but to determine whether an act, despite its cruelty and tragedy, constituted a war crime at all. In the ECHR, “morals”

¹⁰ ECHR, 24 July 2008, *Case of Kononov v. Latvia*, Application No. 36376/04.

¹¹ ECHR, 24 July 2008, *Case of Kononov v. Latvia*, Application No. 36376/04.

is referred to in at least Articles 6, 8, 9, 10, 11 and, procedurally, in Article 21. Operationalising the definiteness of the “morals” through court judgments which address war crimes is, noting that court proceedings about war crimes are basically proceedings about states, extremely difficult and predictably complex. It is already clear that, considering the case law of Nuremberg, Tokyo, the ICTY and the ECHR, the acts being committed in Ukraine at the time of writing and which began on 24 February 2022 will require retaking the initiative to define and establish ‘anew’ what is a ‘war crime’ and what is ‘military self-defence’. From the current legal perspective, it is almost unbelievable that the ICTY had to define what an armed conflict was. The turning point definitely came when the ICTY adopted a decision in the Tadić case,¹² stating that “*an armed conflict exists whenever there is a resort to armed force between States*”. Thus, an explanation was introduced into international case law defining when a certain act constitutes an international armed conflict, and not just an exchange of missiles and threats that falls short of reaching the level of an armed conflict between two states, i.e., of the status of an “international conflict” and, hence, of criminal offences, let alone criminal offences that could be characterised as war crimes. This dilemma means it was necessary to resolve in advance the issue of how to achieve finality, enforceability and complete efficiency and effectiveness, not only of the ICTY, but of all pre-trial procedures. The ICTY resolved this in its judgment in the Blaškić case,¹³ underlining the “good old principle”, stating:

[W]henever [a State's] implementing legislation [of the International Tribunal's Statute] turns out to be in conflict with the spirit and the word of the Statute, a well-known principle of international law can be relied upon to prevent States from shielding behind their national law in order to evade international obligations.

The ICTY highlighted the facts which everyone was very familiar with, but which had not been effectively and efficiently implemented. Case law throughout history teaches us, as does the present war in Ukraine, that apparently nothing becomes self-evident, and that implementation of the rule of law, and of all legal norms generally, requires vigilance and consistency. From the point of view of war crimes, this is particularly important when people die¹⁴ because this is where international law and the national law of a state directly collide, each with their own interests, i.e., the interests

¹² ICTY, 2 October 1995, *The Prosecutor v. Dusko Tadić*, IT-94-1-A, Para. 70.

¹³ ICTY Statute, Article 29 and ICTY, 29 October 1997, *The Prosecutor v. Tihomir Blaškić*, Judgment 18 July 1997, IT-95-14-ARI08, Paras. 53 and 54.

¹⁴ ECHR, 20 November 2014, *Case of Jaloud v. The Netherlands*, Application No. 47708/08, p. 227

of the international community and the interests of the state. When a state of war ensues, these interests are all the more pronounced since in war, as a minimum, the existence of the national sovereignty of at least one of the belligerents, if not the actual, physical existence of a state, as well as its citizens and other residents, is at stake.

The key difference between a combatant and a mercenary from the viewpoint of judicial systems

A person must be granted the status of a prisoner of war in every case,¹⁵ unless evidence is immediately available which demonstrates the person cannot be a prisoner of war because they are immediately suspected or accused of a criminal offence, and are therefore not entitled to the rights and privileges of a prisoner of war.

The Russian Federation criminalised in advance members of organisations operating in the territory of Ukraine. These are the “Crimean Tatar Volunteer Battalion named after Noman Chelebidzhikhan” and the Ukrainian paramilitary nationalist association “Azov” (other names used: battalion “Azov”, regiment “Azov”).¹⁶ The purpose of the Russian Federation in Ukraine is identical to that in Syria since it is characteristic of their operations in the area of Syria, where Russia also criminalised certain organisations in advance with the aim of disregarding the status of combatants or prisoners of war in the event of their capture. The status of prisoner of war prevents the pre-trial or criminal interrogation of suspects of criminal acts, and the Russian Federation is clearly aware of this.

A similar issue was raised by the ECHR in the *Case of Georgia v. Russia*.¹⁷ It stressed the treatment of prisoners of war in accordance with Article 3 of the ECHR, and the fact that the treatment of prisoners of war is significantly different from the treatment of those suspected or accused of a criminal offence.

The Fourth Hague Convention of 18 October 1907 and its appendices define the humane treatment of prisoners of war.

Under the Third Geneva Convention of 1949, prisoners of war must not be subjected to pre-trial or criminal questioning, and cannot relinquish these rights. To sum up, the key difference between a prisoner of war and a suspect of a criminal offence is that: “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent

¹⁵ *The Third Geneva Convention of 1949, Article 5, Paragraph 2.*

¹⁶ Accessible at <http://www.fsb.ru/fsb/npd/terror.htm>, 20. 2. 2023.

¹⁷ ECHR, 21 January 2021, *Case of Georgia v. Russia*, Application No. 38263/08, p. 54.

information".¹⁸ It is essentially about establishing a person's status. In most democratic states, the rules applying to suspects and the accused are very similar, requiring the suspect or the accused to state, in addition to all their personal information, if they so wish, everything they know about certain events which they might be able to describe. In a nutshell, it is about establishing the factual state of a certain act, in this case, a criminal offence. This is a vital difference, which could be characterised by saying that questioning is not the same as information gathering. The Third Geneva Convention of 1949 and the Additional Protocol to the GC (Protocol I) of 8 June 1977, with both countries having been signatories, are essential for the purposes of this article. Under Additional Protocol I, the Third Geneva Convention defines who is a combatant and who a prisoner of war.

In determining the status of mercenaries, the matter becomes rather more complicated, not so much from the legal standpoint, but from the standpoint of the actual policies of states. To this end, the international community – the United Nations – has adopted two acts that are of note for this article. The first is the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1998, which entered into force in 2001. The second is the Montreux Document of 2008.

Following Russia's invasion of Ukraine on 24 February 2022, the seemingly higher level of civility was replaced by mere brute force, a capacity to possess and apply kinetic energy, and to wage industrial-scale war – a war in which the production and intellectual capacities of an entire country are being employed to provide assistance and support to wage that war efficiently and effectively. Therefore, in terms of the practical feasibility of law, we can only expect the enforcement of those legal provisions that are watched over, like the sword of Damocles, by a certain force that would be unleashed if international humanitarian law or court judgments were not enforced or implemented.

The war between the Russian Federation and Ukraine is an international armed conflict between two states. Protocol I thus applies when determining the status of combatants and prisoners of war, along with the general provisions of Common Article 3 of the GC of 1949.

Before directly operationalising the differences between a combatant and a mercenary, it must be noted that members of the opposing party to a conflict hold the status of opponent combatants in the very basis of international law (Hague Convention IV), provided that they are under a command that is responsible for its subordinates, have distinctive and recognisable emblems, carry arms openly, and conduct military operations in accordance with the laws and customs of war. Article 43 of Protocol I goes into greater

¹⁸ *Third Geneva Convention of 1949, Article 17.*

detail, mainly summing up the Hague Convention cited above. For the sake of operationalisation, however, the following provision in Article 43 of Protocol I is noteworthy: “The armed forces of a Party to a conflict consist of all organized armed forces ... which are under a command responsible to that Party for the conduct of its subordinates”. The fundamental provision is that any armed force, even a paramilitary one, is part of the institutionalised armed forces of a state, in this case the armed forces of Ukraine or the Russian Federation. The modern judicial system no longer makes a complete distinction between regular military (armed) forces and paramilitary forces. This is because factual events on battlefields have shown that there is no difference between military and paramilitary forces in the organisational sense. While some might still think that paramilitary forces can “allow themselves a little more freedom” or, in short, less observance of *jus in bello*, this is not the case in practice. Paramilitary forces operate almost entirely under the orders of regular military forces. The remnants of such a mentality display a failure to grasp the essence of command responsibility.

In order for an individual to be characterised as a mercenary, they must meet the following criteria in Article 47 of Protocol I, which defines a mercenary as a person who:

is specially recruited locally or abroad in order to fight in an armed conflict; does, in fact, take a direct part in the hostilities; is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; is not a member of the armed forces of a Party to the conflict; and has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The European Parliament has adopted a resolution on mercenaries,¹⁹ at the beginning listing a range of adopted European and other international legal acts, and stating the irrefutable fact that mercenaries or their companies are involved in military activities on the strategic, operational and tactical levels, and in wars and armed conflicts everywhere. Yet, out of concern and urging and genuinely good intentions nothing happens in reality, the matter was not operationalised; this is why the key fact needs to be stressed; under Article 47 of Protocol I, it is realistically impossible to establish all the

¹⁹ *European Parliament Resolution of 25 November 2021 on the Human Rights Violations by Private Military and Security Companies, particularly the Wagner Group (2021/2982(RSP))*.

conditions it defines, except for “allegiance to the armed forces of a belligerent state”. In the war in Ukraine, the other conditions are realistically indeterminable. This must be stressed in particular because on 23 October 2019 the Russian Federation suspended implementation of part of Protocol I.²⁰

Judicial systems will only be able to effectively and efficiently determine the distinction between a combatant and a mercenary in the war between Ukraine and the Russian Federation based on information about whether a combatant or a mercenary was officially a member of the armed forces of Ukraine or the Russian Federation.

The organisational position of a military unit from the perspective of criminal law and the concretisation of the Ukrainian Armed Forces

The organisational position of a military unit from the criminal law perspective is a fundamental issue that needs to provide an answer to the question of whether a specific armed unit is part of a state’s institutionalised armed forces.

The modern judicial system should strive to minimise the “legal vacuums or grey zones” which often arise with regard to mercenaries and prisoners of war. Judgments by the ECHR and the ICTY based on the Nuremberg and Tokyo Trials and Article 43 of Protocol I should be more than sufficient for providing a clear and unambiguous explanation of the status of armed forces. The question, however, is whether there is enough political will to do so (Ponte, 2021: 35–36, 86, 132).

The UAF include the ILTDU, which is part of the Territorial Defence of Ukraine. On 27 February 2022, the President of Ukraine urged foreigners to join the ILTDU.

For the judiciary, the key statement in the Ukrainian President’s appeal is this - According to the Regulation on Military Service in the Armed Forces of Ukraine by citizens of their countries and stateless persons approved by the Decree of the President of Ukraine # 248 of June 10, 2016, foreigners have the right to join the Armed Forces of Ukraine for military service under a Contract of a voluntary basis to be included in the Territorial Defense Forces of the Armed Forces of Ukraine.

From the perspective of criminal law, the crucial information is whether the military unit is embedded in the national institutionalised armed force of Ukraine.

²⁰ *The Russian Federation decided to withdraw the declaration of the ratification of Additional Protocol I, Article 90, Paragraph 2, recognising the competence of the International Fact-Finding Commission.*

In the ECHR case *Kononov v. Latvia*, the court stated the essence of the Lieber Code from 1863 in Items 63 and 64 concerning military necessity and destruction, including the execution of people as a last resort and, in relation to this article, in Item 67 concerning the differentiation between combatants and civilians. The ECHR referred to an act adopted in 1863, and since then, the basic rules of warfare, *jus in bello*, have not dramatically changed (Gillespie, 2013). Yet, what has changed is communication, and states' acceptance of responsibility. This fact was stressed by the ICTY many times, namely that a state is factually responsible for what its armed forces do. While the ICTY did not rule on state responsibility, it was the state that legally and legitimately appointed military commanders to command duties in order for them to do what they did. Further, the state could have removed such persons from command duties if it had wanted to, instead of only seemingly trying to prevent irregularities.²¹

Due to the position of the ILTDU within the UAF, this fact should be considered in any case entering a pre-trial procedure in the Russian Federation, therefore treating any captured aliens or stateless persons who are officially members of the ILTDU as prisoners of war. The Russian Federation should not initiate pre-trial procedures based solely on the fact that such persons are members of the unit in question. The consequences of pre-trial proceedings are reflected in the 'power' of the state since under the pretext of pre-trial proceedings they can exercise all powers of investigative bodies for the purpose of detecting criminal offences. The purposes of detecting criminal acts are not only the purposes that Western society imagines. In the case of Russia, the matter is especially urgent, as described by Parrot (2015); at the same time, the Council of Europe and the ECHR have already invested a great deal of effort and resources in improving the Russian pre-trial procedure situation. As already mentioned, the Russian Federation is not currently a member of the Council of Europe, which means the international community's task to create conditions in which the Russian Federation will also be able to respect the provisions of international law is all the greater. If the Russian Federation stops imposing death sentences through its proxy courts, it will be a step in the right direction.

The purpose of the immediate differentiation and determination of the status of combatant – the European Convention on Human Rights

Article 7 of the ECHR stipulates that there is "no punishment without law". The ECHR's judgments are mainly linked to certain rights and

²¹ ICTY, 30 January 2005, *Prosecutor v. Popović, Beara, Nikolić, Milić, Pandurević, IT-05-88-a, Para. 1929 and 1931*.

obligations of plaintiffs and defendants, and some directly decide on life and death.²²

If a combatant who is a member of the official, regular national armed forces actively participates in these armed forces and does not meet the criteria to be designated a civilian, non-combatant, spy or mercenary, they must immediately be granted the status of a combatant.

The purpose of Article 7 of the ECHR in times of war is not merely *nulla poena sine lege*; it decides on life and death. Wars fought on European soil include two world wars, wars in the territory of Yugoslavia in the 1990s, and now the war in Ukraine. It has become a tradition for belligerents to deny combatants of the opposing party the right to be awarded the status of combatants under international law.

Even in the 21st century, the ECHR is still ruling such issues which took place approximately seventy years ago – ECHR noted that the USSR did not regard partisans as having the status of combatants or prisoners of war and did not accord to them the international guarantees related to such status ... World War II saw the emergence of partisan movements which had all the characteristics of an armed force. Both the German and the Russian side in World War II refused to grant the status of combatants and armed forces to the partisan armies, characterizing most of their members as “bandits”, prosecuting them as criminal offenders, and not treating them as prisoners of war. Author’s remark: “The current rhetoric by the Russian Federation contains the same terms with regard to the war in Ukraine as stated in Item 18 of the judgment: Bandits and the nationalist underground should be eradicated.”²³

The punishment for participating in a “bandit” group was usually a quick court-martial and the summary execution of capital punishment. The summary carrying out of capital punishment represents the biggest difference in the implementation of Article 7 of the ECHR in peacetime and in war.

Article 7 of the ECHR leaves no place for ambiguity in its “decisions should not be made retroactively” provision.

The judgments of international courts and the ECHR judgments referred to in this article prove that it is only a matter of time before a war crime receives an epilogue in court. This collective memory cannot be erased or even forgotten, meaning that although a committed war crime or some other crime might not get an epilogue in court, it will never sink into collective social oblivion.²⁴

²² ECHR, 23 August 2016, *Case of F.J. K. and others v. Sweden*, Application No. 59166/12.

²³ ECHR, 20 October 2015, *Case of Vasiliauskas v. Lithuania*, Application No. 35343/05, Para. 26, 63, 134.

²⁴ ECHR, 19 September 2008, *Case of Korbely v. Hungary*, Application No. 9174/02, Section: 1 – A and B.

The final sentence for crimes during the Second World War was handed down by a German court at the end of December 2022,²⁵ which only confirms that war crime verdicts are not the same as other criminal cases, and that sentencing people who should have the status of prisoners of war to death is a very serious matter.

Conclusions and a proposal for international action with respect to events in Ukraine since 24 February 2022

To conclude, a summary is given of the stated facts and an effective and efficient solution not only to dilemmas, but also to temptations, which are documented as having occurred in both world wars and in all wars on European soil up to the current war in Ukraine is proposed: whether to respect and follow international humanitarian law and act in accordance with this law, or to be calculating and rely on Europe's historical political indecisiveness and weakness (Rapport, 2016).

First, the nature of the armed conflict must be established, primarily to determine whether it constitutes a war and whether it is an armed conflict of an international or non-international nature. For a state of war, it is sufficient for one party to experience events arising from the TTP employed by another party as an act of war or as events of war. A declaration of war is a political act, not a military or even a legal decision.

Second, it will need to be established whether the ILTDU is part of the armed forces of Ukraine or not. We cannot ignore the fact that in recent times we have had many negative experiences with international private militaries or security services performing various tasks and demonstrably committing major criminal offences.

The status of an armed force creates the basis of the third issue, which is the status of members of the ILTDU; this will have to be established. A partial answer to this question will already be provided by determining whether the legion is part of the armed forces of Ukraine or not. Determining the intention and motive of human action is extremely diverse, but we must agree, in addition to international acts (the Montreux Document of 2008 and the UN mercenary convention of 2001), on when an "apparent combatant" becomes a "mercenary", and on the fact that the simplest way to determine intention and motive is to 'follow the money', i.e., to determine the payments, benefits and other advantages received by an alien or a stateless person as a member of the ILTDU. These payments, benefits and other advantages should

²⁵ "German court convicts 97-year-old ex-secretary at Nazi camp", *Toronto Star* 20 Dec. 2022. Accessible at <https://www.thestar.com/news/world/europe/2022/12/20/german-court-to-deliver-verdict-on-ex-secretary-at-nazi-camp.html>, 20. 3. 2023.

not deviate from the payments, benefits and other advantages received and enjoyed by any Ukrainian national who is a member of the ILTDU. However, the intention of the members of the Ukrainian legion will have to be established alongside answering the oft-ignored question of whether an alien or a non-stateless person is forbidden, by the law of their own state, from actively participating abroad as a member of armed forces which are not the armed forces of their own state. Democratic states should adopt a position, also based also on this article, regarding whether the participation of aliens in the ILTDU violates international law and, more importantly, whether this is in line with the national legislation of the democratic states.

In the fourth and final point, the direction of the operationalisation of procedures aimed at proving the above will need to be indicated. This is mostly a political decision, and less a technical one. Politicians will need to decide whether to establish an *ad hoc* special tribunal such as the ICTY, or whether to refer the issues to the ICC – CPI or the International Court of Justice (ICJ); it is also possible that individual members of the European Union will devise solutions within their own judicial procedures, as recently occurred in Germany²⁶, to hold court proceedings themselves based on the universal principle of the prosecutability of criminal offences.

As mentioned, there has not much academic writing on the topics covered by this article and the article has thus mostly featured the judgments of international courts. The article may therefore be seen as an academic contribution and opening up a completely new academic field that moves from the general (international law, on whose basis constitutions and laws are adopted) to the concrete (judgments of courts) in the most difficult human situation: war. The death sentences pronounced at the beginning of this article are the most concrete act supposed to have a basis in a general theory. Operationalisation of this theory would mean the actual carrying out of the death penalty.

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²⁶ In 2022, a court in Koblenz, Germany, sentenced a 58-year-old Syrian national, Anwar R., to life imprisonment for crimes in Syria. The German court tried on the basis of universal jurisdiction: "Weltrechtsprinzip erlaubt die weltweite Verfolgung von Straftaten". Accessible at <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/lebenslange-haft-ua-wegen-verbrechens-gegen-die-menschlichkeit-und-wegen-mordes-urteil-gegen-ein-1/>, 19. 3. 2023.

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