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EU Foreign Fighters in the 2022 Russo-Ukrainian War –
A Glance into the Legal Protection Offered by International
Humanitarian and Human Rights Law

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Preface

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Table of content

List of Abbreviations

Preface

- A. Introduction 1
- B. European Foreign Fighters in the Russo-Ukrainian War 4
 - I. Definition 4
 - II. European Foreign Fighters in the Russo-Ukrainian War Post-2022 8
 - III. Human Rights Violations Against European Foreign fighters in the Russo-Ukrainian War 10
 - IV. Official Position of States regarding EU Foreign Fighters, State Practice and *Opinio Juris* 14
- C. IHL and IHRL: A Dual Legal Protection Framework for EU Foreign Fighters 17
 - I. The Relevance of These Bodies of Laws in the case of EU Foreign Fighters..... 17
 - II. Applicable Conventions and Case Law 19
- D. Legal Protection Offered by International Humanitarian Law (IHL) 20
 - I. Scope of Application..... 20
 - II. Case Law 26
 - III. Human Rights Protection Offered by IHL 28
 - 1. The Right to Humane Treatment, Prohibition of Torture and Cruel Treatment 29
 - 2. The Right to Fair Trial and Legal Representation..... 31
 - 3. The Right to Health and Medical Treatment..... 34
 - 4. The Right to Repatriation 36
- E. Legal Protection Offered by International Human Rights Law (IHRL)..... 37

I. Scope of Application.....	37
II. Case Law	38
III. Human Rights Protection by IHRL.....	40
F. Conclusion	44
Bibliography.....	I

List of Abbreviations

EU	European Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
ECHR	European Court of Human Rights
GC	Geneva Conventions
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
PoW	Prisoner of War/Prisoners of war
UDHR	Universal Declaration of Human Rights
UN	United Nations

Preface

The idea behind this thesis project was conceived three months after the start of the war on Ukraine in February 2022 which coincided with my time in Saarbrücken, Germany where I experienced and sensed the arrival of thousands of Ukrainian refugees at train stations, bus stops, city centers as well as sensing their presence very well in streets. I also experienced the German people's warm welcome to them.

Around the same time, I started to hear from my surroundings and news that many *Europeans*, young and old, leaving everything and joining the fight in order to deter Russian aggression and protect Ukraine. At some point, I started receiving targeted ads on my personal phone asking me whether I'd like to join the fight myself. This was where I started to wonder whether *these fighters from Europe* have any legal human rights safeguards by going there.

A major part of this thesis was written throughout my metro rides in Montreal, Canada, where I moved to later on after completing my courses in Germany. Like EU foreign fighters, not having the nationality of the warring parties, I too not being Ukrainian, Russian nor European wanted to shed light on this subject out of academic curiosity; coupled with personal experiences that coincided at the same time all together.

This work represents the last step before officially receiving my LL.M which I worked very hard for and made many sacrifices to get. When the writing got tough, I fortunately had my family, friends and partner who gave me the support to conceive this fruit of labor and hopefully my degree thus I owe this work to them.

“Anyone who wants to join the defense of Ukraine, Europe and the world can come and fight side by side with the Ukrainians against the Russian war criminals.”¹ – President Volodymyr Zelenskyy on February 27, 2022.

A. Introduction

Ensuring the protection of foreign fighters in times of war and conflicts is a subject that hardly occurs to one’s mind. This lax perception often existing amongst the general public who label foreign fighters as *worthy* of the human rights violations and abuses they are subjected to could be partly justified by these fighters’ conscious choice of leaving the confines of their homes and participating in a foreign war and in a far-off country unrelated to theirs. They are usually dehumanized and considered to ‘be less of a victim’ in times of war. More interestingly, even academics have not shed enough light on the contours of the legal human rights protection of foreign fighters partaking in *atypical wars* and have simply dealt with the subject matter from a *terrorist/freedom fighter* lens.² In turn, this has dismissed the legal safeguards present in the body of existing laws i.e., International Humanitarian Law (IHL) and International Human Rights Law (IHRL).

President Zelenskyy's urgent appeal on February 27, 2022, in response to Russia's full-scale invasion of Ukraine, has led *fighters* from EU member states to join Ukraine in its defense against the Russian aggression.³ In addition, there seems to be a highly-noticeable European informal support in the form of foreign fighters – out of the overall 16,000 volunteers –⁴ backing Ukraine against Russia. At the time of this writing, one could assume the number of foreign

¹ McKernan, ‘Ukraine Appeals for Foreign Volunteers to Join Fight Against Russia’, 27 February 2022, The Guardian UK, <https://www.theguardian.com/world/2022/feb/27/ukraine-appeals-for-foreign-volunteers-to-join-fight-against-russia> (last accessed 11/8/2023).

² Jayaraman, *CJIL* 17/2016, p.178; see also Benmelech et al., *TPV* 32/2020, p.1461-1477.

³ *The Local.de*, ‘How Germans are Volunteering to Fight Against Russia in Ukraine’, 11 March 2022, <https://www.thelocal.de/20220311/how-germans-are-volunteering-to-fight-against-russia-in-ukraine> (last accessed 11/08/2023); see also Kakassis, ‘Poland's History with Russia Has Inspired Some Poles to Join the Fight in Ukraine’, NPR, 9 March 2022, <https://www.npr.org/2022/03/09/1085544653/polands-history-with-russia-has-inspired-some-poles-to-join-the-fight-in-ukraine> (last accessed 11/08/2023); see also Rettman, ‘First Volunteer Fighters Leave Belgium to Join Ukrainian Brigades’, Eu observer, 3 March 2022, <https://eu-observer.com/world/154476> (last accessed 11/08/2023).

⁴ Olearchyk et al., ‘Zelensky’s Call for Volunteers to Defend Ukraine Heeded by Thousands from Abroad’, The Financial Times, 4 March 2022, <https://www.ft.com/content/2a877400-50df-4878-8815-605405e92c68> (last accessed 15/08/2023).

fighters in the current war even increasing. On the international level, the problematic of whether these EU fighters engaging in combat on foreign lands and predominantly on the side of Ukraine are worth *legal protection* particularly *during combat* and/or *after being captured* arises. Against this backdrop, there are documented accounts and footage of numerous death penalty verdicts being rendered primarily vis-à-vis these fighters hailing from European member states by self-proclaimed pro-Russian courts established in a more recent timeframe on Ukrainian soil in July 2022 and August 2022; out of which two were from Sweden and Croatia.⁵ Prior to these incidents, in May 2022, Russian Defense Ministry spokesman Igor Konashenkov had announced that it will regard all *foreign fighters* allegedly *sent by the West* as *mercenaries* and not as *combatants* worthy of *Prisoner of War* status under international law;⁶ thereby placing them in a precarious situation. Although this thesis project was conceived a few months after the onset of the Ukrainian war in 2022 and has come to fruition in 2023, academia appears to have disregarded this crucial subject. Thus, a legal gap has been created in terms of the *human rights protection* many EU foreign fighters merit today during this conflict.

Flores points out that the foreign fighter's phenomenon has experienced '*an evolution over the past years*'.⁷ What this paper will show is that the foreign fighter phenomenon is indeed not stagnant and that in fact academia has not caught up with it particularly *the foreign fighter phenomenon from EU member states*. The central argument of this academic work posits that European Union foreign fighters should be afforded protection, owing to Ukraine's initiatives to integrate them into its armed forces. This integration bestows upon them certain rights that might otherwise be restricted if they were to engage in unconventional actions. Nevertheless, even under such circumstances, international conventions continue to guarantee their protection from human rights violations vis-à-vis Russia.

⁵ Reuters, *Donetsk Court Charges Britons, Swede and Croat as Mercenaries, 3 Face Death Penalty*, 15 August 2023, <https://www.reuters.com/world/europe/donetsk-separatist-court-charges-5-foreigners-mercenaries-says-3-face-death-2022-08-15/> (last accessed 11 June 2023).

⁶ TASS, *Foreign Mercenaries in Ukraine Will Not Have POW Status — Russian military*, 3 March 2022, <https://tass.com/politics/1416131> (last accessed 11 June 2023).

⁷ Flores, Marcello, *Foreign Fighters Involvement in National and International Wars: A Historical Survey in: Foreign Fighters under International Law and Beyond*, de Guttery Andrea/Capone Francesca/Palussen Christophe (eds.), The Netherlands, 2016, p. 27.

The thesis reflects how *the law* – whether *International Humanitarian Law (IHL)* or *International Human Rights Law (IHRL)* – might be used in its current and perhaps further evolved form, to protect EU foreign fighters who find themselves victims of an international armed conflict (IAC). Established over a decade ago by the United Nations Office of Human Rights Commission conclusions of a complementary relationship between IHL and IHRL i.e., ‘of a shared goal of preserving human dignity and the humanity of all parties in times of war, this academic work cuts from the same cloth by utilizing the two bodies of laws to decipher *the existing legal protection for these fighters*. Although having different scopes of application, the thesis makes use of the existing overlap within the two body of laws and provides case law in order to draw parallels to what is happening to EU foreign fighters in the current Russo-Ukrainian war ignited in 2022.

The thesis is divided into five parts. Section II after the introduction provides an overview of the European foreign fighters particularly within Ukraine post-February 2022, establishes a clear working definition of this phenomenon, reflects the current human rights violations being inflicted on these fighters during and after capture and cites caselaw that is helpful for their classification. It also addresses the absence of a clear categorization of these fighters in international law and national legislation which has only aggravated the problematic; solely substantiating the essentiality of this thesis. It also explores the concept of *opinio juris* to understand the underlying legal perspectives shaping state actions vis-à-vis these fighters in this context.

Section III elaborates on the reliance of this academic work on International Humanitarian Law (the law of armed conflicts) and International Human Rights Law and provides justification of using both as *tools* in the context of the current Russian-Ukrainian war and highlights their relevance and usefulness in terms of guaranteeing the human rights of EU foreign fighters.

Section VI presents the legal protections offered by International Humanitarian Law from human rights abuses and violations particularly during combat and after capture. This is done through determining and justifying the legal status of these EU fighters through conducting a conflict classification and delving into the legal protections of the Geneva Conventions particularly the Third Convention relative to the Treatment of Prisoners of War as well as relevant

caselaw. This section also questions the legality of Russia's treatment of these fighters as *mercenaries* instead of granting them *Prisoner of War* status under IHL.

Section V illustrates the human rights protection these fighters merit through looking at international human rights law. It showcases existing international human rights law whether at the main UN human rights instruments or the European Convention of Human Rights via zooming into certain articles and case law to which Ukraine and Russia are part of which makes them liable to guaranteeing the human rights of these fighters.

The last section presents the main findings of the academic work and offers a relevant conclusion by revisiting 'the catalogue of human rights' presented earlier in the sections and attributing European foreign fighters' human rights that they ought to enjoy during and after captivity by Russia; irrespective of their allegiance to either Ukraine or Russia. The academic work adopts an objective lens as much as possible at a time where the world is divided into two camps by viewing these fighters as *humans* and aims to answer the following question: *To what extent do international humanitarian law and human rights law ensure the protection of EU foreign fighters in the ongoing Russo-Ukrainian War?*

B. European Foreign Fighters in the Russo-Ukrainian War

I. Definition

To proceed in pinpointing a precise definition of European foreign fighters, the method that will be adopted is defining *foreign fighters* then connecting it to the *European* element. Firstly, there is no internationally agreed legal definition of *foreign fighters*, nor a specific regime governing them; as stipulated by a 2016 United Nations Working Group.⁸ This has led to an outpour of interpretations and definitions of *foreign fighters* across academia and finding one which reflects *European foreign fighters* involved in the current Russo-Ukrainian war has not been without challenge.

⁸ Office of UN High Commissioner for Human Rights (OHCHR), 'UN, Working Group on the Use of Mercenaries: Preliminary Findings of Mission to Ukraine', 18 March 2016, <https://www.ohchr.org/en/statements/2016/03/preliminary-findings-un-working-group-use-mercenaries-his-mission-ukraine?LangID=E&NewsID=18492> (last accessed 10/09/2023).

Nevertheless, the salient perception of *European foreign fighters* has been shaped vis-à-vis popular conflicts in more recent years such as that of Iraq, Libya and Syria where *jihadi* foreign fighters (with terrorist intentions) residing in Western states travel to take up arms in conflicts and wars in Muslim-majority countries.⁹ By observing the literature, a trend can be drawn on the existence of in fact two categories of *European* foreign fighters: *jihadi* and *non-jihadi* ones.¹⁰ The latter category has been under-studied, as per Corradi,¹¹ and this research goes a step further in exploring the phenomenon of foreign fighters from the 27 European Union member states *not* necessarily having a Muslim background and who are primarily fighting on the side of Ukraine in the Russo-Ukrainian war since 2022. Foreign fighters hailing from the United States, Canada, United Kingdom (no longer officially a member state of the EU) and even the non-EU Balkan countries (such as Serbia, Belarus, Montenegro), although quite present in the war, are not brought up as examples as EU member state fighters are the real focus of this study.

Historically, European foreign fighters with primarily non-Muslim backgrounds have participated in numerous wars over the years such as the international brigades during the Spanish civil war, the Finnish Winter war of 1939,¹² the Yugoslav Wars¹³ and most recently in Ukraine. Since the Ukrainian President issued a plea for assistance on February 27, 2022, there have been reports of approximately 20,000 individuals from 52 different countries who have volunteered to participate in the conflict; with many EU citizens aligning themselves with Ukrainian forces.¹⁴ The surge in foreign fighters from predominantly European Union member states and Western nations, stems from Russia's full-scale aggression of Ukraine that specifically targeted Kyiv (the capital) and Ukraine's two eastern provinces known as Donetsk and

⁹ Bakker *et al.*, 'xxx' ICCTRP/2013,1,2. See also Hegghammer IS 35/2013, p.53, 53.

¹⁰ Bakker *et al.*, *ibid.*

¹¹ Corradi, IPSR 53/2023, p. 201, 202.

¹² Grasmeyer, 'Lessons from Finland for Ukraine and Its Foreign Legion', War on the Rocks, 21 March 2022, <https://warontherocks.com/2022/03/lessons-from-finland-for-ukraine-and-its-foreign-legion/> (last accessed 17/09/2023).

¹³ Koch, TPV 33/2019, p. 17.

¹⁴ Van Dongen *et al.*, 'Foreign Volunteers in Ukraine: Security Considerations for Europe', International Centre for Counter-Terrorism, 4 May 2022, <https://www.icct.nl/publication/foreign-volunteers-in-ukraine-security-considerations-for-europe> (last accessed on 09/09/2023).

Luhansk; collectively recognized as the *Donbas* region.¹⁵ Vladimir Putin's statement on September 30, 2022, outlined Russia's decision to incorporate four Ukrainian oblasts into its territory. These regions, added two more regions to those cited-above being Zaporizhzhia, and Kherson, collectively constituting approximately 15% of Ukraine's total land area.¹⁶ According to UN agencies, Ukraine has witnessed a total of 22,734 civilian casualties, comprising 8,490 deaths and 14,244 individuals who have sustained injuries.¹⁷ In a parallel development aimed at bolstering the Russian position, a wave of foreign combatants has also enlisted with Russia. These fighters seem to hail from countries such as India and Syria, and a notable presence includes private military personnel affiliated with the Wagner Group; many of whom do not predominantly come from European Union member states.¹⁸

Exact numbers of foreign fighters from European Union member states in Ukraine are hard to get by at the time of this writing especially as the conflict is unravelling, yet ample evidence substantiates that these European foreign fighters have indeed been mobilized, are or have travelled after the 27th of February 2022 primarily on Ukrainian territories.¹⁹ Recent polls conducted in the aftermath of more than a year of war reveal that this conflict has genuinely polarized EU and Western nations, with one side supporting Ukraine and the other leaning towards Russia.²⁰ A Christian Science Monitor article on foreign fighter mobilization in Ukraine states that a constellation of Americans, Canadians, and Europeans have found their way to Ukraine,

¹⁵ *Mpoke Bigg*, 'How Russia's War in Ukraine Has Unfolded, Month by Month', The New York Times, 24 February 2023, <https://www.nytimes.com/article/ukraine-russia-war-timeline.html> (last accessed 11/09/2023)

¹⁶ *AlJazeera*, 'Putin Announces Russian Annexation of Four Ukrainian Regions', 30 September 2022, <https://www.aljazeera.com/news/2022/9/30/putin-announces-russian-annexation-of-four-ukrainian-regions#:~:text=At%20the%20ceremony%20on%20Friday,George's%20Hall%20of%20the%20Kremlin> (last accessed 10/09/2023).

¹⁷ *United Nations Human Rights Office of the High Commissioner*, 'Ukraine: Civilian Casualty Update 10 April 2023', 10 April 2023, <https://www.ohchr.org/en/news/2023/04/ukraine-civilian-casualty-update-10-april-2023> (last accessed 15/09/2023).

¹⁸ *Falk*, 'Ukraine War: Why Is Russia Encouraging Foreign Fighters to Join?', AlJazeera, 22 March 2022, <https://www.aljazeera.com/news/2022/3/23/russias-foreign-fighters> (last accessed 19/09/2023)

¹⁹ *John et al.*, 'It Is Not Just Ukraine We Are Protecting', CNN, <https://www.cnn.com/2022/03/04/europe/ukraine-foreign-fighters-russia-intl-cmd/index.html> (last accessed 10/09/2023); See also *Ruehl*, 'The Foreign Fighters on Front Lines of Russia-Ukraine War', The Asia Times, <https://asiatimes.com/2023/02/the-foreign-fighters-on-front-lines-of-russia-ukraine-war/> (last accessed 10/10/2023)

²⁰ *Garton Ash et al.*, 'United West, Divided From The Rest: Global Public Opinion One Year into Russia's War on Ukraine', European Council on Foreign Relations, 22 February 2023, <https://ecfr.eu/publication/united-west-divided-from-the-rest-global-public-opinion-one-year-into-russias-war-on-ukraine/> (last accessed 18/09/2023).

ready to fight.²¹ Furthermore, this illustrates the positioning of foreign fighter groups within the war. Therefore, by merely assuming that half or 40 % of these foreign fighters (10,000 or 8000 respectively) come from European Union member states i.e., the region most touched by the war since World War II,²² then these figures present to be as highly noteworthy when it comes to foreign EU citizens partaking in the war.

David Malet defines ‘foreign fighters’ as ‘non-citizens of conflict states who join insurgencies during civil conflicts’.²³ But this characterization of foreign fighters does not entirely suffice for this study as the Russian-Ukrainian war post-2022 has quickly accelerated in becoming an *international armed conflict* i.e. a war between two states and is surely not a civil war at this stage.²⁴ Thomas Hegghammer’s definition, also seeming very popular across academia, denotes a ‘foreign fighter’ as ‘an agent who (1) has joined, and operates within the confines of an insurgency, (2) lacks citizenship of the conflict state or kinship links to its warring factions, (3) lacks affiliation to an official military organization, and (4) is unpaid’.²⁵ Yet, the third element in his description constitutes to be problematic as well since in the case of this research study, the majority of Ukrainians have been already or are being incorporated in Ukraine’s national army as will be explained more thoroughly in the sections below. Both Malet and Hegghammer disregard the possibility of foreign fighters joining a state’s official armed forces or the fact of fighting for a State. Thus, both of these popular *definitions of foreign fighters* do not seem applicable to this study which is not surprising as both were initially conceptualized in the early 2010’s where foreign fighters were primarily perceived from a terrorist lens.²⁶ Kacper Rękawek, a prominent Polish academic specialized in foreign fighting research and with numerous publications on Ukraine, provides a more relevant definition to our study as he denotes

²¹ Llana et al., ‘In Ukraine’s Call to Arms, Foreign Fighters Hear Cry for Justice’, The Christian Science Monitor, 22 March 2022, <https://www.csmonitor.com/World/Europe/2022/0322/In-Ukraine-s-call-to-arms-foreign-fighters-hear-cry-for-justice> (last accessed 10/9/2023).

²² Nagourney et al., ‘A Year of War in Ukraine: The Roots of the Crisis’, The New York Times, 27 February 2023, <https://www.nytimes.com/article/russia-ukraine-nato-europe.html> (last accessed on 09/09/2023).

²³ Malet, ‘The More Irregular the Service: Transnational Identity Communities and the Foreign Fighter’, Conference Papers - American Political Science Association, 2007, p. 2.

²⁴ *International Committee of the Red Cross*, Russia-Ukraine International Armed Conflict: The Red Cross and Red Crescent response One Year On’, 23 February 2023, <https://www.icrc.org/en/document/russia-ukraine-international-armed-conflict-red-cross-red-crescent-response-one-year> (last accessed on 9/9/2023)

²⁵ Hegghammer, *op. cit.*, 2010, p.58.

²⁶ Jayaraman, *op. cit.*, see also Benmelech et al., *op.cit.*

‘foreign fighters’ as: ‘non-indigenous, non-territorialized combatants who, motivated by religion, kinship, and/or ideology rather than pecuniary (monetary) reward, enter a conflict to participate in hostilities’.²⁷

It is important to note that some scholars and experts in the field have favored the term ‘foreign volunteers’ as opposed to ‘foreign fighters’ in the Russo-Ukrainian conflict.²⁸ Nevertheless, for the sake of clarity and simplicity, this thesis adopts a more uniform terminology and does not delve into this nuanced distinction. *Volunteers*, in the strict sense of the term, hailing from European member states *that are aiding Ukrainian forces from behind the scenes such as humanitarian workers, logisticians, intelligence gatherers and unconventional war reporters on social media who are not directly partaking in combat are not a subject of this study yet are being quite heavily targeted by Russian forces as well.*²⁹

II. European Foreign Fighters in the Russo-Ukrainian War Post-2022

The Ukrainian-Russian war which was reignited in late February 2022 by Russia (years after the cessation of hostilities in 2014) has attracted, in the words of foreign fighter expert Rękawek, ‘marginalized Western Europeans, effectively redeemed outlaws, who saw foreign fighting as a chance for a fresh start’.³⁰ European foreign fighters have also been labeled to as ‘idealists who abandoned their jobs for the battlefields of Ukraine, looking for a cause or simply to fight’³¹ as well as ‘*Rambo wannabes*’.³² Yet regardless of their motivations which this study

²⁷ Rękawek, *Brown Red Cocktail*, p. 6.

²⁸ Van Dongen et al., ‘Foreign Volunteers in Ukraine: Security Considerations for Europe’, International Centre for Counter-Terrorism, 4 May 2022, <https://www.icct.nl/publication/foreign-volunteers-in-ukraine-security-considerations-for-europe> (last accessed on 09/09/2023); Rękawek, ‘Western Extremists and the Russian Invasion of Ukraine in 2022 All Talk, But Not a Lot of Walk’, Counter Extremism Project, 2022, <https://www.counterextremism.com/content/western-extremists-and-russian-invasion-ukraine-2022>, p.11 (last accessed on 10/09/2023).

²⁹ *LeMonde*, ‘Russian Strikes on Ukraine Kill 2 Foreign Aid Workers, Target Kyiv in New Wave of Overnight Drone Attacks’, 10 September 2023, https://www.lemonde.fr/en/international/article/2023/09/10/russian-strikes-on-ukraine-kill-2-foreign-aid-workers-target-kyiv-in-new-wave-of-overnight-drone-attacks_6131784_4.html (last accessed 18 September 2023).

³⁰ Rękawek, *Brown Red*, p. 76.

³¹ Blann et al., ‘Many of Ukraine’s Foreign Fighters Have No Guns or Training, But Are Ready to Help’, The Times of Israel, 15 March 2022, <https://www.timesofisrael.com/many-of-ukraines-foreign-fighters-have-no-guns-or-training-but-are-ready-to-help/> (last accessed 10/09/2022).

³² Stein, ‘Democracy Defenders and Rambo Wannabes: Ukraine’s Volunteer Foreign Fighters’, The Washington Post, 18 January 2023, <https://www.washingtonpost.com/world/2023/01/18/foreign-fighters-war-ukraine-volunteers/> (last accessed 10/09/2023).

does not aim to explore, an assessment of secondary sources indicates 60-70 French citizens,³³ 70-80 Croats,³⁴ 400 Swedes,³⁵ 1000 Germans,³⁶ 5000 Polish fighters,³⁷ and EU citizens of various nationalities having journeyed to Ukraine to fight against Russian forces.³⁸ There is also a reported instance of a Latvian Member of Parliament who, in reality, serves as the chairperson of the Legal Affairs Committee, becoming part of the influx of European foreign fighters.³⁹

Contrary to usual foreign fighters who tend to act as autonomous and rebellious individuals in various conflicts, European foreign fighters who travelled to Ukraine post-2022 have been channeled to join the *International Legion of Ukraine*;⁴⁰ a military platform formed through a presidential decree intended to recruit foreign fighters via a Ukrainian tourism website. This step in turn has established a temporary visa-free regime for European Union and other foreign fighters on March 1st 2022 wanting to stay in Ukraine for a period longer than 6 months.⁴¹ Over time, the Ukrainian authorities have developed a more sophisticated online platform known solely as the ‘International Legion for the Defense of Ukraine’,⁴² which outlines the pre-requisites more meticulously for individuals interested in joining the conflict in Ukraine (age, criminal history, physical fitness and other criteria). Both online platforms share a common goal of

³³ Grynyszpan, ‘They Need Us’: The French Volunteers Fighting in Ukraine’s International Legion’, *Le Monde*, 26 April 2023, https://www.lemonde.fr/en/international/article/2023/04/26/they-need-us-the-french-volunteers-fighting-in-ukraine-s-international-legion_6024477_4.html (last accessed 10/09/2023)

³⁴ Petrovic, ‘Serbian, Croatian Volunteers Fight on Ukraine’s Front Line’, *Deutsche Welle*, 31 January 2023, <https://www.dw.com/en/serbian-croatian-volunteers-fight-on-ukraines-front-line/a-64563304> (last accessed 10/09/2023).

³⁵ MILITARNYI, ‘Hundreds of Swedes Volunteers Go to Combat for Ukraine’, 2 March 2022, <https://mil.in.ua/en/news/hundreds-of-swedes-volunteers-go-to-combat-for-ukraine/> (last accessed 10/09/2023)

³⁶ Şimşek, ‘Nearly 1,000 Foreign Fighters from Germany traveled to Ukraine: Report’, *Anadolu Agency*, 09 March 2022, <https://www.aa.com.tr/en/russia-ukraine-war/nearly-1-000-foreign-fighters-from-germany-traveled-to-ukraine-report/2528986> (last accessed 09/09/2023).

³⁷ TASS, ‘Authorities Reveal Number of Polish Mercenaries Fighting for Ukraine on Zaporozhye Front’, 19 October 2022, <https://tass.com/politics/1524597> (last accessed 09/09/2023).

³⁸ Mudge, ‘Foreign nationals flock to join war in Ukraine’, 3 November 2022, *Deutsche Welle*, <https://www.dw.com/en/joining-the-war-foreign-nationals-flock-to-ukraine/a-61084878> (2/12/2023).

³⁹ *Euronews*, ‘Ukraine War: Latvian MP Juris Jurašs “Joins Legion of Foreign Fighters”’, 9 March 2022, <https://www.euronews.com/2022/03/09/ukraine-war-latvian-mp-juris-jurass-joins-legion-of-foreign-fighters> (last accessed 10/09/2023).

⁴⁰ Malet, ‘The Risky Status of Ukraine’s Foreign Fighters’, 15 March 2022, *Foreign Policy*, <https://foreignpolicy.com/2022/03/15/ukraine-war-foreign-fighters-legion-volunteers-legal-status/> (last accessed 10/09/2023).

⁴¹ Dasgupta, ‘Ukraine Says Foreigners Who Want to Help Them Fight Russia Will Not Need a Visa’, 1 March 2022, *The Independent UK*, <https://www.independent.co.uk/news/world/europe/ukraine-russia-visa-requirements-foreigners-b2025452.html> (last accessed 11/09/2023).

⁴² *International Legion for the Defense of Ukraine*, ‘Apply for the Legion’, <https://ildu.com.ua/> (last accessed 10/09/2023).

streamlining and facilitating the recruitment of foreign fighters to support Ukraine and thousands of pro-Ukrainian Western fighters have rushed to join the battle; representing a foreign fighter mobilization by far larger than that of 2014.⁴³

Various legions of European foreign fighters did exist prior to the on-going war which materialized post-2014 on the Ukrainian side; with the most popular being the French and the Swedish Legions and have resumed operations ever since the current war erupted.⁴⁴ An interesting observation is the amount of *volunteer battalions* spearheaded by citizens of the European Union existing in the current war which constitute a majority when it comes to other nationalities and regional groups fighting on the side of Ukraine.⁴⁵ Since the war began, these legions have revived their military activities, online social media presence and networks. For example, *Facebook* groups have been established to recruit French fighters,⁴⁶ while *Telegram* and *Signal* chat groups have been relied upon to coordinate foreign fighting efforts.⁴⁷ Moreover these fighters have gone under the banner of the *International Legion for the Defense of Ukraine*; being deployed alongside Ukrainian troops.

III. Human Rights Violations Against European Foreign fighters in the Russo-Ukrainian War

As the Russian-Ukrainian war enters its second year, there are credible reports by UN agencies, human rights groups and reliable journalists on the existence of serious human rights violations potentially being committed against European foreign fighters by Russian forces as the

⁴³ Rękawek, 'Ukraine's Foreign Legion: 12 Important Points', University of Oslo – Centre for Research on Extremism, 18 March 2022, <https://www.sv.uio.no/c-rex/english/news-and-events/right-now/2022/ukraine%E2%80%99s-foreign-legion-.html> (last accessed 10/09/2023).

⁴⁴ See recent work of Kacper Rękawek *Foreign Fighters in Ukraine: The Brown Red Cocktail (2023)*, these two legions have separate chapters in the book's table of content; thereby showing how popular and significant they are to merit political analysis.

⁴⁵ Rękawek, *Brown Red*, p. 90-111.

⁴⁶ Meheut, 'French Volunteers Plan to Head to Ukraine to Join its New Foreign Legion', The New York Times, 3 March 2022, <https://www.nytimes.com/2022/03/03/world/europe/french-volunteers-ukraine.html> (last accessed 19/09/2023).

⁴⁷ Stewart, 'Untrained Foreign Fighters Urged to Steer Clear of Ukraine: "This Is Not Call of Duty"', Global-News.ca, 31 March 2022, <https://globalnews.ca/news/8721221/foreign-fighters-ukraine-canada/> (last accessed 10/09/2023).

OHCHR spokesperson puts it ‘from initial capture, to transit and then places of internment’.⁴⁸ Although there is substantial evidence of Ukrainian soldiers being also implicated in such misconduct vis-à-vis the Russian side,⁴⁹ common violations against the EU foreign fighters have been their unlawful detention, torture ill-treatment, and sexual violence; primarily affecting their Political and Civil Rights.⁵⁰

This has been in the case of the 5 European fighters (at least those documented) – 1 Croat, 1 Swede as well as 3 Britons; captured and detained in the spring of 2022 who had their trial transferred this summer to a military court in Russia.⁵¹ To illustrate, the Croatian Vjekoslav Prebeg and the Swede Matias Gustafsson were apprehended and placed in detention during the spring of 2022 within the Zaporozhye and Donetsk regions, which had been occupied by Russian military forces.⁵² Initially, they were put on trial within the self-proclaimed Donetsk Republic, where they potentially faced the death penalty. Subsequently, in September 2022, the accused individuals were exchanged, along with other Ukrainian prisoners. However, this Spring of 2023, the trial jurisdiction was shifted to a Russian military court and the proceedings were conducted in their absence.⁵³

Upon being repatriated through a prisoner exchange, the Croatian fighter stated that Russian forces *broke his nose* when he was removed from the vehicle, and subsequent to this incident, he *underwent intense interrogation*.⁵⁴ Furthermore, the Croatian fighter evidenced on behalf of his cellmate named Harding, that he *witnessed brutal instances of torture* during his captivity elsewhere under the Russians, describing *the use of cattle prods* by Russian guards and the

⁴⁸ *United Nations*, ‘UN Human Rights Ukraine Released Reports on Treatment of Prisoners of War and Overall Human Rights Situation in Ukraine’, 24 March 2023, <https://ukraine.un.org/en/224744-un-human-rights-ukraine-released-reports-treatment-prisoners-war-and-overall-human-rights> (last accessed 15/10/2023); see

⁴⁹ YouTube, ‘Russian Prisoners Forced to Sing Ukrainian Anthem | Ukraine War 2022’, 26 March 2022, <https://www.youtube.com/watch?v=q5bdDBnI5bU> (last accessed 16/10/2023); see also *Human Rights Watch*, ‘Ukraine: Torture, Disappearances in Occupied South’, 22 July 2022, <https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south> (last accessed 29/11/2023).

⁵⁰ *Mallory*, HRW 2002, p. 368.

⁵¹ *Koroleva*, ‘Rostov-on-Don, the City Where Russia Tries Ukrainian Fighters – and Foreigners’, JusticeInfo.net, 27 June 2023, <https://www.justiceinfo.net/en/118598-rostov-on-don-russia-tries-ukrainian-fighters-foreigners.html> (last accessed 19/09/2023).

⁵² *Koroleva*, *op. cit.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

conversion of *an old phone into a torture device*; this ordeal resulted in Harding's neurological damage and his witnessing *the death of a fellow cellmate*.⁵⁵ Under Russian forces' captivity, Harding was *coerced into recording a farewell message to his daughter* and was *later taped to the floor at the back of a truck during transport*.⁵⁶

Moreover, Russian forces have been unhesitant in pursuing foreign fighters, which most likely includes an undisclosed number of Europeans, within their prejudiced courts newly set up in the regions they have occupied in Ukraine. There is documented evidence that Russia has handed down death sentences to two individuals from Britain and one from Morocco as well brutally tortured two American who were captured while serving in the Ukrainian army.⁵⁷ This is occurring despite strong reservations voiced by international human rights organizations about the fairness and credibility of these tribunals.⁵⁸ In June 2022, the UN human rights office condemned Russia's handing down of the death sentence to certain foreign fighters and its spokesperson stated: 'Such trials against *prisoners of war* amount to a war crime'.⁵⁹ Similarly, in a memorandum from by the European Court of Human Rights, the court has urged Russia not to carry out these death penalties.⁶⁰ Furthermore, on March 23, 2023, the UN human rights office in Ukraine released evidence that almost half of the 229 interviewed Ukrainian Prisoners

⁵⁵ *Ibid.*

⁵⁶ Nicol, 'EXCLUSIVE: 'We Were Taped Together on Truck Floor. Would This End with The Click ofT executioner's Rifle?': Freed British Hostage Reveals Captors Tormented Him with Death Sentence Threats... Even Forcing Him to Record a Goodbye Message to His Daughter', 23 September 2022, The Daily Mail, <https://www.dailymail.co.uk/news/article-11240879/Freed-British-hostage-59-says-captors-forced-record-goodbye-message-daughter.html> (last accessed 15/10/2023).

⁵⁷ AlJazeera, 'Britons, Moroccan Sentenced to Death in Separatist-Held Ukraine', 9 June 2022, <https://www.aljazeera.com/news/2022/6/9/foreign-fighters-sentenced-to-death-in-separatist-held> (last accessed 10/09/2023); see Guarino, 'Prayed for Death': Americans Freed from Russia Claim Torture at "Black Site", ABC News, 13 October 2022, <https://abcnews.go.com/International/americans-captured-ukraine-russian-forces-detail-time-imprisoned/story?id=91407392> (last accessed 10/10/2023).

⁵⁸ Amnesty International, 'Ukraine: Russian Sham Trials of Prisoners of War in Mariupol "Illegal and Unacceptable"', 26 August 2022, <https://www.amnesty.org/en/latest/news/2022/08/ukraine-russian-sham-trials-of-prisoners-of-war-in-mariupol-illegal-and-unacceptable/> (last accessed 15/09/2023).

⁵⁹ United Nations, 'Death Sentence for Ukraine Foreign Fighters Is a War Crime: UN Rights Office', 10 June 2022, <https://news.un.org/en/story/2022/06/1120102#:~:text=The%20UN%20human%20rights%20office,said%20OHCHR%20spokesperson%20Ravina%20Shamdasani>. (last accessed 10/10/2023).

⁶⁰ Council of Europe, 'Memorandum on the Human Rights Consequences of the War in Ukraine', 8 July 2022, <https://rm.coe.int/memorandum-on-the-human-rights-consequences-of-the-war-in-ukraine/1680a72bd4> (last accessed 10/10/2023).

of War in Russian captivity reported that members of the Russian forces subjected them to torture and ill-treatment while in detention, in some cases including sexual violence.⁶¹

In June 2023, Alice Jill Edwards, the UN Special Rapporteur on Torture, expressed profound apprehension regarding the disturbing reports and testimonies suggesting that Russian military forces in Ukraine are consistently and *intentionally* subjecting Ukrainian civilians and *prisoners of war* to severe physical and psychological pain and suffering.⁶² Amongst the practices include ‘electric shocks, beatings, hooding, mock executions and other threats of death’ as claimed by the UN expert.⁶³

On the other hand, Russia insists that these fighters are mercenaries and that they do not merit any protection nor can enjoy prisoner of war status. A definition of this term is of the essence as clarifying the definition of ‘a mercenary’ in international law dictates the legal consequences that follow *when categorizing a combatant as such*.⁶⁴ Article 47 of Additional Protocol I states that a mercenary is an individual who: (a) Is recruited to fight in an armed conflict, locally or abroad (b) Directly participates in hostilities (c) Is primarily motivated by the desire for personal gain and receives significantly higher compensation than regular combatants (d) Is neither a citizen nor a resident of a party to the conflict (e) Is not a member of the armed forces of a party to the conflict.⁶⁵ Upon examining these 5 conditions, it would be clear to say that EU foreign fighters are not mercenaries as they do not satisfy conditions (a),(c), (d), (e). Regarding condition (a), EU foreign fighters are not being recruited, however *volunteering out of their own will* to assist Ukraine and its armed forces against Russian aggression. Regarding condition (c), at this stage, it would be safe to say that foreign fighters from the EU are not receiving any financial compensation as a result of their participation in the Russo-Ukrainian war but are clearly motivated to help their Ukrainian ‘brothers-in arms’ out of altruism and as a result of

⁶¹ *United Nations*, ‘UN Human Rights Ukraine Released Reports on Treatment of Prisoners of War and Overall Human Rights Situation in Ukraine’, *op. cit.*

⁶² United Nations Office of the High Commissioner, ‘Widespread Use of Torture by Russian Military in Ukraine Appears Deliberate: UN Expert’, 15 June 2023, <https://www.ohchr.org/en/press-releases/2023/06/widespread-use-torture-russian-military-ukraine-appears-deliberate-un-expert> (last accessed 15/10/2023) .

⁶³ *Ibid.*

⁶⁴ *Kwakwa*, HICLR 14/1990, p.69-70.

⁶⁵ International Committee of the Red Cross, Article 47- Mercenaries, Commentary of 1987, [IHL Treaties - Additional Protocol \(I\) to the Geneva Conventions, 1977 - Article 47 \(icrc.org\)](#) (last accessed 15/10/2023) .

clearly viewing Russia as a threat to Europe. Last but not least, and as will be evidenced further throughout the academic study, most EU foreign fighters are not acting as solo fighters in the conflict rather are joining the armed forces of Ukraine – a process that is being facilitated by the Ukrainian government.

IV. Official Position of States regarding EU Foreign Fighters, State Practice and *Opinio Juris*

At this juncture, one may safely assume that European Union member states and citizens have by majority and openly aligned themselves with Ukraine and not Russia.⁶⁶ EU member states have expressed within the United Nations General Assembly, strong disapproval of Russia, implemented substantial sanctions, offered humanitarian assistance to Ukraine and neighbouring countries, and delivered military equipment and other supplies to Ukraine.⁶⁷ Moreover, they have exhibited a certain degree of laxity in impeding the transit of their citizen combatants to the battlefield and in certain moments have encouraged their participation. To illustrate, Germany, Denmark, Latvia, and the Netherlands have declared that they will not pursue legal action against individuals who travel to the conflict zone to participate in the Ukrainian side during the so-called Vendome Meeting.⁶⁸ Furthermore, Czech President Zeeman has openly put his signature on a declaration that grants authorization to 103 of his country's citizens to join the Ukrainian frontlines in opposition to Russia.⁶⁹ In a similar light, the Latvian parliament has moved forward with modifications to its national legislation to prevent Latvian nationals who are engaged in the conflict alongside Ukraine from facing legal issues under national legislation.⁷⁰ In fact, the Latvian defence ministry website actively promotes it through a thorough

⁶⁶ *AlJazeera*, 'Russia-Ukraine War Updates: EU Foreign Ministers Meeting in Kyiv', 2 October 2023, <https://www.aljazeera.com/news/liveblog/2023/10/2/russia-ukraine-war-live-shelling-on-kherson-kills-one-in-jures-six> (last accessed 10/10/2023); see also Eurobarometer, 'EU's Response To the War in Ukraine', May 2022, <https://europa.eu/eurobarometer/surveys/detail/2772> (last accessed 29/9/2023).

⁶⁷ *Demertzis et al.*, 'European Public Opinion Remains Supportive of Ukraine', Bruegel, 5 June 2023, <https://www.bruegel.org/analysis/european-public-opinion-remains-supportive-ukraine> (last accessed 9/10/2023)

⁶⁸ *Van Dongen et al.*, *op. cit.*

⁶⁹ *Barron's*, 'Czech Leader Allows Dozens to Fight in Ukraine', 11 May 2022, <https://www.barrons.com/news/czech-leader-allows-dozens-to-fight-in-ukraine-01652280009> (last accessed 15/9/2023).

⁷⁰ *Public Broadcasting Latvia*, 'Saeima Moves to Let Latvians Fight for Ukraine Without Fear of Prosecution', 28 February 2022, <https://eng.lsm.lv/article/politics/saeima/saeima-moves-to-let-latvians-fight-for-ukraine-without-fear-of-prosecution.a445637/> (last accessed 10/10/2023).

guideline on how to volunteer as a fighter in Ukraine.⁷¹ Furthermore, Western nations that share a similar commitment to Ukraine as the EU and have denounced Russian aggression, such as Canada and the United Kingdom, have also grappled with uncertainty regarding the level of authorization for their citizens to engage in combat in Ukraine as foreign fighters.⁷² Having comparable *foreign enlistment laws*, their respective legislations prohibit individuals from conscripting in the armed forces of a foreign nation engaged in a conflict 'with a friendly state'.⁷³ Yet, the reality of fighters hailing from their countries is quite the opposite.

Hence, it appears that *European* foreign fighters originating from EU member nations are not being treated in the customary manner as 'potential threats', and instead, are experiencing a *unique exception* that contradicts established principles of international law; particularly state practice and *opinio juris*. Despite the emphasis on 'prevention' as a key strategy to counter the expansion of foreign fighters in UNSCR 2178 and various counter-terrorism policy documents, it is evident that European member states have not effectively implemented preventive measures, as evidenced by the significant number of fighters currently present in Ukraine.⁷⁴ One of the rare legal frameworks out there enjoying the consensus of the international community – the United Nations Security Council Resolution 2178– which was enacted to regulate the foreign fighter phenomenon primarily approaches it through a lens that emphasizes its association with *terrorism*.⁷⁵ The same depiction is present in the EU Directive in Combatting Terrorism (2017) and the Council of Europe Convention on the Prevention of Terrorism (2005).⁷⁶ Both *state practice* and *opinio juris* shape customary international law i.e. (1) consistent and general international practice by states (state practice), and (2) a belief that practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris*).⁷⁷ Prevalent customary

⁷¹ Ministry of Defence of the Republic of Latvia, 'Become a Volunteer in the Ukrainian Armed Forces', <https://www.mod.gov.lv/en/nozares-politika/international-and-regional-cooperation/international-cooperation/become-volunteer> (last accessed 10/10/2023).

⁷² *Watkin*, 'Foreign Fighters, Mercenaries and the Ukraine Conflict', *Global Justice Journal Queen's Law*, 23 March 2022, <https://globaljustice.queenslaw.ca/news/foreign-fighters-mercenaries-and-the-ukraine-conflict> (last accessed 10/10/2023).

⁷³ *Ibid.*

⁷⁴ *Simsek, op. cit.*

⁷⁵ *Ip*, ICLQ 69/2019, p.103, 104.

⁷⁶ Directive (EU) 2017/541 of 15 March 2017 on Combatting Terrorism, OJ L 88, 31/03/2017, p. 6–21; see also *Council of Europe, Convention on the Prevention of Terrorism* (CETS No. 196), 16/05/2005.

⁷⁷ *Alcala*, 'Opinio Juris and the Essential Role of States', *Articles of War*, 11 February 2021, <https://lieber.west-point.edu/opinio-juris-essential-role-states/> (last accessed 10 October 2022)

law on foreign fighting in armed conflicts is framed quite ‘negatively’ particularly from counter-terrorism and international criminal law perspectives—⁷⁸ which this study does not aim to delve into.

However, what is interesting to observe is current state practice vis-à-vis EU foreign fighters, as already mentioned earlier, as being lenient, encouraging to take up arms against Russia thus quite ‘positive’ and not perceiving these fighters as *the usual terrorists*. During the conflicts in Iraq and Syria, large groups of European fighters journeyed to the Middle East and the aftermath of this phase resulted in the EU to adopt its PNR (Passenger Name Record) Directive in 2016 for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.⁷⁹ Therefore, state practice was that of *restricting* the mobilization of these fighters because *opinio juris* (a belief in legal obligation) existed in doing so. It seems that with the current wave of European fighters going to the battlefield to fight alongside Ukraine against Russia, state practice is that of *leniency* and *tolerance* rather than *hindrance* therefore European Union member states do not hold the belief nor the legal obligation to do otherwise.

On the contrary and as exhibited above, certain EU member states (such as Latvia) have proactively adjusted their domestic laws to facilitate their citizens' participation in Ukraine without unnecessary complications i.e., state practice. As for *opinio juris*, there seems to be an actual belief that these legal amendments in the Latvian national code, open announcements by Denmark, Germany, the Czech Republic and certain EU nations for their citizens to go fight in this war; without worrying too much about the consequences upon return are all quite remarkable and uncommon from an international law perspective. Customary international law is established through a combination of state actions and *opinio juris*, which refers to the acknowledgment or endorsement of a particular practice as being lawful or not.⁸⁰ This situation prompts the consideration that if a substantial segment of the international community refrains from labeling these EU fighters as *terrorists* during the evolving conflict, it could suggest that their

⁷⁸ Cuykens et al., JCSL 24/2019, p. 537, 537-538.

⁷⁹ Directive (EU) 2016/681 of 27 April 2016 on Combatting Terrorism, OJ L 119, 4/5/2016, p. 132–149.

⁸⁰ Bryan, O, 54/2010, p.115, 125.

actions might be legally permissible under customary international law. Consequently, this could imply that they might enjoy more rights compared to the usual foreign fighter.

C. IHL and IHRL: A Dual Legal Protection Framework for EU Foreign Fighters

I. The Relevance of These Bodies of Laws in the case of EU Foreign Fighters

In the contemporary age, advancements in technology, global connectivity, citizen journalism, and increased public awareness have collectively contributed to the extensive documentation and heightened global consciousness of human rights violations during armed conflicts as opposed to before thereby making IHL and IHRL more relevant than ever; particularly in the Russo-Ukrainian context. Although there is an absence of an established guideline or policy document explicitly detailing the *rights and obligations of foreign fighters* in times of armed conflicts, especially concerning the foreign fighters under examination in this study, the convergence of the two legal frameworks, of international humanitarian law and international human rights law, along with relevant case law, is of substantial significance for this thesis.

Two observations can be brought forth: 1) Most of the existing scholarship regarding the connection between International Human Rights Law (IHRL) and International Humanitarian Law (IHL) in the context of foreign fighters tends to emphasize *the foreign fighters' compliance with the conventions' norms during their engagements in battle*, rather than *delving into how these two legal regimes affect the foreign fighters human rights and safeguard their future*.⁸¹ 2) Another substantial portion of academic research is dedicated to *the post-capture prosecution of foreign fighters*, where the integration of these two legal frameworks, alongside international and domestic criminal law systems, is examined for bringing them to justice following the cessation of their activities on the battlefield.⁸² These two approaches by academics and legal experts have been problematic as they have generated a 'human rights gap'. Therefore, this section illuminates the significance and potential advantages of both these legal systems for EU foreign

⁸¹ Amoroso, in de Guttery, A., Capone, F., Paulussen, C. (eds), p. 205, 207; see *Conduit et al.*, ICLR, 18/2016, p.434.

⁸² Paulussen et al., 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges', International Centre for Counter-Terrorism, 30 Jan 2018, <https://www.icct.nl/publication/prosecuting-potential-foreign-fighters-legislative-and-practical-challenges> (last accessed 29/10/2023); see *Mahfoud*, ICLR 18/2016, p. 420-423.

fighters, not only during their combat phase in Ukraine but also throughout their capture and detention, with a specific focus on aspects beyond mere criminal accountability.

It has become more and more recognized that international human rights commitments of states apply *at all times*, whether in times of peace or situations of armed conflict, *to all persons* subject to a state's authority and *effective control*.⁸³ Moreover, nowadays it is also accepted that International Humanitarian Law and International Human Rights Law operate complementarily to protect *the human rights of all individuals*, including European foreign combatants at times of war – a category addressed in this thesis– as opposed to earlier perceptions of having separate or divergent goals.⁸⁴ This alignment, although non-existent when the two regimes were conceived, has found expression in numerous policy documents and determinations by United Nations agencies and human rights organizations. For instance, the Human Rights Committee, in its general comments No. 29 (2001) and No. 31 (2004), reaffirmed that the *International Covenant on Civil and Political Rights* is relevant even in scenarios of armed conflict where the principles of international humanitarian law are in effect.⁸⁵ In addition, through Resolution 9/9, the Human Rights Council of the UN reiterated the synergy and mutual reinforcement between human rights law and international humanitarian law.⁸⁶ Consequently, the Council has emphasized that the protection of all human rights should be consistent, *even during armed conflicts*, recognizing that international humanitarian law takes precedence as the '*lex specialis*' i.e. the more specific norm when relevant.⁸⁷

In the interpretation and enforcement of international human rights and humanitarian law, a fundamental and unwavering principle is the provision of legal protection *without any form of discrimination*, which includes avoiding unfavorable distinctions based on factors such as *race, nationality, religion, or political beliefs* – that also includes EU foreign fighters in the Russo-Ukrainian conflict. The Additional Protocol I, an extension of the foundational Geneva Conventions of International Humanitarian Law, establishes: 'In so far as they are affected by a

⁸³ *Goldman et al.*, TASILTFT 2002, p. 33.

⁸⁴ *Fortin*, NQHR 40/2022, p. 343, 345.

⁸⁵ United Nations, 'International Legal Protection of Human Rights in Armed Conflict', 2011, New York, p.6.

⁸⁶ *Ibid.*

⁸⁷ *Droege*, IRRC 90/2008, p. 501, 520.

situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol *shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria*'.⁸⁸ Article 2 of the International Covenant on Civil and Political Rights— a backbone and key treaty of International Human Rights Law – also cuts from the same cloth: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.'⁸⁹

II. Applicable Conventions and Case Law

In light of the fact that both Russia and Ukraine are *state parties* to important human rights instruments such as the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), as well as the Geneva Conventions and the Additional Protocols, they are obligated to uphold and adhere to the principles of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) during the ongoing hostilities particularly Russia vis-à-vis European foreign fighters.

In straightforward terms, international humanitarian law is applicable in times of armed conflict, while international human rights law applies at all times, both in times of war and peace, with a shared goal of upholding human dignity and that can uphold the dignity of European foreign fighters in the Russian-Ukrainian war; particularly during combat and after potential capture. Case law of the two legal regimes whether through the ICCPR mechanism or the

⁸⁸ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977> (last accessed 15/10/2023) .

⁸⁹ UNGA Res. 2200 A, *International Covenant for Civil and Political Rights*, 16/12/1966, UN Doc. A/RES/2200A(XXI).

European Court of Human Rights, although not entirely identical to the subject matter, draw meaningful parallels to the human rights safeguards of EU foreign fighters in the current conflict such as from of the ICJ's *Wall judgment*,⁹⁰ the Inter-American Court's *Lopez Burgos judgment*,⁹¹ as well as the ECHR's *Loizidou* case and *Issa and others vs. Turkey* judgment.⁹²

D. Legal Protection Offered by International Humanitarian Law (IHL)

I. Scope of Application

1. Classification of Conflict and Legal Status

As already hinted earlier, international humanitarian law (IHL) stands out as *lex specialis* (specialized legal domain) with the most comprehensive provisions for safeguarding the human rights of European foreign fighters in the context of the ongoing war, particularly in situations of during and after their capture. Before delving deeper into the subject, it is crucial to first ascertain *the legal status of EU foreign fighters in the Russo-Ukraine conflict* which is rather a complex issue as well. This determination hinges on establishing *the classification of the Russo-Ukrainian conflict*, which represents the fundamental starting point *for any analysis of international humanitarian law (IHL)*. The primary questions at this initial stage revolve around the legal acknowledgment of an armed conflict and, if such recognition is confirmed, the precise characterization of that conflict as *international* or *non-international armed conflict*. This classification holds significant importance because the application of specific aspects of International Humanitarian Law (IHL) depends on whether the conflict falls into the 'international' or 'non-international' category.⁹³

⁹⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep, p. 178.

⁹¹ IACtHR, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 Case no. A/36/40 [1981].

⁹² ECtHR, *Case of Loizidou v. Turkey* (PO), Application no. 15318/89, 23 March 1995; see also ECtHR, *Case of Issa and Others v. Turkey* (PO), Application no.31821/96, 16 November 2004.

⁹³ *Schmitt*, 'Ukraine Symposium– Classification of Conflicts', Article of War, 14 December 2022, <https://lieber.westpoint.edu/classification-of-the-conflicts/> (last accessed 19/10/2023).

According to the ICRC, the Russian-Ukrainian war that ignited on February 2022 is that of an *international armed conflict (IAC)* mainly as a result of Russian aggression and invasion of Ukraine.⁹⁴ The ongoing situation is different from the events of 2014 in Ukraine, when *non-state armed groups* with ties to Russia acquired weapons and occupied government buildings in Donetsk and Luhansk (Eastern Ukraine) following Russia's annexation of Crimea.⁹⁵ While there is no explicit definition in the Conventions on what constitutes an *IAC* or a *Non-International Armed Conflict (NIAC)*, Common Article 2 of the Geneva Conventions lays down indirectly the customary contours that states have abided by over the years: 1) The legal standing of the parties involved in the conflict, typically being *States* and 2) The *manner* in which the military engagement unfolds, such as through a formally declared war or the partial or complete occupation of the territory belonging to a State bound by the Geneva Conventions.⁹⁶ In this case, Russia is a fully autonomous state which declared war and simultaneously inflicted the invasion of Ukraine from its North-Eastern borders on the 24th of February 2022; coupled with a strong recognition by the international community of the conflict being an all-out war on Ukraine.⁹⁷

It is noteworthy to also highlight that this war does have elements of a *non-international armed conflict* as well particularly when analyzing the confrontations between pro-Russian separatists in Donbas and Ukraine. Given the fact that these separatists have consistently operated under Russia's effective control, the human rights violations being committed by these separatists (regardless whether they are by Russians or foreign nationals fighting as mercenaries for Russia) against the Ukrainian side are attributable to the state of Russia under *Article 8 of the*

⁹⁴ ICRC, 'Russia - Ukraine International Armed Conflict: ICRC Continues to Help People in Need', 14 June 2023, <https://www.icrc.org/en/document/russia-ukraine-international-armed-conflict-icrc-continues-to-help-people-in-need> (last accessed 15/10/2023).

⁹⁵ Dubova, 'Donetsk Dispatch: Sense Of Limbo After Separatists Declare 'People's Republic'', 8 April 2014, Radio Free Liberty, <https://www.rferl.org/a/ukraine-dontesk-dispatch-separatists/25325883.html> (last accessed 31/10/2023).

⁹⁶ United Nations Office of Drugs and Crimes, 'Categorization of an Armed Conflict', July 2018, <https://www.unodc.org/e4j/zh/terrorism/module-6/key-issues/categorization-of-armed-conflict.html> (last accessed 19/10/2023).

⁹⁷ Dickinson, 'Putin Admits Ukraine Invasion Is an Imperial War to "Return" Russian Land', 10 June 2022, Atlantic Council, <https://www.atlanticcouncil.org/blogs/ukrainealert/putin-admits-ukraine-invasion-is-an-imperial-war-to-return-russian-land/> (last accessed 19/10/2023); see also Lerman, 'On Google Maps, Tracking the Invasion of Ukraine', 27 February 2022, The Washington Post, <https://www.washingtonpost.com/technology/2022/02/25/google-maps-ukraine-invasion/> (last accessed 20/10/2023).

Articles on Responsibility of States for Internationally Wrongful Acts as well as customary international law.⁹⁸ On a more recent note, the same notion of Russian effective control of Donetsk and Luhansk regions was clearly confirmed by the European Court of Human Rights decision on the 30th November 2022.⁹⁹ The Court showcased Russian military, economic and political support to these territories even if they fell outside Russian borders. As a result, the affiliation of these separatists in Eastern Ukraine with Russia effectively places them within the framework of the international armed conflict.

Yet the more prevalent IHL criteria that would be implemented to EU foreign fighters in this case is that of an *international armed conflict*. Hence, the *Geneva Conventions and their Additional Protocol I*, which have been ratified by both Russia and Ukraine, are applicable in this context. In line with this classification, European foreign fighters who are engaged in combat alongside Ukrainian forces against Russia should be granted *Prisoner of War* status if they are captured particularly under the Third Geneva Convention on the Treatment of the Prisoner of War – which is the more specialized Convention. In Layman’s term, EU fighters *ought not be* prosecuted for mere participation in combat alongside Ukrainian forces and should enjoy ‘combatant immunity’ or POW status.¹⁰⁰ This qualification is crucial as it safeguards EU fighters’ human rights under international law, preventing legal or illegal action by their captors for their pre-capture violent conduct, provided such conduct aligns with international human rights principles and the rules of war. In addition, it is essential to underscore here that on March 3rd 2022, Russian Defense Ministry spokesperson Igor Konashenkov suggested that foreign volunteers in Ukraine will be considered *mercenaries* and not be granted POW status, potentially facing execution as the worst-case outcome.¹⁰¹ *Article 4 of the Third Geneva Convention* outlines the provisions related to prisoners of war (POWs) and GC III serves as *the treaty* that defines their treatment and rights: ‘*Prisoners of war, in the sense of the present Convention, are persons belonging (..) and who have fallen into the power of the enemy: 1) Members of the armed forces*

⁹⁸ United Nations, ‘Responsibility of States for Internationally Wrongful Acts’, 2001, art. 8.

⁹⁹ ECHR (GC), decision of 30 Nov. 2022 on admissibility, Ukraine and the Netherlands v. Russia (Appl. No. 8019/16, 43800/14 and 28525/20), para. 690 ff.

¹⁰⁰ Nuzov, ‘Mercenary or Combatant? Ukraine’s International Legion of Territorial Defense under International Humanitarian Law’, 8 March 2022, EJIL: Talk!, <https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/> (last accessed 6/11/2023).

¹⁰¹ Kalberg, ‘Too Late for Russia to Stop the Foreign Volunteer Army’, 10 March 2022, CEPA, <https://cepa.org/article/too-late-for-russia-to-stop-the-foreign-volunteer-army/> (last accessed 20/10/2023).

of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces' 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions.¹⁰² While Russia alleges that EU foreign fighters do not merit this IHL status, European foreign fighters fully fulfill both definitions.

When it comes to criteria (1), since the on-start of the war in February 2022, the majority of volunteers *have been and are officially absorbed* into Ukraine's military forces as a result of reviving a presidential decree from 2016 by Volodymyr Zelenskyy.¹⁰³ The definition of 'armed forces' is also very clear in Article 43 of the Additional Protocol which also sheds light on the PoW question: '*The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates (...)*'.¹⁰⁴ Therefore, this administrative step renders European foreign fighters who are non-citizens of Ukraine *equal* to its domestic soldiers on the battlefield; thereby making EU foreign fighters *automatically* eligible for the same legal status as Ukrainian soldiers i.e. PoW status.¹⁰⁵ Hence, this action taken by the Ukrainian administration can be regarded as a strategically well-considered and legally sound decree, designed to provide legal coverage and safeguard for European fighters. It is also worthwhile noting that this phenomenon of officially enlisting foreign fighters into Ukraine's armed forces did not occur in 2014 and excluded the Europeans that were fighting informally on behalf of Ukraine against Russia.¹⁰⁶

¹⁰² ICRC, 'Article 4 – PoW', <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4> (last accessed 20/10/2023).

¹⁰³ President of Ukraine Official Website, 'Appeal to foreign citizens to help Ukraine in fighting against Russia's aggression', 27 February 2022, <https://www.president.gov.ua/en/news/zvernennya-do-gromadyan-inozemnih-derzhav-yaki-pragnut-dopom-73213> (last accessed 19/10/2023).

¹⁰⁴ ICRC, 'International Humanitarian Law Databases: Article 43 – Armed Forces', <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-43> (last accessed 29/10/2023).

¹⁰⁵ Dítřichová *et al.*, 'Status of Foreign Fighters in the Ukrainian Legion', *Articles of War*, 15 March 2022, <https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/> (last accessed on 17/09/2023)

¹⁰⁶ BBC, 'Ukraine War Pulls in Foreign Fighters', 1 September 2014, <https://www.bbc.com/news/world-europe-28951324> (last accessed 29/10/2023).

As for definition criterion (2), which is often visited by states and legal experts when assessing the legal status of *non-state actors* partaking in foreign wars, Russia's primary assumption is that these fighters are *mercenaries*, therefore attributing EU foreign fighters a *non-state* character as mercenaries are eventually privately hired for-profit fighters.¹⁰⁷ Even in this case EU foreign fighters who *assumably* not fighting within the ranks of Ukraine's national army and combating *independently and in a rogue manner*, they too satisfy the definition of POW status as per Article 4(2).¹⁰⁸ Criteria (2) of Article 4 establishes four essential conditions for individuals engaged in a conflict to merit POW status and EU foreign fighters fulfill it as well: 1) Operating under a competent authority; 2) displaying a clear and easily distinguishable emblem from a distance; 3) openly bearing weapons; and 4) executing military actions in compliance with established rules and traditions of warfare.¹⁰⁹ There is substantial and well-documented evidence of Western support, which ensures that EU volunteer fighters are adequately being equipped with items like military vests and boots, allowing them to be more visible to the enemy i.e. Russian forces on the battlefield.¹¹⁰ Furthermore, online evidence shows photos of volunteer fighters wearing military uniforms with visible emblems displaying either the Ukrainian flag or the official Ukrainian government emblem.¹¹¹

Failing to abide by these 4 criteria (i.e. also general rules of war) may lead to the loss of 'lawful combatant' or POW status, and shift the status of EU fighters to 'unlawful combatants'.¹¹² However, even when EU foreign fighters become *unlawful*, *Article 75 of the Additional Protocol I* affords *minimum fundamental guarantees* such as prohibition of violence to life, murder,

¹⁰⁷ Pieper, 'Wagner Group: What Are Private Military Companies?', Deutsche Welle, 28 June 2023, [Wagner Group: What are private military companies? – DW – 06/28/2023](#) (last accessed 15/11/2023).

¹⁰⁸ Graham, *GJIL* 37 /2005, 67.

¹⁰⁹ Watkin, *op. cit.*

¹¹⁰ Husarska, 'Spider Boots, Boxers, Hoverboards: When Ukrainian Troops Ask, We Deliver', 1 October 2023, *The New York Times*, <https://www.nytimes.com/2023/10/01/opinion/volunteering-supplies-ukraine-military.html> (last accessed 29/10/2023).

¹¹¹ Tang, 'The Latest in a Long Line: Ukraine's International Legion and a History of Foreign Fighters', 2 September 2022, 'Harvard International Review', <https://hir.harvard.edu/the-latest-in-a-long-line-ukraines-international-legion-and-a-history-of-foreign-fighters/> (last accessed 20/10/2023); see also Harding, 'It Was like in World War One': the Foreign Volunteers Fighting in Ukraine', 13 July 2023, *The Guardian*, <https://www.theguardian.com/world/2023/jul/13/it-was-like-in-world-war-one-the-foreign-volunteers-fighting-in-ukraine> (last accessed 20/10/2023).

¹¹² Vark, *Ji* x/2005, p.191, 193.

torture, corporal punishment, threats and many forms of inhumane treatment, and ensuring a dignified treatment of adverse prisoners.¹¹³

2. Geographic Location

Given the dynamic and intense nature of the conflict, marked by constantly shifting offensives between Ukraine and Russia and EU fighters continuously moving between battlefields, the question of precisely where International Humanitarian Law (IHL) applies to EU foreign fighters becomes a significant consideration. This is particularly pertinent in the context of battles unfolding in cities located along the Eastern Ukrainian and Western Russian borders. According to IHL expert Marc Sassòli, International Humanitarian Law (IHL) governing International Armed Conflicts (IACs) is applicable in *any location* where opposing State forces engage in belligerent activities, regardless of whether these activities take place within their respective territories.¹¹⁴ In this context, should Russia commit violations, it is obligated to adhere to and implement all relevant provisions of IHL concerning the treatment of these foreign fighters. This encompasses the humane treatment of prisoners of war and compliance with the established rules of engagement during hostilities. By doing so, Russia would be fulfilling its legal responsibilities under IHL, ensuring the protection and well-being of foreign fighters from European nations present on Ukrainian soil.

In one of the *Tadic* case's appeal judgments, the interpretation of *IHL's geographical scope* was touched upon and it was interpreted that the Geneva Conventions were designed to provide protections and regulations that cover not only the *specific battle zones* but also *the broader territories of the states* involved in the conflict, particularly when addressing matters related to *the treatment of prisoners of war and the civilian population*.¹¹⁵ The jurisprudence reads as follows: '*Although the Geneva Conventions are silent as to the geographical scope of international 'armed conflict', the provisions suggest that at least some of the provisions of the*

¹¹³ Doctors Without Borders, 'Fundamental Guarantees: The Practical Guide to Humanitarian Law', <https://guide-humanitarian-law.org/content/article/3/fundamental-guarantees/#:~:text=Additional%20Protocol%20I%2C%20Article%2075%3A%20Fundamental%20Guarantees&text=Any%20person%20arrested%2C%20detained%20or,these%20measures%20have%20been%20taken>. (last accessed 7/11/2023).

¹¹⁴ Sassòli, in: Sassoli 'Scope of Application: When Does IHL Apply?', p. 168.

¹¹⁵ ICTY, Prosecutor v Dusko Tadić, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

Conventions apply to the entire territory of the Parties to conflict, not just to the actual vicinity of the hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the prisoners of war and civilians, are not so limited'.¹¹⁶ This also means that the law of armed conflict together with its human rights protections applies to locations where European foreign fighters are being held as *prisoners of war* or other individuals are being held by Russian forces. This is an extra safeguard for EU fighters as traditionally IHL applicability is quite state-centric meaning, it applies to situations in States A and B. However, what if State A forces are being held in State C by State B? The above jurisprudence allows IHL to apply beyond the frontline when there is a connection to armed violence between opposing parties, *regardless of their geographical location*.¹¹⁷ This means that EU foreign fighters are protected by the provisions of IHL regardless of where they are physically located, whether in Ukraine, Russia or even a third country.

II. Case Law

International Humanitarian Law does not have one specialized court that adjudicates its case however both international and domestic courts have umpired many cases that allow us to draw parallels with EU foreign fighters' human rights during and after capture. For example, the *Al-Jedda v. United Kingdom* case has relevance to International Humanitarian Law (IHL) in the context of armed conflicts and human rights protections EU foreign fighters merit.¹¹⁸ While the primary legal framework under consideration in this case was the European Convention on Human Rights (ECHR), the circumstances of Al-Jedda's detention occurred in the context of the Iraq conflict, and certain aspects align with principles found in IHL. The intersection between human rights law and IHL is particularly pertinent in situations involving individuals detained during armed conflicts.

¹¹⁶ *Ibid.*

¹¹⁷ ICRC, 'Proceedings of the Bruges Colloquium: Scope of Application of International Humanitarian Law', 18-19 October 2012, p. 107.

¹¹⁸ *Al-Jedda v. United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. (2011).

In the case, Al-Jedda's detention by British forces in Iraq brought attention to issues related to *the legality of detention during an armed conflict* and the applicability of UN Security Council resolutions authorizing such detentions. IHL, as embodied in the Geneva Conventions and additional protocols, provides specific rules governing the treatment of individuals in situations of armed conflict, addressing issues such as the detention of combatants and civilians, protection against arbitrary detention, and the right to a fair trial. While Al-Jedda primarily relied on human rights law in his challenge, the case indirectly touches on IHL principles due to the context of armed conflict in Iraq. It exemplifies the interconnectedness of these legal frameworks and highlights the importance of ensuring that both human rights and humanitarian law standards are adhered to in situations involving the detention of individuals, including those categorized as foreign fighters, during armed conflicts.

The *Hamdan v. Rumsfeld* (2006) which was a US Supreme court ruling stands as a pivotal case at the crossroads of International Humanitarian Law (IHL), the treatment of detainees, and the legal status of foreign fighters.¹¹⁹ Central to the case was the designation of Salim Ahmed Hamdan, Osama bin Laden's alleged driver, as an "unlawful enemy combatant," prompting trial by military commission. The legal challenge brought forth questions regarding the conformity of the military commissions with the Uniform Code of Military Justice and the Geneva Conventions. The case underscored the imperative of adhering to IHL principles in the treatment of individuals captured during armed conflicts, notably addressing the issue of whether Hamdan *qualified for prisoner-of-war status*. The Supreme Court's ruling, highlighting violations of the UCMJ and Common Article 3 of the Geneva Conventions, emphasized the necessity of upholding established legal frameworks and fair trial rights for individuals, including foreign fighters, entangled in the complexities of armed conflicts and counterterrorism measures. Thus, one may draw similar parallels to EU foreign fighters in detention under Russian control during the ongoing Russo-Ukrainian war.

¹¹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

III. Human Rights Protection Offered by IHL

European fighters from EU member states captured or being captured during battle in Ukraine, particularly in the intense conflict in Eastern Ukraine in Donetsk and Luhansk, are facing two predominant scenarios. One phenomenon is that Russia is relocating them to its camps within Ukrainian territories with human rights standards reportedly lacking,¹²⁰ while the other involves transporting them back to Russian territories, ostensibly for legal prosecution and subsequent incarceration.¹²¹ In both scenarios, a wide range of human rights violations are being perpetrated vis-à-vis these fighters. As of now, there is insufficient data to determine which scenario is more prevalent or to provide details about the profiles of the European fighter detainees. However, it is clear that these two practices have become widespread among Russian forces when dealing with European foreign fighters on the battlefield.

Interestingly, the Geneva Conventions do not *explicitly* state when the period of initial capture starts despite *explicitly* mentioning when the end period of capture is. Yet, Articles 12 and 17 of the Geneva Conventions both provide a *positive framing* of the initial period of capture by suggesting that this period starts either when PoWs *fall into the hands of the enemy* or *are interrogated by them*.¹²² In either case, both categorizations attribute *responsibility to the captor* which would be, according to *Rowe*, Russian forces, and their accountability for the humane treatment of EU foreign fighters in accordance with the standards of International Humanitarian Law (IHL).¹²³ While the primary distinction between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) has traditionally been that IHL enables right-holders to attribute *responsibility for a human rights breach*, with a focus on the trial and punishment of *individual perpetrators*, a breach of a human rights treaty i.e. Human Rights Law

¹²⁰ The Economist, 'Why Is Russia Setting up Detention Centres in Ukraine?' 30 April 2022, <https://www.economist.com/the-economist-explains/2022/04/30/why-is-russia-setting-up-detention-centres-in-ukraine> (last accessed 8/11/2023).

¹²¹ AlJazeera, 'Ukraine 'Azov Regiment' Prisoners of War Go on Trial in Russia', 15 June 2023, <https://www.aljazeera.com/news/2023/6/15/ukraine-azov-regiment-prisoners-of-war-go-on-trial-in-russia> (last accessed 8/11/2023).

¹²² Geneva Convention Relative to the Treatment of Prisoners of War, 'Articles 12 & 17', <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> (last accessed 1/11/2023).

¹²³ *Rowe*, p. 4.

aims to hold the State accountable.¹²⁴ In the case of a human rights law violation, the State may be liable to compensate the victim or may be required to alter its practices. Yet, in cases of grave breaches of *IHL* such as war crimes, genocide and crimes against humanity under *IHL*, it seems that individual responsibility in principle executed by members of the lower echelons of command as a result of orders from the higher echelon can eventually be translated to *state responsibility* of human rights violations and open the door to *state prosecution*.

This can be said in the case of the *State of Syria*, although where the conflict is more a non-international nature, where Human Rights Watch has attributed the fruition of the recent International Court of Justice ruling *Canada and The Netherlands v. Syria* on the 16th of November 2023 due to successful and consecutive judgments by various European courts whether in Germany, Sweden and France convicting individual Syrian perpetrators affiliated to the Syrian armed forces that have substantiated grave crimes committed alternatively by the Syrian government such as torture, sexual abuse of men, women and children during and after nationwide protests erupted in 2011.¹²⁵ Similar decisions within the context of the current war being analyzed on both Russian President *Vladimir Putin* by the ICC and the Russian Federation per se in the ongoing *Ukraine vs. Russia* proceedings do not place neither Russian forces nor Russia in a very different situation particularly when it comes to the respect of the human rights of EU foreign fighters within the Russo-Ukraine conflict.¹²⁶ Based on this assumption, Russian state responsibility could be accorded as a result of its armed forces engaging with EU foreign fighters.

1. The Right to Humane Treatment, Prohibition of Torture and Cruel Treatment

In line with the spirit of the Geneva Conventions, it is crucial to treat prisoners with dignity and respect while ensuring their protection from any form of torture or inhumane treatment. Upon

¹²⁴ *Ibid.*

¹²⁵ *Human Rights Watch*, 'World Court Rules Against Syria in Torture Case', 16 November 2023, <https://www.hrw.org/news/2023/11/16/world-court-rules-against-syria-torture-case> (last accessed 25/11/2023).

¹²⁶ *ICC*, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (last accessed 25/11/2023); **see also** ICJ, *Application Instituting Proceedings: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, [2022], No.182, p. 4.

capture, EU foreign fighters should be promptly evacuated by Russian forces to camps located at a sufficient distance from the combat zone to ensure their safety as per **Article 19** of the Third Geneva Conventions on the Treatment of Prisoners of War. Similarly, **Article 13** stipulates: ‘*Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.*’¹²⁷ Moreover, **Article 17** amplifies further the human rights safeguards EU foreign fighters ought to enjoy by underscoring that Prisoners of War must not be subjected to physical or mental torture or any form of coercion to extract information.¹²⁸ Those who choose not to answer must not face threats, insults, or any form of unpleasant or disadvantageous treatment.¹²⁹ The Article even places a certain humane threshold that the detaining power in this case Russian forces that cannot be bypassed as prisoners of war are obligated to provide basic identification details, including their surname, first names, rank, date of birth, and army-related information when questioned about their identity.¹³⁰

In addition, **Article 14** of the same Convention entitles EU foreign fighters to be respected and treated in a humane and dignified way by the Detaining Power.¹³¹ This Article is quite vast and focalizes on dignity and rights as it clearly prohibits torture, public humiliation, mistreatment such as beatings and insults of prisoners upon capture. It also addresses the question of *women* prisoners and stipulates that they should receive treatment equal to that granted to male prisoners in all situations, emphasizing the principle of gender equality in their treatment.¹³² For example, the 1960’s Commentaries on the Geneva Conventions which provide further clarification on the interpretation of the general GC state that particular concern must be given in the

¹²⁷ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Articles 13’, <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> (last accessed 1/11/2023).

¹²⁸ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 17’, <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> (last accessed 11/11/2023).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 14’, <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> (last accessed 11/11/2023).

¹³² *Ibid.*

case of women prisoners who are pregnant when captured or become pregnant in captivity despite the precautions taken, not only for the birth, but also for the care of the child.¹³³ Moreover, Article 14's third paragraph ensures the protection of EU foreign fighter's dignity by protecting their civil capacity. The third paragraph pertains to the civil capacity of prisoners of war, signifying their acknowledgment as full members of society with the ability to engage in legal and business matters, which is integral to one's dignity. Although being held as a prisoner of war during armed conflict naturally impacts this capacity, Article 14(3) stipulates that limitations on their civil capacity, as natural legal entities with associated rights, should only extend to what is directly necessary due to their captivity.¹³⁴

Cutting from the same cloth, **Article 70** sets the standard of immediately humanizing PoWs who are in this case European foreign fighters by providing them proper identity cards and the right to communicate with family members and loved ones as it reads: *'Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family (...) informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.'*¹³⁵

2. The Right to Fair Trial and Legal Representation

This right has been quite disregarded by Russian authorities as a result of arbitrary and haphazard trials of EU foreign fighters as outlined in the above sections despite the existence of a dedicated section on just and fair *judicial proceedings* (i.e. **Articles 99-108**) in the Third Geneva Convention. EU combatants on the side of Ukraine have *the right for immediate legal representation* that can occur through their own country i.e., their respective EU member states

¹³³ ICRC, 'Article 14 (2) Commentary of 1960: Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949', <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-14?activeTab=undefined> (last accessed 11/11/2023).

¹³⁴ ICRC, 'Article 14 (3) - Commentary of 1960: Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949', [IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 1960 Article 14 - Respect for the persons and honour of prisoners | Article 14 \(icrc.org\)](https://www.icrc.org/en/document/ihl-treaties-geneva-convention-iii-on-prisoners-of-war-1949-commentary-of-1960-article-14-respect-for-the-persons-and-honour-of-prisoners-article-14) (last accessed 11/11/2023).

¹³⁵ Geneva Convention Relative to the Treatment of Prisoners of War, 'Article 70', <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war> (last accessed 11/11/2023).

or in this case even Ukraine as per **Articles 99 and 105**.¹³⁶ Article 105 also outlines the rights of means of defense of EU foreign fighters standing in isolation and restrained in handcuffs in Russian courts. In the same light, **Article 104** places a procedural notification requirement on Russia towards EU fighters as it reads: ‘*In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial*’.¹³⁷ Furthermore, the mentioned Article encompasses a fundamental protection for EU foreign fighters, a safeguard that Russia has consistently overlooked, persisting with its unlawful trials despite this provision. If there is no proof at the beginning of the trial that the stated notification reached the Protecting Power, the prisoner of war, and their representative at least three weeks before the trial, the proceedings cannot proceed and must be delayed.¹³⁸ Article 104’s 2nd paragraph emphasizes Russia’s responsibility to provide comprehensive information in the notification, ensuring the unequivocal identification of the *accused prisoner*.¹³⁹ The notification should specify the captivity location or, if awaiting trial, the place of confinement of the EU foreign fighter in question. This information is vital if the Protecting Power wishes to exercise individual supervision, and it is usually known to the family and the Central Tracing Agency through capture cards.¹⁴⁰

In terms of shielding EU foreign fighters from potential arbitrary death sentences by Russia, which might be perceived as a war crime, **Articles 100, 101 and 102** come into play that safeguard EU foreign fighters facing such severe legal consequences. Although the Third Geneva Convention *does not prohibit* death sentences vis-à-vis prisoners of war by Contracting Parties, however, if the laws of a Detaining Power in an international armed conflict allow for such penalties, the Convention imposes strict limitations on their application.¹⁴¹ For example, Article 100(1) stipulates that the detaining authority is obligated to promptly notify both the prisoners of war and the Protecting Powers, or an alternative entity, of the offenses that are subject to the

¹³⁶ *Ibid.*, ‘Articles 99 & 105’.

¹³⁷ *Ibid.*, ‘Article 104’.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ ICRC, ‘Article 104 (2) - Commentary of 2020: Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949’, [IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 104 - Notification of judicial proceedings | Article 104 \(icrc.org\)](#) (last accessed 11/11/2023).

¹⁴¹ ‘Article 100 - Commentary of 2020’.

death penalty under its legal system.¹⁴² Furthermore, **Article 101** reads: ‘ *If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.*’¹⁴³ In the same vein, **Article 102** of the Third Geneva Convention stipulates that a legitimate sentence for a prisoner of war necessitates pronouncement by the same courts, following procedures identical to those for the armed forces of the Detaining Power, and compliance with the provisions of IHL.¹⁴⁴ *The right to appeal decisions* laid down in **Article 106**,¹⁴⁵ *the right to be notified of judgments and sentences* as per **Article 107**,¹⁴⁶ *the right to be communicated sentences* as per **Article 108** should be all performed under the same conditions as in the case of members of the armed forces of the Detaining Power.¹⁴⁷ This spirit of the Convention particularly regarding judicial proceedings encourages Russia to treat EU foreign fighters equal to that of its national army members and not lesser.

In another section of the Third Geneva Convention, **Article 84** underscores the entitlement of POWs to fair and unbiased legal proceedings. This article is especially noteworthy given the historical pattern of Russian courts being viewed as biased and lacking legitimacy, particularly in the current context of war. It instructs that EU foreign fighters should not face trial in a court lacking established standards of independence and fairness. The article is designed to safeguard the legal rights of POWs in times of armed conflict, emphasizing the pursuit of justice and adherence to international humanitarian standards. While the first paragraph uses a relative standard, basing the selection of the jurisdictional forum on the competence of courts trying the detaining State’s own forces according to its domestic law, Article 84(2) establishes definitive and minimal criteria for the trial of prisoners of war.¹⁴⁸ It advises that Russia should apply

¹⁴² *Ibid.*

¹⁴³ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 101’.

¹⁴⁴ *Ibid.*, ‘Article 102’.

¹⁴⁵ *Ibid.*, ‘Article 106’.

¹⁴⁶ *Ibid.*, ‘Article 107’.

¹⁴⁷ *Ibid.*, ‘Article 108’.

¹⁴⁸ ICRC, ‘Article 84 - Commentary of 2020: Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949’, [IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 84 - Courts | Article 84 \(icrc.org\)](#) (last accessed 11/11/2023)

minimum standards of due process alongside the legal safeguards afforded to its own military personnel.

3. The Right to Health and Medical Treatment

The right to health and medical treatment has profound presence in the Third Geneva Convention on the Treatment of Prisoners of War that EU foreign fighters ought to enjoy when in Russian captivity. All in all, **Article 15** of the Third GC undoubtedly obliges Russia to cover, at no cost, the maintenance and necessary medical care for the well-being of EU foreign fighters as the Article reads: *‘The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health’*.¹⁴⁹ In fact, the 2020 Geneva Convention commentaries explicitly note that this duty signifies a crucial element of the protection granted to prisoners of war under the Third Convention.¹⁵⁰ Moreover, upon captivity special medical attention should be accorded to EU foreign fighters who cannot articulate their identity due to physical or mental conditions as per **Article 17**.¹⁵¹

Furthermore, **Article 29** obliges Russia to implement all necessary hygiene measures to maintain the cleanliness and health of the camps and to prevent the outbreak of epidemics.¹⁵² In a similar vein, **Article 30** requires that adequate medical supplies be provided to ensure the health of EU foreign fighters in Russian captivity and camps. The Article reads as follows: *‘Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease’*.¹⁵³ In the same Convention, **Article 31** obliges Russia to do regular medical inspections for EU foreign fighters in captivity at least once a month.¹⁵⁴ The 2020 Geneva commentary of the Article reads as follows: *‘The obligation to conduct medical inspections rests exclusively on the Detaining Power, and cannot be outsourced, for example to the ICRC, which has independent rights and obligations under the Convention, such as under*

¹⁴⁹ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 15’.

¹⁵⁰ ‘Article 15 - Commentary of 2020’.

¹⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 17’.

¹⁵² *Ibid*, ‘Article 29’.

¹⁵³ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 30’.

¹⁵⁴ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 31’.

*Article 126, when it comes to checking the conformity of camp infrastructure with the Convention's requirements.*¹⁵⁵ In light of the mentioned conventions, Russia bears the primary responsibility to ensure the healthcare of foreign fighters hailing from EU member states detained by them and must supply the essential resources needed to maintain their well-being.

Should EU foreign fighters be placed in temporary transit camps until their repatriation or conviction, they have *the right to food* to maintain their health and nutritional needs throughout the period of captivity. **Article 26** in the Third Geneva Convention is expressed in the following manner: *'The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners. The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.'*¹⁵⁶ In the context of this Article, even if Russia encounters internal food shortages that make it challenging to adequately feed its own troops and citizens, the commitment to fulfill the nutritional needs of EU foreign fighters under its custody remains unaffected.¹⁵⁷

Even in the context of transferring EU foreign fighters between camps, **Article 46** indicates that Russia is obligated to furnish EU foreign fighters with adequate provisions of food and drinking water to ensure their well-being, along with essential clothing, shelter, and medical care throughout the transfer process.¹⁵⁸ As per the 2020 Geneva commentaries, Russia has 'life-sustaining' duties against EU foreign fighters in its captivity.¹⁵⁹ Finally, it should be emphasized that according to **Article 72** of the Third Geneva Convention, European Union foreign fighters are entitled to receive food through postal shipments. It is crucial to note that such deliveries do not absolve Russia of its responsibility to provide for their nutritional needs during the entire period of captivity.¹⁶⁰

¹⁵⁵ 'Article 31 - Commentary of 2020.

¹⁵⁶ Geneva Convention Relative to the Treatment of Prisoners of War, 'Article 26'.

¹⁵⁷ 'Article 26 - Commentary of 2020'

¹⁵⁸ *Ibid*, 'Article 46'.

¹⁵⁹ 'Article 46 - Commentary of 2020'.

¹⁶⁰ Geneva Convention Relative to the Treatment of Prisoners of War, 'Article 72'

4. The Right to Repatriation

Under ‘*termination of captivity*’ in GC III, there exist two distinct sections (from **Articles 109 to 117**) and (**Articles 118 and 119**) specifically dedicated to the repatriation of prisoners of war. However, the latter section that includes **Articles 118 and 119** govern the release and repatriation of prisoners of war following *the end of active hostilities*. These provisions address scenarios distinct from those outlined in **Articles 109–117**, which cover rules related to the immediate repatriation or accommodation in neutral countries of prisoners of war *during ongoing hostilities*. These two critical segments containing essential provisions are crucial for upholding the human rights of European Union foreign fighters under International Humanitarian Law (IHL) especially when it comes to the right to repatriation.

There is compelling evidence of these combatants engaging in multiple offensives since the onset of the conflict on February 24, 2022. Notable instances include the Kherson battle (commenced and concluded with Ukraine gaining control), the Kharkiv battle (initiated and resolved with Ukraine gaining control) as well as the ongoing conflict persists in Zaporizhzhia Oblast between Russia and Ukraine.¹⁶¹ **Article 118** of the Third Geneva Convention unequivocally states that prisoners of war must be promptly released and repatriated after the cessation of active hostilities.¹⁶² According to the 2020 Geneva commentaries, the obligation to release and repatriate prisoners of war *arises immediately upon the conclusion of active hostilities between the Detaining Power and the Power to which the prisoners belong*.¹⁶³ This duty is intricately tied to the real-time circumstances "on the ground" and is not solely contingent on the formal conclusion of an armed conflict or an agreement between the Parties.¹⁶⁴ Hence, it is imperative that EU foreign fighters be repatriated promptly following the end of specific hostilities. For instance, in the scenario of the Kherson battle that occurred from 9-11 November 2022, in principle repatriation should take place on 12th November, rather than waiting for the overall Russo-Ukrainian war to conclude. The capture of European foreign fighters during battle is

¹⁶¹ Stein, ‘Democracy Defenders and Rambo Wannabes: Ukraine’s Volunteer Foreign Fighters’, *op. cit.*; see also Balachuk, ‘128th Brigade Confirms Deaths of 19 Soldiers in Russian Strike’, *Ukrainska Pravda*, 6 November 2023, <https://www.pravda.com.ua/eng/news/2023/11/6/7427411/> (last accessed 19/11/2023).

¹⁶² Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 118’.

¹⁶³ ‘Article 118 - Commentary of 2020’.

¹⁶⁴ *Ibid.*

happening while being *physically located* on the ground in Ukraine particularly in Eastern Ukraine where the conflict is at its hottest and they are either being held in informal camps in Ukraine or being taken back to Russia.

Article 109 reads: ‘*Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.*’¹⁶⁵ **Article 110(1)** defines seriously wounded and seriously sick prisoners of war mentioned in **Article 109(1)**.¹⁶⁶ It specifies three categories of such prisoners who must be repatriated directly, implying a swift and uninterrupted return without unnecessary stops. Furthermore, according to Article 115 of the aforementioned Convention, no European Union foreign fighter can be detained on the pretext that they have not served their punishment.

E. Legal Protection Offered by International Human Rights Law (IHRL)

I. Scope of Application

Contrary to International Humanitarian Law (IHL), *International Human Rights Law* (IHRL) is applicable *at all times*, irrespective of whether there is peace or war,¹⁶⁷ and it extends to individuals regardless of *their legal status* in armed conflicts.¹⁶⁸ This should also encompass EU foreign fighters, who, being *individual natural persons*, remain subject to these laws, particularly when *being fully integrated* into the Ukrainian army. Rowe states that human rights that armed forces are entitled to ‘are not entirely clear under IHL’,¹⁶⁹ which from this thesis’s standpoint opens the way for IHRL to complement the existing gap. The universality of human rights as laid down in the Universal Declaration of Human Rights of 1945 and later on depicted in the major human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) of 1966, the International Convention on the Elimination of All Forms of

¹⁶⁵ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 119’.

¹⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War, ‘Article 110’.

¹⁶⁷ Nazli & Khan, *JLSS*, 4/2022, p.281.

¹⁶⁸ Fortin, p. 350.

¹⁶⁹ Rowe, p.3.

Racial Discrimination (ICERD) of 1965, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984 are of relevance especially when examining the human rights of EU foreign fighters within the context of the Russo-Ukrainian war that ignited on February 2022. It is noteworthy to point out that both Russia and Ukraine are *state parties* of these conventions meaning both countries have indicated that the governments of both states have formally accepted the terms and obligations outlined in these treaties.¹⁷⁰ *Therefore, all provisions in these conventions apply during wartime.*

Furthermore, the European Convention on Human Rights, established in 1950, plays a crucial role in guaranteeing the protection of the rights and political freedoms of EU foreign fighters during and after their capture. Both Russia and Ukraine are state parties to this Convention, and its provisions are fully applicable within the territories of both nations.¹⁷¹ It is important to note that Russia was expelled as a member from the European Court of Human Rights at the onset of its aggression on Ukraine. The Strasbourg Court has communicated that it maintains jurisdiction to hear cases only until 16 September 2022.¹⁷²

II. Case Law

The application of human rights law has definitely evolved over the years to be broader and more resorted to by international human rights bodies whether the International Court of Justice, the European Court of Human Rights, the Inter-American of Human Rights.¹⁷³ For example, Article 2(1) of the International Covenant for Civil and Political Rights confines its jurisdiction to human rights *within a state's territory*; nonetheless, the Human Rights Committee adopts a broader interpretation, extending to individuals within the state's *territory or jurisdiction* and encompassing those *under its authority or effective control, even beyond national borders*.¹⁷⁴ In the context of European Union (EU) foreign fighters, this interpretation holds

¹⁷⁰ OHCHR, 'Human Rights Instruments: Russia and Ukraine', <https://indicators.ohchr.org> (last accessed 25/11/2023).

¹⁷¹ Council of Europe-ECHR, '47 Member States', https://www.echr.coe.int/documents/d/echr/2010_Expo_50years_02_ENG (last accessed 25/11/2023).

¹⁷² COE Newsroom, 'Russia Ceases to be a Party to the European Convention on Human Rights on 16 September 2022', 23 March 2023, <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022> (last accessed 25/11/2023).

¹⁷³ *Bertoni*, *EHRLR* 3/2009, p.344.

¹⁷⁴ *Droege*, *Elective Affinities*, p.510.

particular importance, especially given that a significant portion of the conflict unfolded and is unfolding on Ukrainian territory i.e. outside of Russia by Russia subsequent to the events of February 2022, where Russian forces have invaded and have *effective control* over. Examples of such territories include Donbas/Donetsk and Luhansk People’s Republics,¹⁷⁵ where a majority of these human rights violations, including torture, inhumane treatment, and abuse of EU fighters have happened and are taking place. Thus, as per this interpretation of the Human Rights Committee, Russia is responsible to ensure the human rights of EU foreign fighters on Ukrainian soil. The reading is as follows: ‘

Similarly, the European Convention of Human Right’s Article 1 reads as follows: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.¹⁷⁶ Section I of the Convention contains the substantive rights and freedoms, such as the right to life, freedom from torture, right to a fair trial, and other fundamental human rights. The *Loizidou v. Turkey* case, heard by the European Court of Human Rights, involved the displacement of Titina Loizidou from her property in Northern Cyprus after the 1974 Turkish military intervention.¹⁷⁷ The court’s 1996 ruling highlighted the novel principle that states could be held accountable for violations outside their territory if they exercised effective control over the area, underscoring the importance of effective control in determining jurisdiction under the European Convention on Human Rights.¹⁷⁸

Al-Skeini and Others v. the United Kingdom later in 2011 concerned allegations of human rights violations in Iraq during the period of the United Kingdom’s military occupation.¹⁷⁹ The applicants, who were relatives of individuals killed in Iraq, claimed that the UK authorities were responsible for the deaths and that the ECHR applied to the actions of British soldiers in Iraq. In this case, the central issue was whether the UK had jurisdiction under Article 1 of the ECHR

¹⁷⁵ *Mueller-Kalandarashvili*, ‘Russia’s “Occupation by Proxy” of Eastern Ukraine – Implications Under the Geneva Conventions’, JustSecurity, 22 February 2022, <https://www.justsecurity.org/80314/russias-occupation-by-proxy-of-eastern-ukraine-implications-under-the-geneva-conventions/> (last accessed 25/11/2023).

¹⁷⁶ European Convention on Human Rights, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

¹⁷⁷ *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. (1996).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Al-Skeini and Others v. the United Kingdom*, Eur. Ct. H.R. 557 (2011).

for actions of British soldiers in Iraq.¹⁸⁰ The ECtHR ruled that the UK did, finding violations of *the right to life* (Article 2), setting a precedent for state accountability under the ECHR for military actions abroad.¹⁸¹ This situation bears similarities to a scenario in which Russia is engaging in human rights violations against third-party nationals, such as EU foreign fighters outside its borders. This case holds significance for our analysis in drawing parallels between different contexts.

In the *Öcalan v. Turkey* case, the European Court of Human Rights underscored the extension of human rights standards beyond national borders, particularly emphasizing the applicability of these standards to individuals held captive by the agents of a given state, providing a relevant context for drawing parallels with European Union foreign fighters in harsh Russian captivity.¹⁸²

III. Human Rights Protection by IHRL

1. The Right to Life

Based on the notion that both states whether the Russian Federation and Ukraine are state parties to the major human rights conventions, this section tackles *the right to life* of European foreign fighters which may be controversial and was not quite tackled in the IHL part of this thesis. The core justification is rooted in the fact that International Humanitarian Law (IHL) adopts a *permissive approach* to the loss of life,¹⁸³ unlike International Human Rights Law (IHRL). IHL, being the legal framework for warfare, acknowledges the acceptability of causing harm, as the overarching goal of war is to achieve victory by engaging in actions, including lethal force and killing the enemy. This stands in direct contrast to the principle of the right to life, which is safeguarded by IHRL in the major conventions. To illustrate, Article 6 of the International Covenant for Civil and Political Rights states: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Öcalan v. Turkey*, 27 EHRR 593, Eur. Ct. H.R 557 (2005).

¹⁸³ *Waschefort*, *EJIL* 34/2023, p. 619.

life'.¹⁸⁴ Article 3 of the UDHR and Article 2 of the European Convention on Human Rights articulate an akin principle,¹⁸⁵ emphasizing the crucial significance of this right.

This right becomes relevant due to European foreign fighters facing arbitrary killings and being handed arbitrary death sentences by Russia since the onset of the conflict. There is no confirmed evidence of EU foreign fighters *being officially guillotined*, but Russia is allegedly using this illegal tactic to pressure and demoralize both current fighters and Ukrainian forces, aiming to discourage future involvement in the war. Russia should not arbitrarily impose the death penalty on these fighters without proper legal processes, fair trials, and adequate safeguards, which are fundamental components of the right to life. Moreover, there is always the risk that in a state of war the identities of EU foreign fighters might be mistaken or confused so Russian authorities must ensure that there are no wrongful rulings or executions in order to safeguard the right to life of European foreign fighters.

2. The Right Against Torture and Inhumane Treatment

Despite being dealt with in the International Humanitarian Law (IHL) section above, the right against torture has substantial foundations in International Human Rights Law (IHRL), rooted in the global consensus on the inhumanity of torture, as evidenced in the Universal Declaration of Human Rights,¹⁸⁶ which extends these protections to European foreign fighters during and after capture. This right provides inherent dignity of foreign fighters, even during capture, recognizing their status as individuals entitled to fundamental human rights. Aside to this, the main convention tackling this right is the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** that was equally ratified by Russia as well as Ukraine in 1987 thereby obliging both states and in this case particularly Russia obliging to take effective measures to prevent acts of torture within its jurisdiction. The convention defines torture around the lines of intentionally causing severe physical or mental pain for purposes like

¹⁸⁴ *International Covenant on Civil and Political Rights*, adopted by the United Nations General Assembly on December 16, 1966, art 1.

¹⁸⁵ *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on December 10, 1948, art. 3; see also *European Convention on Human Rights*, adopted on November 4, 1950, art. 2.

¹⁸⁶ *Universal Declaration of Human Rights*, art. 5.

obtaining information, punishment, intimidation, or discrimination.¹⁸⁷ It involves acts carried out by or with the consent of a public official or someone acting in an official capacity.¹⁸⁸

Article 3 of the European Convention on Human Rights reads as follows: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.¹⁸⁹ The ECHR imposes negative and positive obligations against Russia vis-à-vis EU foreign fighters during and after capture:¹⁹⁰ 1) through placing a core obligation on Russia and its military entities, by mandating them to abstain from causing significant harm to EU foreign fighters *within their jurisdiction*. This encompasses scenarios on Ukrainian territories, regardless of effective control, and extends to instances where these fighters are detained in Russia and 2) Russian engagement in operational measures for safeguarding EU foreign fighters in defined situations, by undertaking thorough investigations into plausible allegations of treatment.

3. The Right to Fair Trial

One of the main human rights abuses EU foreign fighters are being subjected to which partly is related to inhumane treatment and receiving arbitrary death sentences by Russia within the context of the war is being deprived to be heard properly in front of a competent court. Instead, what is occurring is that Russia is conducting partial, unjust, and deceptive trials of European Union foreign fighters, without adhering to any international human rights standards. The IC-CPR’s **Article 9** reads as follows: ‘*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement*’.

¹⁸⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly on December 10, 1984, art. 1.

¹⁸⁸ *Ibid.*

¹⁸⁹ *European Convention on Human Rights*, 1950, art. 3.

¹⁹⁰ ECHR, ‘*Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture*’, 31 August 2022, www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG (last accessed 26/11/2023).

One could debate the legitimacy of Russia's authority to conduct these trials, considering that the primary battleground of the war is on Ukrainian soil, potentially invalidating Russia's jurisdiction. Furthermore, even when these fighters are captured in the self-declared Donetsk or Luhansk regions, the international community, along with the United Nations, maintains the recognition of these territories as integral parts of Ukraine.¹⁹¹ Therefore, in principle, Russia's organization of these trials is considered illegal under International Human Rights Law (IHRL). Therefore, Russia should discontinue trying European foreign fighters by treating them as *mercenaries*, as they are officially recognized as members of Ukraine's armed forces and should be enjoying PoW privileges (explained above). Similarly, the ECHR's accords EU foreign fighters with the same rights as it stipulates in its Article 7 that no punishment without law can be passed on to any individual human being.¹⁹²

4. The Right to Privacy

This human right although not that spoken of has been and is being violated during the Russo-Ukrainian war particularly vis-à-vis EU foreign fighters by Russia. At first glance at this right, one would immediately think of *the right to privacy* as a *buffer* between these fighters and Russian forces during captivity in terms of disclosure of private information, intrusive searches, arbitrary detention and interrogation and unlawful surveillance of the communication of these fighters with their families during captivity (if any communications are allowed by Russian forces anyways) which are completely valid. Yet this section highlights another angle of this right that comes in a form of a *positive obligation* on Russian forces rather than *negative ones* in the form preserving core community norms pertaining to aspects like intimate relationships and public reputation i.e. *privacy in the form of dignity*.¹⁹³

Since the commencement of the Russo-Ukrainian war in February 2022, a considerable number of European Union foreign fighters as well as Ukrainian soldiers have succumbed to harsh and illegal methods of warfare employed by Russian forces, while their families remain uninformed

¹⁹¹ *United Nations*, 'Secretary-General's Remarks on Russian Decision on Annexation of Ukrainian Territory [As Delivered]', 29 September 2022, <https://www.un.org/sg/en/content/sg/statement/2022-09-29/secretary-generals-remarks-russian-decision-annexation-of-ukrainian-territory-delivered> (last accessed 29/11/2023).

¹⁹² *European Convention on Human Rights*, art. 7.

¹⁹³ *Diggelmann & Cleis*, HRLR 14/2014, p. 442.

about their locations.¹⁹⁴ Article 8 of the ECHR has been defined *quite broadly*, yet ECHR case law has narrowed its scope of application. In *Lozovyye v. Russia*, the European Court of Human Rights underscored the importance of the right to access information related to private and family life, emphasizing its relevance to the case of a murder victim whose burial occurred before the victim's parents were informed.¹⁹⁵ The court, invoking Article 8, recognized the right to attend the funeral as part of the protected sphere of private and family life, asserting that authorities have an obligation to undertake reasonable steps to inform family members when aware of a death. Therefore, in the context of European foreign fighters, whether in captivity or on the battleground, and where Russia is aware of the personal information of the detainees or casualties, Russia is obliged to communicate their well-being or death(s) to their families or loved ones so as to ensure a dignified and humane resolution to their circumstances, respecting the principles of international human rights and providing closure to the affected families.

F. Conclusion

The catalogue of human rights, whether offered by International Humanitarian Law (IHL) or International Human Rights Law (IHRL), to European Union fighters in the Russo-Ukrainian War ignited since February 2022 is *extensive*, but not necessarily *exhaustive*. The Right to Humane Treatment, Prohibition of Torture and Cruel Treatment, the Right to Fair Trial and Legal Representation, the Right to Health and Medical Treatment and the Right to Repatriation, the Right to Privacy and even the highly contested Right to Life only scratch the surface regarding the rights EU foreign fighters are worthy of throughout the ongoing conflict. The complexity and fluidity of armed conflicts, particularly in the context of foreign fighters, present ongoing challenges in fully encapsulating the array of human rights these individuals merit. This thesis, while acknowledging the potential for further exploration and expansion of the topic, makes significant strides in shedding light on a subject that has been understudied and underlooked and in the meantime unravelling at the time of writing.

¹⁹⁴ *Ukrainska Pravda*, 'Two Foreign Volunteers Killed in Ukraine by Russian Attack', 10 September 2023, <https://www.pravda.com.ua/eng/news/2023/09/10/7419210/> (last accessed 26/11/2023).

¹⁹⁵ *Lozovyye v. Russia*, Application no. 4587/09, Judgment, European Court of Human Rights, Strasbourg, 24 April 2018.

In an era where human rights discussions are crucial, understanding the legal protections and considerations for European Union foreign fighters becomes paramount. The three main sections of the thesis have systematically unraveled the involvement of European foreign fighters in the Russo-Ukrainian War, elucidated the legal frameworks of IHL and IHRL, and meticulously examined the protections these fighters may be entitled to under these international laws. By delving into conflict classification, the Geneva Conventions, and relevant case law, the thesis provides a robust foundation for assessing the human rights landscape in this specific context. In recognizing the evolving nature of the foreign fighter phenomenon, the thesis contributes to a more nuanced understanding of these individuals, moving beyond stereotypical categorizations and observing from a more official angle as members of Ukraine's army despite being non-citizens of Ukraine.

Much more scholarly attention is needed to ensure a comprehensive exploration of the human rights complexities faced by EU foreign fighters. As the world grapples with the intricacies of modern conflicts, the thesis adopts an objective lens, seeking to humanize these fighters irrespective of their allegiance to Ukraine or Russia. The central question, "To what extent do international humanitarian law and human rights law ensure the protection of EU foreign fighters in the ongoing Russo-Ukrainian War?" is addressed through a thoughtful analysis of legal frameworks, case studies, and the broader implications for human rights in times of conflict. In essence, this thesis makes a meaningful contribution to the academic conversation surrounding the human rights of EU foreign fighters. It not only establishes a solid foundation for ongoing research, discussion, and advocacy within the realms of international law and human rights protection but also sets the stage for increased awareness and attention from government authorities on this complex phenomenon and its repercussions if continued to be ignored.

This academic work aims to serve as a humanitarian and human rights blueprint for the Conflicting Parties (Russia and Ukraine), governments and international law scholars on how to regulate this vague realm of foreign fighters combatting in Ukraine as we speak by setting forth clear obligations and duties against EU foreign fighters of their treatment and disposition upon capture firstly to Russia and even to Ukraine concerning fighters having allegiance to Russia as human rights are universal and do not pertain to a certain nationality in order for them to be merited.

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