

The Legal Status of Mercenaries and Foreign Fighters Under the Geneva Conventions and Additional Protocols: A Case Study of the Russia-Ukraine Conflict

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Abstract—The contemporary landscape of armed conflict is increasingly characterized by the involvement of non-state actors and foreign individuals, presenting complex challenges to the established framework of International Humanitarian Law (IHL). This report examines the intricate legal status of mercenaries and foreign fighters under the Geneva Conventions and their Additional Protocols, using the ongoing Russia-Ukraine conflict as a critical case study. It delves into the precise definitions of combatants and mercenaries, highlighting the deliberate narrowness of the mercenary definition in Additional Protocol I, and contrasts this with the ambiguous, undefined status of "foreign fighters." The analysis reveals a significant tension between the static nature of IHL's codified definitions and the dynamic evolution of modern warfare practices, leading to a legal vacuum that undermines protection and accountability. Through an examination of state practices in the Russia-Ukraine conflict, particularly Ukraine's strategic integration of foreign volunteers and Russia's controversial classification of opposing foreign fighters, the report exposes systematic violations of IHL, including the denial of prisoner of war (POW) status and fair trial guarantees. It further explores the complex interplay between IHL and domestic counter-terrorism laws, which often criminalize actions lawful under IHL, and assesses the role of international accountability mechanisms. The report concludes with recommendations for clarifying legal statuses, strengthening IHL adherence, and enhancing accountability to preserve the integrity of humanitarian norms in future conflicts.

I. INTRODUCTION

The nature of armed conflict has undergone significant transformation in recent decades, moving beyond traditional state-on-state engagements to involve a diverse array of non-state armed groups and foreign individuals. This evolving landscape poses profound

challenges to the application and interpretation of International Humanitarian Law (IHL), the body of law that governs the conduct of hostilities and aims to mitigate their humanitarian consequences.¹ The legal classification of individuals participating in these conflicts—whether as combatants, mercenaries, or foreign fighters—is not merely an academic exercise; it carries direct and often life-or-death implications for their rights and protections, especially if they are captured.²

The Russia-Ukraine conflict stands as a poignant and critical case study in this regard. The conflict has seen the prominent involvement of foreign combatants on both sides, ranging from Ukraine's officially sanctioned International Legion for Territorial Defense to Russia's utilization of private military companies (PMCs) like the Wagner Group.⁴ This extensive foreign participation has ignited contentious debates over their legal status, treatment upon capture, and accountability for any alleged violations of IHL. The increasing presence of foreign combatants in modern conflicts highlights a fundamental tension between the static nature of IHL's codified definitions, particularly concerning mercenaries, and the dynamic evolution of warfare practices. This disjuncture often creates a "legal vacuum" that complicates the application of IHL, thereby undermining both the protection of individuals and the enforcement of accountability for violations.¹

IHL primarily operates on a binary distinction between combatants and civilians. Combatants are individuals who can lawfully participate in hostilities and, if captured in an International Armed Conflict (IAC), are entitled to Prisoner of War (POW) status. Civilians, conversely, are protected from attack unless and for such time as they directly participate in hostilities.⁶

However, categories such as "mercenary" and the broadly used term "foreign fighter" introduce significant complexities into this binary framework. These categories often lead to ambiguous legal statuses, which can result in the denial of fundamental protections and expose individuals to criminal prosecution for acts that would otherwise be lawful if committed by a recognized combatant.⁴ The ambiguity surrounding foreign fighters is not merely academic; it has direct, life-or-death consequences for individuals captured in conflict zones. The misclassification of these individuals, particularly as mercenaries, has been shown to have profound implications, exposing them to prosecution, death sentences, and inhumane treatment, thereby underscoring the critical humanitarian stakes involved in these definitional debates.²

This report aims to dissect these legal complexities, tracing the historical evolution of relevant IHL frameworks, analyzing their application in the Russia-Ukraine conflict, and identifying the persistent challenges to ensuring compliance and accountability.

II. CONCEPTUAL FRAMEWORK: DEFINING COMBATANTS, MERCENARIES, AND FOREIGN FIGHTERS UNDER INTERNATIONAL HUMANITARIAN LAW

Understanding the legal status of individuals involved in armed conflict requires a precise grasp of the definitions and distinctions provided by International Humanitarian Law (IHL). The Geneva Conventions of 1949 and their Additional Protocols, particularly Additional Protocol I (API), form the cornerstone of this legal framework.

A. The Status of Combatants and Prisoner of War (POW) Protections under the Geneva Conventions and Additional Protocol I

Under IHL, a combatant is a person authorized to use force in situations of armed conflict.⁷ This category primarily includes members of national armed forces. However, it also extends to members of other militias and volunteer corps, including organized resistance movements, provided they meet specific conditions: they must be commanded by a person responsible for their subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war.⁶ Additional Protocol I, adopted in

1977, further broadened the notion of "combatants" to include all persons who participate in hostilities as members of armed forces, aiming to standardize the regime of protection and impose equal responsibilities.⁷ A crucial aspect of this expanded definition is that nationality is not a condition for combatant status under API; thus, non-nationals who volunteer and join the armed forces of a party to a conflict cannot be excluded from this category.⁷

The status of combatant is intrinsically linked to the concept of Prisoner of War (POW). If captured in an International Armed Conflict (IAC), combatants are entitled to POW status.⁴ This status grants them significant protections under the Third Geneva Convention, including immunity from prosecution for lawful acts of war.² They cannot be prosecuted merely for participating in hostilities, though they can be prosecuted for war crimes, crimes against humanity, or acts of genocide if they commit such offenses.⁷ POWs are guaranteed humane treatment, which includes protection from violence, torture, insults, and public curiosity.¹⁰ They are entitled to adequate food, clothing, medical care, and the right to correspond with their families.¹⁰ Furthermore, POWs must be released and repatriated without delay once active hostilities cease.¹⁰ If there is any doubt as to whether a person benefits from combatant status, they must be held as a POW until their status is determined by a competent tribunal.⁶

Historically, the presence of foreign volunteers and "soldiers of fortune" in armed conflicts was a common phenomenon, dating back at least to the Roman Empire, which recruited non-citizens into auxiliary units.²¹ In earlier eras, the legal status of captives was often ill-defined, with treatment varying widely from enslavement to ransom.³⁴ Ancient civilizations, including the Israelites, Greeks, and Romans, recognized the necessity of some restraints during armed conflict, such as protecting the innocent or prohibiting certain treacherous stratagems, though these were often rooted in religious or customary practices rather than codified international law.³⁴

The 19th century marked a pivotal period with early attempts to formalize the laws of war. The Brussels Conference in 1874, though not ratified, began to consider protections for non-combatants and humane treatment for prisoners.³⁶ The Hague Conventions of 1899 and 1907 further advanced these efforts, outlining basic rules for land warfare, including

prohibitions on mistreating prisoners and protecting civilians.³⁷ These conventions also contained provisions for militias and volunteer corps to be considered combatants if they met certain conditions, such as having responsible command, a fixed distinctive sign, and carrying arms openly.³⁶

The rise of the modern nation-state concept fundamentally altered perceptions of armed conflict. As states increasingly asserted their monopoly on legitimate force, there was a growing preference for national armed forces and a corresponding skepticism towards non-state armed groups and individuals fighting for private gain. This shift led to mercenaries being viewed as less entitled to protection by the rules of war beginning in the 20th century.¹⁸ The historical evolution of IHL thus reflects a continuous struggle to balance state sovereignty and control over armed conflict with the humanitarian imperative to protect individuals, particularly those operating outside traditional state structures. The emergence of non-state actors, including foreign volunteers and later PMCs, challenged the state's traditional monopoly on force, forcing IHL to adapt, often belatedly, to these new realities, as evident in the debates surrounding API Article 47.

B. The Spanish Civil War and the International Brigades: A Precedent for Foreign Volunteers

The Spanish Civil War (1936-1939) served as a significant precedent for the involvement of ideologically motivated foreign volunteers in armed conflicts. The International Brigades were composed of approximately 32,000 volunteers from over 50 nations, primarily driven by anti-fascist ideology, who fought for the Spanish Republic.³⁹ These brigades were formally integrated into the Spanish Republican Army by a decree in 1937, making them subject to the Spanish Code of Military Justice, although some units retained a degree of autonomy.⁴¹

Despite their formal integration, the legal status of the International Brigades remained debated, particularly in light of the international non-intervention agreement that sought to prevent foreign involvement in the conflict.⁴² Upon their return home, many volunteers faced legal repercussions and discrimination in their countries of origin, with some having their citizenship rights revoked.³³ Captured members were often treated harshly, with some

imprisoned in camps such as Miranda de Ebro, where they faced "real repression".⁴⁴

The Spanish Civil War highlighted the profound challenges of applying traditional IHL to conflicts characterized by significant foreign non-state participation and strong ideological motivations. The involvement of these volunteers, who did not fit neatly into existing combatant categories and were not primarily motivated by private gain, influenced later developments in IHL. This historical experience foreshadowed the complexities that would lead to the narrow definition of "mercenary" in Additional Protocol I and the subsequent ambiguity surrounding the term "foreign fighter." The international community, seeking to strictly define "mercenary" in API, aimed to limit who could claim combatant privilege, while inadvertently leaving a gap for those who did not meet the mercenary criteria but were also not formal state combatants.

C. The Rise of Private Military and Security Companies (PMSCs) and its Influence on Mercenary Law

The post-Cold War era witnessed an exponential growth in the number and activities of Private Military and Security Companies (PMSCs), particularly in conflicts like Afghanistan (2001–14) and Iraq (2003–11).²⁶ These entities operate as "commercial enterprises and registered businesses," offering a wide range of services from logistical and consulting support to direct armed combat operations.²⁶

PMSCs often operate in a legal "twilight zone," making the direct application of IHL challenging.²⁶ Their employees may not strictly meet the narrow, cumulative definition of a mercenary under API Article 47, allowing them to evade the mercenary label despite performing similar functions.⁴⁵ While international initiatives like the Montreux Document (2008) have attempted to restate existing IHL standards applicable to PMSCs, their impact on broader regulation and accountability has been limited.²⁶

States increasingly rely on PMSCs, sometimes to circumvent direct military involvement, reduce visible casualties, or gain deniability for their actions.⁴⁵ The Wagner Group, for instance, has operated as an agent of Russian foreign and defense policy, despite PMCs being technically illegal under Russian law until recently.⁴⁷ This strategic adaptation by states allows

them to engage in conflict while potentially sidestepping direct IHL obligations and accountability. The "re-nationalization" of some PMCs, where they maintain close ties with the state but operate with a high degree of autonomy, further complicates their legal status and accountability for human rights violations committed by their personnel.⁴⁸ This deliberate ambiguity strains the already narrow mercenary definition, creating a gap in effective regulation and oversight.

III. CASE STUDY: THE RUSSIA-UKRAINE CONFLICT

The ongoing Russia-Ukraine conflict serves as a contemporary crucible for testing the applicability and limitations of IHL regarding foreign combatants. The differing approaches and interpretations by both sides highlight the persistent ambiguities and strategic manipulations of legal classifications.

A. Ukraine's Legal Framework for Foreign Volunteers: The International Legion for Territorial Defense Following the full-scale Russian invasion in February 2022, Ukrainian President Volodymyr Zelenskyy appealed to foreign nationals to join the defense of Ukraine.¹⁴ This led to the establishment of the International Legion for Territorial Defense of Ukraine, a military unit composed of foreign volunteers formally integrated into the Ukrainian Ground Forces.⁵² This integration was facilitated by a 2016 presidential decree that already allowed non-Ukrainian citizens to enlist in the Ukrainian Armed Forces on a voluntary, contract-based military service.¹⁴

Ukraine's official position is that members of the International Legion are considered lawful combatants. They are integrated into its armed forces, subject to its command structure and internal disciplinary system, and are expected to adhere to the laws of armed conflict.¹⁴ Consequently, Ukraine asserts that these foreign volunteers are entitled to Prisoner of War (POW) status upon capture, regardless of their nationality or their initial motivations for joining.⁴ Furthermore, members of the International Legion receive standard pay and benefits comparable to those of Ukrainian soldiers, including financial and social security, and are eligible for Ukrainian citizenship if desired.⁵²

Ukraine's formal integration of foreign volunteers into its armed forces is a deliberate legal strategy to ensure their combatant and POW status. This proactive measure aligns with the criteria for combatant status under the Third Geneva Convention and Additional Protocol I, particularly the provision that nationality is not a condition for combatant status if individuals are genuinely integrated into a party's armed forces.⁷ By ensuring these foreign volunteers meet the "member of armed forces" criterion (API Art. 47(2)(e)), Ukraine aims to prevent their classification as mercenaries and secure their POW protections against any opposing claims.

B. Russia's Interpretation and Classification of Foreign Fighters

Russia has adopted a fundamentally different and often contradictory stance regarding foreign combatants in the conflict.

- **Russia's Stance on Foreigners in Ukrainian Forces:** Russia has consistently labeled foreign fighters serving with Ukrainian forces as "mercenaries." Russian officials, including the Ministry of Defense, have publicly warned that these individuals would not be considered combatants under international humanitarian law and would therefore not be entitled to POW status upon capture, instead facing criminal prosecution.² This strategic misclassification is a clear attempt to delegitimize their participation and deny them the protections afforded to lawful combatants.
- **The Wagner Group:** Simultaneously, Russia has extensively utilized the Wagner Group, a prominent Private Military Company (PMC). While PMCs were technically illegal under Russian law for a long time, the official discourse in Russia has shifted, increasingly viewing them as "legitimate market actors".⁴⁷ The Wagner Group operated as an agent of Russian foreign and defense policy, particularly in conflicts like the Donbas region in 2014 and later in Syria and Africa.⁴⁹ Despite their close ties to the Russian state, their legal status under IHL remains ambiguous. While Russia denies their mercenary status, members of the Wagner Group often meet several of the cumulative criteria of API Article 47(2), such as being specially recruited, taking direct part in hostilities, and being non-nationals

of the conflict party.²³ However, proving the "substantially in excess" payment criterion, a key element of the mercenary definition, remains challenging.²³

Russia's strategic misclassification of foreign fighters for Ukraine as "mercenaries" is a politically motivated attempt to delegitimize their participation and deny them IHL protections. This contrasts sharply with Ukraine's proactive integration efforts. Simultaneously, Russia exploits ambiguities in its own domestic law and IHL to utilize groups like Wagner without incurring direct state responsibility. This reveals a cynical exploitation of legal grey areas: Russia applies a strict, hard-to-meet mercenary definition to deny protections to the enemy's foreign fighters, while allowing its own foreign/private forces to operate under ambiguous legal cover, thereby avoiding direct IHL accountability.

IV. CONCLUSION AND RECOMMENDATIONS

A. Summary of Key Findings and Persistent Legal Gaps

The analysis of the legal status of mercenaries and foreign fighters under the Geneva Conventions and Additional Protocols, particularly in the context of the Russia-Ukraine conflict, reveals several critical findings and persistent legal gaps. The definition of a mercenary under Article 47 of Additional Protocol I is exceptionally narrow and cumulative, making it notoriously difficult to apply in practice, especially concerning the subjective "private gain" criterion. This narrowness often creates a significant disconnect between the strict legal classification and popular perception.

Conversely, the term "foreign fighter" lacks a specific, universally agreed-upon definition in IHL, leading to considerable ambiguity in their legal status. This ambiguity has been further complicated by the counter-terrorism framework, notably UN Security Council Resolution 2178, which has blurred the lines between lawful participation in hostilities and terrorism.

In the Russia-Ukraine conflict, these definitional challenges manifest acutely. Ukraine has strategically integrated foreign volunteers into its armed forces through the International Legion, aiming to secure their combatant and Prisoner of War (POW) status under IHL. In stark contrast, Russia has strategically

misclassified foreign fighters serving with Ukraine as "mercenaries" to deny them IHL protections and subject them to criminal prosecution, often through illegitimate "sham trials" that violate fundamental fair trial guarantees. Russia's own reliance on groups like the Wagner Group, operating under ambiguous legal cover, further underscores the complexities of non-state armed actors and the challenges to state responsibility. These definitional and interpretative discrepancies have severe practical implications, leading to the denial of POW status, inhumane treatment, and widespread impunity for human rights abuses.

B. Recommendations for Clarifying Legal Status, Enhancing Protection, and Ensuring Accountability

To address the persistent legal gaps and ensure the continued relevance and efficacy of International Humanitarian Law in contemporary armed conflicts, the following recommendations are put forth:

- **Clarify Definitions and Status:** States and international bodies should actively work towards developing clearer guidelines or interpretations for the legal status of foreign fighters. This requires moving beyond the rigid binary of "combatant" or "mercenary" to develop a more nuanced legal typology that accounts for the varied motivations, affiliations, and levels of integration of foreign individuals in armed conflicts.¹ A more nuanced legal typology for foreign fighters is essential to prevent legal vacuums and ensure consistent application of IHL. The current framework struggles to categorize the diverse motivations and affiliations of these individuals, and the strict mercenary definition is rarely met, leaving a large group in an ambiguous legal space that belligerents can exploit. Therefore, new legal categorization is necessary to ensure that individuals who are not mercenaries are still afforded appropriate protections under IHL, even if they are not formal state combatants.
- **Strengthen Adherence to IHL:** All parties to armed conflicts must strictly adhere to the fundamental principles of IHL, particularly concerning the treatment of captured persons. This includes ensuring POW status for all eligible combatants and upholding fundamental fair trial guarantees for all detainees, regardless of their

classification.² The integrity of IHL hinges on universal adherence, especially concerning the non-derogable rights of detainees. Selective application by powerful states or parties to a conflict undermines its global legitimacy and risks rendering the law ineffective. The ICRC has expressed concerns about IHL's legitimacy being "at risk due to a lack of respect, deliberate violations, and expedient interpretations".⁵⁸ If IHL is not universally respected, it risks becoming a mere suggestion, undermining its humanitarian purpose.

- **Enhance Accountability Mechanisms:** Continued and strengthened international efforts are crucial to investigate and prosecute war crimes and grave breaches of IHL. This involves robust utilization of existing mechanisms such as the International Criminal Court (ICC) and the principle of universal jurisdiction.² Furthermore, concerted efforts are needed to address the widespread impunity for human rights violations committed by foreign armed actors, including Private Military and Security Company (PMSC) personnel, by strengthening domestic legal frameworks and fostering greater international cooperation.⁵⁰ Robust accountability mechanisms are not merely punitive; they are essential for deterring future violations, upholding the rule of law, and restoring trust in the international legal order. The pervasive impunity creates a permissive environment for violations, and active investigation and prosecution, despite their challenges, send a clear message that such acts will not go unpunished. This reinforces IHL's deterrent effect and helps to re-establish the normative framework for armed conflict, which is crucial for protecting victims.
- **Address the PMC/State Nexus:** The increasing reliance on Private Military and Security Companies by states demands a critical re-evaluation of state responsibility under IHL. International instruments or robust national regulations should be developed to govern the activities of PMSCs, ensuring clear state accountability for their actions and preventing them from operating in a "legal twilight zone".²⁶ The activities of groups like the Wagner Group exemplify how states can use PMCs to achieve foreign policy objectives while maintaining

deniability. The "legal twilight zone" allows these entities to operate with less scrutiny and accountability. Therefore, future legal developments must clarify the relationship between states and PMSCs and assign clear responsibility for IHL violations committed by their personnel, ensuring that states cannot outsource combat functions to circumvent their international obligations.

By implementing these recommendations, the international community can work towards a more coherent and effective application of IHL in complex modern conflicts, thereby better protecting individuals caught in the crossfire and upholding the fundamental principles of humanity.

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