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Research Article

COMBATANT IMMUNITY AND THE RUSSIAN-UKRAINIAN WAR: REOPENING THE DEBATE ON A LONGSTANDING DOCTRINE

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ABSTRACT

Background: *Russia's invasion of Ukraine has resulted in the largest conflict in Europe since the Second World War, with estimates suggesting that hundreds of thousands of Russian soldiers are implementing the will of the aggressor state. It has long been believed that combatants are immune from criminal prosecution for their actions during hostilities, including the killing of military personnel defending the victim state unless they violate the laws of war. However, this immunity has naturally generated criticism in the Ukrainian legal community. In this article, the authors analyse the critical arguments made by opponents of combatant immunity and seek to clarify the legal and ethical grounds of the controversial doctrine. Furthermore, the well-known debate on the significance of citizenship (nationality) for recognising combatant or prisoner of war status and the liability of defectors is revisited from a new perspective.*

Methods: *The article is based on an analysis of IHL sources, commentaries, state practices, precedents and scientific views on combatant immunity. Additionally, the article examines the practices of law enforcement agencies in Ukraine and the perspectives of Ukrainian criminal law scholars. General scientific methods of cognition (induction, deduction, analysis, synthesis), as well as historical, empirical and systemic-structural methods, are used.*

The article is structured into three parts. The initial section provides a comprehensive overview of the status of a combatant and their associated privileges within the context of international humanitarian law (IHL), with a particular focus on the ongoing conflict between Russia and Ukraine. The second section delves into the debate surrounding Ukraine's obligation to respect the immunity of the combatant of the aggressor state and offers the authors' conclusions on this matter. The third section addresses the liability of defectors, focusing on the implications of citizenship (nationality) for combatants and prisoners of war (POW).

Results and conclusions: *Several Ukrainian scholars have expressed their unreserved disagreement with Ukraine's application of the doctrine of combatant immunity to Russian soldiers. In the absence of a direct reference to this exceptional privilege in international treaties to which Ukraine is a party and in light of the a priori unlawfulness of aggression, the critical arguments are not without merit. Nevertheless, we conclude that respect for the immunity of a combatant representing the aggressor state is part of Ukraine's international obligations and has a certain justification. Concurrently, the article acknowledges that the legal and ethical grounds for this are not entirely clear. The question of whether defectors should be recognised as combatants and/or prisoners of war is similarly unclear. Nevertheless, we are convinced that regardless of the answer to this question, the criminal prosecution of defectors for high treason cannot be considered a violation of the immunity of a combatant.*

1 INTRODUCTION

The full-scale invasion of Ukraine by the Russian Federation in February 2022, which is a continuation of the armed aggression initiated in 2014, has given rise to numerous challenges for the national criminal law of Ukraine. Amid this ongoing conflict, where Russia possesses considerable military capabilities, an effective propaganda apparatus and international influence, it is evident that Ukraine must adapt its criminal law policy in response to the aggression. This situation requires a reassessment of the social danger posed by various acts while considering the conditions imposed by martial law.[1]

The ongoing conflict between Russia and Ukraine, which began in 2014, indicates that the victim state's national legislation has had sufficient time to evolve within the context of an armed conflict and address related legal aspects. The primary challenge, however, lies in aligning the national legal framework with the standards set forth by international armed conflict law. Russia's occupation of certain districts of the Ukrainian regions of Donetsk and Luhansk, associated with an ongoing armed conflict until 2022,[2] presents a unique case. A distinctive feature of this occupation by proxy is that effective control is exercised by surrogate armed forces (typically certain local militarised groups) operating under the overall control of a foreign state.[3] Concurrently, members of the opposing parties in the armed conflict were predominantly Ukrainian citizens. Consequently, the Ukrainian investigative authorities, in their assessment of the so-called Donetsk National

1 Natalia Antonyuk, 'A Criminal and Legal Assessment of Collaborationism: A Change of Views in Connection with Russia's Military Aggression against Ukraine' (2022) 5(3) Access to Justice in Eastern Europe 139, doi:10.33327/AJEE-18-5.3-n000312c.

2 Of course, the international armed conflict began with the annexation of Crimea, but the large-scale armed confrontation with the wide involvement of the armed forces was caused by the events in Donbas.

3 Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94(885) International Review of the Red Cross 158, doi:10.1017/S181638311200063X.

Republic ('DNR') and Luhansk National Republic ('LNR') militants, focused on such criminal offences as separatism (Articles 109 and 110 of the Criminal Code of Ukraine), participation in a terrorist organisation (Article 258-3 of the Criminal Code), and involvement in illegal armed groups (Article 260 of the Criminal Code).[4]

On 24 February 2022, the international nature of the Russian-Ukrainian conflict became apparent even to those who had previously been the most sceptical. Hundreds of thousands of regular army troops entered the territory of a sovereign country openly, accompanied by hundreds of pieces of heavy equipment, while simultaneously bombing military and civilian targets. The killing and wounding of military and civilian personnel, the extensive destruction of property, the capture of individuals, and other consequences of the war gave rise to a new legal paradigm based on the principles of international humanitarian law (IHL).

Criminal law plays a pivotal role in ensuring fairness. It is not coincidental that criminal punishment is often determined through the principle of fairness, particularly in the sense of retribution. In this context, a society that is outraged by an unprovoked and brutal attack by an adversary naturally demands that the authorities activate the most severe means of influence available under criminal law. It is, therefore, understandable that the affected state desires to bring the aggressor country's military to justice as quickly and severely as possible. This desire is further reinforced by the fact that the leaders responsible for instigating the armed conflict remain inaccessible.

2 EVALUATION OF PARTICIPATION IN HOSTILITIES AGAINST UKRAINE AS A NEW CHALLENGE FOR UKRAINIAN CRIMINAL LAW

In IHL, the principle of distinguishing between lawful combatants and civilians is fundamental.[5] The purpose of this distinction is to ensure that the same person cannot occupy two chairs simultaneously. Consequently, the law of international armed conflict "can effectively protect civilians from being objects of attack in war only if and when they can be identified by the enemy as non-combatants".[6]

The legal basis for the special status of combatants is established in Articles 1-3 of the Regulations concerning the Laws and Customs of War on Land, which were annexed to the

4 Law of Ukraine no 2341-III of 5 April 2001 'Criminal Code of Ukraine' <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 14 May 2024; Mykola Rubashchenko, 'Wandering in Search of Qualification of the Actions in Crimea and in the East of Ukraine (2014–2018)' in Anita Jankovska (eds), *New Stages of Development of Modern Science in Ukraine and EU Countries* (5th edn, Baltija Publ 2019) 147-8, doi:10.30525/978-9934-588-15-0-86.

5 Lawrence Hill-Cawthorne, 'Persons Covered by International Humanitarian Law: Main Categories' in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (Oxford Academic 2020) 99, doi:10.1093/law/9780198855309.003.0005.

6 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 29, doi:10.1017/CBO9780511817182.

Hague Convention (IV) of 1907;[7] Articles 4A (1) – (3) and (6) of the Geneva Convention III;[8] Articles 13 (1) – (3) of the Geneva Conventions I and II;[9] and Articles 43 and 44 of the Protocol Additional to the Geneva Conventions I.[10] Ukraine is a party to all of these international treaties. Based on Article 43 of the Protocol Additional to the Geneva Conventions I, the following categories of combatants can be delineated:

1) members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;
2) members of other militias and members of other volunteer corps, including those of organised 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 organised resistance movements, fulfil the four well-known conditions, defined in Article 4A (2) of the Geneva Convention III;
3) members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power;
4) inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[11]

This article focuses on the members of the Russian Federation's armed forces (Group I). It does not analyse the problems arising from the recognition as combatants of other types of participants in hostilities, nor does it address the status of irregular armed forces, partisans, or private military companies.

Members of regular armed forces are the main group of combatants.[12] At first glance, it may seem that assessing their behaviour during the war may appear to be the least controversial and the most understandable–particularly in comparison to evaluating the actions of armed groups that do not officially recognise their affiliation with parties to the conflict. However,

7 Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907> accessed 14 Ma 2024.

8 Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949> accessed 14 May 2024.

9 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949> accessed 14 May 2024; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949> accessed 14 May 2024.

10 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> accessed 14 May 2024.

11 ibid.

12 Emily Crawford and Alison Pert, *International Humanitarian Law* (2nd edn, CUP 2020) 99, doi:10.1017/9781108635448.

reality shows that this is far from the case. A seemingly simple case has sparked debate among law academics and law enforcement officials in Ukraine and exposed a number of unresolved issues.

The status of a combatant can be reflected by two sides of the same coin. One is that the combatant is a legitimate participant in the hostilities. The flip side of the coin for a combatant is that he or she is a legitimate military target for the enemy. The fact that a combatant has the legal right to take direct part in hostilities, in turn, has two significant legal consequences.

First, "lawful combatants retain the "combatant's privilege", which provides immunity from prosecution for warlike acts (killing or destruction of property), as long as they comply with the laws of war".[13] This immunity means that "combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime".[14]

Second, the detention of a combatant by the opposing party to the conflict renders them a prisoner of war (POW), which in turn entails a special protective status under the Geneva Convention III. This status encompasses not only the rights and guarantees afforded to POWs but also a number of obligations incumbent upon the party holding them captive. The two consequences are, with some exceptions, closely linked: "the unique protective significance of POW status is combatant immunity".[15]

The provisions of the IHL on combatant immunity were effectively dormant in the context of the Russian-Ukrainian conflict between 2014 and 2022. This was due to the rapid annexation of Crimea by Russia, which was not accompanied by significant hostilities. Furthermore, Russia strongly denied its direct involvement in the occupation of certain areas of the Donetsk and Luhansk regions and exercised overall control over the illegal military formations of the 'DNR' and 'LNR'.[16]

In the first few months after the start of the full-scale invasion, investigative bodies actively reported on the opening of criminal cases against enemy military personnel under articles of the Criminal Code of Ukraine, which mainly provide for 'general' criminal offences.[17] For example, on 28 February 2022, the Office of the Prosecutor General announced that an investigation had been initiated against three captured POWs on the grounds of

13 Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (2nd edn, Aspen Publ 2019) 143.

14 Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85(849) International Review of the Red Cross 45, doi:10.1017/S0035336100103521.

15 Derek Jinks, 'The Declining Significance of POW Status' (2004) 65 University of Chicago Public Law & Legal Theory Working Paper 42.

16 We note that with these statements we only state the reasons for the non-application of the above provisions, but we cannot unequivocally agree.

17 Law of Ukraine no 2341-III (n 4).

encroachment on the territorial integrity of Ukraine (Article 110 of the Criminal Code of Ukraine), aiding a crime of aggression (Article 437 of the Criminal Code of Ukraine) and illegal crossing of the state border of Ukraine with the use of weapons (Article 332-2 of the Criminal Code of Ukraine).[18] As of 11 November 2022, the number of cases reported under Article 110 of the Criminal Code against the Russian military has exceeded 9,000.[19] The official statistics published for 2022 indicate that 10,487 cases were opened, compared to 149 cases in 2021 (an increase of over 7,000%).[20] Such an assessment of the military's actions has highlighted the problem of reconciling the provisions of the national criminal law and the provisions of the IHL.

It is also important to note that the investigative authorities in Ukraine have generally been able to adapt their approach rapidly, with the assistance of regular contact with IHL experts. In collaboration with Ukrainian experts in criminal law and IHL, a memorandum on the legal qualification of the actions of prisoners of war was prepared and distributed among pre-trial investigation bodies. In particular, the document stated that military personnel belonging to the regular armed forces of the enemy should be recognised as POWs and that their actions should not be qualified under the Criminal Code of Ukraine: "Given the immunity (privilege) of a combatant, they are not individually liable for participation in an armed conflict if they did not violate the laws and customs of war".[21]

Subsequently, the Office of the Prosecutor General dispatched a Letter of Guidance to the heads of regional prosecutor's offices, elucidating the application of the provisions of the IHL regarding the treatment of POWs and the specifics of qualifying their actions under the Criminal Code of Ukraine. The aforementioned letter set forth the following recommendations:

1) legal relations related to armed conflict are regulated by the IHL, which is enshrined mainly in international treaties (para. 2);
2) in case of capturing persons participating in the armed conflict on the side of the aggressor state, the presumption of their status as POWs should be applied and they should be treated accordingly (para. 7);

18 Mykolaiv Regional Prosecutor's Office, 'Encroachment on the territorial integrity and inviolability of Ukraine - three Russian servicemen were notified of suspicion' (*Prosecutor General's Office*, 28 February 2022) <https://www.gp.gov.ua/ua/posts/posyagannya-na-teritorialnu-cilisnist-i-nedotorkannist-ukrayini-povidomleno-pro-pidozru-tryom-rosiiskim-viiskovim> accessed 14 May 2024.

19 Olha Guyvan, 'During the Full-Scale Invasion, the Russian Military Committed more than 43,000 Crimes – The Ministry of Internal Affairs' (*Suspilne News*, 11 November 2022) <https://suspilne.media/314850-za-cas-povnomasstabnogo-vtorgnenna-vijskovi-rosii-vcinili-ponad-43-tisaci-zlociniv-mvs/> accessed 14 May 2024.

20 *Prosecutor General's Office,* 'Consolidated Report on Persons who Committed Criminal Offenses, December 2022' (*Prosecutor General's Office, 2023*) <https://gp.gov.ua/ua/posts/pro-osib-yaki-vchinili-kriminalni-pravoporushennya-2> accessed 14 May 2024.

21 Mykola Khavroniuk and others, 'Note on the Legal Qualification of the Actions of Prisoners of War (for Pre-Trial Investigation Bodies and Prosecutor's Offices)' (*Centre of Policy and Legal Reform*, 14 March 2022) 3 <https://pravo.org.ua/books/pam-yatka-shhodo-yurydychnoyi-kvalifikatsiyi-dij-vijskovopolonenyh/> accessed 14 May 2024.

3) the actions of detained military personnel of the armed forces of the Russian Federation, in respect of which there is no evidence of their committing crimes under Article 438 of the Criminal Code of Ukraine (Violation of the laws and customs of war), do not require legal qualification under any article of the Criminal Code of Ukraine (para. 9).[22]

Subsequently, apart from a few exceptions, the investigating authorities adopted this Letter of Guidance and limited the qualification of the Russian military's actions to war crimes, taking into account their immunity.

3 DEBATES ON THE OBLIGATION TO RECOGNISE COMBATANT IMMUNITY

In Ukrainian legal literature published after 24 February 2022, the prevailing viewpoint regarding the assessment of the actions of the members of the Russian armed forces is that they cannot be held criminally liable under the Criminal Code of Ukraine for crimes committed directly within the framework of hostilities, provided that they do not violate the laws and customs of war. Accordingly, M. Khavroniuk posits that POWs from among the Russian military who have not perpetrated war crimes are not individually liable for hostilities and, in line with IHL, should be placed in prisoner-of-war camps.[23] Similarly, D. Olieinikov states that once combatants are captured, they acquire POW status and cannot be prosecuted or punished for their participation in hostilities.[24] Y. Orlov clarifies that combatants are criminally liable only for related offences, not for the very initiation and conduct of an aggressive war, which is the responsibility of the top military and political leaders of the aggressor country.[25]

Despite the general recognition of combatant immunity, this approach to qualification has been met with considerable opposition from various quarters, including politicians, members of the public, and civil society. Prominent experts in the field of criminal law have also expressed their criticism.

22 A link to the orientation letter can be found here: Alina Pavlyuk, Dmytro Koval and Yevhen Krapyvin, 'Is the Status of "Prisoner of War" a New Challenge for the Justice System in Ukraine?: Discussion Paper' (*Just talk*, 10 June 2022) <https://justtalk.com.ua/post/status-vijskovopolonenij--novij-viklik-dlya-sistemi-pravosuddya-v-ukraini-discussion-paper> accessed 14 May 2024.

23 Mykola Khavroniuk, 'Regarding the Criminal Liability of Prisoners of War Held by Ukraine' (Criminal Law Responses to Challenges of Martial Law in Ukraine: International of science conference, Kharkiv, 5 May 2022) 174.

24 Denys Olieinikov, 'Groups and Categories of Persons Participating in the Armed Aggression of the Russian Federation against Ukraine' (Retrospective of the Military Aggression of the Russian Federation in Ukraine: Crimes against Peace, Human Security and International Legal Order in the Modern Dimension: International scientific and practical round table, Kyiv, 22-23 June 2023) 85.

25 Yurii Orlov, 'The Criminal-Legal Dimension of Participation in the War in Ukraine: From a Combatant to a Prisoner of War' (2022) 2 Bulletin of the Penitentiary Association of Ukraine 21, doi:10.34015/2523-4552.2022.2.03.

Professor L. Brych was among the first to advocate for the imposition of severe penalties on the military personnel of the aggressor state. She observed that the tragedy resulting from the actions of a neighbouring hostile state exposed the inadequacies of the Criminal Code of Ukraine in terms of addressing criminal liability for engaging in aggressive war against a sovereign state. Consequently, Brych proposed criminalising the participation of the military personnel of a foreign state and its other military in an aggressive war against a sovereign state.[26] In essence, this proposed criminalisation completely denies the concept of combatant immunity, at least in cases where military personnel fight on the side of a state acting in violation of *jus ad bellum*. This proposal is based on the following reasoning:

- the conditions of captivity in Ukraine, given its commitment to European values, are often more comfortable than serving long prison terms in Russia, which potential military personnel would receive if they refused to be mobilised; this does not deter them from participating in their country's aggressive policy;
- the fear of inevitable punishment is a significant motivating factor for many individuals who choose to refuse to participate in a war;
- the criminalisation of participation in an aggressive war could be accompanied by the simultaneous introduction of an incentive norm. This norm would apply to individuals who lay down their arms at the first opportunity and voluntarily surrender, thereby releasing them from criminal liability.[27]

Professor V. Navrotskyi expands the scope of criticism in his article, directly concluding that "combatant immunity in Ukrainian criminal law has no legal, social or moral basis".[28] In his article, he proposes 16 points of critical arguments, all of which are based on the fundamental critical judgements that:

1) there is no international treaty ratified by Ukraine that establishes a legal basis for recognising combatant immunity;
2) Ukraine has not legally committed to adhere to international customs, traditions and practices, including those concerning the non-prosecution of military personnel involved in an armed attack on the country.[29]

Navrotskyi presents counterarguments that can generally be considered either based on the first one (e.g., lack of grounds in criminal and criminal procedural law of Ukraine) or related to the ethical justification of the combatant privilege (IHL is not aimed at protecting

26 L Brych, 'On the Need to Ensure the Inevitability of Criminal Liability for Participation in an Aggressive War against Ukraine' (Criminal-Legal Responses to the Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, 5 May 2022) 47.

27 ibid 44-5, 47.

28 Vyacheslav Navrotskyi, 'About the So-Called "Combatant Immunity"' (2023) 5 Law of Ukraine 39, doi:10.33498/louu-2023-05-039.

29 ibid 41-2.

members of the aggressor army from criminal liability, it is intended to protect victims of war and guarantee humane treatment of POWs).[30]

This raises the question: is Ukraine obliged to respect the immunity of combatants of the aggressor state, and if so, on what legal basis? First of all, it should be acknowledged that neither the Hague Convention (IV) of 1907 nor the Geneva Conventions of 1949 and their Additional Protocols directly contain the wording 'immunity' or 'privilege' in relation to a combatant, nor do they contain an explicit prohibition on bringing combatants to criminal responsibility for participation in hostilities. In this regard, D. Jinks notes that "this privilege is, as a formal matter, extra-conventional in that the Geneva Conventions do not expressly accord any such privilege. It is nevertheless universally recognised".[31] In other words, the term 'immunity' is a conventional one, perhaps not entirely apposite, but generally accepted.

As noted above, Ukraine is a party to all of these international treaties. Article 43(2) of Additional Protocol I contains a key provision: "Members of the armed forces of a Party to a conflict … are combatants, *that is to say, they have the right to participate directly in hostilities*".[32] This does not mean, of course, that combatants were not considered legitimate participants in the war prior to the adoption of this provision in 1977. This rule has its roots in the Hague Conventions and even earlier sources of IHL, but it was formulated at this level and with such clarity for the first time in this context.

Thus, as a party to Additional Protocol I, Ukraine recognises that a combatant has the right to engage in hostilities. This acceptance follows a fairly simple logic: if a combatant has the right to engage in hostilities, then such participation is a legitimate realisation of his right to attack enemy combatants and military objectives. However, like any right, it has its limitations, defined by the IHL, and the violation is grounds for liability. In other words, if I possess a right and do not go beyond the limits of its realisation, why (for what) am I being held liable?

The aforementioned conclusions stem from a logical interpretation of the conventional norm surrounding combatant privilege. This general recognition can be derived from several sources, including authoritative manuals on IHL, commentaries on relevant international treaties and numerous decisions of international tribunals and other jurisdictional authorities. Ultimately, even if there is uncertainty regarding the interpretation of Article 43(2) of Additional Protocol I, it is imperative to refer to the general rules of interpretation of international treaties.

In accordance with Article 31 of the Vienna Convention on the Law of Treaties (1969), a treaty shall be interpreted in good faith, considering the ordinary meaning of its terms within their context and in light of the treaty's object and purpose. In this regard, it is necessary to consider, in conjunction with the context, any subsequent practice in the application of the treaty which

30 ibid 43-53.
31 Jinks (n 15) 7.
32 Protocol I (n 10).

establishes the parties' agreement regarding its interpretation.[33] Additionally, Article 32 allows for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[34]

During the formulation of the provisions of the Geneva Law, the participants of the conferences considered the immunity of combatants to be universally recognised and obvious. For example, concerning Article 43(2) of Additional Protocol I, "the Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces […] can participate directly in hostilities, i. e., attack and be attacked".[35]

Consequently, even if the phrase "they have the right to participate directly in hostilities" is queried, the State Party is precluded from interpreting the Convention provision in a manner that contravenes the meaning that was intended during its development and which has been confirmed in numerous decisions of international judicial bodies. This constitutes the formal basis for Ukraine's recognition of the rule on combatant immunity. This is enshrined, at least in Article 43(2) of Additional Protocol I, the interpretation of which (if any) is easily dispelled.

In the case of manifestly unjustified and unprovoked armed aggression, such as the Russian invasion, the illegality of the war from the point of view of *jus ad bellum (the right to wage war)* should be self-evident to all parties, including the Russian military. This indicates the potential justification for limiting combatant immunity in such illegal cases. However, the rules of *jus in bello* (the law applicable in war) are not contingent upon the observance or violation of *jus ad bellum*. As noted by M. Sassòli, "Perhaps the most important principle for IHL is the absolute separation between *jus ad bellum* (the right to wage war) and *jus in bello* (the law applicable in war)."[36]

This fundamental distinction has its consequences: "it imposes the same legal obligations on all parties to a conflict while concurrently providing equal protection to all persons affected by the conflict, irrespective of whether the parties or individuals are fighting for a just or unjust cause".[37] In light of Ukraine's status as a victim of aggression, the aforementioned distinction is perceived as an act of injustice. However, it is evident that

33 Vienna Convention on the Law of Treaties (23 May 1969) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 14 May 2024.

34 ibid.

35 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) 515.

36 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publ 2019) 18, doi:10.4337/9781786438553.

37 ibid 2.

Ukraine's adherence to the principles of a democratic and rule-of-law state is incompatible with a disregard for international law.

After clarifying the legal (formal) basis for the recognition of combatant immunity, we turn to explore the material (essential) reason for the doctrine's existence, which, according to M. Thorburn "is morally shocking to many: It holds soldiers on both sides of a war immune from criminal prosecution for their otherwise criminal acts of killing, maiming, destroying property, etc., carried out as part of their country's war effort".[38] The scholar distinguishes two approaches to justifying this 'shocking' immunity": the orthodox just war theory, which is based on the just war thesis, and the revisionist just war theory, which morally justifies soldiers on both sides in view of the goal of preventing more harm than is being done.[39]

Hostilities may be justifiable to a certain extent, for example, in the case of the liberation of peoples from colonial oppression in the process of struggle for self-determination or in the case of exercising the right to self-defence under Article 51 of the UN Charter.[40] However, in this case, combatant immunity should be granted to soldiers of only one side – the one exercising the right to self-determination or the right to self-defence – since only their military actions are subject to moral justification. In the context of Russian aggression, the privilege of a legitimate combatant should be reserved for Ukrainian soldiers, given that aggression is expressly prohibited in modern international law.

However, as previously noted, an unjust and unlawful war (from the perspective of *jus ad bellum*) does not negate the legal status of direct participants in the war, their guarantees, obligations, and rights (from the perspective of *jus in bello*). Ultimately, to recognise the hostilities initiated by one of the parties as unjust, a decision of a certain authoritative body, such as the UN Security Council or the International Criminal Court, is required. History has demonstrated that such a decision can take a considerable length of time to be reached, or it may not be reached due to a lack of consensus. In such circumstances, it is evident that each party will justify its position based on just war, even if this is not the case.

Consequently, the just war doctrine may be appropriate for justifying the combatant privilege if combatants' legal status depends on whether they belong to the aggressor state or the victim state. Nevertheless, to implement this approach, the entire IHL system needs to be revised. Furthermore, the legal definition of who the aggressor and the victim are would present practical obstacles.

In view of this, it is understandable why the prevailing view is that combatant immunity – regardless of whether the soldier belongs to the party that launched the aggression – is morally justified by the prevention of more significant harm. As noted by D. Jinks,

38 Malcolm Thorburn, 'Soldiers as Public Officials: A Moral Justification for Combatant Immunity' (2019) 32(4) Ratio Juris 395, doi:10.1111/raju.12256.

39 ibid 396.

40 United Nations Charter (26 June 1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 14 May 2024.

"protective parity (coupled with a war crimes approach to enforcement) best promotes the observance of the law of war, including the principle of distinction".[41] Jinks considers the immunity of a combatant as a tool for observing the rules of war.[42] Indeed, if a combatant does not have the incentive of not being held accountable for hostilities, he or she will thereby lose the incentive to comply with IHL.

A combatant in such a situation where, if captured, they will be equally punished regardless of whether they comply with the laws and customs of war. This can lead to a vicious cycle in which the absence of immunity not only fails to encourage observance of IHL but may also increase the combatant's cruelty. Combatants could resort to any means to avoid capture, knowing that they would face punishment either way. In view of this, we cannot agree with the above-mentioned criticism that combatant immunity contradicts the objectives of IHL. In the current coordinate system, it is an important component of the humanitarian trajectory of IHL.

The approach of M. Thorburn is of interest; the author believes that "the moral foundation of the doctrine lies in the status of soldiers as public officials in the service of their country".[43] In this context, members of the armed forces of a party to an international conflict are in the service of a particular state. Their actions conditionally reflect not their own will but the will of the sovereign state on whose behalf they act. This at least explains why, under international law, responsibility for aggression is limited to the responsibility of the state itself for violating international legal obligations, as well as the individual responsibility of the leaders of the aggressor state.[44] By their nature and seriousness, international crimes are characterised by a competition between the collective nature of the crime and individual responsibility. Still, a person should be held criminally liable for his or her own actions, not those of others.[45] In the *US Law of War Manual*, supported by references to R. Baxter and H. Kelsen, it is emphasised that "the combatant's privilege has also been viewed as an application of the immunity that international law affords States from each other's jurisdiction. In this view, the act of the soldier who conforms to the law of war and does not engage in private acts of warfare is an act of state depriving the enemy state of jurisdiction".[46]

41 Jinks (n 15) 56.

42 ibid 54.

43 Thorburn (n 38) 395.

44 See: Volodymyr A Shatilo and others, 'Prospects for State and Individual Responsibility in Cases of Aggression in the Context of Russia's Armed Aggression Against Ukraine' (2023) 23(4) International Criminal Law Review 626, doi:10.1163/15718123-bja10154.

45 O Vodiannikov, 'Crimes against Peace: The "Leadership" Element of Article 437 of the Criminal Code of Ukraine' (Justice in Ukraine During the War: Problems of Considering Corruption and War Crimes: VI Kyiv Polylogue, 1 December 2023) 106.

46 US Department of Defense, *Department of Defense Law of War Manual* (Office of General Counsel the Secretary of Defense 2023) § 4.4.3.2 <https://www.defense.gov/News/Releases/Release/Article/3477385/defense-department-updates-its-law-of-war-manual/> accessed 14 May 2024.

Y. Orlov and O. Lytvynov draw attention to an important point - the taking of a combatant's life in battle is legitimate only for another combatant, but it is not legitimate in general.[47] In the context of the Russian aggression, it can be argued that the conviction of the military and political leadership of the Russian Federation for the crime of aggression should also result in the conviction for the death of each combatant (on both sides), their injuries, property damage, etc. Consequently, the state responsible for the aggression should be held liable for the damages incurred.

In our opinion, the concept of ethical justification through the construction of 'soldier - servant of a sovereign state' looks weak within the aggression, which the UN Charter expressly prohibits. It is a well-known principle that a person who has executed a clearly illegal order cannot rely on exemption from criminal liability. In this regard, a logical question arises: why combatants following orders from their state that violate the laws and customs of war (an illegal order), are subject to individual criminal liability for serious violations of IHL (in particular, war crimes) but are not subject to punishment for following an order to participate in aggression, which is also a gross violation of international law and order (i.e., it is also an illegal order).

Nevertheless, considering military attacks on the enemy and enemy objects as actions of the state, not its officials, generally corresponds to the nature of the conflict. This is because the conflict occurs not between specific members from opposing sides but between states (in an international conflict).

Furthermore, it can be argued that two purely practical arguments underpin the concept of combatant immunity. The first argument is based on the scale of participation of soldiers from the warring parties in the conflict. The total number of POWs during the First and Second World Wars is estimated to have been in the millions. The ongoing conflict between Russia and Ukraine has involved hundreds of thousands of soldiers from both sides. One might consider the hypothetical scenario in which both parties to the conflict were to convict all of the soldiers they had captured. It is, therefore, pertinent to consider whether the judicial and penitentiary systems could handle such a situation.

The second argument, arguably more compelling, is the interest of the parties in the return of their loyal citizens held captive by the other side. V. Navrotskyi is correct in asserting that the Russian Federation demonstrates a disregard for the status of captured Ukrainian military personnel and prosecutes them, turning a blind eye to their immunity (in particular, the Azov case).[48] Moreover, the Russian side is delaying and complicating the exchange of POWs in every possible way. However, we cannot agree that these facts do not in any way affect the fate of the Ukrainian military in Russian captivity. Despite the gross

47 Oleksii M Lytvynov and Yurii V Orlov, 'Issues of Criminal-Legal Protection of Combatants's Life, or How to Overcome the Effects of Humanitarian War "Laundering" ' (2023) 30(3) Bulletin of Criminological Association of Ukraine 16, doi:10.32631/vca.2023.3.01.

48 Navrotskyi (n 28) 39.

violations, the exchange of POWs takes place, although unfortunately not as often as we would like. Would it be possible to return hundreds of Ukrainian defenders home if they were automatically convicted of participating in hostilities immediately after capture? If so, the process would be much more complicated and time-consuming.

4 THE FATE OF DEFECTORS: DO UKRAINIAN CITIZENS WHO DEFECTED TO THE ENEMY HAVE COMBATANT IMMUNITY?

Although the formal and ethical justification for combatant immunity is not without flaws, it is generally convincing. The status of combatant as defined in the IHL is largely correlated with that of POW, with the exception of those defined in Article 4A(4)-(5) of Geneva Convention III. This substantive relationship is based on the provisions of Article 44(1) of Additional Protocol I, which states that "any combatant who falls into the power of an adverse Party shall be a prisoner of war".[49] It is unsurprising that researchers mention combatant immunity when describing the principle of distinction and even more often when characterising POW status.

The vast majority of combatants (and POWs, respectively) are members of the armed forces of warring states. They consist of citizens of the relevant countries conscripted under different procedures. This is also true of the Russian-Ukrainian war. Although foreign nationals are involved on both sides, their share is generally insignificant. However, the peculiarity of this international conflict is that Russian aggression has led to the annexation of a large territory with a large local population. Consequently, the aggressor was motivated to involve residents who are citizens of Ukraine in the conflict and exploited this opportunity with cynical intent.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) reports the significant pressure exerted upon the residents of the occupied territories to obtain Russian citizenship and Russian passports.[50] Economic conditions and an environment of fear and risk of torture have forced many locals to obtain Russian citizenship.[51] In accordance with Article 19 of the Law of Ukraine "On Citizenship of Ukraine", the voluntary acquisition of foreign citizenship by an adult citizen of Ukraine or the voluntary enlistment in a foreign state's military service are considered

49 Protocol I (n 10).

50 OHCHR, *Human Rights Situation During the Russian Occupation of Territory of Ukraine and its Aftermath, 24 February 2022 to 31 December 2023* (Office of the High Commissioner for Human Rights 2024) 25-7 <https://ukraine.un.org/en/264057-human-rights-situation-during-russian-occupation-territory-ukraine-and-its-aftermath> accessed 14 May 2024.

51 Of course, we do not exclude the possibility that a number of citizens received citizenship for ideological reasons, without any pressure. However, such cases are rather exceptions and do not change the overall picture.

independent grounds for the loss of Ukrainian citizenship.[52] However, as per Part 3 of Article 19 and Article 20 of the same law, Ukrainian citizenship is terminated on these grounds only through a decree issued by the President of Ukraine. Until the issuance of such a decree, a person is considered a citizen of Ukraine.[53]

Under Ukrainian law, a person who has obtained citizenship of another state (or states) in legal relations with Ukraine is recognised only as a citizen of Ukraine. Therefore, *de facto*, Ukrainian citizens who have obtained Russian passports in the occupied territory have become bipatrides – they have been forced to acquire duties of allegiance to the Russian Federation without severing their legal ties with Ukraine and their duty of loyalty to it.

While the acquisition of Russian Federation citizenship by a Ukrainian citizen is not *per se* a criminal offence under Ukrainian criminal law, the opposite is true of 'defectors' – citizens who have joined the enemy's armed forces. In the criminal law of almost any country in the world, defection to the enemy is considered one of the most serious crimes – high treason. Ukraine is no exception in this context: according to Article 111(2) of the Criminal Code of Ukraine, defection to the enemy under martial law is considered high treason and is punishable by imprisonment for 15 years or life imprisonment. In March 2022, the Ukrainian legislator amended the Criminal Code of Ukraine with Article 111-1 ('Collaborationist activity'), which provides for liability for military collaborationism – voluntary participation of a Ukrainian citizen in illegal armed groups created in the temporarily occupied territory or the armed groups of the aggressor state, punishable by imprisonment for a term of 12 to 15 years with deprivation of the right to hold certain positions or engage in certain activities for 10 to 15 years and with or without confiscation of property.[54]

Some Ukrainian citizens have joined the ranks of the enemy armed forces for ideological or mercenary reasons, while others have been recruited by the Russian Federation, which considers the illegally annexed territories to be its own. The aforementioned OHCHR report refers to the conscription of young male residents of the occupied territory into its armed forces by the occupier.[55] Forcing the occupied population to serve in the armed forces of the occupier is a gross violation of IHL and a war crime under Article 8 of the Rome Statute[56] and Article 438 of the Criminal Code of Ukraine. This actualises another controversial issue – the existence of such citizens in two hypostases at the same time under national criminal law – a person who has committed a crime against the national security of Ukraine and has been a victim of a violation of the laws and customs of war. However, in this article, we limit ourselves to a more straightforward case, which directly corresponds to the wording

52 Law of Ukraine no 2235-III of 18 January 2001 'On Citizenship of Ukraine' <https://zakon.rada.gov.ua/laws/show/2235-14#Text> accessed 14 May 2024.

53 ibid.

54 Law of Ukraine no 2341-III (n 4).

55 OHCHR (n 50) 27.

56 Rome Statute of the International Criminal Court (17 July 1998) <https://legal.un.org/icc/statute/romefra.htm> accessed 14 May 2024.

of Part 7 of Article 111-1 of the Criminal Code of Ukraine and concerns the *voluntary participation* of a citizen of Ukraine in the armed forces of the occupier.

In the Unified State Register of Court Decisions of Ukraine, it is easy to find judgements in which Ukrainian citizens who voluntarily joined the armed forces of the aggressor, including the military formations of the 'LNR' and 'DNR',[57] were convicted of collaborationist activity under Article 111-1(7) of the Criminal Code of Ukraine and/or high treason under Article 111-1(2). To illustrate, let us describe the circumstances of several cases.

In one verdict, a citizen of Ukraine was convicted for serving in a military unit of the aggressor state in the occupied territories. He was found to have guarded and occupied Ukrainian territories, carried out instructions and orders of commanders from among the military personnel of the armed forces of the Russian Federation, equipped and strengthened checkpoints, and carried out engineering and technical arrangement of positions. While on duty in the military uniform of the enemy armed forces with fixed identification marks that could be recognised at a distance, he openly carried firearms and actively participated in visual surveillance of air and ground space to detect and neutralise the forces and means of the Armed Forces of Ukraine.[58]

In a second judgement, a Ukrainian citizen signed a contract for military service in the occupier's military formations at the invaders' suggestion as a 'shooter' with the rank of private. In August 2023, following an assault by Ukrainian armed forces, he surrendered and gave himself up.[59]

In a third judgement, a citizen of Ukraine, as part of the armed forces of the aggressor state, in particular, strengthened checkpoints, carried out engineering and technical arrangement of positions, and protected the occupied territories of Ukraine. After the storming of his brigade's position, he was taken prisoner by the Ukrainian military.[60]

In the context of our research, the above raises at least three critical questions:

1) Do defected Ukrainian citizens have the status of combatants/POWs?;
2) Do they have combatant immunity?;
3) Are they legally liable for high treason/collaboration with the occupier?

57 At the end of 2022, the military formations of the LNR and DNR became officially subordinated to the Ministry of Defence of the Russian Federation.

58 Case no 554/6958/23 (Oktiabrskyi District Court of Poltava, 16 August 2023) <https://reyestr.court.gov.ua/Review/112886268> accessed 14 May 2024.

59 Case no 185/12394/23 (Pavlograd City and District Court of Dnipropetrovsk Region, 13 March 2024) <https://reyestr.court.gov.ua/Review/117614918> accessed 14 May 2024.

60 Case no 188/1570/23 (Petropavlivsk District Court of Dnipropetrovsk Region, 4 December 2023) <https://reyestr.court.gov.ua/Review/115364511> accessed 14 May 2024.

Answering these questions presents significant challenges for Ukraine, as the established and universally recognised provisions of the IHL offer no clarity and consensus on the status of defectors.

The search for normative (formal) grounds to resolve this issue, as often happens, encounters different interpretations of non-obvious conventional provisions. Article 4 of Geneva Convention III states only "persons… who have fallen into the power of the *enemy*".[61] This indicates that, in the absence of any explicit mention of citizenship (or nationality) in the text, it can be assumed that this requirement is not a factor in the status of a POW. If it were otherwise, it would be explicitly stated.[62]

On the other hand, Articles 87 and 100 of the same treaty contain provisions that hint at the importance of this feature, stating "when fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, *not being a national of the Detaining Power*, is not bound to it by any duty of allegiance..."[63] and "the death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused *is not a national of the Detaining Power*, he is not bound to it by any duty of allegiance".[64]

At the same time, the cited rules set out minimum requirements for judicial procedures applicable to POWs, including sentencing. Consequently, these provisions can be interpreted to require consideration of the differing statuses of a POW who is a citizen of an enemy or other state and a POW who is a defector. This interpretation does not affect the status of the POW. Of equal importance is that these provisions are located in Chapter III, 'Penal and disciplinary sanctions', which generally relates to the actions of a POW committed after their capture. However, this interpretation is also not uncontroversial.

The Commentary to Geneva Convention III (2020) notes that if defectors fall under the authority of the state from which they fled, they still receive POW status. However, the commentators note the lack of consensus on this matter and add that "there is practice, however, indicating that some States exclude defectors from their own armed forces from prisoner-of-war status, whether they do so independently of or in line with their view of the impact of nationality on that assessment".[65]

61 Geneva Convention (III) (n 8).

62 See more in: Manuel G Martinez, 'Defection and Prisoner of War Status: Protection Under International Hu-manitarian Law for Those Who Join the Enemy?' (2020) 57 Canadian Yearbook of international Law 41, 52, doi.org:10.1017/cyl.2020.10.

63 Geneva Convention (III) (n 8).

64 ibid.

65 Lindsey Cameron and others, 'Article 4 - Prisoners of War: Commentary' *Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949: Commentary* (2020) § 996 <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020?activeTab=undefined> accessed 14 May 2024.

In analysing the general and cumulative conditions for the lawful conduct of hostilities, Y. Dinstein recognises the condition "of non-allegiance to the Detaining Power" while emphasising that it is not explicitly mentioned in the Geneva Conventions and is derived from case law, in particular the *Koi* case.[66] In this case, during the conflict between Malaysia and Indonesia, Malaysians were part of an Indonesian landing force and, under the command of the Indonesian military, landed armed in Malaysia, where they were captured. They were convicted of violating Malaysian national laws on unlawful acts with weapons. The Judicial Committee of the Privy Council (UK) reached two conclusions from the case. On the one hand, it found that a "close examination of the Third Geneva Convention and commonly accepted international law strongly indicated that a prisoner of war was not a national of the detaining power". Thus, "the Convention did not extend the protection of prisoners of war to nationals of the detaining power or to persons who, though not nationals, owed allegiance to that power". On the other hand, as for the members of the Indonesian army (lawful combatants), Malaysian national criminal law did not apply to them.[67]

As for the case *Prosecutor v. Prlić et al.,* a Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) addressed the interpretation of Article 4 of the Geneva Convention (III). The Chamber decided that "a member of the armed forces may not be considered a prisoner of war unless he is captured by that party to the conflict against which the armed forces to which he belongs are fighting". Furthermore, the Chamber ruled that "members of the armed forces of a party to the conflict may not be considered prisoners of war when they are placed into detention by their own armed forces".[68]

The *US Law of War Manual* states that "the special privileges that international law affords combatants *generally* do not apply between a national and his or her State of nationality', 'international law does not prevent a State from punishing its nationals whom it may capture among the ranks of enemy forces".[69]

Perhaps the most comprehensive justification of the importance of nationals of a detaining power is provided by W.C. Biggerstaff and M.N. Schmitt, eliminating the need to repeat the already explored 'pro' arguments in this article. By applying the traditional methods of interpretation of international treaties, the authors argue that the non-recognition of POW status for citizens of the State holding them is a long-standing dominant view of scholars of international law and State practice.[70] D. Jinks further

66 Dinstein (n 6) 40.

67 *Public Prosecutor v Oie Hee Koi* (Judicial Committee of the Privy Council (UK), 4 December 1967) <https://ihl-databases.icrc.org/en/national-practice/oie-hee-koi-case-judicial-committee-privy-council-uk-4-december-1967> accessed 14 May 2024.

68 *Prosecutor v Prlic and Others* IT-04-74 (International Criminal Tribunal for the Former Yugoslavia, 29 May 2013) vol 3, para 604 <https://ucr.irmct.org/scasedocs/case/IT-04-74#eng> accessed 14 May 2024.

69 US Department of Defense (n 46) § 4.4.4.2.

70 W Casey Biggerstaff and Michael N Schmitt, 'Prisoner of War Status and Nationals of a Detaining Power' (2023) 100 International Law Studies 527.

emphasises that "the drafting history of the POW Convention strongly suggests that it was intended to cover only enemy nationals". [71] He points out that "the drafting history of Common Article 3 provides good reason to think that states in general did not support the application of humanitarian rules to their own nationals. Debate surrounding this provision demonstrates that states struggled to make clear that the application of humanitarian law to internal matters would not, in any way, compromise the power of the state to quash rebellion and maintain public order".[72]

It is also important to consider that the status of a POW entails a number of corresponding rights and obligations for both the prisoner and the state that holds them, including in terms of repatriation. Following the cessation of hostilities, POWs are released and returned to their countries of origin. During hostilities, the parties to the conflict facilitate repatriation of the wounded and sick, and mutual exchange of prisoners occurs.

In the context of the ongoing conflict between Russia and Ukraine, the recognition of POW status for a defector would result in the transfer of Ukrainian citizens (through exchange or repatriation) into the hands of the aggressor state. It is pertinent to note that, in accordance with Article 25 of the Constitution of Ukraine, a Ukrainian citizen cannot be expelled from Ukraine or extradited to another state.[73] However, the provisions of the Constitution are norms of direct effect and are superior to any international treaty in the hierarchy of normative acts.

Consequently, the fact that a defector is unable to rely on the status of a legitimate combatant and/or POW appears to be an ambiguous but dominant position. This naturally leads to the impossibility of extending the combatant's immunity to him/her. Concurrently, while various interpretations obscure the formal rationale for this exception, its ethical rationale is based solely on extremely tenuous arguments concerning the non-interference of IHL in the internal relations between the state and its citizens. If this were the case, then a party to a conflict that uses its citizens as a shield against enemy attacks or attacks the enemy in an indiscriminate manner that causes numerous casualties among its own population in enemy-occupied territory should not be considered a violator of IHL. Nevertheless, it appears that the principle of humanity should be indifferent to nationality and citizenship.

Finally, let us recall the arguments set out in the previous section regarding the immunity of combatants and their role in preventing greater harm. A combatant functions as a kind of public servant, performing actions for which the state and its leadership are responsible. When a soldier fights for a state that is hostile to their country of citizenship, they officially occupy a military position, wear the uniform and weapons of that state, and act on its behalf (e.g., under contract). If this soldier understands their participation in hostilities, it will

71 Jinks (n 15) 41-2.

72 ibid.

73 Constitution of Ukraine of 26 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 14 May 2024.

automatically lead to conviction upon capture. The situation becomes even more complex if such a soldier has acquired the citizenship of the state they defected to yet has not (at least formally) taken any action to renounce their original citizenship.

Currently, it is not possible to state unequivocally which interpretation Ukraine has adopted in the Russian-Ukrainian war in relation to its defectors. We have not found any official comments on this issue. The short Instruction of the Ministry of Defence of Ukraine also does not answer this question.[74] The aforementioned judgments, in which defectors were not convicted of murder and destruction of property and in which Ukrainian defectors were taken prisoner, indirectly suggest that Ukraine recognises its defectors as combatants and POWs. Conversely, this may be indicative of Ukraine's compliance with the presumption set forth in Article 5 of Geneva Convention III, which states that any individual is a POW until proven otherwise. It is possible that the individuals were not charged with murder and destruction of property due to a lack of evidence.

The Criminal Code of Ukraine was recently supplemented with Article 84-1, which provides for exemption from punishment in connection with decisions on the prisoner exchange.[75] Judicial practice demonstrates that this provision is widely applied to convicts who are Ukrainian citizens.[76] This practice suggests that Ukraine recognises its citizens as prisoners of war, including those convicted of high treason, at least during the process of prisoner exchange. However, whether this fact also implies recognition of these citizens as enemy combatants remains unclear.

The question raised in this article about the importance of citizenship for the activation of combatant immunity is an attempt to reopen a long-standing debate, and we hope that it will continue to be fruitful. While deliberately avoiding answering the first two of the three questions we have posed in this section, we argue that the answer to the third question (Are defectors liable for high treason/collaboration with the occupier?) should be unequivocally positive. The most interesting thing is that this unambiguity does not depend on the answer to the first two questions.

All sources that recognise combatant immunity stipulate that the privilege of not being prosecuted applies solely to participation in hostilities and criminal offences resulting from participation in hostilities, provided that they are in accordance with the customs and rules

74 Order of the Ministry of Defense of Ukraine no 164 of 23 March 2017 'On approval of the Instruction on the Procedure for the Implementation of Norms of International Humanitarian Law in the Armed Forces of Ukraine' <https://zakon.rada.gov.ua/laws/show/z0704-17#Text> accessed 14 May 2024.

75 See more about the analysis of Art. 84-1 in: DYe Kryklyvets, 'Exemption from Serving Punishment under Article 84-1 of the CC of Ukraine: Issues of Legal Regulation and Law Enforcement' (2023) 2 Juridical Scientific and Electronic Journal 439, doi:10.32782/2524-0374/2023-2/103.

76 See, for example: Case no 461/2647/23 (Halytskyi District Court of Lviv, 13 April 2023) <https://reyestr.court.gov.ua/Review/110222796> accessed 14 May 2024; Case no 447/346/24 (Mykolaivskyi District Court of Lviv Region, 7 February 2024) <https://reyestr.court.gov.ua/Review/116824296> accessed 14 May 2024.

of war. Consequently, we can discuss the temporal, material and personal conditions of its activation, which act in a cumulative manner.

The *rationale temporis* immunity of a combatant does not preclude the combatant's prosecution for offences committed prior to or after direct participation in hostilities. In addition, these offences may be committed in peacetime (e.g. before the beginning of an armed conflict) or during a break in hostilities (e.g. while on military vacation). It is also for a person to commit an offence without being a combatant (e.g. a soldier disguising themselves as a civilian to commit an insidious attack on the enemy or being a member of a terrorist group), but later their status could change (e.g. by becoming a member of the regular armed forces). These offences are not covered by combatant immunity. However, in view of the provisions of Geneva Convention III and Additional Protocol I, they may have the status of a POW.

Ratione materiae, immunity is limited to crimes that meet two cumulative requirements:

a. they are the core of hostilities, stemming from the necessity of conducting hostilities. Outwardly, they may contain signs of various violations that would be considered crimes in other (non-combat) circumstances: crimes against the state (destruction of the constitutional order, violation of the sovereignty, territorial inviolability of the enemy state, its economic or information security), crimes against the person (intentional and reckless murder, bodily harm, etc.), crimes against property (destruction and damage to property; seizure of certain types of property), crimes against public safety (illegal handling of weapons, committing publicly dangerous acts, disturbance of public peace, etc.);
b. they do not violate the laws and customs of war.

Crimes that do not arise from the nature of hostilities are not covered by the shield of privilege. As O. Kaplina notes, combatants "cannot be prosecuted for participating in an armed conflict, with the exception of cases of international crimes committed, in particular, war crimes, as well as so-called general crimes, provided by the national legislation on criminal liability".[77]

The content of the *ratione personae* depends on the view of the nationality of the combatant/POW that is taken as a basis (alternatively): it can be solely a citizen of the enemy state (and possibly its allies) or any individual regardless of nationality.

Liability for high treason by a defector would never meet the *ratione materiae* criterion since the breach of a citizen's duty of loyalty to their state is clearly unrelated to the necessity of hostilities and does not constitute their content. A contrary decision would likely create the basis for extending the doctrine of combatant immunity to non-international armed

77 Oksana Kaplina, 'Prisoner of War: Special Status in the Criminal Proceedings of Ukraine and the Right to Exchange' (2022) 5(spec) Access to Justice in Eastern Europe 14, doi:10.33327/AJEE-18-5.4-a000438.

conflicts, which makes no sense. The duty of loyalty is perhaps the most sensitive component of intra-state relations, and no state is zealous about interfering with it.

Moreover, in most cases, *ratione temporis* defection to the enemy occurs even before a citizen becomes a member of the enemy's armed forces and participates in hostilities (at the very least, he/she first contacts the enemy). In these circumstances, *ratione personae* loses its significance when deciding whether to convict a defector for high treason:

a) if a combatant can only be a citizen of an enemy state, the question of evaluating the defector's actions is not even raised;
b) if a combatant can be any person, the question of immunity can only be raised in relation to crimes that comply with *ratione temporis* and *ratione materiae*, which, in view of the above, cannot include high treason.

In its report, the OHCHR recorded 81 cases of convictions by Ukrainian courts of prisoners, most of whom were Ukrainian citizens, for joining armed groups affiliated with the Russian Federation.[78] We cannot fully agree with the Rapporteur's concerns regarding the violation of combatant immunity, at least in terms of the conviction of defectors who are Ukrainian citizens under articles on high treason (Article 111 of the Criminal Code of Ukraine) and collaborationist activity (Article 111-1 of the Criminal Code of Ukraine), in view of the arguments set out above.[79] We assume that this problem was at least partly due to a misunderstanding of the purpose of supplementing the Criminal Code with an article on collaborationist activity.

As noted earlier, Part 7 of this article punishes the voluntary participation of a citizen of Ukraine in illegal armed or paramilitary groups established in the temporarily occupied territory and/or in the armed formations of the aggressor state. Outwardly, this article refers directly to the participation of Ukrainian citizens in hostilities on the side of the enemy. If we are guided by a broad approach to *ratione personae*, which seems to be followed by the OHCHR, one might conclude that the immunity of a combatant has been violated.

In reality, however, Article 111-1 of the Criminal Code of Ukraine is a special type of high treason, in this context – high treason in the form of defection to the enemy.[80] At the same time, Part 7 of Article 111-1 provides for a privileged type of high treason (less severe

78 OHCHR, *Report on the Human Rights Situation in Ukraine, 1 August to 30 November 2023* (Office of the High Commissioner for Human Rights) 17-8 <https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-august-30-november-2023> accessed 14 May 2024.

79 Regarding convictions under articles on participation in a terrorist organisation (Art. 258-3 of the Criminal Code of Ukraine), participation in illegal armed groups (Art. 260 of the Criminal Code of Ukraine) and some others, it should be acknowledged that the problem existed and was related to the fact that only in December 2022 the military formations of the LNR and DNR were included in the Russian armed forces. However, until then, they were recognised by Ukraine as illegal armed groups (and the question is whether this was correct).

80 Mykola Rubashchenko and Nadiia Shulzhenko, 'Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory' (2024) 7(3) Access to Justice in Eastern Europe 10, doi:10.33327/AJEE-18-7.3-a000315.

punishment compared to Part 2 of Article 111), as it refers to the violation of the duty of allegiance that occurs in the conditions of occupation of the territory. If the violation of the duty of allegiance ('siding with the enemy') does not occur under the influence of the occupation of the territory, the act is punishable more severely – under the general rule of high treason.

5 CONCLUSIONS

Russia's aggression against Ukraine has not only brought immense grief to the homes of ordinary Ukrainians but also caused large-scale economic losses and significantly affected global politics. It has generated a lot of discussion in the legal field and brought dormant or long-known but unresolved legal issues to light. It would seem that given that combatant immunity is firmly rooted in the foundations of IHL, implemented in the practice of international tribunals and national courts, and reflected in all authoritative manuals and commentaries, it should not be contested. However, the cynical and undisguised aggression of the Russian Federation has caused serious criticism in the Ukrainian legal community against the doctrine, which is shocking in that it allows for killing and destruction with impunity.

In a formal sense, none of the international treaties to which Ukraine is a party mention combatant immunity or a prohibition on criminal prosecution for participation in hostilities. Consequently, the interpretation of the provisions of these treaties suggests that the combatant's privilege is indirectly derived from their content. This may be sufficient, but the absence of a direct normative statement of this important doctrine leaves room for debate. The moral aspect of the privilege is arguably even more controversial, particularly when a state aggressively conducts hostilities and represents an unjust war. In such circumstances, the prohibition of criminal prosecution of a combatant of the aggressor state because he is only a person serving his state or because of the transposition of the properties of state sovereignty to a military servant of that state appears to be poorly justified. The only arguments in favour of immunity are that it prevents greater harm (in terms of humanitarian considerations), simplifies the exchange of prisoners of war and does not overload the judicial and penitentiary systems.

The Russian Federation not only occupied but also annexed a substantial territory with a considerable population. The incorporation of the occupied territory into the aggressor state has prompted the question of the status of defectors, namely citizens of the first state who fight on the side of the second state against the first. Two distinct approaches to the status of these individuals can be identified, depending on whether citizenship (nationality) is a mandatory feature. It remains unclear which approach Ukraine has chosen with regard to the treatment of soldiers of the opposing side who are also its citizens. However, there is evidence that Ukraine does not attach any importance to this characteristic.

Regardless of whether defectors can be recognised as combatants and/or prisoners of war, they may be subject to criminal liability for high treason or collaborationist activities (as a mitigating form of high treason). This is because a citizen's breach of allegiance to their state (the act of defecting to the enemy) is not a crime that follows *ratio materiae* from the nature of hostilities between states.

A further area that requires further discussion is that of dual citizenship among defectors. This is because some defectors have not lost their citizenship of one state and have acquired the citizenship of another.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ІМУНІТЕТ КОМБАТАНТА І РОСІЙСЬКО-УКРАЇНСЬКА ВІЙНА: ПЕРЕЗАПУСК ДЕБАТІВ СТОСОВНО ДАВНО ВІДОМОЇ ДОКТРИНИ

Іван Яковюк*, Сергій Харитонов та Олексій Зайцев

АНОТАЦІЯ

Вступ. *Російське вторгнення в Україну породило наймасштабніший конфлікт у Європі після Другої світової війни. Сотні тисяч російських військових реалізують волю держави-агресора. Довгий час вважалося, що комбатанти мають імунітет до кримінального переслідування за бойові дії та їхні супутні наслідки, у тому числі за вбивство військових, що обороняють державу-жертву агресії, якщо тільки вони не порушили закони війни. Такий імунітет викликав критику в українській правничій спільноті. Тому в цій статті автори аналізують висловлені аргументи прибічників імунітету комбатанта і намагаються прояснити правові та етичні підстави суперечливої доктрини. Крім того,*

переглядається під іншим кутом добре відома дискусія щодо значення громадянства (національності) для визнання статусу комбатанта чи військовополоненого та щодо відповідальності перебіжчиків.

Методи. *Основою статті є аналіз джерел міжнародного гуманітарного права (МГП), коментарів, практик держав, прецедентів та наукових поглядів щодо імунітету комбатанта. Також аналізуються практика правозастосовних органів України та погляди українських науковців у сфері кримінального права.*

Стаття складається з трьох частин. Перша частина містить загальний огляд статусу комбатанта та його привілеїв в МГП, а також актуалізує цю проблематику з огляду на російсько-українську війну. У другій було продемонстровано дебати щодо того, чи зобов'язана Україна, як жертва агресії, поважати імунітет комбатанта держави-агресора, та сформульовано висновки авторів. У третій частині розглядається проблема відповідальності перебіжчиків, де основою є питання про громадянство (національність) комбатанта чи військовополоненого.

Результати та висновки. *Низка українських науковців висловила категоричну незгоду з тим, щоб Україна застосовувала доктрину імунітету комбатанта стосовно російських військовослужбовців. З огляду на відсутність прямої вказівки на цей винятковий привілей у міжнародних договорах, учасницею якої є Україна, та апріорі протиправний характер агресії, критичні аргументи не безпідставні. Однак ми робимо висновок, що повага до імунітету комбатанта, який представляє державу-агресора, є частиною міжнародних зобов'язань України і має певне обґрунтування. Водночас у статті визнається, що правові та етичні підстави для цього не зовсім зрозумілі. Ще більш складним є питання того, чи визнавати перебіжчиків комбатантами та/або військовополоненими. Однак ми переконані, що незалежно від відповіді на це питання, кримінальне переслідування перебіжчиків за державну зраду не можна вважати порушенням імунітету комбатанта.*

Ключові слова: *імунітет комбатанта, військовополонений, перебіжчики, колабораціоністська діяльність, державна зрада, російсько-українська війна, кримінальне право.*