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Price of war

The ways of bringing foreigners to justice for crimes committed during the armed conflict in Ukraine

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From the standpoint of international humanitarian and national law, who are foreigners participating in the armed conflict in Ukraine? Which jurisdiction do the actions committed by them during the conflict fall within? Is it possible to bring them to liability after they have left the territory of Ukraine? This analytical review is an attempt to find answers to these questions.



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Contents

1. GLOSSARY	2
2. INTRODUCTION	3
3. MERCENARISM AS GLOBAL SECURITY THREAT	4
4. STATUS OF ARMED CONFLICT PARTICIPANTS IN UKRAINE	6
5. CRIMINAL CODE OF UKRAINE AND ITS COMPLIANCE WITH NORMS OF IHL	9
5.1 ARTICLE 258-3. ESTABLISHMENT OF TERRORIST GROUP OR ORGANIZATION	9
5.2 ARTICLE 260. ESTABLISHMENT OF PARAMILITARY OR ARMED FORMATIONS NOT PROVIDED FOR BY LAW	11
5.3 ARTICLE 438. VIOLATION OF LAWS AND CUSTOMS OF WAR	13
5.4 ARTICLE 447. MERCENARISM	13
5.5 OFFICIAL INFORMATION OF UKRAINIAN PROSECUTION OFFICE ABOUT FOREIGNERS ARRESTED FOR ACTIONS COMMITTED DURING CONFLICT IN UKRAINE	16
6. ANALYSIS OF CRIMINAL CODES OF OTHER COUNTRIES	17
6.1 CRIMINAL PROSECUTION FOR PARTICIPATION IN ARMED CONFLICTS OUTSIDE THE COUNTRY	17
6.2 CRIMINAL CODE OF THE RUSSIAN FEDERATION	18
6.3 CRIMINAL CODE OF THE REPUBLIC OF BELARUS	19
6.4 CRIMINAL CODE OF THE REPUBLIC OF KAZAKHSTAN	21
6.5 CRIMINAL CODE OF THE REPUBLIC OF UZBEKISTAN	22
6.6 CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA	23
6.7 CRIMINAL CODE OF THE REPUBLIC OF ARMENIA	23
6.8 CRIMINAL CODE OF THE REPUBLIC OF SERBIA	24
6.9 CRIMINAL CODE OF SLOVAK REPUBLIC	25
6.10 CRIMINAL CODE OF THE FEDERAL REPUBLIC OF GERMANY	26
7. CONCLUSIONS	27
8. RECOMMENDATIONS	28

1 Glossary

ATO – anti-terrorist operation

AF – Armed Forces

AFU – Armed Forces of Ukraine

AF RF – Armed Forces of the Russian Federation

HC – The Hague Conventions. In the first place, it refers to the Convention with respect to the Laws and Customs of War on Land signed on October 18, 1907.

MDNP – Main Department of National Police of Ukraine

"DPR" – "Donetsk People's Republic"

AP II – Protocol Additional to the Geneva Conventions of August 12, 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Geneva, June 8, 1977.

GC – Geneva Conventions of August 12, 1949.

GCIII – Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949.

"LPR" – "Luhansk People's Republic"

IHL – International Humanitarian Law

ICtCt – International Criminal Court

IAF – illegal armed formation

OSCE – Organization for Security and Co-operation in Europe

RSA – Regional State Administration

UN – United Nations

PACE – Parliamentary Assembly of the Council of Europe

RB – Republic of Belarus

RK – Republic of Kazakhstan

RF – Russian Federation

CoE – Council of Europe

CC – Criminal Code

OSSU – Office of the Security Service of Ukraine

FRG – Federal Republic of Germany

2 Introduction

Participants of the armed conflict in the territory of Donetsk and Luhansk regions of Ukraine are not only the Armed Forces of Ukraine and the RF, but also numerous armed groups that do not belong thereto. The majority of violations of human rights and the norms of international humanitarian law (IHL) reported in these regions of Ukraine by the Documentation Center of the Ukrainian Helsinki Human Rights Union (UHHRU) are committed precisely by members of such groups. Since 2015 these groups were used to form the so-called "Armed Forces" of "Donetsk and Luhansk People's Republics" ("DPR" and "LPR")^{1,2}.

Along with citizens of Ukraine, members of these groups are also residents of other countries, primarily - of the RF. Russian citizens account for more than 10% of all participants of the armed formations, information about which is available in the database of the UHHRU's Center for Documentation. In addition to the RF citizens, there is information about citizens of Belarus (44 individuals), Kazakhstan (38 individuals) Serbia (28 individuals), Moldova (20 individuals), Germany, (19 individuals), Uzbekistan (15 individuals), Slovakia (12 individuals), and France (12 individuals). The Center for Documentation also has information about residents of Italy, Israel, Armenia, Georgia, Czech Republic, Latvia, Spain, Colombia, Lithuania, Macedonia, Poland, Bulgaria, Azerbaijan, Estonia, Kyrgyzstan, and Turkmenistan who participated in the armed conflict in Ukraine or were members of armed formations. The total number of foreigners, in addition to the Russians, exceeds 250. Information about these individuals was received from open sources – social networks, publications in the mass media, including interviews with the armed conflict participants.

From the IHL perspective, the mere fact of being a member of an armed formation, even illegal, is not a breach of law; however, the Criminal Codes (CC) of a number of states have provisions on criminal prosecution for such actions. The same is true for participation in an armed conflict outside the country. Furthermore, one should remember that many participants of IAF committed such actions as: extrajudicial executions, intentional mutilation, torture, inhumane treatment of civilians, and so on.

There are individual cases of prosecution of nationals in Belarus and Kazakhstan for participation in the conflict in Ukraine, but currently the majority of participants of these developments are not prosecuted in their native countries. As, for instance, the commander of the Rusich armed group, citizen of the RF, nationalist Aleksey Milchakov. In the mass media and in social networks, there are photos and video showing him brutalizing the dead bodies of Ukrainian soldiers³. Yet, not only is he not prosecuted in the RF; moreover, he appears at official events.

Such ignoring the crimes committed in Ukraine by a foreign national can lead to the growth of crime rate and political tension in the state of which he is a citizen. Furthermore, foreign nationals participating in the IAF violate not only the Ukrainian legislation but also the legislation of their state.

In this paper, UHHRU's analysts explored the possibilities for prosecuting the foreign nationals who participated in the armed conflict in the territory of Ukraine, and the practice applicable as of the writing of this paper.

¹ http://old.dnr-online.ru/wp-content/uploads/2016/05/Ukaz_N412_04112015.pdf

² <http://lug-info.com/documents/one/zakon-ob-oborone-64>

³ <https://politua.su/2016/07/02/16198/>

3 Mercenarism as Global Security Threat

The data for the recent decades demonstrate an increase of the number of mercenaries worldwide, and the illegal nature of their activities in the territory of various continents of the world, among others, in Central America, African states, former Yugoslavia, Middle East, Iraq, Afghanistan, the North Caucasus, and Ukraine.

Several researchers analyzing mercenarism as a form of criminal activities of foreign nationals emphasize its impact on political, economic, social, national, and ethnic spheres.

On December 22, 2003 the UN General Assembly developing the provisions of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and welcoming the entry into force of this document adopted Resolution (A / RES /58/162) on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, para. 9 of which calls upon the states to investigate alleged participation of mercenaries in all cases of criminal activities of terrorist nature, and to bring to trial those individuals whose liability has been established, or to consider their rendition upon a respective request in accordance with the domestic law and applicable bilateral or international agreements.

Particular interest for the problem of mercenarism became visible in recent years as a result of the growth of extremist, terrorist, separatist sentiments in a number of regions using mercenaries, for instance, in the Middle East, and in the former Soviet Union territory.

The interest in mercenarism at the international law level is explained by the high-demand nature of its criminal institution since it was actively used in fight against legal governments. The applied concept of mercenarism makes it possible to circumvent the prohibitory norms introduced for the conditions of armed conflicts by not recognizing them as such, and to carry out military operations not regulated by the international law norms.

International legal documents on fighting mercenarism exemplify the complicated process of development of a unified position of the global community with regard to such actions, agreement on the common definition, and enshrinement of respective norms.

Effort is taken to develop a new definition of a mercenary in order to ensure an all-encompassing nature of the concept of mercenarism. This effort is caused by the spread of liability of participation of mercenaries in international and domestic armed conflicts, it is related to violations of human rights, and affects the right of peoples to self-determination. We are also talking about a complex international crime, state security, a latent threat of undermining the statehood under specific circumstances in the countries of origin of the mercenaries.

Mercenarism to a certain extent is inter-connected with other crimes such as terrorism, illegal trade in arms, drugs, kidnapping, and organized crime.

Mercenarism in the XXI century is a threat not only for normal relations among the actors of international relations, but it also has social and political



◀ Commander of the Rusich IAF, Aleksey Milchakov, with the "Prime Minister" of Crimea, Sergei Aksionov. Crimea, May 20, 2016. Picture from Sergei Aksionov's Facebook account

significance for an individual state, from the territory of which such citizens come. Fighting mercenarism is in line with the states' fulfillment of their international commitments. Mercenaries trained to carry out terrorist, subversive, extremist, and military activities in the future are dangerous also for the state they come from.

4 Status of Armed Conflict Participants in Ukraine

Prosecution of individuals for participation in the armed conflict in Ukraine is possible within the framework of domestic procedures of the states and the International Criminal Court (ICCt). However, before talking about prosecuting participants of the armed conflict in Ukraine, one should look into their status. What are they in terms of the ICCt and the Ukrainian law?

To this end, one needs to determine the type of conflict currently taking place in the East of Ukraine – domestic or international. Whereas the status of Crimea as part of Ukraine occupied by the RF has been recognized by several international organizations (UN, CoE, OSCE, ICCt), the status of certain parts of Donetsk and Luhansk regions of Ukraine not controlled by the Ukrainian government is not so unambiguous.

Ukrainian authorities do not separate occupation and the ensuing annexation of Crimea from the armed conflict in Luhansk and Donetsk regions of Ukraine. In the Resolution of the Verkhovna Rada of Ukraine On the Appeal of the Verkhovna Rada of Ukraine to the United Nations, European Parliament, Parliamentary Assembly of the Council of Europe, NATO Parliamentary Assembly, OSCE Parliamentary Assembly, GUAM Parliamentary Assembly, and National Parliaments of the Countries of the World on Recognizing the Russian Federation an

Aggressor State dd. January 27, 2015 the totality of the said events is seen as an act of aggression of the Russian Federation against Ukraine⁴. However, the armed conflict itself is defined not as a war with the RF, but as an anti-terrorist operation (ATO) that is carried out against illegal armed formations. At the same time, it is specified that the latter are supported and controlled by the RF⁵.

The Russian government denies its involvement in the armed conflict⁶, despite numerous facts confirming the presence of regular Russian army in the East of Ukraine⁷ and supply of weapons to the "LPR" and "DPR"⁸, fighting against the AFU. Russian authorities claim that the conflict in the East of Ukraine is an exclusively internal affair of Ukraine. With regard to the occupation of Crimea, Russian authorities call it the "annexation" and the Crimea – a part of the RF.

On April 6, 2014 IAF seized the building of Donetsk Regional State Administration (RSA). On April 7, 2014 in the premises of Donetsk RSA, the "Republican People's Council" not previously known by anyone proclaimed the establishment of "Donetsk People's Republic"⁹. An RF citizens, Aleksandr Borodai, became the Chair of the "Council of Ministers of DPR". On April 6, 2014 IAF seized the building of the Security Service of Ukraine in Luhansk. On April 28, 2014 during a rally in Luhansk, the establishment of "Luhansk

People's Republic" was proclaimed. The seizure of the SSU building in Luhansk was coordinated by a RF citizen, Valerii Bolotov. The same individual from May 18 to August 14, 2014 was the head of "LPR".

On May 11, 2014 in the territory controlled by the "DPR" and "LPR", referendums were held, which the government of Ukraine deems illegal. Heads of the "LPR" and "DPR" lay claims to the entire territory of Luhansk and Donetsk regions, respectively. They see this armed conflict as a confrontation between the "republics" and Ukraine. As of today, none of the states has recognized "LPR" and "DPR" as an independent international relations actor. It should be mentioned that participation of the RF citizens in their establishment, political life, and military activities (including involvement of the AF RF) gives grounds to doubt independence of decisions made by the leadership of the "LPR" and "DPR".

On October 12, 2016 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution № 2133¹⁰, para. 2 of which reaffirms the fact of the military intervention by Russian forces in Eastern Ukraine whereas para. 3 states that the "DPR" and "LPR" are established, supported and effectively controlled by the Russian Federation. By this Resolution, the PACE recognizes participation of the AF RF in the armed conflict, and states that the RF is responsible for violation of human rights in the territory controlled by the "L/DPR". However, it should be remembered that the PACE Resolution has a political and not legal nature.

On November 11, 2016 the Office of the Prosecutor of the International Criminal Court presented the Report on the preliminary examination of the case on the situation in Ukraine¹¹. It refers to the situation in Crimea as a continuing occupation by the Russian Federation of a part of the territory of Ukraine. The situation in the East of Ukraine in paragraph 169 of the Report is described as "the existence of an international armed conflict in the context of armed hostilities in Eastern Ukraine from 14 July, 2014 at the latest, in parallel to the non-international armed conflict".

Given the aforementioned positions, it is difficult to define the armed conflict in Eastern Ukraine at present as an exclusively international. A hybrid nature of the RF aggression against Ukraine creates a situation when the armed conflict in the East of Ukraine has characteristics of both non-international and international.

The confrontation between the AFU¹² and the units of the AF RF falls within the characteristics of an international armed conflict. According to the IHL, ranking members of the military of the opposing parties are combatants; therefore, when they fall under the enemy's control they have the status of prisoners of war. They cannot be treated as ordinary criminals. They cannot be prosecuted under the domestic laws of Ukraine and the RF for participation in an armed conflict and for the actions committed during such conflict, provided these actions do not violate the IHL norms set forth for international conflicts.

In the light of the confrontation between the AFU and the AF RF, the UHHRU's Center for Documentation recorded systemic violations of the IHL by representatives of the AF RF. Testimonies of soldiers from Kryvbas battalion, AFU Brigades 51 and 93, military unit 3056, and Donbas battalion of the National Guard of Ukraine were collected (in total, more than 280 individuals) who were captured by Russian soldiers during the armed clashes in the area of Ilovaisk and afterwards transferred to the IAF. By these actions, Russian soldiers violated Article 12 of GC III, according to which the state is responsible for treatment of prisoners of war who can be transferred only to the GC member state.

The opposition between the AFU and numerous armed formations of the "DPR" and "LPR" formed into the First and the Second "Army Corps" should be seen as a non-international conflict. Participants are subject to the IHL norms set forth for the conditions of non-international armed conflict (Article 3 of Geneva Convention III relative to the Treatment of Prisoners of War¹³, Protocol Additional II of June 8. 1977 to the Geneva Conventions of August

⁴ <http://zakon3.rada.gov.ua/laws/show/129-19>

⁵ <http://tyzhden.ua/News/153983>

⁶ <http://korrespondent.net/world/russia/3504300-putyn-v-ukrayne-rossyiskiykh-voisk-net>

⁷ <https://www.youtube.com/watch?v=b848e-flnZM>

⁸ <https://inforesist.org/foto-dokazatelstva-postavok-rossiej-oruzhiya-boevikam-na-donbasse/>

⁹ <https://www.youtube.com/watch?v=jgUtCr0J4SQ>

¹⁰ <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnvceG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzE2NyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRRC1BVC1YUWYUERGlnhzbA==&xslparams=ZmlsZWlkPTIzMTY3>

¹¹ <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE-Ukraine.pdf>

¹² The AFU hereinafter refers to the units of the Armed Forces of Ukraine, National Guard of Ukraine and territorial defense battalions subordinate to the Ministry of Defense and the Ministry of Internal Affairs of Ukraine.

¹³ <https://www.icrc.org/rus/resources/documents/misc/geneva-convention-3.htm>

12, 1949¹⁴ and para. C, D, E and F Article 8 of the Rome Statute¹⁵). Among other things, it prohibits extrajudicial executions, torture, prosecution of civilians, taking hostages, etc. However, participants of a non-international conflict, including foreign nationals, are not combatants, and consequently when captured – not prisoners of war. From the point of view of the Ukrainian law, these are people suspected of having committed crimes in the territory of Ukraine, including under Article 260 of

the Criminal Code (CC) of Ukraine, Establishment of Paramilitary or Armed Formations Not Provided for by Law. This article defines the liability for participation in IAF. Furthermore, the Ukrainian law enforcement bodies by seeing this conflict as an ATO prosecute participants of IAF under Article 253-3 of the CC of Ukraine, Establishment of Terrorist Group or Organization.

5 Criminal Code of Ukraine¹⁶ and Its Compliance with Norms of IHL

As it has been mentioned above, since foreigners participating in the armed conflict in Ukraine as members of IAF are not combatants, proceeding from the position of a non-international armed conflict they can be subject to criminal prosecution under domestic laws of Ukraine. The obligation to investigate crimes and bring the guilty persons to responsibility is vested in the law enforcement bodies of Ukraine.

The committed actions can be classified according to such articles of the Criminal Code of Ukraine as Article 115 Intentional Homicide, Article 121 Intentional Grave Bodily Injury, Article 127 Torture, Article 129 Threat of Murder, Article 146 Illegal Deprivation of Liberty and Abduction, Article 147 Capture of Hostages, Article 182 Breach of Inviolability of Private Life, Article 186 Robbery, Article 227 Damage of Roads and Vehicles, Article 262 Abduction, Appropriation, Demand of Firearms,

Article 263 Illegal Handling of Weapons, Article 289 Illegal Seizure of Vehicle, all Articles (338-360) of Section XV Crimes Against Authority of Governmental Institutions, Local Self-Government Bodies, Civic Associations and Crimes Against Journalists.

This is by far not an exhaustive list of articles of the CC of Ukraine that can theoretically be violated by a person being an illegal participant of an armed conflict. However, these articles make it possible to prosecute a person for a specific action, and not merely for the fact of belonging to an IAF. In this section, we will discuss those articles of the CC of Ukraine that are directly related to a person's participation in military activities and/or in an IAF. We will also compare the norms of the CC of Ukraine with the IHL norms and legislation of other countries, citizens of which are members of IAF.

5.1 Article 258-3. Establishment of Terrorist Group or Organization

1. *Establishment of a terrorist group or a terrorist organization, management of or participation in such group or organization as well as organizational or other assistance in the establishment or activities of a terrorist group or a terrorist organization is punishable by imprisonment for the period from eight to fifteen years, with or without confiscation of property.*

¹⁴ <https://www.icrc.org/rus/resources/documents/misc/6lkb3l.htm>

¹⁵ [http://www.un.org/ru/law/icc/rome_statute\(r\).pdf](http://www.un.org/ru/law/icc/rome_statute(r).pdf)

¹⁶ <http://zakon3.rada.gov.ua/laws/show/2341-14>

2. A person, except for the organizer or the leader of a terrorist group or a terrorist organization, is exempt from criminal liability for an act provided for in Part One of this Article if such person voluntarily reports to a law enforcement body on the respective terrorist activities, contributed to its cessation or disclosure of crimes committed in connection with the establishment or activities of such group or organization, if actions of this person do not contain elements of another crime.

Law enforcement bodies of Ukraine prosecute the persons participating in the armed conflict as IAF members under Article 258-3 of the CC of Ukraine, Establishment of Terrorist Group of Organization. It provides for responsibility not only for establishment but also for participation in a terrorist organization. As of April 2017, the Unified State Register of Court Decisions¹⁷ contained 340 verdicts rendered since April 2014 under Article 258-3 of the CC of Ukraine.

The notion of "terrorist activities" is defined in the Law of Ukraine №638-IV On the Fight Against Terrorism as of March 30, 2003¹⁸.

Terrorist activities are activities that cover:

- planning, organization, preparation, and implementation of terrorist acts;
- incitement to commit terrorist acts, violence against individuals or organizations, destruction of material objects for terrorist purposes;
- organization of illegal armed formations, criminal associations (criminal organizations), organized criminal groups for committing terrorist acts as well as participation in such acts;
- recruitment, supply of weapons, training, and use of terrorists;
- propagation and distribution of the ideology of terrorism.

The notion of the terrorist act is defined in Article 258 of the CC of Ukraine.

A terrorist act is the use of weapons, explosion, arson or other actions that endanger life and health of a person or cause significant property damage or other grave consequences, if such actions were committed with the purpose to violate public security, intimidate the population, provoke a military conflict, aggravation of the international

situation, or in order to influence decision-making, committing or not committing actions by the state authorities or local self-government bodies, their officials, associations of citizens, legal entities, or in order to draw public attention to certain political, religious or other views of the perpetrator (terrorist), as well as a threat to commit such actions for the same purposes.

Such broad definition of a terrorist act and activities together with the use in Article 258 of the CC of Ukraine of such vague formulations as "other actions" and "other grave consequences" makes it possible to prosecute for terrorist activities virtually any participant of the armed conflict in Ukraine.

Similar wording can be found in the majority of Criminal Codes of post-Soviet countries. For instance, in the Criminal Codes of the RF (Article 205), Kazakhstan (Article 255), Belarus (Article 126), Moldova (Article 278), Uzbekistan (Article 155), and Armenia (Article 217). The essence of all articles describing a terrorist act in the Criminal Codes of these countries can be described using the following brief definition:

A terrorist act is commitment of an action that can cause socially dangerous consequences or a threat to commit such action with the aim to influence the decision-making by a third party (state, organization, a group of individuals or an individual) or to destabilize public order.

In practice, this definition can be used for participation in an armed conflict aimed at forcing the government of Ukraine to recognize independence of a part of the Ukrainian territory. The number of verdicts on Article 258-3 of the CC of Ukraine shows that the Ukrainian law enforcement bodies do exactly this. An example can be found in the verdict of Pavlohrad Town District Court on the case № 185/10736/15-к¹⁹. The panel of judges referring

to the fact that "on April 7, 2014 in accordance with Article 1 Paragraph 19 of the Law of Ukraine On the Fight Against Terrorism, a terrorist organization, "DPR" was created", sentenced a citizen of Ukraine to nine years in prison for participation in the armed conflict as a member of the Somali IAF.

However, such vagueness also has the opposite side. There is a possibility that law enforcement bodies of another state will not make a decision on recognizing such activities as terrorism, and refuse to prosecute.

The notion of terrorism is defined differently in different countries, and at present, there is no single clear definition of a terrorist act. For instance, according to the Criminal Code of Serbia (Article 391), actions falling within the notion of terrorism in general coincide with those provided for in the **Council of Europe Convention on the Prevention of Terrorism №196**²⁰. It is stated there that "terrorist offense" means any of the offenses within the scope of and as defined in the following international documents:

1. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973.

4. International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988.
7. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997.
10. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.

This list is rather exhaustive. At the same time, it does not include the fact of participation of an individual in an IAF as the grounds for prosecuting such person.

5.2 Article 260. Establishment of Paramilitary or Armed Formations Not Provided for by Law

1. Establishment of paramilitary formations not provided for by laws of Ukraine or participation in their activities is punishable by imprisonment for a period from two to five years, with or without confiscation of property.

2. Establishment of armed formations not provided for by law or participation in their activities is punishable by imprisonment for a period from three to eight years, with or without confiscation of property.

¹⁷ <http://www.reyestr.court.gov.ua>

¹⁸ <http://zakon2.rada.gov.ua/laws/show/638-15>

¹⁹ <http://www.reyestr.court.gov.ua/Review/56824921>

²⁰ <https://www.coe.int/ru/web/conventions/full-list/-/conventions/treaty/196>

3. Management of formations provided for in Parts 1 or 2 of this Article, financing thereof, supply of weapons, ammunition, explosives or military equipment is punishable by imprisonment for a period from five to ten years, with or without confiscation of property.

4. Participation as a member of formations provided for in Parts 1 or 2 of this Article in attacks on enterprises, institutions, organizations or citizens is punishable by imprisonment for a period from seven to twelve years, with or without confiscation of property.

5. The act provided for in Part 4 of this Article, which caused death of people or other grave consequences is punishable by imprisonment for a period from ten to fifteen years, with or without confiscation of property.

6. A person who was a member of formations provided for in this Article, is exempt from liability specified herein for the acts provided for in Parts 1 or 2 if such a person voluntarily left the formation and informed the state authorities or local self-government bodies about the existence of formation.

The web site of the Unified State Register of Court Decisions²¹, as of April 2017 contained information about **922** verdicts rendered since April 2014 under Article 260 of the CC of Ukraine. Virtually all verdicts were rendered by courts located in the territory of Donetsk and Luhansk regions controlled by the Ukrainian government.

Note. 1. Paramilitary formations are formations that have a military-type organizational structure, more specifically - unitary authority, subordination and discipline, in which military or combat training or physical training is conducted.

Note. 2. Armed formations are paramilitary groups that illegally have weapons, explosive or other arms suitable for use.

For the purposes of prosecuting participants of an armed conflict and IAF members, the use of this article of the Criminal Code is most obvious since participation in an IAF is easy to prove. The participants often do not hide this fact - they give interviews and post their pictures in uniforms with the IAF insignia holding weapons in social media. The Criminal Codes of RF, Belarus, Kazakhstan, Moldova, Armenia and Germany discussed above give them a possibility to prosecute their nationals for establishment of and participation in an IAF. Similar norms are present in many countries, the Criminal Codes of which were not analyzed in this paper. Therefore, the fact of an IAF participant's return to the home country does not mean he escapes liability for the committed actions.

However, there is an important aspect that distinguishes such criminal articles in some Criminal Codes of other countries from the CC of Ukraine. **"A person who voluntarily stopped activities**

in an illegal armed formation and turned in weapons is exempt from criminal liability provided for by this Article". This is a quote from the CC of Belarus (Article 278), yet a similar norm is present in the CC RF (Article 208), Kazakhstan (Article 267), and Moldova (Article 282). This reservation makes prosecution for participation in an IAF more difficult if a foreigner left the territory of Ukraine and returned to his country. Moreover, according to Part 2 Article 208 of the CC RF, citizens of the RF are prosecuted for "participation in an armed formation not provided for by the federal law, and participation in the territory of another country in an armed formation not provided for by legislation of the respective state **with the purposes running contrary to the interests of the Russian Federation"**.

Furthermore, the IHL does not see participation in IAF per se as an offense if the person has not committed other illegal actions.

5.3 Article 438. Violation of Laws and Customs of War

1. Inhuman treatment of prisoners of war or civilians, sending civilians to forced labor, looting of national values in the occupied territory, use of warfare means prohibited by international law, other violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine, as well as giving of an order to commit such actions are punishable by imprisonment for a period from eight to twelve years.

2. The same actions if connected with if they involve intentional homicide are punished by imprisonment for a period from ten to fifteen years or by life imprisonment.

As it can be seen from the text, this article of the CC of Ukraine was written specifically for prosecuting people for violation of the international humanitarian law in the conditions of an international conflict. All the discussed Criminal Codes of other countries contain articles that provide for liability for violation of laws and customs of war. Regarding the situation in Ukraine, the ICCt Prosecutor also can make a decision to open proceedings because the

government of Ukraine did not yet sign the Rome Statue, but it has recognized the ICCt jurisdiction concerning all crimes committed in the territory of Ukraine since February 20, 2014.

As of April 2017, on the web site of the Unified State Register there were no decisions under Article 438 of the CC of Ukraine.

5.4 Article 447. Mercenarism

1. Recruitment, financing, material support, training of mercenaries to be used in armed conflicts, military or violent actions aimed at violently changing or overthrowing the constitutional order, seizing state power, impeding activities of the state authorities or violating territorial integrity, and the use of mercenaries in armed conflicts, military or violent actions is punishable by imprisonment for a period from five to ten years.

2. The same actions committed by an official using the official position are punishable by imprisonment for a period from seven to twelve years, with or without confiscation of property.

3. The actions provided for by Parts 1 or 2 of this Article, which entailed the death of a person, are punishable by imprisonment for a period from ten to fifteen years or by life imprisonment, with or without confiscation of property.

4. Participation of a mercenary in an armed conflict, military or violent actions is punishable by imprisonment for a period from five to ten years.

5. A mercenary is exempt from criminal liability for the actions provided for in Part 4 of this Article, if he before being brought to criminal responsibility voluntarily stopped participation in the armed conflict, military or violent actions, and reported on his participation in the conflict,

²¹ <http://www.reyestr.court.gov.ua>

military or violent actions, or in any other way contributed to termination or solution of crimes provided for in Parts 1-3 of this Article, if his actions do not contain elements of another crime.

■ **Note.** For the purposes of this Article, a mercenary means a person who:

- 1) is specifically recruited in or outside Ukraine for participation in the territory of Ukraine or the territory of other countries in an armed conflict, military or violent actions aimed at violently changing or overthrowing the constitutional order, seizing state power, impeding activities of the state authorities or violating territorial integrity;
- 2) participates in military or violent actions in order to receive some form of private gain;
- 3) is neither a citizen (national) of the conflict party nor a person who legally permanently resides in the territory controlled by a party to the conflict;
- 4) does not belong to personnel of the armed forces of the state in whose territory such actions are carried out;
- 5) was not sent by a state that is not a party to the conflict to perform official duties as personnel of its armed forces.

Article 47 of Protocol I to the Geneva Conventions of June 8, 1977,²² as one of the characteristics of a mercenary specifies that a mercenary is a person who **"is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party"**. In the CC of Ukraine, this statement is shortened to **"participates in military or violent actions in order to receive some form of private gain"**. The concept of **some form of private gain** is vague and can mean non-material benefits as well. Such wording makes it possible to prosecute under Article 447 of the CC of Ukraine the individuals who are not mercenaries from the point of view of international law or domestic law of the state, of which mercenaries are citizens. However, law enforcement bodies of Ukraine still are obliged to prove that the person participates in the armed conflict in order to receive gain, and not for other reasons.

Criminal prosecution for mercenarism is provided for in all of the discussed Criminal Codes, but in the majority of them mercenarism involves in particular material remuneration. Exceptions are Criminal Codes of Kazakhstan (Article 170) and Uzbekistan (Article 154). According to these Codes,

as in Ukraine, a mercenary is a person who receives other gain in addition to material compensation.

In all of the discussed Criminal Codes, the amount of material remuneration is not specified, therefore technically, as a proof one can use the salary slip of the IAF even if the respective amount is commensurate with an average level of remuneration of the personnel of the armed forces of this party to the conflict.

Such approach to defining a mercenary is not in line with the IHL norms, which also prohibit mercenarism. The phrase from Protocol I - «material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party» - makes it possible to identify among the IAF participants those who fight exclusively for material gain.

The Center for Documentation did not establish the facts of payment of remuneration to foreign citizens that would fall under this definition. The available salary slips of IAF demonstrate that remuneration paid to foreign citizens is not different from that of other participants of IAF, and that these amounts are lower than average salaries in their respective countries.

The known facts of enrichment as a result of participation in the armed conflict in Ukraine are rather based not on the remuneration received from the

parties to the conflict but robbery, extortion, and marauding.

In addition to Protocol I, the notion of mercenary is defined in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries²³, adopted by the UN General Assembly Resolution on December 4, 1989. The main difference from Protocol I is the addition that a mercenary can be not only a person who takes part in an armed conflict, but also a person recruited

to overthrow the government or to undermine the constitutional order of the state in another way; or to undermine the territorial integrity of the state. As of the beginning of 2017, 35 countries²⁴, including Ukraine, signed the Convention. The signatories of the Convention also include Serbia and Belarus. The RF did not sign the Convention.

As of April 2017, there were no decisions under Article 447 of the CC of Ukraine on the web site of the Unified State Register.



◀ Members of the Unité Continentale IAF, Ukraine, October 2014, the picture was taken from the Unité Continentale page in Facebook

²² https://www.icrc.org/rus/assets/files/2013/ap_i_rus.pdf

²³ http://www.un.org/ru/documents/decl_conv/conventions/mercen.shtml

²⁴ <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P>

5.5 Official Information of Ukrainian Prosecution Office about Foreigners Arrested for Actions Committed During Conflict in Ukraine

The UHHRU's Center for Documentation submitted to the Office of the Prosecutor General of Ukraine, prosecution offices of Donetsk and Luhansk regions a request asking for the number of foreigners apprehended from 2014 to 2017 on suspicion of having committed criminal offenses under Articles 258, 258-3, 260, 438, 440 of the CC of Ukraine, and the number of indictments forwarded to the court against these individuals. Furthermore, a request for submitted for information about the number of foreigners participating in IAF who were apprehended under other articles of the CC of Ukraine.

The prosecution office of Luhansk region responded that during the period in question no foreign citizens were apprehended by officers of the Ukrainian Prosecution Office in Luhansk Region and the Main Department of National Police (MDNP) in Luhansk Region on a suspicion of having committed violations provided for in this article. The Office of the Security Service of Ukraine (OSSU) apprehended four foreigners on the suspicion of having committed a crime provided for by Article 258-3 of the CC of Ukraine.

The prosecution office of Donetsk region responded that during the period in question no foreign citizens were apprehended by officers of the Ukrainian Prosecution Office in Donetsk Region on a suspicion of having committed violations provided for in this article. The Investigation Department of the MDNP in Donetsk region during the period in question apprehended 5 foreigners under Article 260 of the CC of Ukraine (4 citizens of the RF and 1 citizen of Azerbaijan). Out of them, two individuals were later put on a wanted list. OSSU in Donetsk region apprehended 16 foreigners (14 citizens of the RF, 1 citizen of Azerbaijan, and 1 citizen of Uzbekistan), all - under Article 258-3 of the CC of Ukraine. Out of them, five individuals were later put on a wanted list.

The Office of the Prosecutor General of Ukraine refused to provide the requested information explaining it by the need for statistic processing of the requested information. On the web site of the Prosecutor General's Office (PGO) information is posted about the number of foreigners suspected of having committed offenses during the period in question broken down by the articles of the CC of Ukraine; however, Articles 258, 258-3, 260, 438, 440 of the CC of Ukraine are omitted²⁵.

6 Analysis of Criminal Codes of Other Countries

The majority of the analyzed Criminal Codes contain a provision, according to which the norms of the Criminal Code of the state are applicable to the actions of its citizens abroad provided that the action is recognized as a crime in the state where it was committed. Similar articles can be found in the CC RF (Article 12), Belarus (Article 6), Kazakhstan (Article 8), Serbia (Article 8), Moldova (Article 11), Uzbekistan (Article 12), Armenia (Article 15), Germany (Article 7), and France (Article 113-6). This

also refers to liability for participation in IAF as well as other crimes provided for in the CC of Ukraine.

In addition to this, many Criminal Codes of other countries contain articles, according to which a citizens of the state is prosecuted regardless of whether this is recognized as a crime abroad or not. In the first place, this refers to the violations of the IHL and the crimes related to terrorist activities.

6.1 Criminal Prosecution for Participation in Armed Conflicts Outside the Country

Some Criminal Codes contain articles, the language of which implies that the citizens have committed an offense outside the country. These are the Articles that provide for liability for participation that is unsanctioned by the state in an armed conflict abroad. Such norms are present in the Criminal Law of Belarus (Article 361-3 CC RB), Kazakhstan (Article 172), Serbia (Article 386a, 386b), and Slovakia (Article 419a). This also refers to the CC articles that provide for liability for mercenarism that includes not only the fact of participation in an armed conflict as a mercenary, but also recruitment, creation of training camps, financing, organization of delivery of mercenaries to the conflict zone.

The specific feature of this norm of the Criminal Code is that it extends the sphere of application of

the state's CC to the actions of its citizens abroad regardless of whether they violate the laws of the country they were in at that moment or not. In other words, in order to prosecute there is no need to refer to the act that a citizen by his actions violated laws of Ukraine, it would suffice to prove the fact of his participation in an armed conflict.

Another specific feature of this norm is that if a foreign member of the IAF is seen as a combatant he can still be prosecuted for participation in an armed conflict according to the domestic laws of his country.

Now, let us discuss individual CC articles, under which other countries can prosecute its citizens for participation in the "L/DPR" formations.

²⁵ http://www.gp.gov.ua/stst2011.html?_m=fslib&_t=fsfile&_c=download&file_id=200947

6.2 Criminal Code of Russian Federation²⁶

Liability for the fact of participation in an IAF outside the RF is provided for in Article 208 of the CC RF.

ARTICLE 208. ORGANIZATION OF ILLEGAL ARMED FORMATION OR PARTICIPATION IN IT

1. Establishment of an armed formation (association, detachment, squad or another group) not provided for by federal law, as well as the management of such formation or its financing is punishable by imprisonment for a period from ten to twenty years, with restriction of freedom for a period from one to two years.

2. Participation in an armed formation not provided for by federal law, as well as participation in an armed formation in another state not provided for by the law of that state with the purposes running contrary to the interests of the Russian Federation is punishable by imprisonment for a period from eight to fifteen years with a restriction of freedom for a period from one to two years.

Note. A person who has committed a crime provided for in this Article for the first time, who voluntarily ceased to participate in an illegal armed formation, and who has turned in weapons is exempt from criminal liability if his actions do not contain elements of another crime.



◀ Congress of the Union of Donbas Volunteers Moscow, November 4, 2016. The picture was taken from the Inform Napalm website. Recognized on the picture:

Middle row, left to right: Mikhail Pimenov (citizen of the RF, chief of staff of the IAF Republican Guard of the "DPR"), Alexei Milchakov (citizen of the RF, commander of the "Rusichi" IAF), Alexander Borodai (citizen of the RF, former "Prime Minister" of the "DPR"), Vladislav Surkov (citizen of the RF, Assistant to the President of the RF, ex-Deputy Chair of the Government of the RF), Alexander Gaidei (citizen of Ukraine, chieftain of the "RIM" IAF), Roman Lenshin (citizen of the RF, former commander of the IAF "Border Troops of the LPR"), Valentin Motuzenko (citizen of Ukraine, commander of Kalmius IAF)

The lower row, last person on the right Oleg Bogunevich (RF citizen, IAF member)

²⁶ http://www.consultant.ru/document/cons_doc_LAW_10699/

Its difference from similar articles of the Criminal Codes of other countries is the fact that within the "participation in an armed formation not provided for by the federal law" there is a specific reservation about the "participation in the territory of another country in an armed formation not provided for by legislation of the respective state with the purposes running contrary to the interests of the Russian Federation".

This reservation makes it possible to acquit a citizen of the RF in the event when the court decides that participation in the IAF does not run contrary to the interests of the RF, but then there is a question of how exactly the court should define the state's interests.

Furthermore, the note to Article 208 of the CC RF theoretically makes it possible to refuse to prosecute a person in the territory of the RF since he ceased to participate in the IAF and turned in weapons. However, it should be mentioned here that many RF citizens having returned home continue to actively express their belonging to the IAF fighting in Eastern Ukraine. They continue to wear uniforms with chevrons of the IAF fighting for the "L/DPR", and create organizations (such as the Union of Donbas Volunteers²⁷). These facts give grounds to doubt voluntarily termination of participation in IAF.

The CC RF also contains Article 359 Mercenarism. According to this article, a mercenary is "a person acting with the purpose of receiving material remuneration who is not a citizen of a state participating

in an armed conflict or military actions, who does not reside permanently in its territory, and who is not a person sent to perform official duties".

Although the definition mentions the accused person's purpose as receiving material remuneration, it does not specify the amount of remuneration. This norm is not in line with the IHL.

There is information about several criminal cases initiated against citizens of the RF who participated in an armed conflict as members of the Azov battalion under Article 359 of the CC RF. For instance, in the Resolution of the Judge of Sovetsky District Court of Lipetsk, M.V. Zolotarev, on Case 3/9-83/2015²⁸ the reason for application of Article 359 was the fact that the accused, V.O. Altukhov "received weapon, uniform, provisions for participation in hostilities, and also received financial resources". The verdict of Leninsky District Court of Kirov on Case 1-637/2016²⁹ reads that the accused "S.D. Krivokorytov received special equipment – a fourth-class bulletproof vest and a Kaska-1M Kevlar helmet, as well as firearms – Kalashnikov AK-74 assault rifle, 5.45 mm ammunition in the amount of at least 60 pieces, and was also attached for administration – supplied with food and drinking water", and it was furthermore stated that he "received monetary allowance in the amount of 3000 hryvnia per month". At the same time, there is no information about any case when RF citizens are prosecuted for participation in the IAF fighting against the AFU, which fact indicates a bias in the application of this article by law enforcement agencies of the RF.

6.3 Criminal Code of the Republic of Belarus³⁰

ARTICLE 133. MERCENARISM

Participation in the territory of a foreign state in armed conflicts, military actions of a person who is not part of the armed forces of parties to the conflict and acting with the purpose of obtaining material remuneration without being authorized by the state of which he is a citizen or in whose territory he permanently resides (mercenarism) – is punishable by imprisonment for a period from three to seven years, with or without confiscation of property.

²⁷ <http://sddonbassa.ru>

²⁸ <https://rospravosudie.com/court-sovetskij-rajonnyj-sud-g-lipecka-lipeckaya-oblast-s/act-495865300/>

²⁹ <https://rospravosudie.com/court-leninskij-rajonnyj-sud-g-kirova-kirovskaya-oblast-s/act-533809452/>

³⁰ http://etalonline.by/?type=text®num=HK9900275#load_text_none_1



Aleksandr Ogrenich. The picture was taken from his page in social media

◀ On this picture, there is a citizen of Belarus, Aleksandr Ogrenich, call sign Gorynych, member of the Somali IAF. In his interview for Radio Svoboda, he estimated the number of citizens of Belarus fighting for the "LPR" and "DPR" as approximately 800 individuals.³¹

ARTICLE 287. CREATION OF ILLEGAL ARMED FORMATION

Creation of an illegal armed formation in the absence of the elements provided for in Article 286 (banditism) of this Code, or management of such formation, or participation in it - is punishable by restriction of freedom for a period up to five years or by imprisonment for a period from three to seven years.

■ **Note.** A person who voluntarily stopped activities in an illegal armed formation and turned in weapons is exempt from criminal liability provided for by this Article.

ARTICLE 361.3 PARTICIPATION IN THE TERRITORY OF A FOREIGN STATE IN ARMED FORMATION OR ARMED CONFLICT, MILITARY ACTIONS, RECRUITMENT OR PREPARATION OF PERSONS FOR SUCH PARTICIPATION

1. Participation of a citizen of the Republic of Belarus or a stateless individual permanently residing in the Republic of Belarus in the armed formation of one of the opposing parties in the territory of a foreign state, as well as participation in an armed conflict, military activities without having been authorized by the state and in the absence of elements of a crime provided for in Article 133 of this Code, is punishable by restriction of freedom for a period of up to five years or by imprisonment for a period from two to five years.

2. Recruitment, training, other preparation or use of citizens of the Republic of Belarus or stateless individuals permanently residing in the Republic of Belarus for participation in armed conflicts as member of an armed formation of one of the parties to the conflict, military activities in the territory of a foreign state, as well as financing or providing other material support for such activities. In the absence of elements of a crime as provided for in Article 132 of this Code – is punishable by imprisonment for a period from five to ten years.

On January 14, 2016 President Alexander Lukashenko spoke sharply against the presence 'militants' in the country who fought in Ukraine from one side or another, and demanded that the uniformed agencies should immediately investigate the situation³².

the Ministry of Internal Affairs of the Republic of Belarus, Nikolai Karpenko³³ announced that 135 cases were initiated under the mercenarism article against the citizens of Belarus who participated in the armed conflict in Ukraine.

In March 2016, the Head of the Main Directorate for Combating Organized Crime and Corruption of

On April 20, 2016 the Law of the Republic of Belarus №358-3³⁴, was adopted that, among

³¹ <http://www.svaboda.org/a/27630959.html>

³² <http://www.belta.by/video/getRecord/575/>

³³ <http://www.zviazda.by/be/news/20160324/1458836474-25-gadou-spaunyaecca-adnamu-z-samyh-vyadomyh-padrzdzyalennyau-mus>

other things, added Article 361.3 to the CC RB– **Participation in the territory of a foreign state in armed formation or armed conflict, military actions, recruitment or preparation**

of persons for such participation. This article makes it possible to prosecute citizens of Belarus whose activities do not fall within Article 133 of the CC RB, Mercenarism.

6.4 Criminal Code of the Republic of Kazakhstan³⁵ (CC RK)

ARTICLE 170. MERCENARISM

1. Recruitment, training, financing or providing other material support for a mercenary, as well as its use in an armed conflict, military actions or other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of the state - are punishable by imprisonment for a period from seven to twelve years, with confiscation of property.

2. The same actions committed by a person using his official position or against a minor - are punishable by imprisonment for a period from twelve to seventeen years, with confiscation of property.

3. Participation of a mercenary in an armed conflict, military actions or other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of the state - is punishable by imprisonment for a period from seven to ten years.

4. An action provided in Part 3 of this Article that entailed death of people or other grave consequences - is punishable by imprisonment for a period from fifteen to twenty years, or life imprisonment, or capital punishment, with confiscation of property.

A mercenary is a person specially recruited to participate in an armed conflict, military activities or other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of the state, acting with the purpose of obtaining material remuneration or other personal gain who is not a citizen of the party to the conflict, or the state against which the aforementioned actions are directed, is not a member of

personnel of the armed forces of the party to the conflict, was not sent by another state to perform official duties as a person who belongs to its armed forces.

In Article 170, the notion of "other personal gain" is so vague that makes it possible to prosecute virtually any participation of an armed conflict.

ARTICLE 172. PARTICIPATION IN FOREIGN ARMED CONFLICTS

Intentional unlawful participation of a citizen of the Republic of Kazakhstan in an armed conflict or military activities in the territory of another state in the absence of the elements of mercenarism - is punishable by imprisonment for a period from five to nine years.

ARTICLE 267. ORGANIZATION OF ILLEGAL PARAMILITARY FORMATION

1. Creation of an illegal paramilitary formation, as well as management of such formation - is punishable by imprisonment for a period from two to seven years.

³⁴ <http://pravo.by/document/?guid=12551&p0=H11600358&p1=1>

³⁵ https://online.zakon.kz/Document/?doc_id=31575252&doc_id2=31575252#activate_doc=2&pos=296;-31&pos2=2030;-28

2. Participation in an illegal paramilitary formation - is punishable by a fine totaling up to three thousand monthly calculation indicators, or corrective labor in the same amount, or by restriction of freedom for the period of up to three years, or by imprisonment for the same period.

Note. A person who voluntarily ceases participation in an illegal paramilitary formation and who has turned in weapons and military equipment is exempt from criminal liability if his actions do not contain elements of another offense.

An illegal paramilitary formation is a formation (association, detachment, squad or other group consisting of three or more people) not provided by the legislation of the Republic of Kazakhstan, which has an organizational structure of a paramilitary type, sole command, fighting capacity, and strict discipline.

Article 8 of the Criminal Code of Kazakhstan reads that "citizens of the Republic of Kazakhstan who

committed a criminal offense outside the Republic of Kazakhstan are subject to criminal liability under this Code if the action committed by them is recognized as a criminal offense in the state in the territory of which it was committed, and if these persons were not convicted in another state", which makes it possible to prosecute the citizens of Kazakhstan under Article 267 of the CC of Kazakhstan for participation in IAF in Ukraine.



There is information about minimum two cases of application of Article 267 of the CC RK against citizens of Kazakhstan for participation in the armed conflict in Ukraine. They are Maksim Yermolov³⁶ and Yevgeniy Vdovenko³⁷. Both participated in the IAF fighting against the AFU.

◀ Yevgeniy Vdovenko, the picture was taken from his page in the social media

6.5 Criminal Code of the Republic of Uzbekistan³⁸

ARTICLE 154. MERCENARISM

Mercenarism, which is participation in the territory or the side of a foreign state in an armed conflict or military activities of a person who is not a citizen or a service member of a country in conflict or who does not permanently live in a territory controlled by a party to the conflict or who was not authorized by any state to perform official duties as part of the armed forces, with the purpose to obtain material remuneration or other personal gain, is punishable by imprisonment for the period from five to ten years.

³⁶ <http://aktobetimes.kz/verhnyaya-novost/3166-sudyat-za-ponty-v-ukrainskom-kamuflyazhe.html>

³⁷ <http://www.e-news.su/info/38716-dobrovolcam-donbassa-grozit-ugolovnoe-presledovanie-na-rodine.html>

³⁸ http://fmc.uz/legisl.php?id=k_ug

Recruitment, training, financing or providing other material support for a mercenary, as well as his use in an armed conflict or military activities is punishable by imprisonment for the period from seven to twelve years (this Part is introduced in accordance with the Law of the RUz №535-II dd. August 30, 2003).

As in the CC of Ukraine, the CC of Uzbekistan contains a clarification that a citizen can be recognized a mercenary even if he has not received material remuneration. This makes it possible to consider person who received only rations and uniforms as a mercenary.

6.6 Criminal Code of the Republic of Moldova³⁹

ARTICLE 130. MERCENARY. A mercenary means a person who acts to obtain material remuneration in the territory of a state involved in an armed conflict, military activities or other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of that state, who is not a citizen of that state and does not permanently reside on its territory, and who is not authorized to perform official duties.

Interpretation of the concept of mercenary in Article 130 of the CC of Moldova does not specify the amount of material remuneration that allows prosecuting citizens for the fact of receiving monetary allowance not exceeding the average size in the army of a party to the conflict.

ARTICLE 282. ORGANIZATION OF AN ILLEGAL PARAMILITARY FORMATION OR PARTICIPATION IN IT

(1) Organization of a paramilitary formation not provided for by the legislation of the Republic of Moldova or management of such formation, as well as participation in it is punishable by imprisonment for a period from two to seven years.

(2) A person who voluntarily ceases participation in an illegal paramilitary formation and who has turned in weapons is exempt from criminal liability if his actions do not contain elements of another offense.

ARTICLE 11 of the CC of Moldova extends criminal liability provided for in the code also to the crime committed outside Moldova. This norm makes it possible to prosecute under Article 282 of the CC of Moldova both citizens of the Republic of Moldova and individuals permanently residing in its territory for participation in IAF acting in Ukraine.

6.7 Criminal Code of the Republic of Armenia⁴⁰

ARTICLE 224. ESTABLISHMENT OF ARMED FORMATION NOT PROVIDED FOR BY LAW OR PARTICIPATION IN THEM

1. Creation of armed formations not provided for by law or governing them in the absence of the elements of crimes provided for in Article 222 of this Code is punishable by imprisonment for a period from two to seven years.

2. Participation in an armed formation not provided for by law is punishable by corrective labor for a period not exceeding two years, or by arrest for a period not exceeding three months, or by imprisonment for a period not exceeding five years.

³⁹ https://www.unodc.org/tldb/pdf/Moldova/Penal_Code_of_Moldova.pdf

⁴⁰ <http://www.parliament.am/legislation.php?ID=1349&lang=rus&sel=show>

3. The actions provided for in Parts 1 or 2 of this Article committed with the use of official position, are punishable by imprisonment for a period from six to ten years with deprivation of the right to hold certain positions or engage in certain activities for a period not exceeding three years.

According to Article 15 of the CC of Armenia, "citizens of Armenia, as well as stateless individuals permanently residing in it who have committed a crime outside Armenia are subject to criminal liability under the CC of Armenia, if the action committed by them is recognized as a crime by the

legislation of the state in which it was committed and if they were not convicted in another state". This makes it possible to prosecute persons mentioned in Article 11 of the CC of Armenia under Article 224 of the CC of Armenia for participation in IAF acting in Ukraine.

6.8 Criminal Code of the Republic of Serbia⁴¹

An IAF called Jovan Šević Detachment members of which were Serbian nationals was fighting against the AFU in 2014. The size of the detachment totaled 200–250 individuals. The commander of the detachment was a Serbian citizen, Bratislav Živković⁴². From the point of view of the CC of Serbia, their actions fall within Articles 386a and 386b of the CC of Serbia, which on October 10, 2014 were added to the Criminal Code⁴³.



◀ Serbian Chetniks in Ukraine. The picture was taken from the page of Bratislav Živković in the social media

▲ Medals received by citizens of Serbia for participation in the occupation of Crimea. Picture taken from the page of Bratislav Živković in social media

ARTICLE 386a. PARTICIPATION IN WAR OR ARMED CONFLICT IN ANOTHER COUNTRY

(1) A citizen of Serbia who participates in a war or an armed conflict in another country as a member of military or paramilitary groups of one of the parties to the conflict and is not a citizen

⁴¹ http://www.paragraf.rs/propisi/krivicni_zakonik.html

⁴² <https://lenta.ru/news/2014/07/22/serbia>

⁴³ <http://www.parlament.gov.rs/upload/archive/files/cir/pdf/zakoni/2014/3093-14.pdf>

of that state or a member of the official mission of international organizations in which Serbia is a member is punishable by imprisonment for a period from six months to five years.

(2) If the action provided for in para. 1 of this Article was committed by a group, the guilty person is punished by imprisonment for a period from one year to eight years.

ARTICLE 386b. ORGANIZATION OF PARTICIPATION IN WAR OR ARMED CONFLICT IN ANOTHER COUNTRY

(1) Any person who, for the purpose of committing a criminal offense provided for in Article 386a of the Code in the territory of Serbia, incites or incites another person to commit this crime, organizes a group or conducts training of another person or a group to commit this crime, equips or provides equipment for commitment of this crime, provides or collects funds for commitment of this crime is punishable by imprisonment for a period from two to ten years.

(2) For the commitment of a crime specified in para 1. of this Article, a person is punished in the form of punishment envisaged for this crime, including the cases when people who were organized are not citizens of Serbia.

A Serbian organization called Србска акција stated that eight members of illegal armed formations who fought against the AFU in Ukraine were prosecuted upon their return to their homeland. Србска акција refers to the Serbian newspaper, Pravda, according

to which eight citizens were convicted in Serbia as of July 2015. The defendants agreed to a plea deal: in exchange for confession of guilt, they received from three to five years of imprisonment conditionally⁴⁴.

6.9 Criminal Code of Slovak Republic⁴⁵

ARTICLE 419a. PARTICIPATION OF ORGANIZED ARMED GROUPS IN HOSTILITIES IN THE TERRITORY OF ANOTHER STATE

(1) Any person who, during a war in the territory of another state, actively participates in hostilities as a member of an organized armed group is punished by imprisonment for a period from two to eight years.

(2) Also, as in para 1., punishment is envisaged for those who:

a) calls upon the public to take actions provided for in para 1.

b) calls upon another person to commit or facilitate the commitment of the crime provided for in para 1.

c) provides or receives knowledge of methods and techniques for the manufacture or use of explosives, firearms or other weapons, hazardous materials or hazardous substances, or other specific methods or techniques designed to manage the fight for the purpose of committing the crime provided for in para 1., or

d) financial and other resources, services, cooperation and creation of other conditions for the purpose of committing the crime provided for in para 1.

⁴⁴ <https://regnum.ru/news/1943627.html>

⁴⁵ <http://www.zakonypreludi.sk/zz/2005-300>



This article has been included in the Criminal Code of Slovakia in the context of legislative measures on fighting terrorism. The reason for this was the increased number of the cases of participation of Slovak citizens in armed conflicts abroad, including Ukraine. The article entered into force on January 1, 2016⁴⁶.

◀ Slovak citizen, Martin Sojka Keprta, member of IAF "Piatnashka". The picture was taken from the page of Martin Sojka Keprta in social media

6.10 Criminal Code of the Federal Republic of Germany⁴⁷

ARTICLE 127. FORMING ARMED GROUPS

Who so ever unlawfully forms or commands a group in possession of weapons or other dangerous instruments or joins such a group, provides it with weapons or money or otherwise supports it, shall be liable to imprisonment not exceeding two years or a fine.

Since Article 7 of the CC FRG allows application of the German criminal law to the crimes committed abroad if the act is a criminal offense at the locality of its commission, Article 217 of the CC FRG can be applied with regard to German citizens participating in the conflict in Ukraine.

7 Conclusions

Information about prosecution of foreigners who participated in the armed conflict in Ukraine but had already left its territory demonstrates that as of mid-2017 prosecution is done on the initiative of those states, citizens of which they are.

The most frequently used accusation in these cases is mercenarism. In those countries where it is applied, the interpretation of the notion of a mercenary is not in line with the IHL provisions, and makes it possible to prosecute virtually any participant of an armed conflict.

Legislative bodies of some states realizing that the notion of a mercenary is not always suitable to define participants of an armed conflict have introduced to the civil code such element of a crime as participation in an armed conflict abroad without having been authorized by the state. In this way, they separated liability for participation in an armed conflict or an IAF for receiving a material gain from participation for other reasons.

From the IHL perspective, participation in an armed conflict for a uniform, ration or insignificant material remuneration is not mercenary and, without any other actions committed, is not an offense. Moreover, participation in an armed conflict without material gain is not considered as offense.

The responses received from the Prosecution Office of Ukraine demonstrate that Ukrainian law enforcement bodies also prosecute IAF members only for the mere fact of participation (Article 260 of the CC of Ukraine). Furthermore, in the Ukrainian courts, IAF are considered to be terrorist organizations, and participants of the armed conflict are accused of participation in activities of a terrorist organization (Article 258-3 of the CC of Ukraine) only on the grounds of participation in an IAF, which is also against the IHL norms.

Such practice of prosecuting foreigners for participation in the conflict in Ukraine is used because except for the fact of the foreigner's participation in an IAF there is often no other information about his other offenses. This is the sufficient reason to initiate a criminal case against him in Ukraine and to forward the criminal proceedings materials to law enforcement bodies of the country, the citizens of which he is. In the first place, we are talking about the countries where participation in an IAF is a crime and where a crime committed by the citizen abroad falls under the jurisdiction of the CC of this state.

⁴⁶ http://www.minv.sk/?trestne_ciny

⁴⁷ <http://www.gesetze-im-internet.de/stgb/>

8 Recommendations

For prosecuting foreigners who are members of IAF it is recommended that the Ukrainian law enforcement bodies should establish cooperation with law enforcement bodies of other states.

In addition to the fact of participation in a conflict as such, Ukrainian law enforcement bodies should also investigate other crimes committed by the participants of the conflict in Ukraine. These include attempted murder, illegal possession, use and carrying of weapons, unlawful deprivation of liberty, obstruction of the work of state authorities, etc.

In addition, law enforcement agencies of Ukraine should pay special attention to investigating the facts of participation of foreigners in war crimes. We are talking about murders, extrajudicial

executions, torture, taking hostages, deliberate injuries, intentional strikes on civilian targets, etc. The CC of Ukraine in addition to Article 438 contains articles envisaging punishment for each of the aforementioned acts. Similar articles are present in the Criminal Codes of other states, therefore the fact that a foreigner has left the territory of Ukraine does not exempt him from liability for such crimes in the country, which he is a citizen of. It should also be mentioned here that the IHL prohibits such actions unlike participation in an armed conflict or IAF. In the event when the national investigation system demonstrates its inefficiency, the ICtY prosecutor can make a decision to start investigation. However, this option is not a panacea and does not relieve law enforcement agencies of the obligation to record offenses and conduct investigative activities.



From the standpoint of international humanitarian and national law, who are foreigners participating in the armed conflict in Ukraine? Which jurisdiction do the actions committed by them during the conflict fall within? Is it possible to bring them to justice after they have left the territory of Ukraine? This analytical review is an attempt to find answers to these questions.

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