

The Status of Stateless Fighters in International
Humanitarian Law

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Table of Contents

List of Abbreviations.....	4
1. Research Introduction.....	5
1.1. Introduction.....	5
1.2. Research Question.....	8
1.3. Primary Argument.....	9
1.4. Methodology and Case Study.....	11
1.5. Thesis Structure.....	12
2. International Legal Frameworks Around Stateless Fighters.....	13
2.1. Introduction.....	13
2.2. International Human Rights Law.....	13
2.2.1. Analysing the Status of Stateless Fighters under the 1954 Convention.....	14
2.2.2. Comparison of the 1954 and 1961 Conventions on Statelessness: Implications for Stateless Fighters	15
2.2.3. The Application of Other Human Rights Conventions on Stateless Fighters during Armed Conflicts.....	17
2.2.4. The Status and Rights of Stateless Fighters in Human Rights Conventions.....	18
2.3. International Humanitarian Law.....	19
2.3.1. Combatant Status and Prisoner of War Status in International Armed Conflicts.....	19
2.3.2. Combatant Status and Prisoner of War Status in Non-International Armed Conflicts.....	21
2.4. Conclusion.....	22
3. Status of Stateless Fighters According to the Third Geneva Convention, the Additional Protocols and State Practice.....	23
3.1. Introduction.....	23
3.2. Stateless Fighters in International Armed Conflicts.....	23
3.2.1. Distinguishing Article 4A (1) and 4A (2) of the Third GC: The Implications of This Distinction on Stateless Fighters.....	24
3.2.2. The Removal of Distinction and the Extension of Combatant Immunity to Stateless Fighters under Article 43&44 of AP I.....	26

3.3. Stateless Fighters in Non-International Armed Conflicts.....	28
3.3.1. Basic Protection provided to Stateless Fighters in Non-International Armed Conflicts....	28
3.3.2. Additional Protection provided to Stateless Fighters in Non-International Armed conflicts.....	29
3.4. Stateless Fighters and State Practice.....	30
3.4.1. State Practice of States such as Ukraine and Russia in IACs.....	31
3.4.2. Comparing State Practice of Iran,Iraq,Syria and Türkiye in NIACs.....	32
3.5. Conclusion.....	33
4. Case Studies relating to Stateless Fighters in International and Non-International Armed Conflicts.....	34
4.1. Introduction.....	34
4.2. Absence of Explicit Provisions relating Stateless Fighters.....	34
4.3. Risk of Arbitrary Detention and Inadequate Legal Representation for Stateless Fighters captured as Prisoners of War	36
4.4. Problems in reparation of Stateless fighters after the Cessation of Hostilities.....	36
4.5. Conclusion.....	37
5. Conclusion.....	39

List of Abbreviations

IHL-International humanitarian law

NSA- Non-State Actor

IAC-International Armed Conflict

NIAC-Non-International Armed Conflict

GC-Geneva Convention

AP - Additional Protocol

CA3- Common Article 3

CIHL-Customary International Humanitarian Law

ILDU-International Legion for the Defence of Ukraine

ARSA-Arakan Rohingya Salvation Army

KWP-Kurdistan Workers Party

EAG-Ethnic Armed Group

NSAG-Non-State Armed Group

IHRL-International Human Rights Law

ANSA-Armed Non-State Actor

POW-Prisoners of War

ICRC-International Committee of the Red Cross

SAG-Stateless Armed Group

PKK-Kurdistan Workers Party.

ICCPR-International Covenant on Civil and Political Rights

KWP-Kurdistan Workers Party

CAT-Convention Against Torture

1. Research Introduction

1.1. Introduction

International humanitarian law (IHL) not only provides humanitarian protections to individuals in an armed conflict but also determines their status based on their contributions during the conflict.¹ Persons involved in armed conflicts include civilians, non-state actors (NSAs), combatants, medics, humanitarian actors, hors de combat, levee en masse, and other actors. All these persons are protected persons during an armed conflict although they may not enjoy the status of combatants. The emergence of new actors which include foreign fighters and dissident fighters has also played a key role in the development of the rules of IHL that relate to the status of combatants and prisoners of war.² During armed conflicts, international humanitarian law protects combatants and grants them the status of prisoners of war if they are captured. In an international armed conflict (IAC), persons belonging to the armed forces of the state or militias integrated into the armed forces are considered as prisoners of war or combatants according to the provisions of the Third Geneva Convention (GC) and Additional Protocol I (AP I). The definition of combatants also extends to resistance fighters and voluntary fighters. In contrast, in the case of non-state actors in a non-international armed conflict (NIAC), only the fundamental protections listed in Common Article 3 (CA 3) of the Geneva Conventions and Additional Protocol II (AP II) apply. What the Geneva Conventions or customary international humanitarian law (CIHL) does not mention is the status of stateless fighters in an armed conflict.

After the Russian invasion of Ukraine in February 2022, Ukraine passed a law that allowed non-Ukrainian nationals to join the Ukrainian Defence Forces.³ Apart from the armed forces of Ukraine several volunteers, foreigners, and stateless persons joined combat on both sides. Some volunteers joined the International Legion for the Defence of Ukraine (ILDU) which is part of the armed forces of Ukraine while others joined resistance groups such as the Shaikh Mansoor Battalion that does not come under the central command of the Armed Forces of Ukraine.⁴ The Russian Federation declared foreign and stateless fighters who joined the Ukrainian Defence

¹ International Committee of the Red Cross: 'What is International Humanitarian Law?' (International Committee of the Red Cross, 6th April 2022) Accessed on: 30th February 2024.

² Ibid.

³ Alia Shoaib: 'President Zelensky appeals for foreign volunteers to come to Ukraine and enlist in a newly formed 'International Legion' to fight the Russian invasion' (Business Insider, 27th February 2022) <[Ukraine Sets up 'International Legion' for Foreigners to Fight Russians \(businessinsider.com\)](https://www.businessinsider.com/ukraine-international-legion)> Accessed on: 16th February 2024.

⁴ Ibid.

Forces as well as the resistance groups as mercenaries instead of combatants and decreed that if captured these individuals will be tried and sentenced according to the domestic laws of the state.⁵ Indeed, some foreign and stateless fighters were also sentenced to death on charges of terrorism and war crimes by Russian-backed separatist courts in Eastern Ukraine. They have since been denied the status of prisoners of war and have been charged with terrorism according to the domestic laws of the Russian Federation.⁶

For NIACs, the example of stateless members of Arakan Rohingya Salvation Army (ARSA)⁷ in Myanmar and Kurdish Workers Party (KWP)⁸ in Kurdish-majority region of Iraq, Syria, Turkey and Iran is quite relevant for this thesis. Members of these groups include stateless individuals participating in an armed conflict not of an international character. First, the status of ARSA as an ethnic armed group (EAG) or as an insurgent group is disputed because most states consider it as an ethnic armed group while others are of the view that it is an insurgent group.⁹ Regardless, ARSA is composed of stateless fighters belonging to the Rohingya community residing in the Northern Rakhine region of Myanmar.¹⁰ Despite being a non-state armed group (NSAG), ARSA has not been widely discussed by scholars and policy makers let alone the status of stateless NSAs in ARSA.¹¹ Second comes the stateless members of Kurdistan Workers Party (KWP) in parts of Iraq, Syria, Iran and Türkiye concentrated in the mountains of Kurdish-Majority regions of Türkiye and Iraq.¹² It is an armed resistance group which can be granted the status of a combatant group under Article 44(3) of AP I.¹³ However, it needs to fulfil the conditions mentioned in the Third GC and AP I to qualify as a combatant group. However, this thesis does not discuss the status of these

⁵ Reuters: 'Ukraine demands humane treatment by Russia of captured fighters, including foreigners' (Reuters, 18th July 2022) < <https://www.reuters.com/world/europe/ukraine-russia-humanitarian-law-must-apply-foreigners-fighting-ukraine-2022-07-18/>> Accessed: 4th April 2024.

⁶ Ibid

⁷ Mike Winchester: 'Birth of an Ethnic Insurgency in Myanmar', (Asia Times, 28th August 2017).

⁸ Jessica A. Stanton: 'Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law' (Cambridge University Press, 2016) 217.

⁹ Lee Ronan. "Myanmar's Arakan Rohingya Salvation Army (ARSA): An Analysis of a New Muslim Militant Group and Its Strategic Communications." (2021) 15(6) Perspectives on Terrorism 61, 62.< JSTOR, <https://www.jstor.org/stable/27090916>>. Accessed 14 May 2024.

¹⁰ Lee Ronan. "Myanmar's Arakan Rohingya Salvation Army (ARSA): An Analysis of a New Muslim Militant Group and Its Strategic Communications." (2021) 15(6) Perspectives on Terrorism 61, 62.< JSTOR, <https://www.jstor.org/stable/27090916>>. Accessed 14 May 2024.

¹¹ Ibid 61.

¹² Jessica A. Stanton: 'Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law' (Cambridge University Press, 2016) 217.

¹³ Ibid 217.

armed groups but the status of stateless fighters who are members of these armed groups because the status of stateless fighters is rarely discussed in IHL or its scholarly literature.

The scholarly literature relating to the status of stateless fighters encompasses two different legal frameworks i.e. international human rights law (IHRL) and international humanitarian law because both these frameworks apply simultaneously during armed conflicts. IHRL is termed as *lex generalis*, as it applies at all times and the presence of an armed conflict does not affect its application.¹⁴ In contrast, IHL is defined as "*lex specialis*" because its application is limited to armed conflicts, and it ceases to apply after the termination of hostilities.¹⁵ Moreover, IHL has the capacity to bind all parties to the armed conflict including NSAs and has clear rules relating to combatant status and NSA responsibility, whereas IHRL does not bind NSAs to an armed conflict but only imposes obligations on states and to a lesser extent to international organisations.¹⁶ The application of IHRL does not affect the application of IHL during armed conflicts and only complements IHL in situations where it does not have specific rules relating to a particular situation.¹⁷ For example, there are no specific rules of IHL relating to the detention of captured NSAs in NIACs and captured mercenaries in IACs.¹⁸ In this case the specific rules relating to IHRL shall apply.¹⁹ These rules may include rules from basic IHRL conventions such as the Convention Against Torture, the Convention Relating to the Rights of Stateless Persons, and other conventions.²⁰ As the subject of stateless fighters includes the study of both legal frameworks, the thesis discusses the existing literature relating to stateless persons in IHRL and categories of combatants as well as the conditions to be granted combatant status in IHL in order to determine the status of stateless fighters.

¹⁴ Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in Editor(eds) Ziv Bohrer, Janina Dil & Helen Duffy, *Law Applicable to Armed Conflict* (Cambridge University Press, 2020), 20. Available at SSRN: <https://ssrn.com/abstract=3528156> . Accessed: 2nd May 2024.

¹⁵ Ibid 20.

¹⁶ Ibid 21.

¹⁷ Helen Duffy: 'The relationship between human rights law & IHL' <Stream The relationship between human rights law & IHL with Helen Duffy from Human Rights In Practice by LLInC | Listen online for free on SoundCloud>Accessed;23rd May 2024.

¹⁸ Emily Crawford and Allison Pert, '*International Humanitarian Law*' (2nd edn, Cambridge: Cambridge University Press 2020) 129.

¹⁹ Helen Duffy: 'The relationship between human rights law & IHL' <Stream The relationship between human rights law & IHL with Helen Duffy from Human Rights In Practice by LLInC | Listen online for free on SoundCloud>Accessed;23rd May 2024.

²⁰ Ibid.

In the field of IHRL, scholars including Edwards²¹, Weissbrodt & Collins²², and van Waas²³ investigate the rights of individuals including stateless individuals by utilising relevant human rights instruments such as the 1954 Convention on Statelessness, the 1961 Convention on Statelessness and other human rights conventions. Based on these instruments, the authors argue that stateless persons are a marginalised community which suffers from discrimination as most states do not grant them civil, political, economic, and social rights which only belong to nationals.²⁴ They also contend that stateless persons should be given the same rights as those of foreigners and aliens. They also contend that nationality is not a prerequisite for stateless persons to be granted fundamental human rights although these rights might not be equal to the rights granted to nationals of a state.²⁵ The field of IHRL examines the rights of stateless persons but does not analyse the status and rights of stateless combatants in armed conflict.

Scholars of IHL discuss the status of non-state actors, combatants, foreign fighters, and other actors in IACs and NIACs. Regarding the status of non-state actors, scholars including Crawford & Pert²⁶, and Bellal²⁷ argue that in an IAC, NSAs are entitled to the status of prisoners of war and legal combatants, if they fulfil the conditions mentioned in Article 4A (2) of the Third GC and Article 43&44 of AP I whereas NSAs and armed non-state actors (ANSAs) in an NIAC are only entitled to fundamental guarantees mentioned in Common Article 3 of Geneva Conventions and

²¹ Alice Edwards: 'The meaning of nationality in international law in an era of human rights: Procedural and Substantive Aspects' in Alice Edwards Laura van Waas eds, *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 40

²² David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 245, 246.

²³ Laura van Waas: 'The UN Statelessness Conventions' in Alice Edwards Laura van Waas (eds.), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 73.

²⁴ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 245, 246.

²⁵ Laura van Waas: 'The UN Statelessness Conventions' in Alice Edwards Laura van Waas (eds.), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 73.

²⁶ Emily Crawford and Allison Pert, *'International Humanitarian Law'* (2nd edn, Cambridge: Cambridge University Press 2020) 128.

²⁷ Annyssa Bellal, 'What are Armed Non-State Actors? A Legal and Semantic Approach' in E. Heffes et al. (eds.), *International Humanitarian Law and Non-State Actors*, (1st Edition, T.M.C. ASSER PRESS and the authors 2020) 25.

Additional Protocol II. Other scholars of IHL, such as Sommario²⁸, Ditrichova and Bilkova²⁹, and Corn³⁰ determine the legal status of persons participating in armed conflicts by analysing the Third GC and APs. They contend that in an IAC, foreign fighters and other resistance fighters are entitled to the status of legal combatants and prisoners of war if they are members of the armed forces of the parties or fulfil the conditions mentioned in Article 4 of the Third GC and Article 43&44 of AP I.³¹ However, in a NIAC, only the fundamental protections granted by CA 3 of the GCs and AP II (if ratified by state parties) shall apply.³² IHL examines the rights of NSAs and other combatants but does not discuss statelessness and the rights of stateless fighters.

The existing literature relating to IHRL covers the rights and status of stateless persons but does not discuss their status as stateless fighters or combatants in armed conflicts. In contrast, IHL covers a wide range of actors which include fighters enrolled in the armed forces of a state, NSAs, foreign fighters, dissidents, resistance fighters, militias but statelessness and the status of stateless fighters as combatants or prisoners of war in an IAC as well as in a NIAC is rarely addressed in IHL or its scholarly literature. In the context of IHL, stateless civilians are protected in the Fourth Geneva Convention but the gap relating to the status of stateless fighters remains. Thus, further research is needed to determine the status of fighters who are stateless during armed conflicts.

1.2. Research Question

Based on the literature discussed in the previous section the research question is:

What is the legal status of stateless fighters in international and non-international armed conflicts under international humanitarian law?

The sub-research questions are: -

²⁸ Emanuele Sommario, 'The Status of Foreign Fighters under International Humanitarian Law' in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016).

²⁹ Petra Ditrichova.Varonika Bilkova, 'Status of Foreign Fighters in the Ukrainian Legion' (Lieber Institute West Point,15th March 2022). < <https://lieber.westpoint.edu/status-foreign-fighters-ukrainian-legion/>> Accessed: 29th March 2024.

³⁰ Geoff Corn, 'Prisoners of War in Occupied Territory' (Lieber Institute WestPoint, 3rd March 2023) < <https://lieber.westpoint.edu/prisoners-of-war-occupied-territory/>> Accessed:13th February 2024.

³¹ Emanuele Sommario, 'The Status of Foreign Fighters under International Humanitarian Law' in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016)149.

³² Emanuele Sommario, 'The Status of Foreign Fighters under International Humanitarian Law' in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016),

- 1) What are the international legal frameworks relevant to stateless fighters?
- 2) To what extent do stateless fighters fulfil the conditions mentioned in the Third Geneva Convention or customary international law to qualify as prisoners of war?
- 3) To what extent do the stateless fighters in Ukraine and members of Arakan Rohingya Salvation Army reveal further gaps in the IHL protections afforded to stateless fighters?

1.3. Primary Argument

The combatant status granted to stateless persons taking part in hostilities not only helps to differentiate stateless fighters from civilians or irregular combatants through the application of the principle of distinction but also grants specific rights, immunities and privileges to persons qualifying as combatants or prisoners of war. The rights and immunities include humane treatment, special status of Prisoners of war (POW) if captured, the right to be tried by military tribunals instead of regular courts and the right to be lawfully targeted.³³ Hence, it is necessary to determine the status of stateless fighters in light of the GCs and APs. In situations where they are found eligible to be granted the status of combatants then they may be targeted, or granted humanitarian protections if they cease to take part in hostilities and have all the rights and duties of a combatant.

This thesis argues that stateless fighters can be granted the status of legal combatants and prisoners of war in certain situations. In an IAC, the rules of IHL that relate specifically to combatant status apply to stateless fighters who either fall within the categories of combatants or fulfil the conditions mentioned in Article 4A of the Third GC. Stateless fighters are legal combatants if they are members of the armed forces or militias integrated into the armed forces of a party. In cases where stateless fighters are part of militias or other armed groups that do not fall under the central command of the armed forces of a state party but fulfil the conditions mentioned in Article 4A (2) of the Third GC and Article 43&44 of API, they will be considered as legal combatants. The conditions mentioned in Article 4A (2) of Third GC or Article 43 of AP I do not mention nationality. This is attested by the International Committee of the Red Cross (ICRC)'s 2020 Commentary, which observes: "the text of Article 4 does not stipulate nationality as a factor for prisoner-of-war status in contrast to protected person status under the Fourth Geneva Convention. The criterion should likewise not be inferred from the text of other relevant articles

³³ Emily Crawford and Allison Pert, 'International Humanitarian Law' (2nd edn, Cambridge: Cambridge University Press 2020) 97.

in the Third Convention.”³⁴ Thus, nationality cannot be considered as an essential requirement to ascertain the status of an individual as a combatant or prisoner of war. The thesis also argues that the protections and combatant status granted to combatants also extend to stateless fighters or stateless armed groups that do not belong to or represent a state party. The removal of distinction between the distinct categories of combatants mentioned in Article 4A of the Third GC by Article 43 of AP I help in the creation of a distinct category of stateless fighters or stateless armed groups (SAG) similar to other categories of combatants.

In the context of a NIAC, stateless fighters who belong to a non-state armed group (NSAG) will not be granted the status of combatant and will only be eligible for the basic protections under Common Article 3 and of AP II of the GCs. The reason these fighters are not given combatant status and the protections provided to combatants is because stateless NSAs just like regular NSAs in NIACs do not adhere to the rules and principles of IHL that are necessary to be followed to qualify as combatants. In cases where there are no clear rules regarding the treatment of detainees in IHL, for example CA 3 prohibits torture but does not specify or define torture, then the provisions of IHRL Conventions such as the Convention on Torture shall apply. CA3 and AP II also lack procedural rules relating to the detention of stateless fighters. Therefore, IHRL does not play a key role in armed conflicts but only fills in the gaps left by IHL.

Last, state practice and case studies help to flesh out some of the key legal issues relating to the status of stateless fighters as combatants or prisoners of war in an IAC as well as a NIAC. For example, the stateless fighters in the armed forces of Ukraine are legal combatants but they are treated as mercenaries by the Russian Federation because they neither have the nationality of the state for which they are fighting nor alliance to any other state. Ukraine considers them as part of its armed forces and has passed legislation to conscript them into the armed forces and grant them the status of combatants. Nevertheless, their rights and status are mostly overlooked by the international community which is more concerned about foreign fighters and their rights as the state to which they belong continuously advocate for their rights. In contrast to foreign fighters, stateless fighters have almost no international support. Besides the stateless persons listed into the Ukrainian armed forces, stateless fighters belonging to armed groups that are not incorporated into the armed forces of Ukraine are considered legal combatants by the Ukrainian Government but

³⁴ International Committee on the Red Cross: ‘ICRC’s 2020 Commentary on the Third Geneva Convention ‘ (ICRC, IHL Databases) <[IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 4 - Prisoners of war | Article 4 \(icrc.org\)](#)> Accessed: 23rd May 2024.

as they do not represent a state to which they owe some kind of loyalty it is very easy for opponents such as the Russian Federation to declare them as mercenaries even though they fulfil all the conditions mentioned in Article 4A of the Third GC and AP I. In the same way stateless fighters belonging to the Chechen Shaikh Al-Mansoor Battalion cannot be considered as legal combatants under Article 4A(2) of the Third GC because the battalion has not yet incorporated into the Ukrainian Armed Forces and does not represent any state. Hence, Russia may declare captured stateless prisoners of war as mercenaries and refuse to grant them the status of prisoners of war and punish them under domestic laws. However, this discretion is and should be limited to NIACs. In a NIAC states have the discretion to punish NSAs under domestic law so stateless persons will be treated as NSAs if they belong to an insurgent group and if captured during an NIAC but in the case of an IAC, they should be treated as legal combatants under Article 43 of the AP I and given the status of prisoners of war if they fulfil the conditions mentioned in Article 4A of the Third GC and Articles 43&44 of the AP I.

1.4. Methodology And Case Study

The research on this thesis relies on primary legal instruments which include the provisions of the Geneva Conventions, treaties, resolutions, soft law, the practice of states such as Ukraine, Russia, Iraq, Iran, and Myanmar relating to stateless combatants and case studies relating to the stateless fighters in Ukraine and members of the Arakan Rohingya Salvation Army (ARSA).

By utilizing doctrinal research, this thesis contributes to the existing research by examining the status of stateless fighters in international and non-international armed conflicts. Since, there is no mention of the legal status of stateless fighters in IHL, the thesis tries to determine their status and the protections granted to them in international armed conflicts by analysing Article 4 of the Third GC, and API as these provisions relate to combatant status. The study will also investigate the status of stateless non-state actors and try to determine as to what extent they are covered by the Third Geneva Convention. In most cases, armed groups which include stateless insurgents possess fundamental guarantees enlisted in CA 3 of the Geneva Conventions whereas in some cases, stateless NSAs may enjoy all the protections granted by the Convention. Then the question is that if non-state actors are covered by the Geneva Conventions, will stateless fighters and stateless non-state actors be covered as well? Under what circumstances will stateless fighters be eligible to be classified as legal combatants or prisoners of war if captured? What are the gaps in the protection relating to stateless fighters? To recognise these gaps in protection legal documents, state practice

and case studies will be analysed using black letter law approach. The black letter law approach is one of the traditional approaches to legal scholarship.³⁵ Using a black letter law or doctrinal approach, this thesis interprets and analyses law that revolves around stateless fighters in IHRL and IHL through formalist principles which seek to identify, organise, and synthesise law from its sources.³⁶ These sources include statutes, treaties, case studies, customary law, state practice, etc.³⁷

1.5. Thesis Structure

The thesis is divided into five chapters. This introductory chapter defines and introduces the topic, puts forward the research question, as well as the sub-research questions, main argument, and the research method. Chapter 2 discusses the international legal frameworks around stateless fighters. These include international human rights conventions and international humanitarian law conventions. Chapter 3 explains as to what extent and under what conditions stateless fighters fulfil the conditions mentioned in the Third Geneva Convention and under what circumstances will they fail to fulfil those conditions. In this Chapter the Geneva Conventions and their additional protocol will be analysed. Furthermore, the State practice of states which include Ukraine, Russia, Iraq and Myanmar will also be examined. Chapter 4 highlight the gaps in IHL protection afforded to stateless fighters by using case-studies of stateless fighters in Ukraine and the members of Arakan Rohingya Salvation Army. The last chapter concludes by examining to what extent stateless fighters can be granted the status of legal combatants or prisoners of war if captured.

³⁵ Dr Kevin J. Brown: 'Approaches to the Study of Law', in C.Ashford and J.Guth(eds), *The Legal Academic's Handbook*(Palsgrave Macmillan,2016),1.

³⁶ Ibid 1.

³⁷ Ibid 1.

2. International Legal Frameworks around Stateless fighters.

2.1. Introduction

There are two main international legal frameworks around stateless fighters. These include international human rights law and international humanitarian law. International human rights law formulates the principles that deal with the rights of individuals including stateless persons at national and international level. It applies during times of peace as well as war. In contrast, international humanitarian law determines the status of individuals and groups involved in international and non-international armed conflicts. Its application is restricted to armed conflicts, and it grants protection to combatants, stateless civilians, etc. Both the frameworks do discuss various actors during and after the cessation of hostilities but do not discuss stateless fighters. This chapter discusses both the legal frameworks in order to determine the status of stateless fighters and is divided into further three sections.

The first section of the chapter discusses the rights of stateless persons in IHRL by comparing the 1954 Convention on the Status of Stateless persons with the 1961 Convention relating to the Reduction of Statelessness and other human rights conventions. The second section of the chapter examines the Geneva Conventions and their Additional Protocols in order to discuss the legal framework relating to persons fighting in armed conflicts. The analysis of these existing legal frameworks helps to ascertain the status of stateless fighters which have neither been studied by scholars of international human rights law nor by the scholars of international humanitarian law. The third section of the chapter compares IHRL with IHL and the fourth section of the chapter mentions concludes with the concluding arguments relating to the international legal frameworks around stateless fighters.

2.2. International Human Rights Law

There are several international or regional human rights conventions relating to the rights and status of stateless individuals in IHRL, but these conventions do not mention the rights of stateless fighters. The 1954 Convention relating to the Status of Stateless Persons defines the status and

rights of stateless persons. It contends that stateless persons deserve all the basic fundamental rights which include the right of education, the right of residence, the right not to be discriminated and other rights although it does not discuss the right of citizenship or nationality of stateless persons as mentioned in the 1961 Convention on Reduction of Statelessness that relates to the right of nationality and discusses the legal pathways through which stateless individuals can acquire nationality.³⁸

Other human rights conventions, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on Ending Discrimination Against Women, and other conventions do not explicitly define the rights of stateless persons but indirectly address the rights of all persons including stateless people. Overall, this section analysis the status and rights of stateless persons in IHRL by comparing the conventions relating to stateless persons with other human rights conventions in order to study the existing legal framework relating to stateless persons in IHRL. The section analyses to what extent the status of stateless persons in IHRL may affect the status of stateless fighters in IHL because IHRL discusses the rights of stateless persons but does not mention stateless fighters.

2.2.1. Analysing the Status and Rights of Stateless Fighters under the 1954 Convention on Statelessness

The 1954 Convention on the Status of Stateless Persons discusses the rights of stateless persons but does not define and analyse the status and rights of stateless fighters. According to this convention, stateless persons should be granted at least minimum protections and rights such as the right to life, right to non-discrimination, the right to practice their religion, right to lawful residence, right to possess property, right to justice and fair trial, right to profession and education, right to social security, among others.³⁹ These rights are basic and fundamental in nature and may not match the rights or protections granted to nationals of a state.⁴⁰ This is because some rights granted to individuals are dependent upon nationality such as the right to vote and other political rights. If stateless persons are granted less rights than nationals of a state, then the question is that will stateless fighters also be discriminated and granted lesser rights similar to stateless persons?

³⁸ Laura van Waas: 'The UN Statelessness Conventions' in Alice Edwards Laura van Waas (eds.), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 73.

³⁹ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons' (2006) 28(1) *Human Rights Quarterly* 245, 249.

⁴⁰ *Ibid* 248.

While discussing the provisions of the 1954 Conventions, scholars such as Collins and Weissbrodt contends: “According to the 1954 Convention, stateless persons should be granted all those rights which are granted to nationals of a state or foreign nationals residing in a state.”⁴¹ This suggests that stateless persons residing in the territory of a state party to the 1954 Convention have rights similar to that of a foreigner or alien residing in the state and van Waas agrees with Collins and Weissbrodt by asserting that “the base level of rights enjoyment is that accorded to aliens generally in the same circumstances and effectively amounts to a non-discrimination clause for stateless persons vis-à-vis other non-nationals.”⁴² By analysing Collins & Weissbrodt’s and van Waas’ argument regarding the status and rights of stateless persons, it is evident that there is a consensus among HR scholars that stateless persons are to be granted the rights accorded to foreigners or aliens residing in state. This means that if the status and rights of stateless fighters are interpreted similarly to the interpretation of rights of stateless persons according to the 1954 Convention, then under IHRL stateless fighters would have lesser rights than ordinary fighters and they should be accorded the same rights as those granted to stateless citizens, aliens, and foreigners. If such an interpretation is practically implemented, such as in the case of stateless fighters in the Ukrainian armed forces then these stateless fighters will be granted lesser protections and rights as compared to other members of the armed forces. Instead, Stateless members of Ukrainian armed forces would only be given basic human rights such as the right to be treated humanely, freedom from torture, right to health and other rights. This raises a question as to what extent will the 1954 Convention and other rules of IHRL apply to stateless fighters during armed conflict? As stated in the introduction of this thesis, it is necessary to analyse the status of stateless fighters in IHRL as both IHL and IHRL apply simultaneously in armed conflicts. However, the extent to which IHRL applies to stateless fighters in armed conflicts needs to be determined.

2.2.2. Comparison of the 1954 and 1961 Conventions on Statelessness: Implications for the Status and Rights of Stateless Fighters under International Human Rights Law.

The 1954 Convention on Statelessness and the 1961 Convention on the Reduction of Statelessness are the only two international conventions in international human rights law and

⁴¹ Ibid 249.

⁴² Laura van Waas: 'The UN Statelessness Conventions 'in Alice Edwards Laura van Waas (eds.), *Nationality and Statelessness under International Law* (Cambridge University Press 2014), 73.

international refugee law that explicitly discuss stateless persons but there is no mention of stateless fighters in these conventions. Despite being related to the same topic, both the conventions differ in their scope and purposes. The 1954 Convention on Statelessness explicitly defines the rights of stateless persons and does not list nationality as a criterion for determining the rights and status of stateless persons.⁴³ Regarding the 1954 Convention, Weissbrodt and

Collins observe: “The principles of human rights would maintain that being human is the right to have human rights.”⁴⁴ In contrast, the 1961 Convention encourages the reduction of statelessness of stateless people.⁴⁵ It states that state parties must prevent situations in which persons may lose their citizenship.⁴⁶ Persons born on their territory should be provided all means to obtain citizenship.⁴⁷ Both these conventions discuss stateless persons and how they can achieve their rights but do not discuss the status and rights of stateless fighters.⁴⁸ This raises further questions relating to the application of the 1954 Convention and other IHRL Conventions to Stateless fighters and as to what extent will the 1954 Convention and other rules of IHRL apply to stateless fighters? If the relationship between IHL and IHRL during an Armed Conflict is analysed, it is evident that both the stateless conventions and other rules of IHRL apply to stateless fighters, but these rules do not affect the applicability of IHL to stateless fighters and instead complement the rules of IHL in particular situations during armed conflicts.

While determining the status and rights of stateless fighters during armed conflicts, the 1954 and 1961 Stateless Conventions and other rules of IHRL apply simultaneously with the rules of IHL. Helen Duffy observes: “There is.... no longer any reasonable doubt that, as a matter of law, IHRL applies in armed conflict, and that it does so alongside and in dynamic relationship with IHL.”⁴⁹ Both IHRL and IHL apply to stateless fighters in armed conflicts, but this raises further questions as to how do these two bodies of international law apply simultaneously? This thesis contends that

⁴³David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons'(2006) 28(1) Human Rights Quarterly 245,246.

⁴⁴ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons'(2006) 28(1) Human Rights Quarterly 245,246.

⁴⁵ Ibid 246.

⁴⁶ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons'(2006) 28(1) Human Rights Quarterly 245,246.

⁴⁷ Ibid 246.

⁴⁸ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons'(2006) 28(1) Human Rights Quarterly 245,246.

⁴⁹ Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in Editor(eds) Ziv Bohrer, Janina Dil &Helen Duffy, Law Applicable to Armed Conflict (Cambridge University Press, 2020), 68. Available at SSRN: <https://ssrn.com/abstract=3528156> . Accessed: 2nd May 2024.

IHRL and IHL will apply simultaneously. IHL provides specific rules relating to the status of combatants, treatment of prisoners of war whereas IHRL offers broader protections and fundamental rights to all persons including stateless fighters during armed conflicts. As Helen Duffy comments: “Determining applicable law in an armed conflict depends not only on the existence or not of armed conflict, or its nature, but also on the identification of particular norms, their content and objectives, as they apply to a particular factual scenario within the conflict.”⁵⁰ This means that the rules of IHRL play a crucial role in filling the gaps in IHL and these rules provide essential protections for stateless fighters in various situations where the rules of IHL might fall short. This concurrent application of both these frameworks ensures that the rights of stateless fighters are upheld consistently, regardless of their combatant status or compliance with the laws of war.

2.2.3. The Application of Other Human Rights Conventions to Stateless fighters during Armed Conflicts

As discussed earlier, international human rights law does not discuss the status and rights of stateless fighters during armed conflicts although it does apply simultaneously with international humanitarian law and complements it in specific situations during such conflicts. Almost all human rights conventions that have been formulated are universally recognised conventions that impose obligations on states and give rights to all individuals during and after an armed conflict irrespective of their status, nationality, caste, race, or religion.⁵¹ This means that the provisions of the HR Conventions also apply to stateless fighters during armed conflicts because as it was discussed in the previous sections that IHRL simultaneously applies with IHL in armed conflicts and plays a complementary role. However, the provisions of IHRL do not bind stateless fighters and cannot impose obligations on them, but they do impose obligations on state parties to respect the basic human rights to all persons which also includes stateless fighters.⁵²

Unlike the 1954 and 1961 Conventions on Statelessness, other human rights conventions do not explicitly mention the rights of stateless fighters, but they do contain provisions that prohibit

⁵⁰ Ibid 72.

⁵¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.

⁵² Helen Duffy, "Trials and Tribulations: Co-Applicability of IHL and Human Rights in Editor(eds) Ziv Bohrer, Janina Dil & Helen Duffy, *Law Applicable to Armed Conflict* (Cambridge University Press, 2020), 20. Available at SSRN: <https://ssrn.com/abstract=3528156> . Accessed: 2nd May 2024.

discrimination against specific groups of people which also include stateless persons. According to Weissbrodt and Collins: “the rights of stateless persons are indirectly mentioned in conventions other than the 1951 Convention on Statelessness”.⁵³ An example is the Article 2 of the ICCPR, which obliges states: “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”.⁵⁴ The clause “other status”⁵⁵ may include persons who have the status of stateless persons because the ICCPR does not discuss statelessness or stateless persons in detail. The phrase “individuals within its territory”⁵⁶ is not confined to nationals of the state.⁵⁷ The provisions of these conventions intend to extend broader protections of IHRL to all individuals including stateless fighters unlike the 1954 Convention on Statelessness that is devoted to stateless persons and emphasises the basic rights of Stateless Persons. The human rights conventions complement the 1954 Stateless Convention by indirectly protecting stateless persons and protecting them from discrimination and human rights abuses but similar to the 1954 Convention, the HR Conventions do not discuss the status of stateless fighters.

2.2.4. The Status and Rights of Stateless Fighters in Human Rights Conventions.

International conventions such as the 1954 Convention on Statelessness and the 1961 Convention on the reduction of Statelessness discuss how stateless persons are eligible for basic human rights but these conventions refrain from discussing the rights of stateless fighters who join combat during armed conflicts. Besides these conventions other conventions such as the ICCPR or the UN Convention Against Torture (CAT) will apply to stateless fighters during armed conflicts when there are no specific rules of IHL relating to a particular situation. For example, during NIACs, CA 3 and it is a peremptory norm that prohibits torture but neither the Article nor

⁵³ David Weissbrodt, Clay Collins: 'The Human Rights of Stateless Persons' (2006) 28(1) Human Rights Quarterly 245,246.

⁵⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.

⁵⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.

⁵⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2.

the norm itself provide any procedural law relating to the prohibition of torture of detainees. In this case, the provisions relating to the Convention Against Torture shall apply to complement the rules of IHL.

IHRL promotes humane treatment of stateless fighters in an armed conflict but their status as combatants cannot be determined by utilising the Human Rights Conventions and instead, their status will be determined by analysing the rules of IHL. The question arises as to what will be the status of stateless persons fighting in armed conflicts? Are they combatants or simply individuals who are civilians but taking part in hostilities? Can they be granted the status of prisoners of war if captured? Under what circumstances or conditions can they qualify as combatants? In order to determine the status of stateless persons the legal framework of international humanitarian law needs to be analysed. Stateless fighters under IHRL may be granted fundamental rights such as: the right to fair trial and the right not to be discriminated. These rights apply to stateless persons and stateless fighters because IHRL applies at all times but the status of stateless fighters or combatants in IHL needs to be determined. In conclusion, IHRL does apply to armed conflicts, its provisions can be utilised to extend basic protections and rights to stateless fighters/combatants, but they cannot be utilised to determine the status of stateless fighters. Therefore, IHRL will apply to stateless fighters in required situations.

2.3. International Humanitarian Law

This section discusses the current law relating to combatant status and how the interpretation of the legal instruments relating to IHL help to determine the status of stateless individuals as combatants and extend combatant immunity to these individuals. The conventional law has laid the foundations for determining the status of persons participating in armed conflicts. The Third Geneva Convention focuses on the status and rights of individuals as prisoners of war and the Additional Protocol I protects victims of international armed conflicts, including individuals who no longer take part in hostilities. In a non-international armed conflict, persons belonging to the armed forces of the state are not legal combatants whereas those fighting against them are non-state actors, who cannot be granted the status of legal combatants or prisoners of war. Only fundamental guarantees enlisted in CA 3 and the AP II (if ratified by the capturing state) will apply in the case of captured NSAs in a NIAC. However, the status of stateless fighters has not been mentioned in international humanitarian law, but the protections listed in the provisions of the

Third GC and AP I can be extended to them in certain situations. The section discusses combatant status in an IAC and a NIAC and whether it can be extended to stateless fighters.

2.3.1. Combatant Status and Prisoner of War Status in an IAC

The provisions of the Third GC and AP I determine the status of persons who no longer take part in hostilities in an IAC, but the status of stateless fighters is not mentioned in these provisions. Article 4A (1) of the Third GC declares that the members of the armed forces, volunteer corps and militias that are incorporated into the armed forces of a state as legal combatants.⁵⁸ It does not mention any further conditions for a member of the armed forces or militias integrated into the armed forces to qualify as a legal combatant. In contrast to Article 4A(1), Article 4A (2) encompasses the members of organised resistance movements, and other volunteer corps that are not incorporated into the regular armed forces of a state party and persons belonging to this category will only qualify as combatants if they fulfil the four conditions mentioned in this provision.⁵⁹ Regarding Article 4A (2) of the Third GC, Sommario observes: “Article 4A (2) protects all groups participating in an IAC. The granting of combatant status, however, is subordinated to the fulfilment of a number of conditions.”⁶⁰ The four conditions mentioned in Article 4A (2) of the Third GC are: belonging to a group commanded by a person responsible for his subordinates, having a fixed distinctive sign, carrying arms openly and conducting operations in accordance with the laws of war.⁶¹ These conditions apply when analysing the status of individuals belonging to militias and voluntary groups not incorporated into the armed forces of a state.⁶² In particular, Article 4A (1) and 4A (2) do not define nationality as a factor determining the status of a person belonging to the armed forces of a country or volunteer groups or militias not integrated into the armed forces of a country. Therefore, members of armed forces or militias regardless of their nationality or their status as stateless persons may qualify as combatants if they belong to one of the categories mentioned in these provisions or if they fulfil the conditions mentioned in Article 4A (2) of the Third GC. According to these provisions, stateless fighters cannot be recognised as separate category of combatants because all the categories of combatant

⁵⁸ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135, Article 4. < <https://www.refworld.org/docid/3ae6b36c8.html>> Accessed on: 20th March 2024.

⁵⁹ Ibid Article 4.

⁶⁰ Emanuele Sommario, ‘The Status of Foreign Fighters under International Humanitarian Law’ in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016) 148.

⁶¹ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135, Article 4.

⁶² Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135.

groups under Article 4A (2) of the Third GC need to belong to one of the parties to the conflict otherwise they may not qualify as combatants.⁶³

Article 43 of the AP I reaffirms the status of individuals and conditions mentioned in Article 4A of the Third GC for persons or groups to be granted the status of combatants but unlike Article 4A of the Third GC, it does not differentiate between the members of armed forces and other groups including militias and volunteer groups which are not integrated into the armed forces.⁶⁴ According to Article 44 of AP I, persons who fulfil the conditions mentioned in Article 4A of the Third GC and Article 43 of the API are treated as prisoners of war similarly to the combatants mentioned in Article 4A of the Third GC.⁶⁵ Regarding the difference between Article 4 of the Third GC and Article 43 of AP I, Sommaro observes: “The article restates existing principles, except that it removes the distinction between regular armed forces on one side and volunteer groups, militias, and resistance movements on the other. According to the new provision, the criteria for determining entitlement to combatant and POW status are the same for members of both groups. This constituted a novelty compared to pre-existing law, but it appears to raise little controversy and has already been incorporated into customary IHL.”⁶⁶ Therefore, Article 43 of AP I not only affirms the conditions mentioned in Article 4A (2) of the Third GC and Article 43 of AP I but also removes the distinction between combatant groups mentioned in Article 4A of the Third Geneva Convention. The removal of the distinction between the categories of combatants enforces equal status for all categories of combatants and armed groups including stateless fighters taking part in hostilities if they fulfil the conditions mentioned in Article 4A (2) of the Third GC to qualify as combatants. After the removal of the distinctions, the definition of POWs or combatants becomes more inclusive and is not limited to the formal definition and categories mentioned in Article 4A. According to Article 43 of AP I, the rights of privileges of combatants

⁶³ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949), 75 UNTS 135, article 4. < <https://www.refworld.org/docid/3ae6b36c8.html>> Accessed on: 20th March 2024.

⁶⁴International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3. Article 43.

⁶⁵ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3, Article 44.

⁶⁶ Emanuele Sommaro, ‘The Status of Foreign Fighters under International Humanitarian Law’ in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016) 151.

extend to Stateless fighters who could be recognized as legal combatants and POWs since there is no requirement for affiliation with a state party in Article 43 of AP I as compared to Article 4A (2) of AP I. Hence, the removal of distinction extends the rights and privileges of combatants to stateless fighters and stateless NSAGs in an IAC.⁶⁷

2.3.2. Combatant Status and Prisoner of War Status in NIACs

CA3 of the GCs and AP II are the only provisions in IHL that relate to the protection of NSAs and persons taking part in hostilities in a NIAC, but they do not discuss the status of stateless NSAs. Both the provisions apply to all actors taking part in the armed conflict, but they do not list persons taking part in hostilities/NSAs as combatants or prisoners of war. As Crawford and Pert observe: “Participation by NSAs in an NIAC is not an internationally wrongful act but neither CA3 nor AP II legitimises and immunises such participation.”⁶⁸ Not being granted immunities and privileges does not mean that a NSA in a NIAC is not entitled to humanitarian protections mentioned in CA 3 of the GCs. As Crawford and Pert further explain: “Both CA 3 and AP II enshrine certain fundamental guarantees regarding minimum standards of treatment that detainees in NIACs must be afforded. This includes basic standards of humane treatment in CA 3 and AP II.”⁶⁹ This raises another question as to the application of these provisions to stateless NSAs. If regular NSAs are covered by this provision, then what is the status of stateless NSAs?

To analyse the status and protections granted to stateless NSAs the provisions that apply to regular NSAs should be analysed. The fundamental guarantees enlisted in Common Article 3 and AP II prohibit inhumane acts such as murder, mutilation, cruel treatment, and torture.⁷⁰ They also protect civilians and individuals who have ceased take part in hostilities. The only difference between CA 3 and AP II is that the fundamental guarantees mentioned in AP II complement CA 3 by additionally prohibiting hostage taking, collective punishment and requires respecting medical personnel units and transports during a NIAC.⁷¹ Regarding the additional protection provided to detainees as mentioned in Article 4 of AP II that complement CA 3 of the Third GC,

⁶⁷ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

⁶⁸ Emily Crawford, Alison Pert: ‘International Humanitarian Law’ (2nd Edition, Cambridge University Press 2020)128.

⁶⁹ Ibid 129.

⁷⁰ Ibid 129.

⁷¹ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II, 1977), 1125 UNTS 609.

the ICRC's 2020 Commentary on the Third GC states: "The list of prohibited acts is fuller than that of common Article 3. That being so, and because of the absolute character of these prohibitions, which apply at all times and in all places".⁷² Lastly, Additional Protocol II has not been ratified by several states, but common article 3 of the Geneva Conventions is universally accepted by states. Both CA 3 and AP II do not discuss the status of stateless NSAs taking part in NIACs but may apply to stateless NSAs in the same way as these protections are provided to regular NSAs because their application extends to all persons involved in the armed conflict and not only the persons taking part in hostilities.

2.4. Conclusion

In conclusion, the legal frameworks of IHRL and IHL apply to stateless fighters. IHL determines the status of stateless fighters and provides them with privileges and protections if they qualify as combatants whereas IHRL fills the remaining gaps and ambiguities in IHL by providing extended humanitarian protections to these fighters. As both the frameworks apply to stateless fighters, they play their respective roles by complementing each other in different situations. In IHL, the status of individuals taking part in armed conflicts, is determined by analysing the provisions of the Third Geneva Convention, the Additional Protocols of the Geneva Conventions and state practice. The status of combatants such as foreign or international fighters, dissidents, detainees was not initially determined unless scholars contributed to this research. The status of stateless fighters and stateless NSAs is still not defined in IHL. However, the laws relating to combatant status and the basic protections granted to NSAs may be extended to stateless fighters and stateless NSAs.

⁷² Ibid Article 4.

3. Status of Stateless Fighters According to The Third Geneva Convention, Additional Protocols, and State Practice

3.1. Introduction:

This chapter discusses the status of stateless fighters in armed conflicts by analysing the provisions relating to the status of combatants and prisoners of war in the Third Geneva Convention & the Additional Protocols, and state practice. First, the chapter tries to ascertain the status of stateless fighters in IACs and how the category of stateless fighters may be included as a separate distinct category of combatants in IACs by analysing Article 4A of the Third GC and Articles 43&44 of AP I. It analyses the distinction between Article 4A (1) and Article 4A (2) and how it affects the status of stateless fighters, and it analyses how Article 43 of AP I removes the distinction between the distinct categories of combatants in Article 4A of the Third GC. Second, the chapter examines the status and protections provided to stateless non-state actors by discussing CA 3 of the GCs and AP II. These protections are the same that are given to regular NSAs. Third, it discusses the prevalent state practice relating to the treatment of stateless fighters in armed conflicts. Last, the chapter concludes by putting forward the concluding arguments relating to the status of stateless fighters in the Third Geneva Convention and State practice.

3.2. Stateless Fighters in International Armed Conflicts

This section discusses as to what extent stateless fighters and stateless armed groups can be granted the status of legal combatants in international armed conflicts by analysing the provisions relating to combatant status in IHL. First, the section analyses how the distinction between Article 4A (1) and Article 4A (2) of the Third GC helps in ascertaining the status of stateless fighters and to what extent will stateless fighters belonging to these categories enjoy the rights and privileges of a combatant during IAC by. Second, it discusses how the removal of distinction between distinct categories of combatants mentioned in Article 4A of the Third GC by Article 43 of AP I has relevance to the recognition of the status of stateless fighters and how stateless fighters can be categorised as a distinct legal category in international humanitarian law.

3.2.1. Distinguishing Article 4A (1) and 4A (2) of the Third GC: The Implications of This Distinction on Stateless Fighters

The distinction between the various categories of combatants mentioned in Article 4A of the Third GC help to determine the status of stateless fighters falling within these categories. Article 4A(1), lists the main category of combatants including members of the armed forces of a state and militias integrated into these armed forces whereas Article 4A(2), allows persons who are members of voluntary corps or resistance movements that do not form part of the armed forces mentioned in Article 4A(1) to be granted the status of combatants if they fulfil these conditions: being commanded by a person responsible to his subordinates, having a distinctive sign, carrying arms openly and following the rules and laws of war.⁷³ However, the provision itself does not extend combatant immunity to stateless fighters or Stateless Armed Groups (SAGs) as an independent category because members of resistance groups or NSAGs which do not represent a state party to the conflict cannot be termed as combatants according to the ICRC's 2020 Commentary on the Third Geneva Conventions.⁷⁴ The distinction between both these provisions are discussed in order to analyse how it affects the status of stateless fighters in the light of these provisions.

During IACs, stateless fighters who are legally conscripted into the armed forces of a state or who belong to militias and volunteer corps incorporated into these armed forces are legal combatants according to Article 4A (1) of the Third GC. Article 4A (1) explicitly declares members of the armed forces of a state party to the conflict as well as members of militias or volunteer corps forming part of such armed forces as legal combatants.⁷⁵ This is further attested by Crawford and Pert, who contend: "Members of the armed forces comprise the main category of combatant on IHL-they are all persons belonging to the armed forces of a party to the conflict

⁷³ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention). Article 4A(2).

⁷⁴ International Committee of the Red Cross, 'Commentary on the Third Geneva Convention: Article 4 (ICRC 2020) <IHL Treaties - Geneva Convention (III) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 4 - Prisoners of war | Article 4 (icrc.org) > Accessed 27 May 2024.

⁷⁵ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 4A(1).

who are entitled to take direct part in hostilities.”⁷⁶ These terms “all persons”⁷⁷ and all “members of the armed forces”⁷⁸ imply that the categories mentioned in Article 4A(1) include stateless fighters in the armed forces as there is no specific condition (such as nationality) in this provision that prevents a stateless person who is legally conscripted into the armed forces of a state from being granted the status of combatant or prisoner of war. The 2020 Commentary of the ICRC relating to Article 4A (1) complements Crawford and Pert’s argument: “4A (1) expressly includes militias or volunteer corps forming part of the armed forces.”⁷⁹ Therefore, stateless fighters who are not only conscripted into the armed forces but also form part of militias integrated into these armed forces are legal combatant under Article 4A (1) of the Third GC. However, there may be further implications and additional requirements by the domestic law or codified military manuals of a particular state relating to stateless fighters but that does not affect their status as legal combatants in international humanitarian law because Article 4A(1) of the Third GC explicitly grants combatant status to all members of the armed forces of a state or militias incorporated into these armed forces who directly take part in hostilities without distinguishing between nationals and non-nationals(including stateless persons).

In contrast, Article 4A (2) of the Third GC extends combatant status to stateless fighters who are members of resistance groups or volunteer corps not integrated into the armed forces of a state only on the condition that they fulfil the criteria required to qualify as a combatant mentioned in Article 4A (2). As Sommario observes: “Article 4A (2) protects all groups participating in an IAC. The granting of combatant status, however, is subordinated to the fulfilment of a number of conditions”⁸⁰. This means that stateless fighters belonging to the categories mentioned in Article 4A (2) must fulfil the four conditions mentioned in the Article 4A (2). These conditions include being commanded by a person responsible for his subordinates, having a clear distinctive sign,

⁷⁶ Emily Crawford, Allison Pert: ‘International Humanitarian Law’(2nd Edition, Cambridge University Press 2020)99.

⁷⁷ Emily Crawford, Allison Pert: ‘International Humanitarian Law’(2nd Edition, Cambridge University Press 2020)99.

⁷⁸ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 4.

⁷⁹ International Committee of the Red Cross, ‘Commentary on the Third Geneva Convention: Article 4 (ICRC 2020) <IHL Treaties - Geneva Convention (III) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 4 - Prisoners of war | Article 4 (icrc.org) > Accessed 27 May 2024.

⁸⁰ Emanuele Sommario, ‘The Status of Foreign Fighters under International Humanitarian Law’ in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016)148.

carrying arms openly and following the laws and rules of war.⁸¹ However, the application of Article 4A (2) of the Third GC is restricted to stateless fighters who are part of volunteer corps or resistance groups who belong to a state party to the conflict even when non-state armed groups (NSAG) and stateless armed groups (SAGs) fulfil the conditions of the Third GC. According to Sommario, the application of Article 4A(2) is restricted to combatant groups who belong to a party to a conflict i.e. State which means that fighters belonging to SAGs cannot be granted the status of combatants.⁸² ICRC's 2020 Commentary complements Sommario's observation by contending: "The definition of this category of prisoner of war was an innovation in the Third Convention, expressly extending prisoner-of-war status to organized resistance groups, including those fighting against an Occupying Power, but only when such groups 'belong to' a State and fulfil the four conditions described in subparagraph 4A(2)."⁸³ This means that SAGs or stateless fighters belonging to NSAGs cannot be granted the status of combatants according to Article 4A(2) even though they fulfil the conditions mentioned in the Article. However, they do not owe allegiance to any state and will only qualify as combatants if they are either members of the combatant groups mentioned in Article 4A of the Third GC or when they fulfil all conditions including the condition relating to belonging to an armed group that belongs to one of the state parties to the conflict. This means NSAGs including those containing stateless fighters not only need to fulfil the four conditions mentioned in the Third GC but also need to belong to a state party to the conflict but this does create a lot of ambiguity and doubts relating to the status of stateless persons who are distinct category than the ones that come under Article 4A of the Third GC.

Article 4A(1) is a clear explicit provision but the ambiguity in Article 4A (2) of the Third GC can be explained through the example of the stateless members of Shaikh Mansoor Battalion in Ukraine, the Battalion itself does not have any alliance any state party to the conflict and therefore its stateless members are not legal combatants according to Article 4A(2) even though

⁸¹ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 4.

⁸² Emanuele Sommario, 'The Status of Foreign Fighters under International Humanitarian Law' in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016) 148.

⁸³ International Committee of the Red Cross, *Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, 2020) <[IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Article 4 \(icrc.org\)](#)> Accessed 25th March 2024.

this group fulfils all the four conditions mentioned in this provision. This means that there are certain gaps and ambiguities in Article 4A (2) of the Third GC because one hand it says that persons who fulfil the four conditions will be granted the status of prisoners of war whereas on the other hand it says that these persons should belong to combatant groups that belong to a state party to the conflict. The distinction between Article 4A (2) and Article 4A (1) while determining their application to stateless fighters not only highlights the ambiguities in Article 4A (2) but also brings into light the discrimination faced by armed groups who do not represent a state but fulfil the conditions mentioned in Article 4A (2) especially in IACs. Such armed groups should be characterised as legal combatants, but they are not characterised as such. However, the removal of distinction between Article 4A (2) and Article 4A (1) by Article 43 of AP I has mitigated the contradictions and ambiguities relating to Article 4A(2) and have helped to extend the protection granted to combatants to NSAGs such as Shaikh Mansoor Battalion and SAGs.

3.2.2. The Removal of Distinction and the Extension of Combatant Immunity to Stateless Fighters under Article 43&44 of AP I.

Article 43 of AP I removes the distinction between the categories of combatants mentioned in Article 4A of the Third GC and this results in the extension and broader application of combatant immunity as well as combatant status to stateless fighters and SAGs if they fulfil the four conditions mentioned in Article 4A (2) of the Third GC. The four conditions are the ones mentioned in Article 4A of the Third GC which include being commanded by a person responsible for his subordinates, having a fixed distinctive sign, carrying arms openly, and obeying the principles and laws of war.⁸⁴ Stateless fighters who fulfil these conditions will qualify as combatants under Article 43 of AP I and will automatically be granted prisoners of war status under Article 44 of AP I if captured.⁸⁵ Regarding the removal of the distinction between the categories mentioned in Article 4A by Article 43 of AP I, Sommariva observes: “The article restates existing principles, except that it removes the distinction between regular armed forces on one side and volunteer groups, militias, and resistance movements on the other. According to the new provision, the criteria for determining entitlement to combatant and POW status are the same for

⁸⁴Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 4A(2).

⁸⁵ Protocol Additional to the Geneva Conventions 1949 and relating to the protection of victims of international armed conflicts (8 June 1977) 1125 UNTS 3, Articles 43 and art 44.

members of both groups. This constituted a novelty compared to pre-existing law, but it appears to raise little controversy and has already been incorporated into customary IHL.”⁸⁶ This means that the process of ascertaining the status of individuals as combatants has become more flexible due to the removal of the distinction between various categories of combatants mentioned in Article 4A and this results in the extension of combatant immunity to stateless fighters, SAGs and stateless NSAGs in IACs if they fulfil the four conditions mentioned in Article 43 of AP I.

Article 43 of AP I has an inclusive approach because it includes all groups including stateless fighters as legal combatants if they fulfil the conditions mentioned in Article 4A (2) of the Third GC. By analysing Article 43 of AP I, it is evident that the definition and categorisation of a combatant has not only played a critical role in the evolution of the traditional categorisation of combatants mentioned in Article 4A of the Third GC but has also made the incorporation of stateless individuals and other individuals who fulfil the conditions mentioned in Article 4A(2) & Article 43 of AP I as legal combatants easier. Unlike the traditional nature of Article 4A of the Third GC which is restricted to persons belonging to combatant groups that owe allegiance to a state, Article 43 of AP I declares that all armed groups and armed forces whether they owe allegiance to a state or are a SAG or NSAG on the condition that they are well-organised and fulfil the condition in Article 4A(2). The phrase “party to a conflict”⁸⁷ in Article 43 of AP I does not necessarily mean state as it can mean “armed volunteer groups”⁸⁸ who have a certain degree of organisation unlike Article 4A (2), in which “party to a conflict”⁸⁹ means state party. However, the meaning of this phrase, in the AP I is wide. The 1987 Commentary of ICRC observes: “Party to the conflict”⁹⁰,

⁸⁶ Emanuele Sommario, ‘The Status of Foreign Fighters under International Humanitarian Law’ in A. de Guttry et al. (eds.), *Foreign Fighters under International Law and Beyond*, (1st Edition, T.M.C. ASSER PRESS and the authors 2016) 151.

⁸⁷ ICRC, ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’ (IHL Databases) < [IHL Treaties - Additional Protocol \(I\) to the Geneva Conventions, 1977 - Article 43 \(icrc.org\)](https://www.icrc.org/ihl-treaties-additional-protocol-i-to-the-geneva-conventions-1977-article-43) > Accessed 3 June 2024.

⁸⁸ Ibid.

⁸⁹ ICRC, ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’ (IHL Databases) < [IHL Treaties - Additional Protocol \(I\) to the Geneva Conventions, 1977 - Article 43 \(icrc.org\)](https://www.icrc.org/ihl-treaties-additional-protocol-i-to-the-geneva-conventions-1977-article-43) > Accessed 3 June 2024.

⁹⁰ Article 43 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

within the meaning of the Protocol, is fairly wide, involving not only the categories of resistance groups or other groups but also those fighting for conflicts of “self-determination”⁹¹ or “national liberation”⁹². Therefore, stateless members of NSAGs who fulfil the conditions in Article 4A (2) and Article 43 of AP I are legal combatants.

3.3. Stateless Fighters in a NIAC

This section discusses the status of stateless fighters or stateless NSAs in a NIAC. In NIACs, stateless fighters have the same status as regular non-state actors because the provisions of IHL that apply during NIACs, apply to all persons and actors involved in the armed conflict. Persons taking part in hostilities do not enjoy privileges or immunities granted to combatants in international armed conflicts. The only provisions that apply to stateless NSAs are CA 3 of the GCs and Additional Protocol II. CA 3 is a universally accepted norm that grants basic humanitarian protection, and the application of AP II provides additional protections and is subject to ratification by the state party and it provides Additional Protections to persons including stateless NSAs in a NIAC. Both the provisions apply to Stateless NSAs but where these provisions lack a certain rule or procedural application of a certain rule than in those conditions the provisions of IHRL shall apply. The section discusses the fundamental humanitarian protection provided to stateless fighters or stateless NSAs in a NIAC. It also discusses some of the additional protections provided to stateless NSAs. The protections in CA3 and AP II are the only protections for stateless fighters in NIAC, but the absence of combatant status in NIACs may create problems in addressing the rights of Stateless NSAs in NIACs.

3.3.1. Basic Protections Provided to Stateless Fighters in NIAC

In NIACs, stateless fighters who are members of NSAGs, SAGs, or regular armed forces do not qualify as combatants as there is no combatant status in these types of conflicts, but they do have rights similar to other actors during such conflicts however, the absence of combatant status only provides them with basic protections. They are entitled to fundamental humanitarian protection enlisted in CA3 of the Third GC which is a universally accepted norm and applies to

⁹¹ ICRC, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (IHL Databases) < [IHL Treaties - Additional Protocol \(I\) to the Geneva Conventions, 1977 - Article 43 \(icrc.org\)](#) > Accessed 3 June 2024.

⁹² ICRC, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (IHL Databases) < [IHL Treaties - Additional Protocol \(I\) to the Geneva Conventions, 1977 - Article 43 \(icrc.org\)](#) > Accessed 3 June 2024.

conflicts not of an international character. The provision applies to persons who do not take part in hostilities, or who have laid down their arms due to injury or detention.⁹³ The fundamental guarantees listed in CA 3 include humane treatment, protection from discrimination, protection from murder, mutilation, humiliation or degrading treatment, protection from being kept as a hostage, right to a fair trial and being cared for if wounded or sick will apply to all actors including stateless fighters who have laid down their arms.⁹⁴ Stateless fighters in NIACs are to be treated humanely just as other non-state actors as mentioned by Crawford and Pert: “Both CA 3 and AP II enshrine certain fundamental guarantees regarding fundamental guarantees regarding minimum standards of treatment that detainees in NIACs must be afforded. These include the basic standards of humane treatment as outlined in CA 3”⁹⁵. According to this provision, all the persons detained in a NIAC shall be treated humanely and granted fundamental protections mentioned in CA 3. There is no distinction between detainees as all detainees whether they are foreign fighters or stateless fighters will be granted the basic humanitarian protections. CA3 is a universally recognised norm which grants protections to all persons without any distinction and does not differentiate between categories of individuals during IACs unlike the provisions of the Third GC and AP I.⁹⁶

Therefore, just like ordinary NSAs, stateless NSAs enjoy the basic humanitarian protection. Crawford and Pert do not mention any distinction between persons taking part in NIACs. Their argument is further complemented by Bellal who contends: “Members of ANSAs that are a Party to non-international armed conflicts do not enjoy such a status in IHL, and they will normally be criminally liable under the national law of their States for having taken up arms and participated in hostilities against the State.”⁹⁷ Thus, according to CA 3, stateless NSAs are not eligible for the status of a combatant just like other NSAs but will be treated humanely in accordance with CA 3

⁹³ Emily Crawford, Alison Pert: ‘International Humanitarian Law’(2nd Edition, Cambridge University Press 2020)128.

⁹⁴ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 3.

⁹⁵ Emily Crawford, Alison Pert: ‘International Humanitarian Law’(2nd Edition, Cambridge University Press 2020)128.

⁹⁶ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention) Article 4.

⁹⁷ Annyssa Bellal, ‘What are Armed Non-State Actors? A Legal and Semantic Approach’ in E. Heffes et al. (eds.), *International Humanitarian Law and Non-State Actors*, (1st Edition, T.M.C. ASSER PRESS and the authors 2020) 25.

of the GCs. As such for fighters who are not labelled as combatants it may cause problems because many of these fighters continuously take part in hostilities and may have combatant like features but because they are not granted combatant status, their participation in hostilities results in them being labelled as irregular combatants as they do not follow the provisions of the Third GC.

3.3.2. Additional Protection Provided to Stateless Fighters in NIAC

Additional protocol II enlists additional protections for individuals taking part in a NIAC than those provided by CA3, although it does not provide any status for stateless non-state actors. The provisions of AP II are neither universally applicable nor ratified by many states, so they apply to only a small number of states who have ratified it. The humanitarian protection in AP II shall apply to stateless NSAs in the same way as they apply to regular NSAs and civilians. This creates an ambiguity as there is no clear distinction of rights and privileges granted to different actors in a NIAC. These humanitarian protections do not replace CA 3 but instead supplement the provisions of CA 3 and are a broader framework applicable in NIACs. As ICRC observes: “The list of prohibited acts is fuller than that of common Article 3. That being so, and because of the absolute character of these prohibitions, which apply at all times and in all places”.⁹⁸ AP II complements CA3 by prohibiting acts such as slavery, outrages upon personal dignity, acts of terrorism and collective punishment.⁹⁹ However, their application is usually limited as only some countries are party to these conventions. In conclusion, countries who are parties to AP II will have to adhere to the guidelines mentioned in the provisions of AP II when dealing with the subject of stateless fighters. As AP II applies to all persons during a conflict it does not differentiate between different actors in regard to nationality. Hence, if stateless NSAs are fighting for or against a state which is has ratified AP II the provisions of AP II shall apply to all detainee NSAs including stateless NSAs and these individuals will not be granted the status of combatants.

⁹⁸ International Commission of the Red Cross: 'The 1987 Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977' < <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-4/commentary/1987> > Accessed on: 4th May 2023.

⁹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978).

3.4. Stateless Fighters and State Practice

The section discusses the state practice of states which include Ukraine, Russia, Turkey, Iraq and other states relating to the protections, rights and status granted to stateless fighters. First, the section discusses the status of stateless fighters in Ukraine, where most of these fighters are conscripted into the armed forces and given combatant privileges. However, some states Russia deny their status as legal combatants and treats them as mercenaries by allowing them to be tried by its domestic courts but on the other hand it allows stateless fighters to join the Russian Army without any formal combat experience or conditions and instead with the promise of citizenship and money. This entitles the stateless fighters in Russia to be treated as stateless mercenaries instead of combatants. The thesis will discuss this in section 3.4.1. Section 3.4.2. discusses the state practice of states such as Iran, Iraq, Türkiye, Syria and Myanmar.

3.4.1. State Practice of States such as Ukraine and Russia in IACs.

The section discusses the status of stateless fighters in the light of the state practice of Russia and Ukraine during the ongoing IAC. After the 2022 invasion of Ukraine, the country has conscripted foreign and stateless persons i.e. persons belonging to the Roma community which is a stateless marginalised community of Ukraine into its armed forces through Presidential Decree No.248 and passed legislation relating to conscripting foreign and stateless fighters in the Ukrainian Defence Forces by legally granting them the status of members of armed forces who are combatants according to Article 4A(1) of the Third GC.¹⁰⁰ These fighters are issued residence permits and all the necessary tools of identification for them to be recognised as legal combatants by the Ukrainian Government.¹⁰¹ They also sign a contract with Ukrainian Government and High command of the Ukrainian Army as regular soldiers of the Ukrainian Army.¹⁰² . After the enactment of the legislation relating to foreign and stateless fighters by the Ukrainian government all foreign and stateless fighters whether they belong to the Russian side, or the Ukrainian side should be considered combatants.¹⁰³

¹⁰⁰ Alia Shoaib: 'President Zelensky appeals for foreign volunteers to come to Ukraine and enlist in a newly formed 'International Legion' to fight the Russian invasion'(Business Insider,27th February 2022) Accessed on: 16th February 2024.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ ASSER Institute: 'The Domestic Implementation of International Humanitarian Law in Ukraine.'(ASSER Institut, 2021) < <https://www.asser.nl/media/794633/2021-the-domestic-implementation-of-ihl-in-ukraine-updated.pdf> >

Additionally, Ukraine has incorporated provisions of the Third GC into its domestic law as it is a dualist state and international law needs to be incorporated into its domestic law.¹⁰⁴ Thus, Ukraine adheres to the rules and principles of the Third GC, AP I and customary law and grants stateless fighters protections and privileges under this principle. However, Ukraine does consider stateless fighters as a different category, but it considers stateless fighters as foreign fighters i.e. as Non-Ukrainian Nationals. So, commonly all stateless fighters are foreign fighters although foreign fighters and stateless fighters are distinct categories and in practice stateless fighters might not be treated in the same way as nationals are treated.

In contrast, Russia has no specific rules relating to stateless fighters but on the 30 September 2022, the Russian government passed a law that allowed foreigners and stateless persons who have signed a contract of approximately one year with the Ministry of Defence of the Russian Federation to apply for citizenship.¹⁰⁵ The Russian Government does not incorporate the guidelines mentioned in the Third Geneva Convention and AP I in their military manuals or legislations. On one hand they have recruited stateless fighters without passing any specific regulations or laws relating to them and on the other hand they consider foreigners and stateless fighters in the Ukrainian Legion as mercenaries although the fighters in the Legion fulfil the conditions mentioned in the Third GC and AP I. Many of the stateless fighters in Russia do not formally join the Russian Army and are made to participate in 2-3 months active combat in order to be granted nationality. This creates a doubt regarding the status of these fighters. But in the case of regular Ukrainian prisoners of war who are stateless, or foreigners Russia's policy is different as they are considered as mercenaries by the Russian Federation without considering their status in the light of the Third Geneva Conventions and Additional Protocols.

3.4.2. Comparing State Practice of Iran,Iraq,Syria and Türkiye in NIACs.

States such as Iran,Iraq,Syria and Türkiye follow a consistent state practice relating to stateless fighters belonging to Kurdish organisations such as the Kurdistan Workers' Party (PKK). PKK consists of fighters of different ethnicities besides Kurds who have nationality unlike Kurds who are stateless. The nature of conflict between these states and the Kurdish separatists is a NIAC.

¹⁰⁴ ASSER Institute: 'The Domestic Implementation of International Humanitarian Law in Ukraine.'(ASSER Institut, 2021) < <https://www.asser.nl/media/794633/2021-the-domestic-implementation-of-ihl-in-ukraine-updated.pdf> >

¹⁰⁵ Miłosz Bartosiewicz and Piotr Żochowski, 'Putin's Foreign Legion: Foreigners Fighting in the War in Ukraine', (OSW, 20th February 2024). <<https://www.osw.waw.pl/en/publikacje/analyses/2024-02-20/putins-foreign-legion-foreigners-fighting-war-ukraine>> Accessed 3rd June 2024.

The PKK is considered as a terrorist organisation and the members of this organisation including stateless persons are considered insurgents.¹⁰⁶ This means that the basic provisions of the CA3 and AP II apply to stateless members of PKK. As CA 3 is a universally recognised norms its application cannot be doubted but the application of AP II depends on whether these states have ratified the Convention. Hence, it is important to determine whether in practice, the States mentioned adhere to the Third GC and AP II while dealing with stateless members of PKK.

In Türkiye, Iran, Iraq and Syria, stateless members of PKK are treated as insurgents rather than combatants.¹⁰⁷ These fighters and other stateless Kurds when captured are kept in detention, tortured, and tried by the domestic courts of these states.¹⁰⁸ They often face inhumane treatment and torture while detained in total disregard of CA 3 of the Third GC which Türkiye, Iran and Syria and all states are bound to follow. These states have been repeatedly scrutinised and advised by international community and international organisations to grant basic human rights and humanitarian protections to members of PKK and other Kurds.¹⁰⁹ One more thing that is interesting is that majority of Kurds fighting in these states are stateless but the fact that they are an ethnic minority is given more relevance than the fact that they are stateless and deserve to be treated according to the basic provisions of the Third GC which are universally applicable even on stateless persons.

3.5. Conclusion

In conclusion, the status of stateless fighters as legal combatants varies in different situations. At times when stateless fighters fulfil the conditions mentioned in the Third GC and AP I they will

be qualified to be treated as legal combatants under Article 4A of the Third GC and the removal of distinction between the categories of combatants in Article 4A of the Third GC by Article 43 of

¹⁰⁶ Council on Foreign Relations, 'Conflict Between Turkey and Armed Kurdish Groups' (Global Conflict Tracker, 8 August 2023) <https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-turkey-and-armed-kurdish-groups> accessed 4 June 2024.

¹⁰⁷ Council on Foreign Relations, 'Conflict Between Turkey and Armed Kurdish Groups' (Global Conflict Tracker, 8 August 2023) <https://www.cfr.org/global-conflict-tracker/conflict/conflict-between-turkey-and-armed-kurdish-groups> accessed 4 June 2024.

¹⁰⁸ Human Rights Watch, 'World Report 2023: Turkey' (Human Rights Watch, 2023) <<https://www.hrw.org/world-report/2023/country-chapters/turkey>> accessed 4 June 2024.

¹⁰⁹ Ibid.

AP I shows how stateless fighters can develop into a distinct category of legal combatants similar to the ones mentioned in Article 4A which include resistance fighters and other actors. However, stateless NSAs in a NIAC do not enjoy the status of prisoners of war and are only granted basic humanitarian protection under CA 3 of the Third GC and AP II. The status of different stateless fighters is also impacted and influenced by the continuous state practice of states. The state practice of states in situations are quite different from the legal frameworks which are usually not adhered to during the ground practice. Therefore, by utilising the provisions of the Third GC, AP I and state practice, it can be determined that there are certain situations in which stateless fighters are qualified to be called as combatants whereas in other situations they are simply non-state actors.

4.0. Case Studies Relating to Stateless Fighters in International Armed Conflicts and Non-International Armed Conflicts

4.1. Introduction

This thesis discusses two different case studies relating to stateless fighters in armed conflicts. The case studies relating to the Stateless fighters who are members of International Legion of Ukraine and members of Arakan Rohingya Salvation Army (ARSA) point out to some difficult questions and certain ambiguities relating to the protections afforded to stateless fighters by IHL. Both these groups operate in different situations and have a different status as the Stateless fighters conscripted in the Ukrainian armed forces and other SAGs (Shaikh Mansoor Battalion) are combatants according to Article 4A and 43 of AP I because they participate in IACs and fulfil the conditions of being classed as combatants. This means that they are eligible for all the protections mentioned in the Third GC and AP II. In contrast, stateless members of ARSA cannot be termed as combatants because they participate in NIACs and are only eligible for basic protections. However, the level of protections granted to these groups may vary.

Stateless fighters who are members of the Ukrainian armed forces are legal combatants just like regular members of these armed forces under Article 4A (1) of the Third GC. This means that they are eligible for all the protections mentioned in the Third GC and AP I. However, other SAGs or stateless persons belonging to NSAGs such as Shaikh Mansoor Battalion are also eligible to be treated as combatants only on the condition that they fulfil the conditions mentioned in Article 43 of AP I. In contrast, CA3 applies to members of ARSA who have limited and basic protections under the Geneva Conventions. The chapter utilises the case study relating to stateless fighters in Ukrainian Armed Forces as well as stateless NSAs who belong to the Arakan Rohingya Salvation Army in Myanmar in order to analyse further gaps in IHL protections afforded to stateless fighters.

4.2. Absence of Explicit Provisions relating to Stateless Fighters

As discussed in the previous chapters there are no explicit provisions relating to the status and rights of stateless fighters in IHL and IHRL. This has various implications for stateless fighters who are granted the status of combatants but are not treated as combatants because of not having nationality. Although nationality is not a requirement according to Article 4 of the Third GC or

Article 43 of AP I.¹¹⁰ The absence of explicit provisions relating to the status of stateless fighters makes them vulnerable to inhumane treatment and the risk of being treated as mercenaries. However, stateless fighters are entitled to combatant protections in IACs and fundamental protections in NIACs as mentioned in Chapter 3 if they act according to the legal provisions mentioned in IHL. Additionally, the provisions of IHRL also apply to these fighters and fill any gap present in the protections granted by IHL to stateless fighters. Stateless fighters belonging to the ILDU and Shaikh Mansoor Battalion are not recognised as combatants by Russian Federation and some other states although the stateless members of ILDU are legally integrated into the defence forces of Ukraine under Article 4A (1) of the Third GC and the domestic law of Ukraine in accordance with the Presidential Decree 248.¹¹¹ The stateless members of the Shaikh Mansoor Battalion fulfil all the conditions mentioned in Article 4A (2) of the Third GC and Article 43 of AP I although they do not belong to any of the state parties. This means that they will qualify for protections afforded to prisoners of war (POWs). However, they are considered as a terrorist group by Russia and some other states.

The refusal of Myanmar and Russia to grant basic protections and combatant status to stateless fighters results in their rights being violated under IHL and IHRL. These violations include arbitrary detention of stateless fighters, not being granted the right to due process, being prosecuted under domestic laws for acts of war, facing harsher penalties compared to regular combatants.¹¹² The stateless members of ARSA face more problems as they neither have any citizenship nor recognized as lawful combatants. They are labelled as terrorists by the government of Myanmar and not recognised as legal combatant group.¹¹³ They are subjected to summary executions, torture, and other human rights violations without fair trial guarantees. The identification of stateless fighters as legal combatants in an IAC is an issue because there are no explicit provisions in the Geneva Conventions and Additional Protocols that provide them the protections of combatants although Article 43 of AP I does play a role in extending protections to stateless

¹¹⁰ International Committee of the Red Cross, 'Commentary on the Third Geneva Convention: Article 4 (ICRC 2020) <IHL Treaties - Geneva Convention (III) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 4 - Prisoners of war | Article 4 (icrc.org) > Accessed 27 May 2024.

¹¹¹ Alia Shoaib: 'President Zelensky appeals for foreign volunteers to come to Ukraine and enlist in a newly formed 'International Legion' to fight the Russian invasion'(Business Insider,27th February 2022)<[Ukraine Sets up 'International Legion' for Foreigners to Fight Russians \(businessinsider.com\)](https://www.businessinsider.com/ukraine-international-legion)> Accessed on: 16th February 2024.

¹¹² Human Rights Watch, 'Myanmar: The Rohingya's Decade of Detention' (15 June 2022) <https://www.hrw.org/news/2022/06/15/myanmar-rohingyas-decade-detention> accessed 4 June 2024.

¹¹³ Ibid.

fighters by broadening the roles and principles relating to combatant status. However, although ARSA is a NSAG its stateless members cannot be given any combatant status because of the nature of the armed conflict in Myanmar.

4.3. Risk of Arbitrary Detention and Inadequate Legal Presentation for Stateless Fighters Captured as Prisoners of War

Stateless fighters who are captured as prisoners of war are always at risk of arbitrary detention and inadequate legal presentation as they are treated as lesser combatants because they do not represent a state. When these fighters are captured by Russians and the Myanmar military are at a risk of arbitrary detention because they are not adequately represented as they are not backed by states that can hire lawyers for them and oversee the judicial proceedings. They do not belong to any state that can offer them support when they are tried by domestic courts or military courts of state. Many stateless and foreign fighters have been sentenced by the domestic courts of Russia although Ukrainian government has played an important role and supported them but as they do not represent a state their rights and status are mostly ignored by the international community.¹¹⁴ The same goes for ARSA, ARSA fighters have been arbitrarily arrested and detained for indefinite periods of time without trial. The lack of legal recognition and consular support makes it difficult for them to challenge their detention or receive a fair trial. Torture and ill-treatment of detained ARSA members and stateless combatants is common, with no adherence to the provisions of the Third GC due to their stateless status and the attitude of the Russian and Burmese government towards them. This means that although stateless fighters in IAC's should be granted the status of legal combatants but that would not be applicable unless stateless fighters are introduced as a separate of distinct category in Article 4A of the Third GC.

4.4. Problems in Repatriation of Stateless Fighters After the Cessation of Hostilities

¹¹⁴ Polina Ivanova, Roman Olearchyk: 'Russia-backed court sentences British and Moroccan "Mercenaries" to death' (Financial Times, 2022) <[Russia-backed court sentences British and Moroccan 'mercenaries' to death \(ft.com\)](https://www.ft.com/content/8d8d8d8d-8d8d-4d8d-8d8d-8d8d8d8d8d8d)> Accessed: 3rd June 2024.

The section discusses how the right of repatriation applies to stateless fighters in an IAC under Article 118 of the Third GC¹¹⁵, but the practical implementation of this right is exceedingly difficult. Stateless fighters do not owe allegiance to any state and may not be repatriated under Article 118 of the Third GC as the right is granted to combatants who belong to a state. However, the 2020 Commentary of the Third Geneva Convention states: “Where prisoners of war are concerned, account must be taken of the duty of allegiance which binds members of the armed forces to the Power on which they depend.”¹¹⁶ It further states: “Repatriation in this context therefore means handing prisoners of war over to this Power”¹¹⁷. In most instances, this will be the prisoners’ “State of nationality.”¹¹⁸ Both the arguments of the ICRC relating to Article 118 contradict each other. However, the term ‘repatriation’ refers to the returning of individuals to their places of origin, nationality, or residence.¹¹⁹

However, belonging to a state does not mean that these persons should be nationals of that state. This right applies to stateless fighters in Ukraine which include members of the Ukrainian Armed Forces and other NSAGs. For NSAGs and members of armed forces, the right will only apply if they are legal residents of Ukraine although they have this right and can be repatriated to the state they represented as combatants but the members of ARSA who are not protected by the provisions of the Third GC and are only protected by CA 3. Without citizenship or nationality, members of ARSA who are detained by Myanmar are entitled to the fundamental protection mentioned in CA 3 of Third GC. cannot be repatriated or resettled, which results in prolonged displacement in refugee camps or precarious living conditions in neighbouring countries. The stateless status of ARSA members makes them more vulnerable to persecution, forced labour, human trafficking, and other abuses, both within Myanmar and in refugee contexts. They may be excluded from programs that relate to reintegration and rehabilitation which are designed for former combatants. As members of ARSA and stateless fighters in Ukraine cannot return to a state to which they

¹¹⁵ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII) Article 118.

¹¹⁶ International Committee of the Red Cross, ‘Commentary on Article 118 of the Third Geneva Convention’ (2020) <[IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 118 - Release and repatriation | Article 118 \(icrc.org\)](#)> Accessed 4 June 2024.

¹¹⁷ Ibid.

¹¹⁸ [IHL Treaties - Geneva Convention \(III\) on Prisoners of War, 1949 - Commentary of 2020 Article | Article 118 - Release and repatriation | Article 118 \(icrc.org\)](#)

¹¹⁹ Ibid.

belong this leaves stateless fighters in a precarious situation, often leading to continuous displacement and vulnerability to exploitation.

4.5. Conclusion

In conclusion, the gaps and other ambiguities in the protections provided by International Humanitarian Law (IHL) to stateless fighters, such as members of Ukrainian armed forces and other non-state armed groups in Ukraine and members of the Arakan Rohingya Salvation Army (ARSA) in Myanmar, highlight significant vulnerabilities of stateless fighters in IACs and NIACs. These gaps exist because stateless fighters are not recognised as combatants in the primary legal instruments or customary international law and because of this, they lack of recognized legal status, lesser rights when detained, and limited post-conflict reintegration support. Similarly, ARSA members in Myanmar face severe discrimination, arbitrary detention, and mistreatment, further aggravated by their stateless status and the hostile attitude of Myanmar's government. To address these challenges, it is essential to enhance legal recognition and protections for stateless fighters and there is a need to address the gaps mentioned in the previous sections through the implementation of the existing treaties and formulation of new rules and regulations that complement or can be included in the existing legal frameworks. The existence of the gaps in protections does not mean that stateless fighters because they are qualified as combatants in IACs in accordance with Article 4A of the Third GC and Article 43 of AP I and in NIACs they are eligible to be granted fundamental protection enlisted in CA 3 of the Third GC and AP II.

5. Conclusion

In conclusion, the stateless fighters are legal combatants in certain situations and have all the rights and privileges granted to combatants in IHL. Besides IHL, the broader protection of IHRL also apply to stateless fighters in armed conflicts. As Helen Duffy explains the relationship between IHRL and IHL during armed conflicts: “Determining applicable law in an armed conflict depends not only on the existence or not of armed conflict, or its nature, but also on the identification of particular norms, their content and objectives, as they apply to a particular factual scenario within the conflict.”¹²⁰ This means that when and where necessary, IHRL applies to stateless fighters during armed conflicts in the same way as IHL applies. All the broader protection in IHRL will apply to stateless fighters: such as right to association, freedom from torture and humane treatment but only in particular situations where there is no rule or principle of IHL available such as in the case of NSAs in NIACs and mercenaries in IAC.

IHL applies to stateless fighters and grants them the status of legal combatants and prisoners of war in certain situations. In an IAC, stateless fighters are legal combatants if they are members of the armed forces or militias integrated into the armed forces of a party. The members of the armed forces and militias integrated into them include all members regardless of their nationality because Article 4A (1) does not state any condition which stateless members of the armed forces

¹²⁰ Helen Duffy, 'Trials and Tribulations: Co-Applicability of IHL and Human Rights in Editor(eds) Ziv Bohrer, Janina Dil & Helen Duffy, *Law Applicable to Armed Conflict* (Cambridge University Press, 2020), 68. Available at SSRN: <https://ssrn.com/abstract=3528156> . Accessed: 2nd May 2024.

have to fulfil except of being conscripted into the armed forces. As, Crawford and Pert contend: “Members of the armed forces comprise the main category of combatant on IHL-they are all persons belonging to the armed forces of a party to the conflict who are entitled to take direct part in hostilities.”¹²¹

In cases where stateless fighters are part of militias or other armed groups that do not fall under the central command of the armed forces of a state party but fulfil the conditions mentioned in Article 4A (2) of the Third GC, they will be considered as legal combatants but then the question is that what is the status of SAGs and stateless fighters belonging to NSAGs that are not affiliated with a state. Article 4A (2) creates a distinction between itself and Article 4a(1) and this gives rise to further ambiguity relating to the rights of stateless fighters who do not belong to any party to the conflict. However, Article 43 of AP I not only removes the distinction between the categories of stateless fighters mentioned in Article 4 of the Third GC but also plays an important role in the formation of a new category of stateless fighters which is similar to other categories such as the volunteer fighters and resistance fighters. The only criteria are to fulfil the four conditions mentions in Article 4A(2) which are restated by Article 43 of AP I. The Article also broadens the meaning of “party to the conflict”¹²² by including certain resistance groups and other actors in the meaning of this phrase.¹²³ This means that the category of stateless fighters can become a distinct category of combatants similar to other categories in Article 4A of Third GC and AP I.

In the context of a NIAC, stateless fighters who belong to a non-state armed group (NSAG) will not be granted the status of combatant and will only be eligible for the basic protections under Common Article 3 and of AP II of the GCs. The reason these fighters are not given combatant status and the protections provided to combatants is because stateless NSAs just like regular NSAs in NIACs do not always adhere to the rules and principles of IHL that are necessary to be followed to qualify as combatants and sometimes the question of non-intervention and state sovereignty is also kept in mind when granting combatant status to such actors. In cases where there are no clear rules regarding the treatment of detainees in IHL, for example CA 3 prohibits torture but does not specify or present the procedural law relating to the prohibition against torture, then the provisions of IHRL Conventions such as the Convention on Torture shall apply. CA3 and AP II also lack

¹²¹ Emily Crawford, Allison Pert: 'International Humanitarian Law'(2nd Edition, Cambridge University Press 2020)99.

¹²² International Committee of the Red Cross, 'Additional Protocols to the Geneva Conventions of 1949' (ICRC, 1977) <<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977>> Accessed: 4 June 2024.

¹²³ Ibid.

procedural rules relating to the detention of stateless fighters. Therefore, IHRL does play a key role in armed conflicts and fills in the gaps left by IHL. This means that IHL needs IHRL to fulfil the gaps left by it.

Last, state practice and case studies relating to stateless fighters show that the practical application and ground practice during armed conflicts is not consistent with the legal frameworks that have helped to determine the status of stateless fighters. For example, the stateless fighters in the armed forces of Ukraine are legal combatants but they are treated as mercenaries by the Russian Federation because they neither have the nationality of the state for which they are fighting nor alliance to any other state. Ukraine considers them as part of its armed forces and has passed legislation to conscript them into the armed forces and grant them the status of combatants. Nevertheless, their rights and status are mostly overlooked by the international community which is more concerned about foreign fighters and their rights as the state to which they belong continuously advocate for their rights. In contrast to foreign fighters, stateless fighters have almost no international support. The thesis contends that stateless fighters are lawful combatants if they fulfil the four conditions mentioned in Article 4A (2) which have been restated in Article 43 of AP I. This thesis presents three circumstances in which stateless fighters can be termed as legal combatants in IACs. First, when stateless fighters are members of the armed forces or militias incorporated into the armed forces combatants under Article 4A (1). Second, if these fighters fulfil are part of NSAGs that belong to party to the conflict and fulfil the four conditions in Article 4A (2) of the Third GC. Last, when stateless fighters belong to stateless armed groups or non-state armed groups. These are the conditions when they qualify as legal combatants. They will be treated as prisoners of war if captured in these three circumstances. However, in NIACs these fighters do not qualify as combatants and can only be given the fundamental protections under CA 3 and AP II. The thesis does not describe and analyse the status of stateless fighters during NIACs in detail as there is no combatant status in NIACs.

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