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AGGRESSOR STATE, AGGRESSOR INDIVIDUAL, AND WHAT INTERNATIONAL LAW DOES/SHOULD PROTECT

*Nurbanu Hayır**

ABSTRACT

This note examines the measures taken against Russian citizens in the context of the Russo-Ukrainian War in positive international law and analyzes the rationale for sanctioning individual citizens of an aggressor state. It questions whether the gravity of state aggression by Russia enables measures targeting individuals based solely on their Russian citizenship by investigating whether the blanket denial of asylum and imposition of travel bans for Russian citizens constitutes a breach of norms of international law. It further tests this citizenship link by turning to the legality of denationalization of pro-Russian Ukrainian citizens under international law. Building on this foundation, the note probes the existing schemes of responsibility under international law and corporate law to delve into how international law should approach citizens of an aggressor state.

I. INTRODUCTION

In response to the Russian Federation's aggression against Ukraine that started in February 2022, several measures were taken to end the gross violations of the United Nations Charter,¹ international humanitarian law, and human rights.² Among these were measures against individuals. Some European Union ("EU") states decided to impose a blanket ban on issuing Schengen visas to Russian citizens, believing that it is not right to host Russian

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1. U.N. Charter art. 2, ¶ 4.

2. Amnesty Int'l, *'He's not coming back'. War Crimes in Northwest Areas of Kyiv Oblast*, AI INDEX EUR. 50/5561/2022 (May 6, 2022), <http://www.amnesty.org/en/documents/eur50/5561/2022/en>; Gian Volpicelli, *Calls for War-Crimes Tribunal Grow over Russia's Actions in Izyum*, POLITICO (Sept. 2, 2022), <http://www.politico.eu/article/czech-presidency-izyum-ukraine-mass-grave>; see also U.N. Hum. Rts. Council, Independent International Commission of Inquiry on Ukraine [hereinafter U.N. HRC, Commission of Inquiry], <http://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index> (last visited Aug. 3, 2024); Press Release, U.N. Off. of High Comm'r for Hum. Rts., *New Report by UN Human Rights Shows the Shocking Toll of the War in Ukraine* (June 29, 2022) [hereinafter UNHCR, *New Report*] <http://reliefweb.int/report/ukraine/new-report-un-human-rights-shows-shocking-toll-war-ukraine-enruuk>.

travelers while Ukrainians suffer from Russian aggression.³ Following the partial mobilization order in Russia, several EU states stated that they would not admit Russian draft evaders, who, in the opinion of those countries, are responsible for their state's acts.⁴ Similar statements were made in the 1960s by the Turkish government in response to the internal conflict in Cyprus between Turkish and Greek Cypriots. In 1964, Turkey unilaterally revoked the 1930 Convention between Turkey and Greece that guaranteed the continued residence of Greek inhabitants in Istanbul,⁵ and instituted the forced migration of Greeks from Turkey to Greece as a result.⁶ Public discourse had frequently accused the Greek inhabitants in Turkey of providing financial support to EOKA, the Cypriot paramilitary group aiming for the unification of Cyprus with Greece, and highlighted the contrast between the poverty and struggles of Cypriot Turks with the wealth and prosperity of Istanbul's Greek community, reinforcing the perception that the Greek minority was complicit in the violence in Cyprus.⁷

Though there are myriad grounds for comparing and differentiating these two examples, they both reflect common trends that form the focus of this paper: states responding to armed conflicts by challenging the established understanding of the role of individuals in international law, imposing restrictions on individual rights, and raising a question of whether citizens should be responsible for acts of their state. Three common aspects of these trends can be observed: 1) an aggressor state is found to be responsible for an armed conflict that harms a certain group of individuals, 2) there is another group of individuals, linked to this state (usually via nationality), and 3) other states respond to this violation by imposing restrictions on the rights of the second group of individuals under an assumption that those individuals are

3. Steven Erlanger, *Russia-Ukraine War: E.U. Toughens Visa Requirements for Russians, but Balks at Travel Ban*, N.Y. TIMES (Aug. 31, 2022), <http://www.nytimes.com/live/2022/08/31/world/ukraine-russia-war-news>.

4. Mary Dejevsky, *Why Britain Should Welcome Russians Fleeing Putin's War*, THE SPECTATOR (Sept. 23, 2022), <http://www.spectator.co.uk/article/why-britain-should-welcome-russians-fleeing-putin-s-war>.

5. KANUN NO.: 1758 [LAW NO. 1758], Türkiye CUMHURİYETİ RESMİ GAZETESİ [OFF. GAZETTE REP. TURK.] 303 (Mar. 15, 1931) (Turk.).

6. Melis Çapan, *1964'te sınır dışı edilen Rumlar anlatıyor: Yanımıza bir valiz alabildik; '1-2 yıla döneriz' dedik, dönemedik...* [*Greeks Who Were Deported in 1964 Tell: We Were Able to Take a Suitcase With Us; We Said, "We Will Return in 1-2 Years," but We Couldn't...*], T24, (Apr. 11, 2018), <http://t24.com.tr/haber/1964te-sinir-disi-edilen-rumlar-anlatiyor-yanimizabir-valiz-alabildik-1-2-yila-doneriz-dedik-donemedik,602221> (Turk.).

7. On the impact of the Cyprus dispute on Greek inhabitants in Istanbul, see generally ALEXIS ALEXANDRIS, *THE GREEK MINORITY OF ISTANBUL AND GREEK-TURKISH RELATIONS* ch. X (2d ed. 1992). See also Alper Kaliber, *1964 Rum Sürgünü Ve Kıbrıs Sorunu: Bir Ötekileştirme Siyaseti Olarak Dış Politika [The 1964 Expulsion of Greeks from Istanbul and the Cyprus Question: Foreign Policy as a Means of Othering]*, in İSTANBULLU RUMLAR VE 1964 SÜRGÜNLERİ TÜRK TOPLUMUNUN HOMOJENLEŞMESİNDE BİR DÖNÜM NOKTASI [ISTANBUL GREEKS AND THE 1964 EXILES: A TURNING POINT IN THE HOMOGENIZATION OF TURKISH SOCIETY] 31, 33 (İlay Romain Örs ed., 2019).

responsible for the acts of their state. Indeed, the practice of ascribing responsibility for an aggressor state's actions to those with close ties to that state is somewhat unorthodox under international law, but its recurring presence introduces a question explored in this note: can citizens be responsible for the acts of their aggressor nationality state, despite not having contributed to them individually?

This note begins by analyzing, in Part II, whether international law considers citizenship when determining states' obligations vis-à-vis individuals. For this purpose, the note will examine whether it is legal under current international law norms for European states to categorically refuse Russian nationals fleeing the Russian mobilization order and impose blanket visa bans against Russian citizens. Then, the note will turn to a fictional scenario and examine whether it would be legal under current international law norms to expel and denationalize pro-Russian Ukrainian citizens who support Russia. These cases will help determine whether the link of citizenship to the aggressor state can be a ground to impose punitive measures on individuals or whether international law is completely blind to citizenship, focusing exclusively on individual conduct when states suspend rights for breaches of international law. Subsequently, Part III will examine whether international law should remain neutral to citizenship by questioning the moral grounds for holding individual citizens responsible for acts of an aggressor state, using the situation of Russian citizens in the context of the Ukraine conflict as a case study. It will first investigate whether it would be just to assume individual responsibility for each Russian because they could have objected to the Russian aggression. Next, it will explore the fairness of distributing Russia's responsibility to its citizens, using a corporate responsibility framework, with a focus on the lack of "democratic authorization"⁸ of the Russian state. Part IV concludes.

II. DOES INTERNATIONAL LAW TREAT INDIVIDUALS WITHOUT REGARD TO THEIR CITIZENSHIP TIES TO THE AGGRESSOR STATE?

This section will demonstrate that, in the context of wars, existing international law norms do not consider the citizenship of the individual as a criterion in determining the protections for asylum-seekers and foreign travelers. These norms require looking beyond citizenship and examining the individual circumstances of each citizen to establish whether those circumstances merit protections under international law. Ergo, even citizens of an aggressor state may be entitled to protections under international law. Conversely, citizenship-based blanket measures disregard individual circumstances and undermine the protections accorded to individuals. To underline that the metric for determining the extent of protection for individuals in international law is not citizenship

8. The term is used by Anna Stilz to depict the legitimacy of the state, as a coercive body, stemming from the acceptance and endorsement of state actions from the morality of the citizens. Anna Stilz, *Collective Responsibility and the State*, 19 J. POL. PHIL. 190, 198–201 (2011).

but individual conduct, this section will further demonstrate that the rules of denationalization and expulsion offer very limited protections to an aggressor citizen of a non-aggressor state.

A. *Categorical Refusal of Asylum Requests of Citizens of the Aggressor State*

On September 21, 2022, Vladimir Putin, the President of the Russian Federation, signed a decree announcing a partial national mobilization order.⁹ Though the Russian defense minister stated that approximately 300,000 troops would be deployed,¹⁰ concerns were raised over non-disclosed or unclear parts of the mobilization call that may enable the conscription of around 1 to 1.2 million people.¹¹ In November, shortly after the suspension of the initial mobilization order, Vladimir Putin signed a new decree to mobilize citizens who had been convicted of serious crimes.¹² A week later, Putin signed an amendment to allow dual citizens to be conscripted.¹³ Serious protests took over the streets, leading to the arrest of thousands of Russians.¹⁴ As a result of the threat of being drafted, Russian men rushed to the airports and land borders, trying to flee to Turkey, the Gulf states, Georgia, Armenia, and Kazakhstan.¹⁵ Around 17,000 people fled to Finland before the country closed its borders with Russia,¹⁶ and Russia set up contact points on the Russian side of the border to prevent people from leaving.¹⁷

9. *Vladimir Putin Declares a Partial Mobilisation*, THE ECONOMIST (Sept. 21, 2022), <http://www.economist.com/europe/2022/09/21/vladimir-putin-declares-a-partial-mobilisation>.

10. *How Russia is Conscribing Men to Fight in Ukraine*, THE ECONOMIST (Sept. 24, 2022), <http://www.economist.com/the-economist-explains/2022/09/24/how-russia-is-conscripting-men-to-fight-in-ukraine>.

11. *Id.* (citing Russian newspapers Novaya Gazeta and Meduza).

12. Uliana Pavlova, *Putin Signs Law to Mobilize Russian Citizens Convicted of Serious Crime*, CNN (Nov. 5, 2022), <http://www.cnn.com/2022/11/05/europe/russia-ukraine-law-mobilize-serious-crime-offenders-intl/index.html>.

13. Ann M. Simmons, *Putin Signs Decree Allowing Russians With Dual Citizenship to Be Drafted*, WALL ST. J. (Nov. 14, 2022), <http://www.wsj.com/articles/putin-signs-decree-allowing-russians-with-dual-citizenship-to-be-drafted-11668451647>.

14. Lisa Haseldine, *Over 1,300 Arrested as Protests Spring Up Across Russia*, THE SPECTATOR (Sept. 21, 2022) (citing *Списки задержанных в связи с акциями против мобилизации 21 сентября* [Lists of Detainees in Connection with Actions Against Mobilization on September 21], OVD, (Sept. 21, 2022), <http://ovd.news/news/2022/09/21/spiski-zaderzhannyh-v-svyazi-s-akciyami-protiv-mobilizacii-21-sentyabrya>), <http://www.spectator.co.uk/article/1300-arrested-as-protests-spring-up-across-russia>.

15. Dejevsky, *supra* note 4.

16. *More Russians Travelled to Finland During Weekend, Border Data Shows*, REUTERS (Sept. 26, 2022).

17. Nicole Stybnarova, *Putin's War is Illegal – and Russians Fleeing the Draft May Have the Right to Asylum*, THE GUARDIAN (Oct. 8, 2022), <http://www.theguardian.com/commentis-free/2022/oct/08/vladimir-putin-war-russia-draft-asylum-refugee-ukraine>.

Numerous Eastern European states made it clear that Russians fleeing their country to avoid the draft were not welcome. Latvia, Lithuania, and Estonia made statements saying that they would not accept any Russian draft evaders seeking refuge in their countries. Estonian Prime Minister Kaja Kallas stated that “[e]very citizen is responsible for the actions of their state, and citizens of Russia are no exception. Therefore, we do not give asylum to Russian men who flee their country. They should oppose the war.”¹⁸ Foreign Minister Urmas Reinsalu echoed that sentiment, saying that “[a] refusal to fulfil one’s civic duty in Russia or a desire to do so does not constitute sufficient grounds for being granted asylum in another country.”¹⁹ The day after the mobility announcement, Latvian Foreign Minister Edgars Rinkevics said, in a tweet, “[m]any of Russians who now flee Russia because of mobilisation were fine with killing Ukrainians, they did not protest then, it is not right to consider them as conscious objectors. There are considerable security risks admitting them and plenty of countries outside EU to go.”²⁰ Lithuanian Foreign Minister Gabrielius Landsbergis posted similar tweets, stating in one that “Lithuania will not be granting asylum to those who are simply running from responsibility. Russians should stay and fight against Putin.”²¹ In another tweet, he suggested that they could disobey, protest, and become prisoners of war or deserters rather than fleeing to Europe.²² Czechia also announced that it would not grant asylum to Russians fleeing the mobilization order.²³

The announcements came after several measures that had already made it difficult for Russian asylum-seekers to access safe countries in the EU, such as the EU-wide suspension of air travel from Russia,²⁴ as well as the

18. Dejevsky, *supra* note 4.

19. *Baltic Nations Say They Will Refuse Refuge to Russians Fleeing Mobilisation*, REUTERS (Sept. 21, 2022), <http://www.reuters.com/world/europe/latvia-says-it-wont-offer-refuge-russians-fleeing-mobilisation-2022-09-21>.

20. Edgars Rinkēvičs (@edgarsrinkevics), TWITTER (Sept. 22, 2022, 10:11 AM) <http://x.com/edgarsrinkevics/status/1572951778987053056>; *see also* *Baltic Nations Say They Will Refuse Refuge to Russians Fleeing Mobilisation*, *supra* note 19.

21. Gabrielius Landsbergis (@GLandsbergis), TWITTER (Sept. 23, 2022, 3:12 PM), <https://x.com/Glandsbergis/status/1573389737741918209>; *see also* *Lithuania Will Not Give Asylum to Russians Mobilised for War, Says FM*, LITHUANIAN RADIO & TELEVISION [LRT] (Sept. 26, 2022), <http://www.lrt.lt/en/news-in-english/19/1786892/lithuania-will-not-give-asylum-to-russians-mobilised-for-war-says-fm>.

22. Gabrielius Landsbergis (@GLandsbergis), TWITTER (Sept. 24, 2022, 7:10 AM), <https://x.com/GLandsbergis/status/1573631057961918466>.

23. *Czechs Will Not Issue Humanitarian Visa to Russians Fleeing Mobilization*, REUTERS (Sept. 22, 2022), <http://www.reuters.com/world/europe/czechs-will-not-issue-humanitarian-visa-russians-fleeing-mobilisation-2022-09-22>.

24. Monika Scislowska, *Baltic Nations Close Borders to Russians over Ukraine War*, ASSOCIATED PRESS (Sept. 19, 2022), <http://apnews.com/article/russia-ukraine-travel-poland-2e3d1ff14694f5e3dc45838a96015e>; Annabelle Timsit & Paulina Firozi, *More European Nations Ban Russian Flights from Their Airspace — Including the Entire E.U.*, WASH. POST (Feb. 27, 2022), <http://www.washingtonpost.com/world/2022/02/27/airspace-russia-flights-european-countries-ban>.

suspension of issuing Schengen visas by most Baltic states,²⁵ following the failure of a unanimous decision to adopt an EU-wide ban.²⁶ Scholars noted that these measures had already made it virtually impossible for Russians to seek asylum.²⁷ More importantly, following the announcements, Estonia, Latvia, and Poland closed their borders to most Russian citizens, with few exceptions,²⁸ and news agencies reported that border police in Estonia, Latvia, Lithuania, and Poland actively turned away Russian citizens at their borders.²⁹ Some of the rejections were due to stricter visa requirements,³⁰ but for the most part, borders of Baltic states were reported to have been practically closed.³¹ As can be seen in the statements above, many concerns are related to security and the perceived responsibility of Russians for their state's illegal war against Ukraine.³² These practices pose a question: if Russian citizens were categorically turned away at the border, would this categorical refusal of asylum-seekers based on Russian nationality be legal under international law?

Russian draft evaders may have certain rights and protections with respect to such measures under international law. The protections originate from the principle of non-refoulement (prohibition of forcible return) for refugees, codified by the 1951 Convention Relating to the Status of Refugees ("Refugee Convention")³³ and by non-refoulement provisions of human rights treaties such as the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR").³⁴ The destination states where most Russians flee are parties to the Refugee Convention, ICCPR, and

25. See *infra* Part II.B.

26. Jon Gambrell & Adam Schreck, *EU Divided on Response to Russians Fleeing Military Service*, PUB. BROAD. SERV. (Sept. 25, 2022), <http://www.pbs.org/newshour/world/eu-divided-on-response-to-russians-fleeing-military-service>.

27. Sarah Ganty, Dimitry V. Kochenov & Suryapratim Roy, *Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States Against Russian Citizens and EU Law*, 48 YALE J. INT'L L. ONLINE 1, 24 (2023).

28. Scislowska, *supra* note 24.

29. Andrius Sytas, *Baltic States and Poland Close Doors to Russian Tourists*, REUTERS (Sept. 19, 2022), <http://www.reuters.com/world/europe/baltic-states-poland-close-doors-russian-tourists-2022-09-19>; *Baltic Nations Say They Will Refuse Refuge to Russians Fleeing Mobilisation*, *supra* note 19.

30. *Update: Situation at the EU's Land Borders with Russia*, FRONTEX (Sept. 5, 2022), <http://frontex.europa.eu/media-centre/news/news-release/update-situation-at-the-eu-land-borders-with-russia-zEpChN>.

31. Giulia Carbonaro, *Would Europe Open its Borders to Russians Seeking Asylum?*, EURONEWS (Sept. 23, 2022), <http://www.euronews.com/2022/09/22/will-europe-open-its-borders-to-russians-seeking-asylum>.

32. See *supra* notes 18–22 and accompanying text.

33. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

34. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 1955 U.N.T.S. 223 [hereinafter ECHR].

ECHR, and are bound to uphold their obligations under the treaties.³⁵ Accordingly, this note will examine the right to asylum and the principle of *non-refoulement* under these treaties.³⁶ In doing so, this note will demonstrate that draft evasion can give rise to protections under international law regardless of the citizenship of the individual and that an individualized examination of each case is necessary to determine whether someone is entitled to these protections.

1. The Refugee Convention

The Refugee Convention regulates the status of individuals who are fleeing their home country based on fear of persecution,³⁷ that is, a fear of “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group” as well as other threats of serious human rights violations.³⁸ This section will argue that some Russians fleeing Putin’s mobilization call may qualify as refugees, and certain states’ closure of borders and invalidation of visas to prevent the arrival of Russian citizens may violate the Refugee Convention.

A refugee is defined under Article 1 of the Refugee Convention as a person who:

[has a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁹

35. U.N. Off. of High Comm’r for Hum. Rts., Ratification Status for CCPR - International Covenant on Civil and Political Rights, http://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CommitteeID=8 (last visited Aug. 3, 2024); Council of Eur., *Chart of Signatures and Ratification of Treaty 005*, <http://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=005> (last visited Aug. 3, 2024).

36. Though there are other treaties where obligations of a similar nature exist, these will not be discussed separately, as obligations thereunder raise similar reflections discussed in this section. See generally *Study Guide: The Rights of Refugees*, HUM. RTS. EDUC. ASSOCS. (2003), <http://hrlibrary.umn.edu/edumat/studyguides/refugees.htm> (discussing non-refoulement as addressed under international law).

37. Refugee Convention, *supra* note 33; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (expanding the Convention’s scope, which was originally limited to persons displaced due to events in Europe, to the entire globe).

38. U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV/1 (1992) [hereinafter UNHCR Guidelines].

39. Refugee Convention, *supra* note 33, art.1(A)(2). *But see id.* art. 1(F) (excluding people for whom there are serious reasons for considering that they have committed a)

Given this provision, some of the Russians who flee conscription may have grounds to claim refugee status based on a well-founded fear of persecution. Refugees under Article 1 are protected under the guarantee of Article 33 of the Refugee Convention, which prohibits state parties to the Convention from “expel[ling] or return[ing] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁰

The UN High Commissioner for Refugees (“UNHCR”) has had a clear stance that, in cases where someone’s refusal to perform military service is based on genuine political, religious, or moral reasons, or valid reasons of conscience, that person may qualify as a refugee under the Refugee Convention.⁴¹ The Court of Justice of the European Union (“CJEU”), while discussing the EU Directive that incorporates the Refugee Convention into EU law,⁴² stated that, in armed conflicts “where there is no legal possibility of avoiding military obligations, it is highly likely that the authorities will interpret the refusal to perform military service as an act of political opposition, irrespective of any more complex personal motives of the person concerned.”⁴³ The Court’s analysis suggests an understanding of the difficulties of opposing a government’s military decision despite well-founded personal reasons. Similarly, Russians that evade the mobilization order without a record of pure and consistent dissidence to Putin may have grounds to invoke asylum.⁴⁴ More importantly, according to UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (“UNHCR Guidelines”), the risk of taking part in a military operation that is condemned by the international community as contrary to the basic rules of human conduct can give rise to an asylum claim.⁴⁵ There is credible evidence that Russian aggression

international crimes defined by international instruments, b) non-political crimes, and c) acts contrary to the purposes and principles of the United Nations do not qualify as refugees).

40. *Id.* art. 33.

41. UNHCR Guidelines, *supra* note 38, ¶¶ 167–74; U.N. High Comm’r for Refugees, UNHCR’s Position on Certain Types of Draft Evasion (Jan. 1991), <http://www.refworld.org/docid/4a54bc1f0.html>.

42. Directive 2011/95/EU, 2011 O.J. (L 337) 9 [hereinafter EU Refugee Directive].

43. Case C-238/19, *EZ v. Bundesrepublik Deutschland*, ECLI:EU:C:2020:945 ¶ 60 (Nov. 19, 2020).

44. Tom Dannenbaum, *Mobilized to Commit War Crimes*, JUST SECURITY (Sept. 27, 2022), <http://www.justsecurity.org/83269/russian-deserters-as-refugees-part-two>.

45. UNHCR Guidelines, *supra* note 38, ¶ 170; EU Refugee Directive, *supra* note 42, art. 9(2)(e) (“prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)”). Article 12(2) of the EU Refugee Directive states that a person is excluded from being a refugee if “he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes” or if “he or she has been guilty of acts contrary to the

in Ukraine involves “internationally condemned acts” such as the execution and torture of civilians and prisoners of war that amount to war crimes.⁴⁶ Unlike the crime of aggression, such crimes could be committed by even the lowest-ranking soldiers,⁴⁷ and thus, there is a risk that those conscripted may be expected to take part in acts of this sort. Though it is uncertain that a particular individual will commit these crimes, CJEU case law supports the idea that in the face of the recurring and systematic nature of crimes throughout a military operation “it should be assumed that the performance of [the draft evader’s] military service will involve committing, directly or indirectly, such crimes or acts, regardless of his or her field of operation.”⁴⁸

Many Russians are considered to have fled because they did not want to take part in the illegal war in Ukraine.⁴⁹ Though this may or may not be true,⁵⁰ these legal provisions require an analysis to make a case for each individual. When Russians are denied entry for asylum case processing at the border, state authorities fail to assess whether their fear of persecution behind their decision to escape Russia is well-founded under the Refugee Convention.

The categorical denial of draft evaders is particularly problematic in cases of Russian minorities who may have been particularly vulnerable to government policies,⁵¹ religious objectors to taking up arms (regardless of the context of the military operation),⁵² or those vulnerable to the problems endemic to the Russian military, such as racism and religious prejudice which constitute targeted mistreatment and placement of individuals in riskier

purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.” EU Refugee Directive, *supra* note 42, art. 12(2)(a), (c).

46. UNHCR Guidelines, *supra* note 38, ¶ 171; Amnesty Int’l, *supra* note 2; Volpicelli, *supra* note 2; U.N. HRC, Commission of Inquiry, *supra* note 2; UNHCR, *New Report*, *supra* note 2.

47. Dannenbaum, *supra* note 44. See Rome Statute of the Int’l Crim. Ct. art. 8bis, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

48. Case C-238/19, *EZ v. Bundesrepublik Deutschland*, ECLI:EU:C:2020:945, ¶ 38 (Nov. 19, 2020).

49. *Putin Signs New Laws to Punish Russian Draft-Dodgers*, KYIV POST (Sept. 27, 2022), <http://www.kyivpost.com/russias-war/putin-signs-new-laws-to-punish-russian-draft-dodgers.html>.

50. On Putin’s popularity rising after the war, see Sam Jones, *More than 4,300 People Arrested at Anti-war Protests Across Russia*, THE GUARDIAN (Mar. 6, 2022), <http://www.theguardian.com/world/2022/mar/06/4300-people-arrested-anti-war-protests-across-russia-decouce-vladimir-putin-war-ukraine>; see also Natia Seskuria, *Why the EU Should Ban Russian Tourists*, FOREIGN POL’Y (Sept. 14, 2022), <http://foreignpolicy.com/2022/09/14/ukraine-war-putin-eu-visa-ban-russian-tourists>. About the credibility of the polls, see Anna Mulrine Grobe, *Europe Debates: Should We Ban Russians for Actions of Their Government?*, CHRISTIAN SCI. MONITOR (Dec. 1, 2022).

51. Amy Mackinnon, *Russia Is Sending Its Ethnic Minorities to the Meat Grinder*, FOREIGN POL’Y (Sept. 22, 2022), <http://foreignpolicy.com/2022/09/23/russia-partial-military-mobilization-ethnic-minorities>.

52. NAJMAH ALI, CONSCIENTIOUS OBJECTION TO MILITARY SERVICE AND REFUGEE STATUS DETERMINATION 7 (2021).

situations.⁵³ All these issues may be evidence of a well-founded fear of persecution based on race or religion under the Refugee Convention. None of these potential reasons can come to light unless draft evaders are given the opportunity to have their asylum cases heard. For all these cases, asylum requests of Russian must be processed with individual scrutiny.

There are therefore various grounds to argue that some Russians fleeing the mobilization order may qualify as refugees. In such circumstances, states are obliged to process asylum applications to determine whether the individual qualifies as a refugee. An outright suspension of processing asylum applications by Russian citizens would be a refusal to undertake obligations under the Refugee Convention. The non-refoulement principle, the prohibition to expel or return a refugee under the Refugee Convention, is strictly applicable except in cases specified under Article 32 of the Refugee Convention, which are limited to concerns of national security and public order that the refugee may cause in the host state's territory.⁵⁴ Article 32 further requires that the decision to expel a refugee on these grounds should be made based on due process and requires that the refugee has been given a chance to defend their position. Prior to expulsion, the refugee must be given reasonable time to seek another country for refuge.⁵⁵

The principle of non-refoulement has been interpreted as applying to pushbacks occurring outside state territories before a refugee sets foot in foreign territory.⁵⁶ UNHCR guidelines note that the application of the Refugee Convention is not limited to boundaries of the state's territory but wherever the state exercises its jurisdiction, "including at the frontier, on the high seas or on the territory of another State."⁵⁷ The strong connection between border activities and the *non-refoulement* obligation under the Refugee Convention can also be seen in EU law, which guarantees the right to asylum,⁵⁸ and stipulates in Article 4 of the Schengen Border Code that border control activities, including checks at official border crossings and surveillance at land or sea borders, must adhere to the requirements of the

53. Mackinnon, *supra* note 51; Stephen Kalin, *Crimean Tatar Minority Is in Crosshairs of Putin's Draft*, WALL ST. J. (Oct. 4, 2022), <http://www.wsj.com/articles/crimean-tatar-minority-is-in-crosshairs-of-putins-draft-11664797639>; Emily Calton O'Keefe, *Putin's Cannon Fodder: Ethnic Minorities Disproportionate Casualties In Russia's War*, ORG. FOR WORLD PEACE (Sept. 4, 2022), <http://theowp.org/putins-cannon-fodder-ethnic-minorities-disproportionate-casualties-in-russias-war>.

54. Refugee Convention, *supra* note 33, art. 32.

55. *Id.*

56. U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶ 24 (Jan. 26, 2007) [hereinafter UNHCR, *Advisory Opinion*].

57. *Id.*

58. Charter of Fundamental Rights of the European Union arts. 18-19, Oct. 26, 2012, 2012 O.J. (C 326) 399.

Refugee Convention, including the principle of *non-refoulement*.⁵⁹ These requirements apply to all border control activities, including those conducted on the high seas.⁶⁰ It is also well accepted in case law and scholarship that a state would violate its *non-refoulement* obligations by denying entry at its borders without the opportunity for the asylum-seeker to make their case for asylum.⁶¹

Though some Russian asylum-seekers may pose a threat to the national security of the Baltic states, expelling them requires adhering to strict procedural requirements under Article 32 so the individuals have a chance to present a case against the alleged threat to national security or public order.⁶² Failing to make individualized assessments would violate not only Article 33 of the Refugee Convention but also Article 3, which stipulates that the protections under the Refugee Convention shall apply to refugees without discrimination as to race, religion or country of origin.⁶³ Thus, EU states may violate the Refugee Convention by closing their borders to prevent access to their territories by draft-evaders.

2. Human Rights Treaties: ICCPR & ECHR

A similar form of the obligation of *non-refoulement* is found in international and regional human rights treaties in relation to Article 7 of the ICCPR,⁶⁴ as well as Article 3 of the ECHR.⁶⁵ These provisions introduce an absolute prohibition on cruel, inhuman, or degrading treatment or punishment,⁶⁶ and states

59. Regulation 2016/399, 2016 O.J. (L 77) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399> [hereinafter Border Code]; see also Jascha Galaski, *How Do Refugees Travel to Other Countries? Why Don't They Take the Plane?*, LIBERTIES (Dec. 10, 2018), <http://www.liberties.eu/en/stories/why-refugees-do-not-take-the-plane/16316>; Edward Hasbrouck, *Asylum Requires Traveling to a Border*, PAPERS PLEASE (Mar. 29, 2022), <http://papersplease.org/wp/2022/03/29/asylum-requires-traveling-to-a-border>.

60. Galaski, *supra* note 59; Hasbrouck, *supra* note 59.

61. Felipe González Morales (Special Rapporteur on the Human Rights of Migrants), *Rep. on Means to Address the Hum. Rts. Impact of Pushbacks of Migrants on Land and at Sea*, U.N. Doc. A/HRC/47/30, ¶ 24 (2021); Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others [2004] UKHL 55; Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 112–15 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). See, for example, in the case of COVID-19 border closures, Leon Castellanos Jankiewicz, *COVID-19 Symposium: US Border Closure Breaches International Refugee Law*, OPINIO JURIS (Apr. 4, 2020), <http://opiniojuris.org/author/leon-castellanos-jankiewicz/COVID-19>.

62. U.N. High Comm'r for Refugees, *Provisional Comments and Recommendations on the Draft Amendments to the Law on Asylum and Refugees*, ¶¶ 6–8 (Dec. 4, 2013); see also UNHCR, *Advisory Opinion*, *supra* note 56, ¶ 10.

63. Refugee Convention, *supra* note 33, arts. 3, 33.

64. ICCPR, *supra* note 34, art. 7.

65. ECHR, *supra* note 34, art. 3.

66. ICCPR, *supra* note 34, art. 7; ECHR, *supra* note 34, art. 3; see also David Weissbrodt, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture*

have an obligation not to return individuals to places where they will be subjugated to treatments of this sort. United Nations Human Rights Committee (“HRC”) and European Court of Human Rights (“ECtHR”) jurisprudence provides examples of draft-evaders who were entitled to enjoy the protection of *non-refoulement* under Article 7 and Article 3 respectively.

In Communication No. 2007/2010, the HRC dealt with the issue of the return of an Eritrean national who was a conscientious objector to compulsory military service in Eritrea based on religious grounds.⁶⁷ The applicant argued that there was a likelihood that upon his return he would be subject to torture and inhuman treatment, as this is the frequent practice against draft evaders and returned asylum-seekers in Eritrea.⁶⁸ The HRC found that the individual’s return to Eritrea would violate Article 7 of the ICCPR.⁶⁹

The ECtHR has recognized that states have an obligation to provide civil alternatives to individuals who refuse to perform military service based on religious grounds.⁷⁰ Further, the ECtHR found a violation of Article 3 of the Convention in cases where the applicant who refused to provide military service on pacifist grounds was subjected to repeated and long prison sentences.⁷¹ Similarly, in *MO v. Switzerland*, the ECtHR found that the expulsion of an Eritrean national evading military draft may constitute a violation of Article 3 of the Refugee Convention.⁷² The ECtHR has been particularly cautious of returning persons to states that are not party to the ECHR. In *M.A. and Others v. Lithuania*, Lithuania was found to be in violation of Article 3 of the Convention for failing to assess the safety of an individual’s return to Belarus, “a country that was not a State Party to the ECHR.”⁷³ Given that Russia ceased to be a party to the ECHR on September 16, 2022,⁷⁴ Russian draft-evaders may be at particular risk in this regard.

and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties, 5 BUFF. HUM. RTS. L. REV. 1, 27–33, 42–45 (1999).

67. U.N. Hum. Rts. Comm., Views of the Hum. Rts. Comm. Under Art. 5, Para. 4 of the Optional Protocol to the Int’l Covenant on Civ. and Pol. Rts. (110th Session), U.N. Doc. CCPR/C/110/D/2007/2010, ¶¶ 2.1–3.1 (May 12, 2014).

68. *Id.* ¶ 3.2.

69. *Id.* ¶ 9.3.

70. *Teliatnikov v. Lithuania*, App. No. 51914/19, ¶ 110 (Sept. 7, 2022), <http://hudoc.echr.coe.int/fre?i=001-217607>.

71. *Ulke v. Turkey*, App. No. 43973/98, ¶ 64 (Jan. 1, 2006), <http://hudoc.echr.coe.int/eng?i=001-72146>; *see also Savda v. Turkey*, App. No. 42730/05 (June 12, 2012), <http://hudoc.echr.coe.int/eng-press?i=003-3980699-4625431>.

72. *M.O. v. Switzerland*, App. No. 41282/16, ¶ 70–73 (Sept. 20, 2017), <http://hudoc.echr.coe.int/eng?i=001-174424>. The Court nevertheless found that Swiss’ authorities’ evaluation of the asylum application did not violate the Convention. *See id.* ¶ 81.

73. *M.A. v. Lithuania*, App. No. 59793/17, ¶ 113 (Mar. 11, 2019), <http://hudoc.echr.coe.int/fre?i=001-188267>.

74. Eur. Ct. H.R., *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights* (Mar. 22, 2022),

The HRC and ECtHR also noted that the transnational nature of some border governance acts, such as on the high seas, do not exempt states from their obligations because the extraterritorial application of human rights obligations is well-established.⁷⁵ The key factor for determining jurisdiction and responsibility is whether a state has effective control over a person, rather than the person's physical location within the state's territory.⁷⁶ The HRC emphasized that "[s]tates are responsible for border governance on their territory, and for any operations elsewhere where they exercise effective control or authority over an area, place, individual(s) or transaction."⁷⁷ In *Hirsi Jamaa and Others*, the ECtHR ruled that Italian authorities' interception of a boat of 200 people on the high seas and their summary return of the passengers to Somalia and Eritrea violated Article 3 of the ECHR. Although the acts were carried out outside the territorial jurisdictions of states, they had effective control over the persons on the boat.⁷⁸ Thus, border closures are likely to have the same effect as summarily returning individuals back to their country of origin, where they face the risk of ill-treatment. By closing the borders, states proactively impede an asylum-seeker's access to their territory, thereby exercising effective control over them.

B. Blanket Travel Bans Against Citizens of The Aggressor State

The debate surrounding the imposition of visa bans on Russian citizens in response to the ongoing conflict in Ukraine has sparked significant controversy and raised important questions under international law. Following the calls in August 2022 from Ukrainian President Zelenskyy for a visa ban, some EU states made calls for an EU-wide visa ban against Russian citizens.⁷⁹ The

http://www.echr.coe.int/documents/d/echr/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.

75. U.N. Hum. Rts. Comm., Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea, ¶ 38, U.N. Doc. A/HRC/47/30; U.N. Hum. Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004) [hereinafter General Comment No. 31]; *Hirsi Jamaa v. Italy*, ¶ 211, App. No. 27765/09 (Feb. 23, 2012), <http://hudoc.echr.coe.int/eng?i=001-109231>.

76. General Comment No. 31, *supra* note 75, ¶ 10.

77. Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea, *supra* note 75, ¶ 38.

78. *Hirsi Jamaa v. Italy*, App. No. 27765/09, ¶ 211.

79. Isabelle Khurshudyan, *Zelensky Calls on West to Ban All Russian Travelers*, WASH. POST (Aug. 8, 2022), <http://www.washingtonpost.com/world/2022/08/08/ukraine-zelensky-interview-ban-russian-travelers/>; Mart Linnart, *Interior Ministry: Legal Basis Exists for Restricting EU Tourist Visas*, ERR NEWS (Jan. 1, 2019), <http://news.err.ee/1608701485/interior-ministry-legal-basis-exists-for-restricting-eu-tourist-visas/>; Richard Connor, *Estonia, Finland Seek End to Russian Tourist Visas*, DW (Aug. 9, 2022), <http://www.dw.com/en/ukraine-war-estonia-and-finland-seek-end-to-russian-tourist-visas-for-europe/a-62758209>.

EU could not reach a unanimous decision,⁸⁰ but did not restrain member states from taking individual measures.⁸¹ Subsequently, Finland, Poland, Czechia, Latvia, Lithuania, and Estonia stopped issuing short-term visas to Russians.⁸² Exceptions to these visa bans remained very limited,⁸³ and they did not initially include students.⁸⁴ Estonian Prime Minister Kaja Kallas stated in a tweet: “Stop issuing tourist visas to Russians. Visiting Europe is a privilege, not a human right. Air travel from RU is shut down. It means while Schengen countries issue visas, neighbours to Russia carry the burden (FI, EE, LV – sole access points). Time to end tourism from Russia now.”⁸⁵ Similarly, Finnish Prime Minister Sanna Marin highlighted the immoral nature of accepting Russians: “It is not right that while Russia is waging an aggressive, brutal war of aggression in Europe, Russians can live a normal life, travel in Europe, be tourists.”⁸⁶ Czech Foreign Minister Jan Lipavsky also noted that, “[w]hile Russian rockets fall on a children’s playground and on people in Ukraine, up to 200 Russian Federation citizens travel to the Czech Republic via international airports every day.”⁸⁷

80. Lorne Cook, *EU to Tighten Travel Rules for Russians, but no Visa Ban*, ASSOCIATED PRESS (Aug. 31, 2022), <http://apnews.com/article/russia-ukraine-putin-travel-national-security-belgium-973cb8d4af45f61c6452547e27361de>; *EU Russia: Bloc Toughens Visa Regime but no Ban*, BBC (Aug. 31, 2022), <http://www.bbc.com/news/world-europe-62745637>.

81. Lili Bayer, *EU Opens Door to Regional Border Restrictions for Russians*, POLITICO (Aug. 31, 2022), <http://www.politico.eu/article/eu-russia-opens-door-to-regional-border-restrictions-for-russians>.

82. Bleona Restelica, *Czech Republic to Impose Entry Ban on Russian Tourists on Oct. 25*, SCHENGEN NEWS (Oct. 13, 2022), <https://schengen.news/czech-republic-to-impose-an-entry-ban-on-russian-tourists-on-oct-25>; *Latvia Indefinitely Stops Issuing Visas to Russian Citizens*, LATVIAN PUB. BROAD. (Aug. 5, 2022), <http://eng.lsm.lv/article/economy/transport/latvia-indefinitely-stops-issuing-visas-to-russian-citizens.a46818>; *Czechs Tighten Entry Rules for Russian Tourists, Joining Other EU States*, REUTERS (Oct. 12, 2022), <http://www.reuters.com/world/europe/czechs-tighten-entry-rules-russian-tourists-joining-other-eu-states-2022-10-12>; Connor, *supra* note 79.

83. *Contra* Shkurta Januzi, *Which EU Countries Have Imposed Visa & Entry Restrictions on Russian Tourists, So Far?*, SCHENGEN NEWS (Oct. 21, 2022) <http://schengen.news/map-which-eu-countries-have-imposed-visa-entry-restrictions-on-russian-tourists-so-far> (showing that some other European Union (“EU”) states suspended short-term visas with greater exceptions to students, family members, etc. which could be more accurately described as restrictions).

84. Shkurta Januzi, *Estonia Will No Longer Issue Visas or Residence Permits to Russian Students, Restricts Them for Russian & Belarussian Workers*, SCHENGEN NEWS (July 28, 2022), <http://schengen.news/estonia-will-no-longer-issue-visas-or-residence-permits-to-russian-students-restricts-them-for-russian-belarussian-workers>; Bleona Restelica, *Estonia Exempts Russians Studying in the Country From Visa Ban*, SCHENGEN NEWS (Aug. 15, 2022), <http://schengen.news/estonia-exempts-russians-studying-in-the-country-from-visa-ban>.

85. Kaja Kallas (@kajakallas), TWITTER (Aug. 9, 2022, 03:21 AM) <https://x.com/kajakallas/status/1556903576726896642>.

86. Connor, *supra* note 79.

87. *Czechs Tighten Entry Rules for Russian Tourists, Joining Other EU States*, *supra* note 82.

Estonia even moved towards invalidating the existing visas held by Russians.⁸⁸ Czechia also announced that it would turn away Russians with Schengen visas, practically invalidating the visas for entry into the state.⁸⁹

The measures taken are far from uniform, but avid supporters of the visa ban justify it with an aim to restore justice between Russians and Ukrainians, the latter being subjugated to the consequences of aggression by the Russian state, while the former continue their lives as normal.⁹⁰ Some also argue that this is a necessary symbolic measure to send a message that unless Russians speak out against the war, they will not be welcome in the West.⁹¹ The question then arises whether the Russian state's aggression can be a reason for a blanket visa ban against Russian citizens under existing international law norms. Would the laws in force allow for restoring the balance this way and suspend the rights (if any) of Russians for symbolic signals?

This section will discuss the legality of bans against Russian nationals traveling for tourist or business purposes. Unlike the right to asylum, international law regarding visa policies remains limited. Both the ICCPR and ECHR recognize the right to travel for nationals of a country, but states have full discretion to determine the entry rules for foreigners in their territory. A pure right to travel for foreign nationals does not exist and a general imposition of visa obligations on foreign nationals is not seen as a question of international law, and is therefore not within the scope of this section.

An entry ban, however, has implications for different rights, such as the right to private and family life, and may raise concerns about discrimination. These rights and the prohibition of discrimination are guaranteed under human rights treaties. The refusal to issue visas to *any* Russian citizen constitutes an entry ban, and their legality is discussed within this framework. This discussion will first examine the legality of travel bans under the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). It will then address EU law, which forms the legal basis of the Schengen visas and is considered a part of international law operating as *lex specialis* among members of the EU.⁹²

88. *Estonian Visa Cancellation Has Ordinary Russians Worried*, REUTERS (Aug. 16, 2022), <https://www.reuters.com/world/europe/estonian-visa-cancellation-has-ordinary-russians-worried-2022-08-16>; Ott Tammik, *Estonia Eyes Unilateral Russian Visa Ban If EU Won't Agree*, BLOOMBERG (Aug. 19, 2022), <http://www.bloomberg.com/news/articles/2022-08-19/estonia-ready-for-unilateral-russian-visa-ban-if-eu-won-t-agree>.

89. *Czechs Tighten Entry Rules for Russian Tourists, Joining Other EU States*, *supra* note 82.

90. Raphael Bossong, *Why Calls to Ban Russian Tourists from Europe Are Unwise*, OPEN DEMOCRACY (Sept. 6, 2022), <http://www.opendemocracy.net/en/odr/europe-visa-ban-on-russians-is-unwise-and-illegal>.

91. Natia Seskuria, *Why the EU Should Ban Russian Tourists*, FOREIGN POL'Y (Sept. 14, 2022).

92. Katja S. Ziegler, *The Relationship Between EU Law and International Law* 1–20 (U. Leicester Sch. L. Rsch. Paper No. 13–17, 2013) at 5.

1. Human Rights Treaties: ICCPR & ICERD

An analogous issue to this one arose in the context of travel bans against nationals of six Muslim countries as a part of former U.S. President Donald Trump's policy.⁹³ Though the U.S. Supreme Court held in 2018 that denials of visas must respect the boundaries of the U.S. Constitution, and found such bans were constitutional after the language was cleared from religious animosity against Muslims and grounded on security concerns,⁹⁴ the ban raised concerns under the ICERD and ICCPR.⁹⁵ An indiscriminate denial of Russian travelers' entry into Russia raises similar questions.

The ICERD explicitly provides that state parties are obliged to ensure that their immigration laws "do not discriminate against any particular nationality."⁹⁶ The Committee on the Elimination of Racial Discrimination ("CERD Committee") emphasized the importance for state parties to guarantee that safeguards against racial discrimination extend to non-citizens irrespective of their immigration status, and stresses that immigration policies cannot "have the effect" of causing discrimination against persons on the basis of race, color, descent, or national or ethnic origin.⁹⁷ In two individual communications, where Australia's suspension of the visa processing for Afghan asylum-seekers and Canada's draft national act to issue a list of safe countries for expedited asylum requests were at issue, the CERD Committee found that these practices raised concerns of discrimination against non-citizens.⁹⁸ These examples demonstrate that categorical measures on nationality could violate ICERD in immigration contexts. According to the Committee, differential treatment based on citizenship can violate the ICERD if the treatment is not proportionate to the legitimate aim pursued with it.⁹⁹

Visa applications require individuals to submit documents that enable the authorities to determine whether they pose any sort of a risk to the destination country. Suspending existing visas and any further visa processing based on nationality is a disproportionate measure, given that the risks states aim to

93. *A Licence to Discriminate: Trump's Muslim & Refugee Ban*, AMNESTY INT'L UK (Oct. 6, 2020), <http://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban>.

94. *Trump v. Hawaii*, 583 U.S. 667, 671 (2018).

95. Jay Shooster, *Trump's Immigration Policy Risks Violating International Law—Alienates US Allies*, JUST SECURITY (Jan. 27, 2017), <http://www.justsecurity.org/36834/trumps-immigration-restrictions-risk-violating-international-law-cutting-foreign-allies-support>.

96. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(3), Mar. 7, 1966, 660 U.N.T.S. 169 [hereinafter ICERD].

97. Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non-citizens*, ¶ 9, CERD/C/64/Misc.11/rev.3 (2004).

98. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 24, U.N. Doc. A/65/18, Supp. No. 18 (2010); Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 15, U.N. Doc. A/67/18, Supp. No. 18 (2012) [hereinafter 2012 CERD Report].

99. 2012 CERD Report, *supra* note 98, ¶ 4.

avert can be detected through the regular visa process, and it cannot be established with certainty that all Russians pose threat to the destination countries in the EU. In fact, the main purpose of visa requirements is to determine the so-called “eligibility” of the traveler.

As to the ICCPR, though the treaty does not acknowledge a right to enter the territory of a state party, the HRC acknowledged that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.”¹⁰⁰ Thus, in addition to the ICERD obligation to refrain from disproportionate measures of discrimination, ICCPR emphasizes the related rights attached to traveling, which means that aliens “may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.”¹⁰¹ This does not rule out the possibility of imposing conditions, such as visa requirements, in positive international law norms, but they do not grant a *carte blanche* for regulating entry without regard to the aims and lawful limits of these measures.¹⁰² The HRC further underscored that the prohibition of discrimination under the ICCPR applies to “any field regulated and protected by public authorities.”¹⁰³

In the context of the Russo-Ukrainian War, it must be noted that not all applicants for Schengen visas are tourists; applicants include students, journalists, artists, dissidents, and family members of EU citizens that must obtain a visa to travel into the EU.¹⁰⁴ Scholars pointed out that making a “clear-cut” distinction between people who are traveling for tourism and those traveling for other purposes is problematic because the visa ban will inevitably affect a larger group of people than just those who are traveling to the EU for leisure and shopping.¹⁰⁵ This group could include Russian family members of EU citizens and residents, despite assurances that they will not be affected.¹⁰⁶ For example, though the Schengen visa ban imposed by Latvia only permitted visas for humanitarian reasons, such as a serious illness or the funeral of a relative, it was later limited to only funerals, preventing people from visiting their living relatives.¹⁰⁷ The exceptions to see family members were eventually

100. U.N. Off. of High Comm’r for Hum. Rts., CCPR General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 5 (Apr. 11, 1986), <http://www.refworld.org/docid/45139acfc.html>.

101. *Id.* ¶ 7.

102. *Id.* ¶ 6.

103. U.N. Off. of High Comm’r for Hum. Rts., CCPR General Comment No. 18: Non-Discrimination, ¶ 12 (Nov. 10, 1989), <http://www.refworld.org/docid/453883fa8.html>.

104. Ganty et al., *supra* note 27, at 5.

105. Aleksandra Ancite-Jepifánova (Jolkina), *The Visa Ban, Nikolai and His Russian Sister: Why Schengen Visa Restrictions for Russian Citizens Risk Tearing Families Apart*, VERFASSUNGSBLOG (Sept. 29, 2022), <http://verfassungsblog.de/the-visa-ban-nikolai-and-his-russian-sister>.

106. *Id.*

107. *Id.*

redefined but excluded unregistered partners and most relatives, such as siblings, cousins, uncles, aunts, nieces, nephews, and others.¹⁰⁸ It is argued that the EU member states that imposed travel bans created an “arbitrary distinction” between relationships, leading to some individuals being denied the opportunity to see their loved ones.¹⁰⁹ This becomes all the more important when the numbers of Latvian and Estonian passport holders with Russian origin are taken into account, with ethnic Russians constituting over 20% of the population of both Latvia and Estonia.¹¹⁰ Furthermore, the exception to visit a relative applies only to EU nationals, making it impossible for Ukrainian refugees in these states with Russian family members to visit their loved ones. This is especially pertinent because the exception for visiting family members in Latvia and Lithuania does not include the relatives of non-EU nationals who are legal residents in these countries, while in Estonia, the exception is only available to long-term residents.¹¹¹ Without qualifying for these exceptions, it becomes difficult to enter the EU for any purpose, as current regulations allow states to restrict travel for Russians for other than “essential” purposes and applications cannot be made except where Russians legally reside.¹¹²

Consequently, the issue of blanket travel bans—despite concerns over public security—may undermine international law regarding the prohibition of non-discrimination and other related rights (for example, respect for the right to private and family life) under the ICCPR and the ICERD.¹¹³

108. *Estonian Embassy in Moscow Has Stopped Accepting Visa Applications from Russian Citizens*, EMBASSY OF ESTONIA MOSCOW (Mar. 15, 2023), <http://moscow.mfa.ee/estonian-embassy-in-moscow-has-stopped-accepting-visa-applications-from-russian-and-belarusian-citizens>; *Russian Citizens Travelling to the European Union via Lithuania Will Be Subject to Stricter Controls*, MINISTRY OF THE INTERIOR OF THE REPUBLIC OF LITHUANIA (Sept. 19, 2022), <http://ru.mfa.lt/ru/en/news/russian-citizens-travelling-to-the-european-union-via-lithuania-will-be-subject-to-stricter-controls>.

109. Ancite-Jepifánova, *supra* note 105.

110. *Demogrāfija*, CENTRĀLĀ STATISTIKAS PĀRVALDE, (Feb. 16, 2021), <http://www.csp.gov.lv/lv/demografija#iedzivotaju-skaitis> (last visited Aug. 3, 2024); *RV0222U: Population by Sex, Ethnic Nationality and County, 1 January*, STATISTICS ESTONIA, http://andmed.stat.ee/en/stat/rahvastik_rahvastikunaitajad-ja-koosseis__rahvaarv-ja-rahvastiku-koosseis/RV0222U (last visited Aug. 3, 2024).

111. Ancite-Jepifánova, *supra* note 105.

112. A European Commission (“EC”) communication did note that “Russian visa applicants travelling for essential purposes, including notably family members of EU citizens, dissidents, independent journalists, and civil society representatives, human rights defenders should have the possibility to access the EU.” *Communication from the Commission Updating Guidelines on General Visa Issuance in Relation to Russian Applicants Following Council Decision (EU) 2022/1500 of 9 September 2022 on the Suspension in Whole of the Application of the Agreement Between the European Community and the Russian Federation on the Facilitation of the Issuance of Visas to the Citizens of the European Union and the Russian Federation; and Providing Guidelines on Controls of Russian Citizens at the External Borders*, COM (2022) 7111 final (Sept. 30, 2022) [hereinafter *Communication from the Commission*].

113. European Court of Human Rights (“ECtHR”) judgments were related to decisions made by states for individuals and do not provide a useful precedent in the issue of blanket

2. European Union Law

Under EU law, nationals of certain non-EU states, including the Russian Federation, must obtain a visa prior to crossing EU borders for short visits up to 90 days.¹¹⁴ In addition, the Schengen Border Code complements the Visa Code by regulating entry conditions for non-EU citizens.¹¹⁵ The two codes do not explicitly authorize blanket visa bans or border closures. Instead, the language suggests that the consular officials and the border security agents must examine the cases on an individual basis.¹¹⁶ For instance, the Visa Code lists the reasons to deny a Schengen visa application under Article 32, including if the person is considered a threat to public policy, internal security, public health, or international relations of the member states.¹¹⁷ The CJEU explains that a visa application can only be refused under the grounds listed in the Visa Code, but the state has “wide discretion” in assessing their existence.¹¹⁸ Such refusal is subject to appeal under Article 32 (3) of the Visa Code.¹¹⁹

While it suffices for these grounds for refusal, such as threats to public policy or internal security,¹²⁰ to be potential threats,¹²¹ this does not mean that refusal can be categorical without providing an individualized assessment.¹²² The European Commission stated in a Communication that Russian citizens who are “family members of EU citizens, dissidents, independent

travel bans. In relation to individual visa denials, the ECtHR has an ambiguous approach. In *M.N. v. Belgium* [GC], App. No. 3599/18, ¶ 125 (May 5, 2020), <http://hudoc.echr.coe.int/fre?i=001-202468>, the ECtHR ruled that visa denial issued to Syrian nationals by the Belgian consulate in Libya does not trigger the application of ECHR because Article 1 of the Convention (which states that the State parties must guarantee respect for the Convention for individuals under their jurisdiction) does not extend to public acts carried out outside their territories over non-nationals. The decision made a stark contrast with the ECtHR’s previous judgments which held that “. . . states are accountable before the Court *ratione loci* for decisions about visas which impinge on Convention-protected rights even when they are taken at their overseas posts. This is a classic exercise of extraterritorial jurisdiction.” NUALA MOLE & CATHERINE MEREDITH, *ASYLUM AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 108 (2010) (citing *X v. Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 158 (Eur. Comm’n on H.R., Sept. 25, 1965)).

114. Regulation (EC) No. 810/2009, 2009 O.J. (L 243) 1 [hereinafter Visa Code].

115. Border Code, *supra* note 59.

116. Daniel Thym, *Border Closure and Visa Ban for Russians: Geopolitics Meets EU Migration Law*, *MIGRATION & ASYLUM L. & POL’Y IN EUR.* (Oct. 11, 2022), <http://eumigrationlawblog.eu/border-closure-and-visa-ban-for-russians-geopolitics-meets-eu-migration-law>.

117. Visa Code, *supra* note 114, art. 32.

118. Case C-84/12, *Rahmanian Koushkaki v. Bundesrepublik Deutschland*, ECLI:EU:C:2013:862, ¶ 60 (Dec. 19, 2013).

119. *See e.g.*, Case C-403/16, *Soufiane El Hassani v. Minister Spraw Zagranicznych*, ECLI:EU:C:2017:960, ¶ 23 (Dec. 13, 2017).

120. Visa Code, *supra* note 114, art. 32(1); Border Code, *supra* note 59, art. 6(1)(e).

121. Case C-544/15, *Sahar Fahimian v. Bundesrepublik Deutschland*, ECLI:EU:C:2017:255, ¶ 40 (Apr. 4, 2017).

122. Thym, *supra* note 116.

journalists, . . . civil society representatives, [and] human rights defenders” who can show essential reasons for travel should be able to enter in the EU and the visa applications should consider these factors.¹²³

Therefore, current norms of EU law suggest that individualized assessments for visa applications are required. High-level EU officials underlined that, though individual member states could impose restrictions, such measures should comply with the EU rules on the entry of non-EU citizens.¹²⁴ Numerous states made calls to continue visa procedures, and attempts for a general ban at the level of the EU were not successful.¹²⁵

In line with this, embassies and consulates must review each application and its accompanying documents to determine the reasons for travel and assess whether the applicant poses a public policy or international security risk based on individual circumstances. Nationality or the existence of armed conflict initiated by the nationality state of the applicant alone cannot be used as grounds to deny a group of applicants without any scrutiny.

C. Denationalization and Expulsion of Citizens of Non-Aggressor States?

Russia’s invasion of Ukraine was embraced by a number of pro-Russian Ukrainians in certain regions.¹²⁶ Ukrainian officials have stated that Russian sympathizers provide information about the locations of Ukrainian targets and give a significant advantage to the enemy forces.¹²⁷ Authorities in the first few months of the war found that some attacks were becoming more precise, raising concerns about the magnitude of these war efforts by Russian sympathizers.¹²⁸ In the Kharkiv region, nearly 400 people were detained under post-invasion, anti-collaboration laws, which stipulate that individuals who are convicted of collaborating with Russian forces, publicly denying

123. *Communication from the Commission*, *supra* note 112, ¶ 5.

124. Josep Borrell, High Representative, Press Remarks at the Informal Meeting of Foreign Affairs Ministers (Gymnich) (Aug. 31, 2022), http://www.eeas.europa.eu/eeas/informal-meeting-foreign-affairs-ministers-gymnich-press-remarks-high-representative-josep-borrell-1_en?s=232.

125. *See US Rejects Ukrainian Call for Blanket Ban on Visas for Russians*, THE GUARDIAN (Aug. 22, 2022), <http://www.theguardian.com/us-news/2022/aug/22/us-rejects-russians-visa-ban-ukraine>; *see also* Emily Rauhala & Beatriz Rios, *Ban Russian Tourists? E.U. Is Divided on Visa Restrictions*, WASH. POST (Aug. 30, 2022), <http://www.washingtonpost.com/world/2022/08/30/russian-tourists-ban-schengen-visas>; Wilhelmine Preussen, *Scholz on Russia Tourist Visa Ban: Nein!*, POLITICO (Aug. 16, 2022), <http://www.politico.eu/article/scholz-dismisses-call-russia-tourist-visa-ban>.

126. Brian Milakovsky, *Collaborators or Compatriots*, FOREIGN AFFS. (Oct. 7, 2022), <http://www.foreignaffairs.com/ukraine/collaborators-or-compatriots>.

127. Andrew E. Kramer & Valerie Hopkins, *Zelensky Takes Aim at Hidden Enemy: Ukrainians Aiding Russia*, N.Y. TIMES (July 18, 2022), <http://www.nytimes.com/2022/07/18/world/europe/zelensky-ukraine-russian-spies.html>.

128. Joanna Kakissis, *Ukraine Hunts for Pro-Moscow Collaborators Suspected of Helping Russia Strike Targets*, NPR (Sept. 21, 2022), <http://www.npr.org/2022/09/21/1124108146/ukraine-russia-suspected-collaborators-mykolaiv>.

Russian aggression, or supporting Moscow may be subject to imprisonment for up to 15 years.¹²⁹ Approximately 1,300 individuals nationwide were under investigation for collaboration with Russian forces.¹³⁰

In the past, some states responded to the commission of acts of terrorism by their nationals by canceling their passports and expelling them.¹³¹ For example, Australian law allows for the cancellation of a person's passport for national security reasons, terrorism-related activities and conduct that is seriously prejudicial to Australia's interests.¹³² Similarly, under the common law of the United Kingdom, a person can be deprived of their British citizenship if it is conducive to the public good or necessary for public security.¹³³ Ukrainian President Zelenskyy defined the acts of some Russian sympathizers as "crimes against the foundations of the national security of the state"¹³⁴ Article 19 of the Ukraine Citizenship Act provides that Ukrainian citizenship can be revoked if the person voluntarily took part in the armed forces of another state, unless such a decision will result in a person's statelessness.¹³⁵ Unlike the denationalization laws of some other European states, the Ukrainian law does not include terrorism-related activities or national security concerns as grounds to revoke citizenship and expel nationals. Upon reflection, this raises a hypothetical question: Could Ukraine denationalize Russian sympathizers—that is, revoke their Ukrainian citizenship or nationality¹³⁶—in order to expel them from Ukraine and impose

129. See *Ukrainians Detain Suspected Russian Sympathizers*, ARK. DEMOCRAT GAZETTE (May 1, 2022), <http://www.arkansasonline.com/news/2022/may/01/ukrainians-detain-suspected-russian-sympathizers>; Mstyslav Chernov & Yuras Karmanau, *Ukraine Cracks Down on 'Traitors' Helping Russian Troops*, PUB. BROAD. SERV. (Apr. 29, 2022), <http://www.pbs.org/newshour/politics/ukraine-cracks-down-on-traitors-helping-russian-troops>.

130. Laura King, *How to Punish Wartime Collaborators? Ukraine Charts Painful Course*, L.A. TIMES (July 28, 2022), <http://www.latimes.com/world-nation/story/2022-07-28/how-to-punish-wartime-collaborators-ukraine-tries-to-chart-a-course>.

131. See e.g., 22 U.S.C. 211a § 4(2) 1926; Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, § 28 (Ger.); Law No. 6749 of October 18, 2016, Türkiye Cumhuriyeti Resmi Gazetesi [Official Gazette of Turkey], Oct. 18, 2016, §§ 3, 5. (Turk.).

132. Australian Passports Act 2005, § 14.

133. British Nationality Act 1981, § 10.

134. Kramer & Hopkins, *supra* note 127; King, *supra* note 130.

135. Ukraine Citizenship Act 2001, art. 19.

136. Cf. Matthew Gibney, *Denationalization*, in THE OXFORD HANDBOOK OF CITIZENSHIP 358, 360–61 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017) (defining denationalization as "the non-consensual withdrawal of nationality from an individual by his or her own state"). It should be noted that, although there were initially questions about how Ukraine might treat suspected Russian collaborators, more recent reports suggest that—to the extent that denationalization or "effective denationalization" of Ukrainian citizens is an issue—such denationalization appears to be a result of actions of the Russian government that prevent Ukrainians from establishing or maintaining their Ukrainian nationality. See Evan Harary, *In Ukraine, Russian Passportization Generates Effective Denationalization*, OPINIO JURIS (Apr. 1, 2024), <http://opiniojuris.org/2024/01/04/in-ukraine-russian-passportization-generates-effective-denationalization> (describing more recent developments); Joshua Yaffa, *The Hunt for Russian Collaborators in Ukraine*, THE NEW YORKER

a kind of exile as punishment? Russian sympathizers' expulsion would likely undermine Russia's war efforts by inhibiting the possibilities of infiltration and facilities to travel with a Ukrainian passport.

In the discussions of asylum requests and travel bans above, this paper concluded that citizenship ties to the aggressor state do not automatically remove the guarantees under international law, which does not place importance on the citizenship tie to an aggressor state, but instead concentrates on individual conduct.¹³⁷ This section focuses on the citizenship tie of an aggressor individual to a non-aggressor state to demonstrate that very limited protections exist solely based on citizenship, and individual conduct allows for extensive restrictions on individual rights, including the loss of the "meta-right" to have rights,¹³⁸ i.e., loss of citizenship. This further supports the contention that international law is blind to citizenship and heavily reliant on individual conduct. To underline this fact, this section analyzes the legality of the hypothetical revocation of citizenship and the expulsion of citizens under the ICCPR, the ECHR, and the European Convention on Nationality, to which Ukraine is a party.¹³⁹

Denationalization is a form of expulsion, and the modern practice of exile without denationalization is scarce.¹⁴⁰ Stripping citizenship, followed by deportation, is a way of achieving the exile of a national.¹⁴¹ Therefore, denationalization and expulsion are strongly interconnected and will be examined together.

Article 12 of the ICCPR establishes the right to liberty of movement and residence within a state's territory, the freedom to leave any country, including one's own, as well as the right to enter one's own country.¹⁴² It specifies that the right to liberty of movement, the right to freedom to choose one's residence, and the right to leave any country, including one's own, can only be restricted by law for reasons of national security, public order, health, morals, or the rights and freedoms of others.¹⁴³ As to the right to enter one's own country, Article 12.4 stipulates that no one shall be arbitrarily denied this right. According to the HRC, deprivation of nationality is not prohibited under the ICCPR unless it constitutes an arbitrary deprivation, which includes elements

(Jan. 30, 2023), <http://www.newyorker.com/magazine/2023/02/06/the-hunt-for-russian-collaborators-in-ukraine> (detailing some initial concerns).

137. See *supra* Part II.A–B.

138. Peter H. Schuck, *Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?*, in *DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP* 177, 177 (Rainer Bauböck ed., 2018).

139. Council of Europe, *Explanator Report to the European Convention on Nationality*, E.T.S. No. 116.

140. Rutger Birnie & Rainer Bauböck, *Introduction: Expulsion and Citizenship in the 21st Century*, 24 *CITIZENSHIP STUD.* 265, 266–68 (2020).

141. Audrey Macklin, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, in *DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP*, *supra* note 138, at 163, 164.

142. ICCPR, *supra* note 34, art.12.

143. *Id.*

of inappropriateness, injustice, illegitimacy, or lack of predictability.¹⁴⁴ Arbitrariness can be best avoided by respecting specific procedural and substantive guarantees.¹⁴⁵ The procedural guarantees include the possibility for judicial or administrative review.¹⁴⁶ Substantively, the decision must have a legitimate purpose and be proportional, in that the consequences of revocation must be weighed against the offense that led to the revocation of nationality.¹⁴⁷ Revocation of nationality remains an option despite the possibility that it could result in statelessness, as observed by the HRC.¹⁴⁸

Under European human rights law, the ECtHR has also held that denationalization for national security or terrorism-related reasons is a legitimate measure that a state may take, provided that it is proportionate to the legitimate aim pursued.¹⁴⁹ It must be noted that none of the decisions before the ECtHR in a national security context resulted in the statelessness of the applicant, but in other contexts, it recognized the possibility of statelessness as a result of denationalization.¹⁵⁰ In conclusion, the human rights treaties allow for denationalization on certain grounds, especially for terrorism-related acts that prejudice the vital interests of states. Under the European Convention on Nationality that Ukraine ratified, states must adopt measures that ensure individuals do not become stateless in cases of loss or renunciation of nationality.

There are specific legal considerations that would shape the scope of the lawfulness of hypothetical denationalization cases by Ukraine under international law. Ukraine officially derogated from its obligations under Article 12 of the ICCPR in Donetsk and Luhansk regions in March 2022.¹⁵¹

144. See, e.g., Van Alphen v. the Netherlands, Communication No. 305/1988, ¶ 5(8), U.N. Doc. CCPR/C/39/D/305/1988 (U.N. Hum. Rts. Comm. July 23, 1990); A v Australia, Communication No. 560/1993, ¶ 9(2), U.N. Doc. CCPR/C/59/D/560/1993 (U.N. Hum. Rts. Comm. Apr. 30, 1997); U.N. Hum. Rts. Council, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 25, U.N. Doc. A/HRC/13/34 (2009).

145. U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 31, U.N. Doc. A/HRC/25/28 (Dec. 19, 2013).

146. U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶¶ 43–46, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009).

147. *Id.* ¶ 25.

148. U.N. Secretary-General, *supra* note 145, ¶ 40.

149. K2 v. the United Kingdom, App. No. 42387/13, ¶ 67 (Feb. 7, 2017), <http://hudoc.echr.coe.int/eng?i=001-172143>; Johansen v. Denmark, App. No. 27801/19, ¶ 50 (Feb. 1, 2022), <http://hudoc.echr.coe.int/eng?i=001-216316> (“... the Court considers it legitimate for Contracting States to take a firm stand against those who contribute to terrorist acts, which it cannot condone in any circumstances . . .”).

150. In Ramadan v. Malta, App. No. 76136/12, (Oct. 17, 2016), <http://hudoc.echr.coe.int/eng?i=001-163820>, an Egyptian national who would be rendered stateless after the revocation decision lost the case as it vitiated the citizenship application. The Court held that the applicant intentionally vitiated the application and knew about the possible consequences of statelessness. *See id.* ¶¶ 56–57.

151. Permanent Rep. of Ukraine to the Council of Eur., *Note Verbale*, DIRECTORATE OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW, C.O.E. Doc. No. 31011/32-017-3 (Mar. 2, 2022), <http://rm.coe.int/1680a5b0b0>.

A derogation allows a state to temporarily limit certain human rights during a state of emergency, war, or public danger, under strict conditions ensuring necessity and non-discrimination while respecting non-derogable rights like the right to life and freedom from torture.¹⁵² The derogation extends the margin of discretion of Ukraine, under the ICCPR, to denationalize Ukrainians, subject to legal guarantees.

Nevertheless, Ukraine assumed specific obligations to prevent statelessness in denationalization decisions. It ratified the two Statelessness Conventions, which prohibit denationalization that would render the individual stateless and do not include any clauses permitting derogation.¹⁵³ Moreover, under the European Convention on Nationality, to which Ukraine is a party, denationalization because of “voluntary service in a foreign military force” and “conduct seriously prejudicial to the vital interests of the State Party” would only be allowed in cases of nationals with more than one passport.¹⁵⁴

Ukraine is also party to treaties that prohibit the expulsion of nationals as a form of punishment. Article 3 of Protocol 4 to the ECHR, which Ukraine ratified, stipulates that, “[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.” The ECtHR held in *H.F. and Others v. France* that, unlike Article 12 of the ICCPR, which allows for the non-arbitrary deprivation of the right to return to one’s country, Protocol 4 “secures an absolute and unconditional freedom from expulsion of a national.”¹⁵⁵ Moreover, the ECtHR noted that the preparatory work for Protocol 4 indicates that the prohibition of exile was intended to be absolute within the Council of Europe framework,¹⁵⁶ with an aim to prohibit the exile of nationals. This has been used against certain groups of people in the past,¹⁵⁷ and is inherently incompatible with modern democratic principles.¹⁵⁸ Though Ukraine derogated from some of the provisions of Protocol 4, it did not derogate from the prohibition of the expulsion of nationals under Article 3.¹⁵⁹ In any event, following the ECtHR judgment, derogation from Article 3 does not seem possible. Consequently, it appears that Ukraine restricted itself from expelling nationals. The above-mentioned ECtHR cases that ruled on the legality of denationalization involve states that are not party to Protocol 4.

Though Ukraine is bound by specific obligations to safeguard nationals against statelessness under the European Convention on Nationality, the two

152. ICCPR, *supra* note 34, arts.4, 5.

153. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117; Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

154. European Convention on Nationality art. 7(3), Apr. 1, 2000, E.T.S. 166.

155. *H.F. v. France*, App. Nos. 24384/19 and 44234/20, ¶¶ 248, 252 (Sept. 14, 2022), <http://hudoc.echr.coe.int/fre?i=001-219333>.

156. *Id.* ¶ 126.

157. *Id.* ¶ 260.

158. *Id.* ¶¶ 210, 248.

159. Permanent Rep. of Ukraine to the Council of Eur., *supra* note 151.

Statelessness Conventions, and Protocol 4 to the ECHR, international human rights law generally allows for the denationalization and expulsion of individuals on national security grounds. However, it is important to note that, under international law, the determination of individual rights is not based on whether a person holds citizenship of an aggressor or non-aggressor state. Instead, what matters is whether the individual's actions support aggressive efforts or pose a threat to the national security of a state. This can lead to a suspension of rights in the most extreme forms, i.e., denationalization and expulsion.

III. SHOULD INTERNATIONAL LAW PROTECT CITIZENS OF AN AGGRESSOR STATE?

As shown above, the illegality of the blanket measures against asylum-seekers and foreign travelers stems from a lack of individual assessment to determine whether there are legal grounds to justify their exclusion. By contrast, if an individual's act contributed to aggression, the consequence for this individual act can be as severe as denationalization, for which international law remains permissive. Nevertheless, some states imposed these blanket measures arguing that Russians have a responsibility to “stay and fight against Putin”¹⁶⁰ or that Russians are “responsible for the actions of their state” like every citizen.¹⁶¹ These statements appear to suggest a belief that each Russian incurs individual responsibility for their failure to fight against the war, and that consequently all Russians hold collective responsibility for the Russian state based on their membership. The question is, then, is the way international law currently operates—which, as can be seen above, significantly restricts blanket measures based on assumptions of individual responsibility—the proper approach? Or, alternatively, should blanket measures against citizens of an aggressor state be permitted based on an assumption of omission or collective responsibility?

To explore an answer to this question, this part visits different legal frameworks of responsibility to investigate the normative parameters of establishing responsibility. First, it scrutinizes the individual responsibility rationale behind different international law norms. The aim is to lay out analogous sites of normativity for legal responsibility. Accordingly, Section A will demonstrate that Russian citizens cannot be held individually responsible for failing to fight against the acts of their state as (1) the majority lacks the capacity to do so, (2) the cost of publicly opposing the war is unduly high, (3) even a distributive justice framework would not justify a no-fault responsibility because most Russians are not benefitting from this war. This leads to the conclusion that a mere presumption of individual responsibility cannot justify blanket measures.

160. Gabrielius Landsbergis (@GLandsbergis), TWITTER (Sept. 23, 2022, 3:12 PM), <http://twitter.com/GLandsbergis/status/1573389737741918209>; *Lithuania Will Not Give Asylum to Russians Mobilised for War, Says FM*, *supra* note 21.

161. Dejevsky, *supra* note 4.

Section B will then analogize to the concept of corporate responsibility to consider the grounds on which members of a collectivity, if they cannot legally be held individually liable, may be held liable for acts of that collectivity. It will demonstrate that, while membership may in certain cases imply a duty for individuals to “own up” to the liabilities of the collective entity, for citizens of anti-democratic regimes like Russia, such a scheme is not justified.

A. *The Role of Capacity, Cost, And Fault in Determining Individual Responsibility*

The stability of the democratic institutions in most of the European states may have led to a view that Russians intentionally failed to make the choice to proactively challenge the Russian government’s invasion of Ukraine. This view was likely informed by polls that showed Russians’ support for the war.¹⁶² However, such polls may not provide a full picture, as in a war environment, pro-government views are likely to take over, and people who fear repercussions of publicly criticizing state aggression are likely to hide their true views.¹⁶³ The reality is that (1) most Russian citizens lack the capacity to prevent state aggression, (2) their acts of defiance have unimaginable costs, (3) they should not be held liable for acts from which they gain no benefit. As such, an individual responsibility on the part of all Russians cannot be assumed to justify blanket measures.

1. Capacity

It may be overlooked how important capacity—that is, legal competence and factual ability—is for legal responsibility. Most crimes in criminal law involve prohibitions applicable to everyone, such as “do not kill” or “do not steal.” Nevertheless, in some circumstances, capacity is a central characteristic for the commission of a crime. In international criminal law, it is widely accepted, following the example of the Nuremberg trials, that the crime of aggression can only be committed “by a person in a position effectively to exercise control over or to direct the political or military action of a State.”¹⁶⁴

162. Maxim Trudolyubov, *For Putin, War Is Power (and Power Is War): Why Russians Do Not React to War*, WILSON CTR. (June 23, 2022), <http://www.wilsoncenter.org/blog-post/putin-war-power-and-power-war-why-russians-do-not-react-war>.

163. Will Vernon, *Ukraine War: The Russians Risking Freedom to Protest Against Putin’s Invasion*, BBC (Sept. 22, 2022), <http://www.bbc.com/news/world-europe-62969778>; Maarten den Heijer, *Why EU Countries Should Open Their Borders to Russian Draft-Evaders*, VERFASSUNGSBLOG (Sept. 26, 2022), <http://verfassungsblog.de/why-eu-countries-should-open-their-borders-to-russian-draft-evaders>.

164. See Nikola R. Hajdin, *Responsibility of Private Individuals for Complicity in a War of Aggression*, 116 AM. J. INT’L L. 788, 789 (2022); Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia’s Invasion of Ukraine*, 26 AM. SOC’Y INT’L L. INSIGHTS, Issue 2, Apr. 19, 2022, <http://www.asil.org/insights/volume/26/issue/2/>; Rome Statute, *supra* note 47, art.8*bis* (1).

This requirement applies to both perpetrators and accomplices.¹⁶⁵ Scholars contend that it would not be fair to hold low-ranking soldiers, who do not hold positions of power, accountable for the commission of a crime over which they do not have effective control.¹⁶⁶ Going back to the origins of this assumption, it is not difficult to see that determining who has the capacity to commit the crime of aggression should be straightforward, as states' domestic laws and military manuals usually include provisions on the authority to make war decisions and to direct the conduct of operations. They effectively justify the assumption of who has the legal competence and/or factual ability because the legal provisions enable direct influence on these decisions and factual circumstances allow for the effective implementation of these legal provisions.

How would this analogously apply to the capacity of the citizens of an aggressor state to defy and stop state aggression? Russian citizens have the right to vote, which, in practice, is the legal competence to determine the decision-makers. This competence to select decision-makers has an impact only so far as individuals act as a collective and have voted for the winning government. Even then, unless decided through a referendum, individuals only have an indirect influence on war decisions. Unlike high-ranking officials in international criminal law, civilians are unable to control the conduct of warfare. Thus, by definition, individual responsibility cannot be attributed to voting power. This conclusion becomes more obvious in non-functioning democracies like Russia where there are no free and fair elections.¹⁶⁷

Other democratic tools of political mobilization to pressure and protest against the government are also insufficient to show a citizen's factual ability to change government policies in the Russian context. Only between four and fifteen percent of Russians believe that they have the ability to trigger a change in government policies.¹⁶⁸ This attitude has been consistently observed since the fall of the Soviet Union.¹⁶⁹ This attitude reflects the limits of public-government interactions, and it proved more accurate following the Russian government's censorship of media and criminalization of discussions about the war using the excuse of preventing the dissemination of "fake news."¹⁷⁰

Thus, no individual voter has the legal competence to directly influence operational decisions, nor do they have the factual ability to protest and lead

165. Hajdin, *supra* note 164.

166. Tom Dannenbaum, *The Criminalization of Aggression and Soldiers' Rights*, 29 EUR. J. INT'L L. 859, 867 (2018).

167. See, e.g., Lucy Papachristou, *Independent Russian Vote Monitor Says Election Was a Mockery*, REUTERS (Mar. 18, 2024), <http://www.reuters.com/world/europe/independent-russian-vote-monitor-says-election-was-mockery-2024-03-18>.

168. See *Ответственность И Влияние*, ЛЕВАДА-ЦЕНТР (Nov. 17, 2021), <http://www.levada.ru/2021/11/17/otvetstvennost-i-vliyanie-4>; Trudolyubov, *supra* note 162.

169. Trudolyubov, *supra* note 162.

170. Andrei Kolesnikov, *Can't Stop, Won't Stop: Why the Russian Public is Tired of the War in Ukraine*, CARNEGIE (June 7, 2022), <http://carnegieendowment.org/politika/87261>.

to change because non-functioning democracies do not offer sites of engagement to exert pressure on governments. Most Russians lack the capacity to fight back against the war as the European states have urged them to do. This alone should render any assumption of individual responsibility unjustified.

2. Cost of Position Precluding Wrongfulness

Most legal systems include defenses that preclude the wrongfulness of certain failures to uphold obligations, which would otherwise be considered unlawful. For instance, mitigations for self-defense, duress, and necessity are common to the criminal and/or tort laws of most national systems,¹⁷¹ and similar defenses are considered customary international law norm for the responsibility of states for internationally wrongful acts.¹⁷² In international criminal law, substantive defenses include justifications, where the accused's actions are deemed lawful under the circumstances (for example, self-defense), and excuses, where the conduct remains unlawful, but the accused's blameworthiness is negated due to factors like duress or insanity.¹⁷³ These defenses are recognized under Article 31 of the Rome Statute of the International Criminal Court (ICC), which outlines grounds for excluding criminal responsibility.¹⁷⁴ The rationale behind each affirmative defense differs slightly, but the aim is to prevent the unjust or disproportionate punishment of those who acted in situations that posed a threat to their safety or well-being (or essential interests in the case of states).¹⁷⁵ Circumstances giving rise to affirmative defenses can be categorized as cases where the cost of complying with a norm brings irreparable harm to the individual (or state), and, thus, may lead to decreased blame for the violation.

The cost of rebellion for Russians is very high, which may account for why most Russian civilians do not openly rebel against the Russian aggression in Ukraine. Voicing anti-war views on media and attending protests may lead to criminal sentences,¹⁷⁶ which makes it difficult for most Russians to openly oppose the war because doing so would mean risking the future of

171. Christian Von Bar, *General Defences*, in THE COMMON EUROPEAN LAW OF TORTS: VOLUME TWO 485, 493, 499 (2000).

172. Int'l L. Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, art. 71(1) (2001) [hereinafter ARSIWA Commentary].

173. See Kai Ambos, *Defences in International Criminal Law: Exceptions in International Law?*, in EXCEPTIONS IN INTERNATIONAL LAW 347, 353–58 (Lorand Bartels & Federica Paddeu eds., 2020).

174. Rome Statute, *supra* note 47, art. 31.

175. A. P. SIMESTER, FUNDAMENTALS OF CRIMINAL LAW: RESPONSIBILITY, CULPABILITY, AND WRONGDOING 406 (2021); *see also, e.g.*, Int'l L. Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, U.N. Doc. A/Res/56/83 (2002).

176. Vernon, *supra* note 163; 'No to War!': Anger Over Troop Conscription Rages in Russia, AL JAZEERA (Sept. 26, 2022), <http://www.aljazeera.com/amp/news/2022/9/26/no-to-war-anger-over-troop-conscription-rages-in-russia>.

their families and jobs.¹⁷⁷ Russia is notorious for alarmingly high rates of forced disappearance, particularly of political opponents and human rights advocates.¹⁷⁸ The external pressure by supranational bodies has not yielded any meaningful checks on authoritarian measures. The country is known for its lack of compliance with a deluge of judgments of the ECtHR,¹⁷⁹ a body which no longer has jurisdiction over it,¹⁸⁰ and for its global power as a crucial trade partner that makes it able to resist international pressure. Thus, open and public refusals of Russian state aggression are likely to cause serious threats to the well-being of Russians. An expectation for Russians to openly fight the Russian regime is therefore equivalent to expecting them to bear the high likelihood of undue costs. Given the special place of cost assessment in rules of responsibility and wrongfulness in both domestic and international law, presuming that each Russian citizen is responsible for their failure to defy the regime should not be accepted.

3. No-Fault Liability for Accrued Benefit

There are legal schemes in which, although no fault can be attributed to an individual, the benefit gained by a harmful act requires the individual to make a just reparation to the harmed. Can Russians be held responsible for the harm Ukrainians suffer under those legal schemes, though they are not at fault for failing to stop an aggressor regime?

Compensation for lawful harm is a well-established concept in domestic legal systems.¹⁸¹ For example, if an individual enters someone else's land without permission under a necessity to protect their well-being, tort law requires that the individual must compensate the damage although the act is considered lawful.¹⁸² Further, the International Law Commission, the UN body with the mandate to codify international law norms, has advised that those who engage in hazardous activities not prohibited by international law should be liable without fault for transboundary harms arising out of these

177. Vernon, *supra* note 163.

178. AM. BAR ASS'N CTR. FOR HUM. RTS., DISAPPEARING HUMAN RIGHTS DEFENDERS: RUSSIA'S HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL CRIMES IN UKRAINE 10–11 (Sept. 2022), http://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/chr-hrd-disappearances-ukraine.pdf.

179. Jerzy Jaskiernia, *Actual Challenges for the Implementation of Judgments of the European Court of Human Rights*, 48 REV. EUR. & COMP. L. 103, 118–19 (2022).

180. Eur. Ct. H.R., *supra* note 74.

181. Int'l L. Comm'n, Rep. on the Work of Its Fifty-Eight Session, Text of the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities and Commentaries Thereto, U.N. Doc. A/61/10, at 110, 157 (2006) [hereinafter Text of the Draft Principles and Commentaries Thereto].

182. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910); see also Colleen Murphy, Jennifer Robbennolt & Lesley Wexler, *State Amends for Lawful Harm Doing*, 7 OÑATI SOCIO-LEGAL SERIES 547, 555–56 (2017) (discussing the *Vincent v. Lake Erie* case).

activities.¹⁸³ Such schemes are justified under a distributive justice framework, which requires the beneficiary of harmful but lawful activities to pay for the damage these activities cause to others precisely because they accrue benefits at the expense of others.¹⁸⁴

However, contrary to the claims of the Russian government, it is hard to establish that Russian citizens benefit from Russia's acts of aggression in Ukraine. Not only has the aggression been largely a failure for Russia,¹⁸⁵ the international reaction and sanctions against Russia have led to high inflation rates and the shrinking of the Russian economy at unprecedented rates.¹⁸⁶ Ergo, even a distributive justice framework that undergirds a no-fault liability framework cannot justify presuming individual responsibility of Russian citizens.

B. *The Distribution of a State's Responsibility to Its Citizens:
A Comparison with Corporate Responsibility*

Having established that there is likely no justification for presuming Russian citizens are individually responsible under international law for failing to oppose the state aggression, this note will now examine whether, in the absence of such justification, Russian citizens may be held responsible by virtue of their membership in the collective entity of Russian state. Then it will examine whether blanket measures against Russian citizens can be justified using a collective responsibility rationale.

Notable examples of collective responsibility include reparative approaches that require a state to pay compensation, which indirectly affects individual taxpayers. This was the case for Germany after World War I and Iraq after the Kuwait invasion.¹⁸⁷ In such scenarios, which are widespread in international relations, individuals are indirectly held liable for a war that they did not necessarily support. The state, which makes the reparation as a legal entity, distributes its legal responsibility to pay compensation.¹⁸⁸ This is analogous to corporate responsibility, where a company's damage

183. Text of the Draft Principles and Commentaries Thereto, *supra* note 181, Principles 1 and 3.

184. JULIO BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* 29 (2010); *see also* Text of the Draft Principles and Commentaries Thereto, *supra* note 181, at 60 ¶ 7, 74 ¶¶ 11–13 (discussing the “polluter pays” principle).

185. Michael Schwirtz, Anton Troianovski, Yousur Al-Hlou, Masha Froliak, Adam Entous & Thomas Gibbons-Neff, *How Putin's War in Ukraine Became a Catastrophe for Russia*, N.Y. TIMES (Dec. 17, 2022), <http://www.nytimes.com/interactive/2022/12/16/world/europe/russia-putin-war-failures-ukraine.html>.

186. *Russian Inflation Spikes to 20-Year Record on War and Sanctions*, BLOOMBERG (May 13, 2022), <http://www.bloomberg.com/news/articles/2022-05-13/russian-inflation-spikes-to-20-year-record-on-war-and-sanctions>; Alexander Marrow, *Battling High Inflation, Sanctions, Russia to Resume Rate-Cutting Next Year – Reuters Poll*, REUTERS (Nov. 3, 2022), <http://www.reuters.com/markets/europe/battling-high-inflation-sanctions-russia-resume-rate-cutting-next-year-2022-11-03>.

187. Stilz, *supra* note 8, at 190.

188. *Id.* at 191.

is distributed to all shareholders when the debtor collects the debt from the company assets.¹⁸⁹

In order to understand whether it is acceptable to hold citizens of a state responsible for acts of that state, this section will consider the concept of corporate responsibility to understand on what grounds members of a collective may be held liable for acts of that collective. First, it will examine the origins of corporate responsibility—the idea that shareholders are responsible for both costs and benefits of the independent legal personality they created: the corporation. By drawing on the “democratic authorization” principle introduced by Professor Anna Stilz, this section will demonstrate why it would not be justifiable for Russian citizens to be held collectively responsible for the actions of a state that they did not democratically authorize.

It is useful to distinguish types of measures that are not relevant to the discussion of collective responsibility. There are several situations in which a measure taken against an individual, primarily based on their ties to a state, is acceptable in international law. First is the declaration of *persona non grata* of a person because of the relations between two states. Second are sanctions on those who have close ties with the government of the aggressor state. The first type of measure is exclusively applicable in a diplomatic context. The second concerns the responses to complicity, thus, raises question of shared responsibility.

A declaration of *persona non-grata* is an ancient measure that a host state can lawfully take against a foreign diplomat without showing any justifications, and it often occurs as a response to the conduct of the sending state.¹⁹⁰ The declaration puts an end to all privileges and immunities of the diplomat and sends them back to the sending state.¹⁹¹ The major difference, however, is that the person in question is a diplomatic agent, received on behalf of the sending state, and the privileges belong to the state rather than the diplomat.¹⁹² The person is considered an extension of the state, and the benefits accruing to that individual are based on respect for that sovereignty. When a person is sent back to the sending state, this is not a measure against the individual, nor does it hold the individual personally responsible for the acts of state, but it makes an official statement to a state official. In other words, sending the diplomat back ends the diplomat’s official duty in the country.

There is also a uniform practice of sanctioning a list of individuals, which was seen in the case of Russian oligarchs considered close to the regime. Article 29 of the Treaty of the European Union authorizes decisions taking individual measures against nationals of non-EU countries in the form of travel

189. *Id.*

190. Jean d’Aspremont, *Persona Non Grata*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Rüdiger Wolrum ed., Jan. 2009).

191. *Id.*

192. MALCOLM SHAW, INTERNATIONAL LAW 560 (7th ed. 2014); *In re Grand Jury Proceedings, Doe No. 770*, 817 F.2d 1108, 1111 (4th Cir. 1976).

bans or denial of admission into the EU.¹⁹³ In an effort to target only individuals who benefit from or otherwise support Russian aggression,¹⁹⁴ these decisions must comply with sanctions guidelines, which suggest that individual sanctions must respect international law, due process, and the right to an effective remedy.¹⁹⁵ This is the opposite of a collective responsibility scheme, as the measures taken against listed people are the result of an individualized assessment of their ties with an aggressor regime. Further, the concrete measures taken against those on the sanctions list, such as property seizures, are allowed for by established legal frameworks that require demonstrating their involvement in violating a legal norm.¹⁹⁶

Consequently, since these are not instances of collective responsibility, it is natural that these measures are not considered within the existing international law frameworks.

1. The Rationale Behind Corporate Responsibility

State responsibility is analogous to corporate responsibility.¹⁹⁷ In the case of states, an independent body constituted by members of the state, rather than all of the individual members of the state, responds to violations of international law. Corporate responsibility is well-established in most legal systems. When a company causes damage to a third person, though several individuals or departments in that company may have caused the damage, a separate agent (the company) may be held liable.¹⁹⁸ This is because if these individuals had acted separately, they would not have caused the damage. The fact that they are neatly organized in a collective entity makes it possible to bring about that damage.¹⁹⁹ Individuals are separate, stand-alone legal personalities capable of acting independently. A by-product of corporate responsibility is that all the shareholders in a company are affected by it, even though not all shareholders contributed to the decision-making or the emergence of the damage.²⁰⁰ This is considered justifiable because each

193. Consolidated Version of the Treaty on the European Union art. 29, 2016 O.J. (C 202) 33.

194. Guidelines On Implementation and Evaluation of Restrictive Measures (Sanctions) In the Framework of The EU Common Foreign and Security Policy, 5664/18, ¶ 9 (May 4, 2018), <http://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

195. *Id.*

196. *See, e.g.*, Application for a Warrant to Seize Property Subject to Forfeiture, In the Matter of the Seizure of the Motor Yacht Tango, with International Maritime Org. No. 1010703, Case No. 22-sz-5 (2022), 11–12 (Cindy Burnaham, Affidavit in Support of an Application for a Seizure Warrant) (about the seizure of the yacht TANGO); *see also* Washington Post Live, *Transcript: Targeting the Oligarchs with Andrew Adams*, WASH. POST (Apr. 7, 2022), <http://www.washingtonpost.com/washington-post-live/2022/04/07/targeting-oligarchs-with-andrew-adams>.

197. Stilz, *supra* note 8, at 195.

198. *Id.* at 193.

199. *Id.*

200. *Id.* at 194.

shareholder benefits from the activities of a company and thus, when the company causes damage, shareholders should “own up” to the company’s liabilities.²⁰¹ They can be seen to have “accepted this bargain” when they decided to become members of the company and are now subject to a special responsibility scheme independent of their blameworthiness.²⁰² There is a continuous structure that they benefit from, which requires them to own up to the damages done by the corporation though they did not directly cause them. This does not mean that shareholders are morally at fault, but rather that they have a responsibility to absorb the costs as members of the corporation to fulfill certain tasks as a result of their voluntary membership in the corporation from which they *generally* benefit.²⁰³

2. Applying Corporate Responsibility Principles to the Relationship between Citizens and Their State

Citizens’ relationships with their state differ from shareholders’ relationships with a corporation. They did not voluntarily accept the state. Renouncing citizenship is very costly and sometimes renders one stateless.²⁰⁴ However, saying that any measure that impacts citizens is illegal turns states into “responsibility laundering machines,”²⁰⁵ making it impossible to make states respond to the harms they caused to other states and non-citizens. Then, is there any legal mechanism that makes it possible to hold citizens responsible for the acts of their state?

Although the relationships are different, Anna Stilz argues that the relationship between corporations and shareholders is, in certain ways, analogous to the relationship between nationals and a democratic state. Philosophers have long argued that state’s *raison d’etre* is to realize individuals’ rights, because when individuals act out of self-interest without a supra-level collective as an organizational authority, too many different individual interests cause conflicts.²⁰⁶ By applying the law equally to all of its citizens, the state is the machinery by which individuals exercise their rights in a collective manner.²⁰⁷ Though most citizens do not voluntarily choose their state of origin, but rather are born into it (unlike shareholders in a corporation), they continue to benefit from the existence of the state and would not choose to quit it even in moments of disagreement. Indeed, compared to shareholders, nation-states operate in a way that constitutes an indispensable part of

201. *Id.*

202. *Id.*

203. *See id.* at 194–95.

204. *Id.* at 196.

205. John M. Parrish, *Collective Responsibility and the State*, 1 INT’L THEORY 119, 127 (2009).

206. Stilz, *supra* note 8 at 198–200 (citing HOBBS, LEVIATHAN 107 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651)).

207. *Id.*

individual life, shaping their identity, language, culture and community. Stilz argues that in democratic states, the existence of democratic institutions secures a minimum standard for the exercise of individual rights, and that, thus, the state is democratically authorized and the “[m]embership in a democratic legal state is sufficient to confer responsibility even in the absence of consent, voluntary affirmation, or further evidence of identification with the regime.”²⁰⁸

Though states are not permitted to initiate wars of aggression under international law, states may take actions to promote the best interests of their citizens.²⁰⁹ While all states hope to act in the best interest of their citizens, the democratic authorization principle is only applicable for states that maintain a minimum standard, including the implementation of democratic procedures, the establishment and protection of private rights, the guarantees of due process, and the rule of law rather than arbitrary governance.²¹⁰ As long as the state respects the fundamental rights of all of its citizens, even dissenters may be held responsible for repairing harms caused by the state, as they rely on the constitutional framework and state institutions provided by the state to interpret and enforce their rights.²¹¹

Though both citizens of non-democratic states and of democratic states have limited impact in creating sudden changes in government policies,²¹² what distinguishes citizens of democratic states is their ability to continue benefiting from the functional state institutions and human rights guaranteed by the laws of that state. Citizens of non-democratic states do not necessarily benefit in the same way from the overall existence of their state. This is why, for citizens of non-democratic states, membership does not suffice for collective responsibility based on authorization for living under the rule of that state. Instead, a framework of “shared responsibility”²¹³ which requires actual individual conduct of support for acts of the state, (for example, actively taking part, providing funding or taking pride in acts of aggression) should determine whether a citizen of a non-democratic state should be responsible for the acts of state agents. Also, Stilz points out that the state may meet certain criteria that allow it to exercise the rights of some of its citizens but still not fulfill the rights of all of its citizens.²¹⁴ This would be the case in instances such as when strict laws of segregation are in place.

The implication of the concept of collective responsibility for citizens of a democratic state is, like in the case of shareholders, a responsibility to bear

208. *Id.* at 204.

209. *Id.* at 200.

210. *Id.*

211. *Id.* at 206.

212. *Id.* at 207.

213. *Id.* at 206.

214. *Id.* at 204.

the costs of repairing the harm that the state caused.²¹⁵ Citizens would not be considered blameworthy for the acts of their state or be punished or be objects of other states' reprisals²¹⁶ (for example, they may not be made object of attacks, etc.) but could solely be required to take part in repairing the damage. Blanket measures against Russian citizens taken with an aim to put an end to Russian aggression can also be considered comparable to acts to stop the harm arising out of the acts of Russia. In both cases, the harm the state causes can be mitigated at the expense of the citizens of the aggressor state. However, Russia is not a democratically authorized state for most Russians.²¹⁷ It is a state that operates in a framework with limited political competition, absence of rule of law, and systematic human rights abuses.²¹⁸ As such, most Russian citizens should not be considered collectively responsible for acts of the Russian state.

The concepts explored above further illustrate that individualized assessment in international law is more in line with the promotion of human rights, even in response to state aggression, and international law requires individual assessment to identify those who are either treated democratically by their state or who have a shared responsibility. In the case of oligarchs, for example, it can be argued that they democratically authorize the Russian state. In the case of Russians who impose a risk on other states' national security by their individual conduct, it can be said that they have a shared responsibility as they have been complicit in the aggression by supporting it either financially or politically. On the other hand, for ordinary citizens of a non-democratic state, the wording of the Refugee Convention and the *non-refoulement* principle under human rights treaties seem to operate on a basis contrary to collective responsibility. Refugees are protected from being returned to their home state where they have a well-founded fear of persecution (such as a risk of threat to life or freedom) based on reasons of "race, religion, nationality, membership of a particular social group or political opinion"²¹⁹ or a significant risk of cruel, degrading or inhumane treatment.²²⁰ The wordings highlight the significant likelihood that the states individuals flee from are not democratically authorized. This is why states are

215. *Id.* at 206.

216. *Id.*

217. *See supra* Part III.A.

218. *Freedom in the World 2024, Russia*, FREEDOM HOUSE (2024), <http://freedomhouse.org/country/russia/freedom-world/2024> (last visited Aug. 3, 2024); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., *Russia 2021 Human Rights Report, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2021* (2021), http://www.state.gov/wp-content/uploads/2022/04/3136152_RUSSIA-2021-HUMAN-RIGHTS-REPORT.pdf; Economist Intel. Unit, *Democracy Index 2021: The China Challenge*, 38–39 (2021), <http://www.eiu.com/n/campaigns/democracy-index-2021> (Russia ranked 124th out of 167 countries, with a score of 3.24 out of 10).

219. Refugee Convention, *supra* note 33, art. 33.

220. ICCPR, *supra* note 34, art. 7; ECHR, *supra* note 34, art. 3.

obliged under the non-refoulement principle to process individual claims to determine those fleeing states that they did not democratically authorize.

Correspondingly, the emphasis on individual assessments for visa procedures particularly aims to identify the circumstances of citizens from non-democratic states. Short-term visa liberalization, such as the waiver of the visa requirement for foreign travelers, primarily depends on a country's democratic development. Approximately 80% of the countries whose nationals must obtain a visa rank at the bottom half in democracy indexes.²²¹ For example, visa liberalization is fully achieved between members of the EU, Canada, Australia, New Zealand, and the United States, whereas nationals of states such as Russia, China, Iran, and Chad, which are categorized as authoritarian regimes, are subject to visa requirements.²²² For these non-democratic countries, the assumption is that a visa acts as a litmus. Instead of categorically banning their entry, they are required to obtain a visa where individual assessments of eligibility will be made. Thus, the individual scrutiny required in travel regulations also aims to protect citizens of non-democratic states who are subject to visa requirements and who should not be held responsible for the acts of their state.

Upon reflection, it can be justified why international law does not allow for the collective responsibility of all Russian citizens for the Russian state's aggression. They are citizens of an authoritarian state who should not bear collective responsibility for the actions of a government that fails to provide a framework ensuring even the basic minimum exercise of their individual rights. As required by the international law norms, the standard for them should be able to distinguish those for whom the Russian Federation acts as a democratically authorized state or those who have a shared responsibility by actively endorsing acts of aggression. This also provides justification for why international law allows measures against Russian oligarchs and citizens who actively support the aggression.

IV. CONCLUSION

The Russo-Ukrainian War challenges the traditional understanding of the individual in international law. Despite the horror of the Russian state aggression, international law limits the measures that can be taken against Russian individuals based on their citizenship. The blanket refusal of asylum requests,

221. See, e.g., Visa Code, *supra* note 114, Annex 1; *Global Democracy Has a Very Bad Year*, THE ECONOMIST (Feb. 2, 2021), <http://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>. There is a clear correspondence between blue states (democracies) and the states that achieved visa liberalization. While it cannot be contended that democracy is the only factor, other factors such as trade relations or low risk of illegal immigration are secondary. For example, the EU does not impose visa requirements for Brazil. Visa Code, *supra* note 114, Annex 1. The United States does. U.S. EMBASSY & CONSULATES IN BRAZIL, *Nonimmigrant Visas*, <https://br.usembassy.gov/visas/nonimmigrant-visas> (last visited Aug. 3, 2024). Similarly, the EU does not impose a visa requirement to Saudi Arabia. Visa Code, *supra* note 114, Annex 1.

222. *Global Democracy Has a Very Bad Year*, *supra* note 221.

as well as travel bans based on Russian citizenship, are highly likely to violate international law norms, which require strict individual scrutiny to determine actual ties with the state aggression threatening national security and public order to other states. By contrast, there are grounds to suggest that international law allows severe measures against pro-Russian Ukrainians, the citizens of the non-aggressor state who contribute to the state aggression by their individual conduct. We thus conclude that citizenship is irrelevant to international law guarantees, and what matters is individual conduct. Thus, blanket measures against Russian citizens are illegal under the current international law framework.

The existing international law norms do not demonstrate the inadequacy of the current framework in the face of gross state aggression. On the contrary, it is not normatively justified to assume that each Russian is responsible for the acts of their aggressor state because most Russians lack the capacity to halt these acts of aggression, their cost of rebelling against an authoritarian government is unduly high, and they do not gain any benefit from the state aggression, which would have otherwise justified a distributive justice framework. In addition to the absence of moral grounds for individual responsibility, a corporate responsibility rationale would not apply to Russians either. Russian state is not a democratically authorized state that upholds the rights of its citizens through institutions governed by the rule of law. Hence, there is no collective responsibility rationale to distribute the Russian state's responsibility to its citizens.

In conclusion, the blanket measures against Russian citizens, which ignore individual circumstances, are illegal under the existing international law norms, and these norms are normatively justified since there are no grounds to suggest that Russians should be held individually or collectively responsible for the acts of their state without an assessment of their individual conduct.

